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The Under-Policing of Crimes Against Black Women

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THE UNDER-POLICING OF CRIMES AGAINST BLACK WOMEN

Lisa Avalos[†]

ABSTRACT

It is well known that over-policing has a severe adverse impact on communities of color. What is less well known is that over-policing is accompanied by a corollary—a pervasive and systemic under-policing of violence against women of color. The refusal to see women of color as victims of crime who are worthy recipients of justice, and the tendency to minimize the severity of violence committed against them, are habits that are deeply embedded in the American system of (in)justice. From an 1855 Supreme Court decision refusing to recognize an enslaved woman’s right to sexual autonomy to a prosecutor’s 2021 decision to prosecute a Black rape victim for alleged false reporting, this Article explores how the legal system neglects crimes against Black women and simultaneously criminalizes them. Along the way, the Article considers why Oklahoma City police officer Daniel Holtzclaw targeted African American women during his campaign of sexual violence, how Cleveland resident Anthony Sowell got away with murdering eleven Black women without being detected, and what motivated Washington, D.C., police officers to charge an eleven-year-old African American rape victim with false reporting.

The Article argues that race-conscious police reform requires an intersectional approach. We must consider remedies for the under-policing of crimes against women of color alongside remedies for police brutality, excessive use of force, and other forms of over-policing. It argues that achieving police accountability for investigating and prosecuting violence against women of color requires (1) robust protocols designed to reduce implicit bias by sharply curtailing officer discretion and (2) accountability and oversight mechanisms designed to ensure that each and every complaint of such violence is thoroughly investigated.

The Article then draws attention to global proposals capable of catalyzing the needed systemic change. It first considers a statutory

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approach—the Illinois Sexual Assault Incident Procedure Act—arguing for other states to follow Illinois’s lead. This law requires police to follow certain procedures in relation to every sexual assault report, eliminating the opportunity to ignore crimes based on the race or gender of the victim. It next considers a constitutional approach—the new Equality Amendment proposed by Kimberlé Crenshaw and Catharine MacKinnon—analyzing the impact this amendment would have on crimes against women of color. The Article concludes that both of these approaches could be powerful tools for placing under-policing of violence against women of color on the radar and creating the needed change.

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INTRODUCTION

In recent years, names such as Michael Brown, George Floyd, Tamir Rice, and Breonna Taylor have placed a spotlight on police use of excessive force against Black people. Over one thousand people have been shot and killed by American police in the past year, and that rate has held steady since 2015, when the *Washington Post* began keeping a public record of “every fatal shooting by an on-duty police officer in the United States.”¹ Black and Hispanic Americans are killed by police at disproportionately high rates, with Blacks comprising nearly 20 percent of all fatal police shootings even though they are only 13 percent of the population.² Victims of fatal police shootings are overwhelmingly male; less than 5 percent of victims are female.³

However, there is another side of this coin which garners far less attention. Women of color, particularly Black women (including those who identify as LGBTQ), experience serious crimes such as sexual assault, domestic violence, and homicide at disproportionately high rates,⁴ and yet these crimes often go uninvestigated and unprosecuted. The victims of these crimes are often treated by law enforcement and prosecutors in inhumane and despicable ways.⁵ Moreover, crimes

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1. *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [https://perma.cc/6EPG-UEDJ] (Nov. 8, 2022).
 2. *Id.*
 3. *Id.*
 4. Susan Green, *Violence Against Black Women—Many Types, Far-Reaching Effects*, INST. FOR WOMEN’S POL’Y RSCH. (Jul. 13, 2017), <https://iwpr.org/iwpr-issues/race-ethnicity-gender-and-economy/violence-against-black-women-many-types-far-reaching-effects/> [https://perma.cc/UP6S-MRK3].
 5. For instance, eleven-year-old Danielle Hicks-Best was prosecuted for false reporting when she told police she had been gang-raped by several men. Joanna Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*, WASH. POST (Mar. 12, 2015), <https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice>

against Black women often receive very little media attention, with the result that the American public is unaware of the extent of such crimes and how infrequently perpetrators are held accountable.⁶ Ignoring these crimes, and Black women as victims, results in system-endorsed violence against these women. In placing police violence against Black communities front and center, we must consider not just the excessive use of force, but also the underenforcement of the law in relation to crimes committed against Black women.

This Article is one effort to shine a spotlight on this critical and troubling terrain. Part I discusses the scope of violence against women and girls and analyzes the reasons why authorities have become desensitized to it. It argues that the weak link in investigating and prosecuting crimes against Black women and girls lies at the level of the police investigation, and also argues that prosecutorial discretion is a license for discrimination. Part II addresses two solutions that hold promise for rectifying this type of racialized and gendered inequality. Both of these approaches could be powerful tools for placing under-policing of violence against women of color on the radar and creating the needed change.

I. THE INADEQUATE LAW ENFORCEMENT RESPONSE TO CRIMES COMMITTED AGAINST BLACK WOMEN

The underenforcement of crimes committed against women of color is a systemic problem. It has its origins in the dehumanizing stereotypes of Black women and girls. Underenforcement is then practiced through a series of counterproductive police responses to crimes reported against such women.

/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html?utm_term=.62c432beaf97 [https://perma.cc/UQA3-6RAQ] [hereinafter Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*]; Lisa Avalos, *The Chilling Effect: The Politics of Charging Rape Complainants with False Reporting*, 83 BROOK. L. REV. 807, 807–08 (2018); Lisa Avalos, *Policing Rape Complainants: When Reporting Rape Becomes a Crime*, 20 J. GENDER, RACE & JUST. 459, 482 (2017); see also Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 55–58 (2017) (noting horrific deaths of Black women at the hands of police followed by cover-ups).

6. See, e.g., Treva Lindsey, *The Media Failed Black Women by Not Covering This Rape Trial*, COSMOPOLITAN (Dec. 15, 2015), <https://www.cosmopolitan.com/politics/news/a50842/the-medias-disgraceful-silence-on-daniel-holtzclaw/> [https://perma.cc/6WU6-42JZ]; Jacobs, *supra* note 5, at 52–53, 55–58 (noting numerous cases of serious violence against Black women that were not covered by the media or where the victims were not identified as Black).

A. Stereotypes of Black Women and Girls

First, stereotypes of Black women and girls contribute to why crimes against them are downplayed and minimized. As Professor Michelle Jacobs has pointed out, there are three major stereotypes that influence how people see Black women and crimes committed against them.⁷ The result is that these stereotypes may unconsciously influence how police interact with Black victims and how conscientiously they investigate crimes against them. Stereotypes also likely influence whether prosecutors will prosecute cases where the victim is a Black woman, as well as how juries see Black females as victims.⁸

These stereotypes include, first, the Jezebel trope—that Black women are promiscuous, seeking out sexual activity with all kinds of men, and are in fact unrapeable as a result.⁹ The second stereotype is the notion that Black women often lie, particularly about being sexually assaulted, and so therefore are lacking in credibility.¹⁰ The third stereotype is that Black women are overly aggressive, even mannish, and are therefore accustomed to violence in the home.¹¹ These stereotypes have been pressed into service since the days of slavery, and they are still alive and well today.¹² The persistence of these stereotypes contributes to police not taking violence against Black women seriously. Stereotypes also may make prosecutors reluctant to bring cases against perpetrators for fear that juries will view a Black woman as a willing partner, in sexual violence cases, or as a mutual combatant, in domestic violence cases—not a crime victim.

B. Underenforcement of Crimes Against Black Women

Once set in motion by negative stereotypes, the legal system's troubling and inadequate responses to crimes against Black women and girls can be grouped into three broad categories. Understanding these responses will position us to consider what sorts of systemic corrections are necessary.

The legal system has responded to crimes committed against Black women and girls by (1) denying them the equal protection of the law through legal arguments; (2) neglect and failure to investigate; (3) punishment of those who complain through retaliation—bringing

7. Jacobs, *supra* note 5, at 46–52.

8. *Id.* at 76–78; *see also* Jennifer Wriggins, *Race, Racism and the Law*, 6 HARV. WOMEN'S L.J. 103, 123 (1983) (noting that “the rape of Black women has been denied by the legal system”).

9. Jacobs, *supra* note 5, at 47–48.

10. *Id.* at 48–50.

11. *Id.* at 50–52.

12. *See generally id.* at 47–52 (discussing the tendencies of recent judges, juries, and prosecutors that developed from these traditional stereotypes).

charges against *them*; and, more generally, (4) excessive punishment of Black female crime suspects. While these are all strategies that have been used against women more broadly, this Part will unpack the particular harm to Black women when legal actors exploit the intersecting oppressions of gender, race, socioeconomic status, and other vulnerabilities in order to ignore serious crimes.

1. Denying Black Women the Equal Protection of the Law
Through Constitutional and Statutory Interpretation

Constitutions and statutes in the United States have been designed without attention paid to the particular experiences of many categories of people, including Native populations, women, and people of color.¹³ This Part highlights how these omissions have affected case outcomes where the issue involved a Black woman's experience of the intersectional oppressions of race and gender. The first example involves the sexual assault of an enslaved woman, and the second example involves the treatment of female genital mutilation under asylum law.

a. Celia Murders Her Enslaver

Slavery, of course, denied Black people any right to bodily autonomy, including freedom from sexual assault. And that was because of deliberate choices made in drafting the U.S. Constitution. Professors MacKinnon and Crenshaw note that “[w]hite supremacy and male dominance, separately and together, were hardwired into a proslavery and tacitly gender-exclusive Constitution from the beginning.”¹⁴ This Constitution purposefully excluded any mention of rights for women and enslaved people and took measures not to alienate the enslaving states.¹⁵

It is well documented that sexual assault against enslaved women was ubiquitous.¹⁶ The case of Celia, an enslaved woman in pre-Civil

13. Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: The Equality Amendment*, 129 YALE L.J.F. 343, 344–46 (2019) (noting that women, enslaved people, and Native people were “consciously and purposely excluded” from the U.S. Constitution); *see also* Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 735, 735–36 (2002) (noting that the original text of the U.S. Constitution never referred to women at all and that it is the only “major written constitution that includes a bill of rights but lacks a provision explicitly declaring the equality of the sexes”).

14. MacKinnon & Crenshaw, *supra* note 13, at 344.

15. *Id.* at 344–46.

16. *See, e.g.*, Jacobs, *supra* note 5, at 47; Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 7–8 (2006) (noting that “[r]aping a Black woman was not a crime for the majority of this Nation’s history”); Wriggins, *supra* note 8, at 118–19; HARRIET A. JACOBS,

War Missouri, illustrates this principle. Celia was purchased at age fourteen and raped by her enslaver, elderly widower Robert Newsom, for the next five years.¹⁷ In 1855, when she was nineteen and pregnant with her third child by Newsom, she killed him in order to avoid yet another rape.¹⁸ At trial, she attempted to argue that she had a right to defend herself from sexual assault because of an 1845 law stating that it was a crime “to take any woman unlawfully against her will and by force, menace or duress, compel her to be defiled.”¹⁹ But the judge refused to give the jury an instruction to that effect because Celia was enslaved by Newsom.²⁰ Apparently, the statutory language “any woman” only applied to white women.

Instead, the judge told the jury of twelve white men that “[i]f Newsom was in the habit of having intercourse with the defendant[,] who was his slave[,] and went to her cabin on the night he was killed to have intercourse with her[,] or for any other purpose[,] and while he was [there] she struck him . . . and killed him . . . it is murder in the first degree.”²¹ Celia was punished by hanging for her transgression of resisting sexual assault.²² In pre-Civil War Missouri, it must have been far too threatening to the status quo for a jury to even consider the notion that a Black woman had the right to refuse her enslaver’s sexual advances.

Celia’s case illustrates the utility of the early American approach of denying Black women the equal protection of the law by constructing a discriminatory legal system. There is no need to investigate and prosecute crimes against Black women if the law affords them no rights that can be violated.

b. Downplaying the Harm of Female Genital Mutilation

A more recent and pernicious example of denying Black women the equal protection of the law is exhibited in how late twentieth-century law has responded to asylum claims from women claiming that they are fleeing persecution in their countries of origin on the grounds that they would be subjected to female genital mutilation (FGM) if they are

INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF 27–30, 265 n.2 (Jean Fagan Yellin ed., Harvard Univ. Press 1987) (1861).

17. DeNeen L. Brown, *Missouri v. Celia, a Slave: She Killed the White Master Raping Her, Then Claimed Self-Defense*, WASH. POST (Oct. 19, 2017, 4:00 AM), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/19/missouri-v-celia-a-slave-she-killed-the-white-master-raping-her-then-claimed-self-defense/> [<https://perma.cc/7UYQ-J8QN>].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

forced to return. Most of the women who are victims of FGM worldwide are Black.²³

“FGM comprises all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried out for traditional, cultural or religious [i.e., nonmedical] reasons.”²⁴ All forms of FGM are harmful and can result in severe consequences including extreme pain and bleeding, psychological trauma, infections, damage to the urinary tract, and even death.²⁵ As a form of gender-based violence that inflicts severe harm on its victims, FGM is a form of persecution and even torture under international human rights law.²⁶

When asylum-seekers flee persecution in their home countries and arrive in a safe country, such as the United States or the United Kingdom, their claims are handled under the United Nations Refugee Convention, which was first drafted in 1951.²⁷ That Convention has been codified in American law.²⁸ It grants protection to refugees and asylum-seekers fleeing persecution on a protected ground; those protected grounds include race, religion, nationality, political opinion,

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23. FGM is most commonly practiced across a swath of African countries, from Guinea and Senegal in the west to Ethiopia and Somalia in the east, although some Arab states are also affected. *Female Genital Mutilation (FGM) Frequently Asked Questions*, U.N. POPULATION FUND (Feb. 2022), https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#fgm_ethnicity [<https://perma.cc/BQ9E-NZ2D>].
 24. U.N. High Comm’r for Refugees, *Guidance Note on Refugee Claims Relating to Female Genital Mutilation* 4 (May 2009), <https://www.refworld.org/pdfid/4a0c28492.pdf> [<https://perma.cc/3UYK-FY69>] [hereinafter UNHCR, *FGM Report*].
 25. *Id.* at 4–5.
 26. *Id.* at 5–6; Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008).
 27. Both refugees and asylum-seekers are persons who seek international protection. The difference is that refugees seek protection and permission from the protection-granting country before they physically enter the country, whereas asylum-seekers apply for protection from within the safe country or at a port of entry. Clare Klobucista, James McBride & Diana Roy, *How Does the U.S. Refugee System Work?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounder/how-does-us-refugee-system-work-trump-biden-afghanistan> [<https://perma.cc/YHN7-KFNJ>] (Apr. 13, 2022, 3:30 PM).
 28. 8 U.S.C. § 1158 (adopting the five criteria for refugee status from the Refugee Convention without a specific reference to the Refugee Convention).

and membership in a particular social group.²⁹ Gender is not listed as a protected ground, nor has the Refugee Convention ever been updated to include it.³⁰ The drafters' choice to recognize race as a potential ground for persecution while not explicitly listing gender has the effect of rendering invisible any persecution that Black women might experience as a result of the intersection between their race and gender, which is where FGM lies.

How to handle asylum claims from potential victims of FGM was an issue of first impression in the United States and United Kingdom in the mid-1990s, and judges in both countries, relying on their own discretion, initially denied asylum claims based on FGM.³¹ In the United Kingdom, Lord Justice Auld refused to grant an asylum claim from a woman fleeing Sierra Leone on the grounds that a practice could not be identified as persecution if it was embraced by most people in the society.³² In *Fornah v. Secretary of State for the Home Department*, he wrote:

The practice, however repulsive to most societies outside Sierra Leone, is . . . clearly accepted and/or regarded by the majority of the population of that country, both women and men, as traditional and part of the cultural life of its society as a whole.³³

Auld also believed that FGM “is not, in the circumstances in which it is practised in Sierra Leone, discriminatory in such a way as to set those who undergo it apart from society.”³⁴

Lord Justice Auld's position is quite the paradox, because he recognizes that FGM constitutes a violation of Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment.³⁵ And yet he cannot bring himself to

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29. *Id.* § 1158(b)(1)(B)(i); Convention and Protocol Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].
30. *See* Refugee Convention art. 1(A)(2) (not listing gender); *In re A-R-C-G-*, 26 I. & N. Dec. 388, 390, 392 (B.I.A. 2014), *overruled by In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), *vacated*, 28 I. & N. Dec. 307 (A.G. 2021) (determining that “married women in Guatemala who are unable to leave their relationship” is “a valid particular social group” made up of “members who share the common immutable characteristic of gender”).
31. *See infra* notes 32–36 and accompanying text.
32. *Fornah v. Sec’y of State for the Home Dept.* [2005] EWCA (Civ) 680 [44(1)] (Eng.), *rev’d sub nom*, *Sec’y of State for the Home Dept. v. K* [2006] UKHL 46.
33. *Id.*
34. *Id.* [44(3)].
35. *Id.* [1]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

say that a society discriminates when it inflicts torture or inhuman or degrading treatment on its female members. Auld does not see this as discrimination because it never occurs to him to contrast how women are being treated relative to men, who are not similarly subject to torture or inhuman or degrading treatment in order to be accepted as full members of society. To put this another way, Auld articulates the long-held view that Black women should simply endure mistreatment and keep silent about it.

An American immigration judge also declined to grant asylum in *In re Kasinga*, the first-ever FGM case heard in the United States similarly finding that the claimant did not qualify for relief because she was “not being singled out for circumcision” since “all members of her ethnic tribal group” were “pressured into being circumcised.”³⁶ In both *Fornah* and *Kasinga* the judges saw no legal claim because they did not recognize that a Black woman’s right to bodily autonomy was violated, whether criminally or otherwise. They also missed the reality that in certain societies, entire populations of women are subject to torture based on their sex.³⁷

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36. *In re Kasinga*, No. A73 476 695, at 12 (Phila. Immigration Ct. Aug. 25, 1995) [<https://perma.cc/R SX7-VZ69>]. *Kasinga* appealed from the original immigration judge’s decision of August 25, 1995. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); see also Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURV. Q., Mar. 2010, at 46, 54–55.
37. Sierra Leone, the country at issue in *Kasinga*, has one of the highest rates on the African continent for FGM, with 83 percent of women aged 15–49 having been subjected to the procedure. *Following Another Death from FGM in Sierra Leone, 130 Women’s Rights Groups Around the World Call On the Government to Criminalize FGM*, EQUALITY NOW (Feb. 1, 2022), https://www.equalitynow.org/press_release/fgm-sierra-leone-130-womens-rights-groups-feb/ [<https://perma.cc/T573-6ZCU>] (citing MINISTRY OF HEALTH AND SANITATION, REPUBLIC OF SIERRA LEONE, DEMOGRAPHIC AND HEALTH SURVEY 2019, 329–30 (2020), <https://dhsprogram.com/pubs/pdf/FR365/FR365.pdf> [<https://perma.cc/LW4E-JA3S>]). Similarly, over 90 percent of Somali girls and women have been subjected to FGM, while 92 percent of Egyptian girls and women have been so subjected. Tobin Jones, *Daughters of Somalia, a Continuous Pledge to End Female Genital Mutilation*, U.N. NEWS (Feb. 4, 2022), <https://news.un.org/en/story/2022/02/1111242> [<https://perma.cc/6A2F-M778>]; *Egypt: New Penalties for Female Genital Mutilation*, HUM. RTS. WATCH (Sept. 9, 2016, 12:55 AM), https://www.hrw.org/news/2016/09/09/804gypt-new-penalties-female-genital-mutilation?gclid=EAIaIQobChMI5Yb__Kj-QIVtm1vBB0e-AOFEAAYyAAEgIqo_D_BwE [<https://perma.cc/M7CG-HLDX>] (citing MINISTRY OF HEALTH AND POPULATION, ARAB REPUBLIC OF EGYPT, DEMOGRAPHIC AND HEALTH SURVEY 2014, at 185 (2015), <https://dhsprogram.com/pubs/pdf/fr302/fr302.pdf> [<https://perma.cc/7532-YYVK>]).

The courts of both countries later reversed their positions and now recognize FGM as a valid ground for asylum.³⁸ The United Nations High Commissioner for Refugees later provided authoritative guidance on how gender-based asylum claims should be treated.³⁹ It advises framing such claims as involving persecution that falls within the “particular social group” classification, and it states that gender-based violence may be grounds for asylum.⁴⁰ This guidance is helpful to future judges. But the absence of such guidance when *Fornah* and *Kasinga* were decided left these complex matters—which required an understanding of the intersectionality between race, gender, and other factors (such as age)—to the discretion of individual judges who could not see the persecution.

Perhaps their blindness was because the Refugee Convention did not include gender as a protected category, or maybe it was a more unconscious bias. But regardless of the reason, it is difficult to imagine that judges would have been so blind to an extremely harmful social practice if it involved torture being inflicted upon white males.⁴¹ Historically, gender oppression has often taken the form of forcing females—but not males—to drastically alter their bodies in order to conform to an impossible feminine ideal, whether through foot-binding, corsets, FGM, or other social practices.⁴² The continued prevalence of FGM, in a world where foot-binding and deforming corsets have largely disappeared, demonstrates that Black women have had to uniquely fight to have their right to bodily autonomy recognized.

2. Denying Black Women Equal Protection Through Neglect or Negligence

We have seen, in the Part above, a few examples of the ways in which the law, as it is formally construed and interpreted by judges, has denied Black women the same rights afforded to more privileged groups in society. The examples I noted above concerned rights to

38. Musalo, *supra* note 36, at 46–47 (citing *Kasinga*, 21 I. & N. Dec., at 358, 368); UNHCR, *FGM Report*, *supra* note 24, at 6–7 (citing Sec’y of State for the Home Dept. v. K [2006] UKHL 46 [25], [94]).

39. *See generally* United Nations High Commissioner for Refugees, *UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender*, UNHCR (Nov. 2016), <https://www.unhcr.org/en-us/5822266c4.pdf> [<https://perma.cc/8HGU-FXZV>].

40. *Id.* at 1–3.

41. *Fornah v. Sec’y of State for the Home Dept.* [2005] EWCA (Civ) 680 [1] (Eng.). Despite that, Justice Auld did not think FGM was “discriminatory.” *Id.* [44(3)].

42. For instance, some women have been required to wear high heels as a condition of employment, despite the health consequences. Kate Demolder, *Oppressive or Empowering? The Complicated History of High Heels*, IRISH TATLER (Mar. 2, 2020), <https://irishtatler.com/news/high-heels-oppression> [<https://perma.cc/4ETB-N7Z6>].

sexual and bodily autonomy, but the analysis could apply to other legal rights as well, such as the right to vote.

However, as the law has increasingly been construed and interpreted to grant equal protection to all people regardless of race, gender, or other statuses, those in positions of authority have developed additional strategies that enable them to deny Black women the equal protection of the law. Neglect and negligence in relation to crimes against Black women play a central role in this process.

Prosecutors have the discretion to choose which cases to take to trial.⁴³ Police, in turn, have some discretion in carrying out investigations. They may pursue investigations that they find personally interesting, or that they perceive as aiding their careers, and they may avoid matters for a range of reasons.⁴⁴ If a police officer receives the message that prosecutors will not bring certain types of cases, he may rationally choose not to investigate such cases. It may also be that he gets the message that solving certain types of crimes will help his career, whereas solving other types of crimes will not. In this way, decisions about which crimes get investigated can be closely tied to knowledge about which crimes will be prosecuted by local prosecutors.

Law enforcement officers have limited time and resources. They also have different levels of training and motivation, with the result that those with higher levels of training, motivation, and resources are able to investigate more crimes than those with lower levels. All officers must make decisions about how to allocate the time that they have, and they quickly learn which crimes they can ignore without consequence. This often includes crimes committed against people who are vulnerable in some way and accordingly do not have the ability to continue advocating for themselves when their initial complaints are ignored. The less training, motivation, and resources an officer has, the more important it is to him to know which matters require his attention and which he can let slide.

Crimes committed against Black women can often be ignored with impunity, as a number of cases illustrate. The remainder of this Part will analyze four cases that involve serial crimes committed against Black women. In each case, the perpetrator was able to amass a large number of victims because no one in law enforcement bothered to pay attention to his crimes. These cases illustrate that equal protection of the law only exists when the law is enforced on behalf of all groups equally. Neglect and negligence play a substantial role in actual case outcomes. Perpetrators come to expect this neglect, and they count on it.

43. *Prosecutorial Discretion*, 49 ANN. REV. CRIM. PROC. 273, 273–77 (2020).

44. Tom Tyler, *Police Discretion in the 21st Century Surveillance State*, 2016 U. CHI. LEGAL F. 579, 585.

a. Neglect and Negligence in Action: Samuel Little, Lonnie Franklin, and Anthony Sowell

We first consider Samuel Little. In 2019, the FBI declared Little to be the most prolific serial killer in U.S. history, with a pattern of offending that included travel across the entire country and spanned thirty-five years, from 1970 to 2005.⁴⁵ According to the FBI, Little confessed to having committed ninety-three murders, at least fifty of which have been verified by law enforcement.⁴⁶ Incredibly, Little was not apprehended until 2014, by which time he had been convicted of eight murders and was serving a life sentence for just three of them; he died in prison in 2020.⁴⁷ Little liked to draw, and he drew numerous pictures of his murder victims.⁴⁸ Authorities released many of his drawings in 2019 in the hope that the public could help them identify some of Little's other victims whose killings remained unsolved.⁴⁹

How does a man get away with murdering dozens of women over thirty-five years? Little told us himself: by staying in the ghetto.⁵⁰ Speaking to a female journalist in 2018, Little stated: "I never killed no senators or governors or fancy New York journalists. Nothing like that. [If] I killed you, it'd be all over the news the next day. *I stayed in the ghettos.*"⁵¹

Little paid close attention to who his victims were and how those victims were regarded by the authorities. Many of his known victims were Black women.⁵² And in addition to experiencing the intersecting effects of sexism and racism, many of his victims were marginalized in

45. *FBI Seeking Assistance Connecting Victims to Samuel Little's Confessions*, FBI (Oct. 6, 2019), <https://www.fbi.gov/news/stories/samuel-little-most-prolific-serial-killer-in-us-history-100619> [<https://perma.cc/37YD-4W9Y>] [hereinafter *FBI Seeking Assistance*].

46. *Id.*

47. Neil Vigdor, *Samuel Little, Serial Killer Who Confessed to 93 Murders, Dies at 80*, N.Y. TIMES (Dec. 31, 2020), <https://www.nytimes.com/2020/12/31/us/samuel-little-dead.html> [<https://perma.cc/S4FN-S5BB>] [hereinafter Vigdor, *Samuel Little, Serial Killer Who Confessed to 93 Murders, Dies at 80*].

48. See *FBI Seeking Assistance*, *supra* note 45.

49. Karen Zraick, *F.B.I. Hopes Samuel Little's Drawings Will Help Identify His Murder Victims*, N.Y. TIMES (Feb. 13, 2019), <https://www.nytimes.com/2019/02/13/us/samuel-little-serial-killer.html> [<https://perma.cc/6QMA-GGED>].

50. Jillian Lauren, *The Serial Killer and the 'Less Dead,'* THE CUT (Dec. 20, 2018), <https://www.thecut.com/2018/12/how-serial-killer-samuel-little-was-caught.html> [<https://perma.cc/G272-6DWM>].

51. *Id.* (emphasis added).

52. Vigdor, *Samuel Little, Serial Killer Who Confessed to 93 Murders, Dies at 80*, *supra* note 47.

other ways.⁵³ They were typically young women who were estranged from their families and struggling with poverty and addiction.⁵⁴

That nexus between race, gender, vulnerability, and being the victim of a murder that has remained unsolved is no accident. One former police chief has stated:

One of the unfortunate realities of policing is that departments that are under pressure to solve a variety of murders may pay less attention to victims from a more vulnerable population if they don't have the same organized community pressure to solve those crimes If a killer wants [to] do as many murders as possible, they'll start to exploit those gaps in the social fabric and those weaknesses in law enforcement with victims that few people care about.⁵⁵

Similarly, a crime analyst with the FBI stated that “[f]or many years, Samuel Little believed he would not be caught because he thought no one was accounting for his victims.”⁵⁶

Other serial offenders target Black women for the same reason—successfully evading detection because they know that the victims will not be regarded with concern. Lonnie Franklin, also known as the Grim Sleeper, was convicted of murdering nine women and one teenage girl in South Los Angeles.⁵⁷ His murder spree began in the 1980s and continued until 2007; his nickname resulted from the fact that he apparently took a hiatus from killing between 1988 and 2002.⁵⁸ But police later concluded, after linking him to six additional murders, that Franklin had not taken a hiatus from killing; they had just missed some of his victims.⁵⁹ Police also found photos at his home that suggested he may have had thirty-five additional victims who remained unidentified

53. *Id.*

54. *Id.*

55. *Why Did It Take So Long to Find Prolific Serial Killer?*, CRIME REP. (Oct. 9, 2019), <https://thecrimereport.org/2019/10/09/why-did-it-take-so-long-to-find-prolific-serial-killer/> [<https://perma.cc/B2S3-ETD6>] (quoting Jim Bueermann, former police chief of Redlands, California and former president of the National Police Foundation).

56. *See FBI Seeking Assistance*, *supra* note 45 (quoting Christie Palazzolo, a crime analyst for the FBI's Violent Criminal Apprehension Program).

57. Mike McPhate, *Los Angeles Man Is Convicted in 'Grim Sleeper' Serial Killer Case*, N.Y. TIMES (May 5, 2016), <https://www.nytimes.com/2016/05/06/us/grim-sleeper-lonnie-franklin-los-angeles.html> [<https://perma.cc/3FDV-W69T>].

58. *Id.*

59. Joel Rubin, *Police Link 6 More Slayings to Grim Sleeper Suspect*, L.A. TIMES (Oct. 29, 2011, 12:00 AM), <https://www.latimes.com/local/la-xpm-2011-oct-29-la-me-grim-sleeper-20111029-story.html> [<https://perma.cc/S6VV-BX68>].

at the time of his trial.⁶⁰ Thus his nickname actually stemmed from a perceptual error on the part of the police.

In 2016, Franklin was convicted and sentenced to death; he died in prison in 2020.⁶¹ Like Little, he targeted young Black women, often drug users and sex workers who were “living at the margins,” and he sexually assaulted at least some of his victims.⁶² Officials described Franklin as “hiding in plain sight” because he lived within a few miles of where his victims’ bodies were found.⁶³ He had also had a rape conviction on his record from when he served with the U.S. Army in Germany.⁶⁴ Despite these facts, police were not able to apprehend him for decades. Family members and victim advocates believe the police did not investigate the murders with urgency because the victims were marginalized Black women, doing sex work or using drugs.⁶⁵

The story repeats itself with the case of Anthony Sowell in Cleveland, Ohio—a case more heinous, in some respects, because of how blind the police were to obvious clues. Sowell murdered eleven Black women whose bodies were found at or around his home.⁶⁶ The crimes went undetected for years, despite a horrific stench coming from the house.⁶⁷ He was finally convicted in 2011, and he died on death row in 2021.⁶⁸

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60. Hillel Aron, *As Grim Sleeper Murder Trial Nears, Police Can't Find 35 Women in Photos*, L.A. WEEKLY (Feb. 5, 2016), <https://www.laweekly.com/as-grim-sleeper-murder-trial-nears-police-cant-find-35-women-in-photos/> [<https://perma.cc/5KUJ-SQ5Z>].
61. Christopher Mele, *Serial Killer Known as ‘Grim Sleeper’ Dies in Prison*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/us/grim-sleeper-dead.html> [<https://perma.cc/WM44-FC6G>].
62. McPhate, *supra* note 57; Rubin, *supra* note 59; Mele, *supra* note 61.
63. McPhate, *supra* note 57.
64. *‘Grim Sleeper’ Suspect Had Conviction for Gang Rape in Germany, DA Discloses*, EYEWITNESS NEWS (May 4, 2016), <https://abc7.com/grim-sleeper-lonnie-franklin-serial-killer-trial/1324202/> [<https://perma.cc/JZ6F-JLAQ>].
65. McPhate, *supra* note 57.
66. Ian Urbina & Christopher Maag, *After Gruesome Find, Anger at Cleveland Police*, N.Y. TIMES (Nov. 5, 2009), <https://www.nytimes.com/2009/11/06/us/06cleveland.html> [<https://perma.cc/96EJ-MSS5>]; *Anthony Sowell Timeline*, CLEVELAND.COM, https://www.cleveland.com/metro/2009/11/anthony_sowell_timeline.html [<https://perma.cc/6K4G-TK5P>] (Nov. 8, 2009, 7:30 AM).
67. Urbina & Maag, *supra* note 66.
68. Neil Vigdor, *Anthony Sowell, Serial Killer Who Terrorized Cleveland, Dies at 61*, N.Y. TIMES (Feb. 9, 2021), <https://www.nytimes.com/2021/02/09/us/anthony-sowell-serial-killer-dead.html> [<https://perma.cc/C42B-CVR5>] [hereinafter Vigdor, *Anthony Sowell, Serial Killer Who Terrorized Cleveland, Dies at 61*].

Law enforcement's blindness to Sowell's murders was especially noteworthy because Sowell had previously served fifteen years in prison for a very similar crime—luring a young woman into his home, then choking and raping her.⁶⁹ He was released from prison in 2005, and his murder spree began shortly thereafter, at his home in a predominantly poor and Black part of Cleveland.⁷⁰ Police made regular trips to Sowell's home to confirm his whereabouts because of his status as a sex offender.⁷¹ But they never inquired about the overpowering stench emanating from his house, which was obvious to people in the neighborhood for at least three years prior to Sowell's arrest.⁷² The owner of a sausage factory right next door to Sowell even went to great lengths to ensure that his business was not responsible for the smell.⁷³

In addition, law enforcement's flagrant disregard for Sowell's vulnerable victims was unmistakable. Police failed to adequately investigate in December 2008 when one of Sowell's victims ran up to a police car, bleeding, and told police that Sowell punched her, choked her, and tried to rip off her clothes.⁷⁴ They failed again on September 22, 2009, when another victim told police that Sowell choked her with an extension cord and raped her until she passed out. In both cases, police attributed their lack of progress to the victims' alleged unwillingness to speak to police. However, by September 2009, police were already aware of several unsolved murders of Black women in the area, and Sowell's neighbor across the street had called City Hall, in June 2007, to report a foul odor that "smelled like a dead person or animal."⁷⁵ Police should therefore have been aware of a very disturbing pattern of events and should have made investigating Sowell a priority, whether or not the victims were willing to speak to police.

By the end of October 2009, police had obtained a search warrant for Sowell's home based on the September 22 complaint, but not before Sowell had attacked yet another woman.⁷⁶ On October 20, 2009, seven

69. *Id.*

70. *Id.*; Ian Urbina, *Neighbor Says Police Knew About Rapist's House*, N.Y. TIMES (Nov. 2, 2009), <https://www.nytimes.com/2009/11/03/us/03rape.html> [<https://perma.cc/M9SC-5LNS>].

71. Urbina, *supra* note 70.

72. See Mark Puente, *Anthony Sowell's Neighbors Wonder How Stench of Rotting Bodies Went Unidentified for Years*, CLEVELAND.COM, https://www.cleveland.com/metro/2009/11/neighbors_wonder_how_stench_of.html [<https://perma.cc/VAT7-SWLC>] (Nov. 3, 2009, 8:50 AM).

73. *Id.*

74. *Anthony Sowell Timeline*, *supra* note 66.

75. *Id.* Interestingly, police paid a surprise visit to Sowell's home in September 2009 to verify his address as a registered sex offender, but they apparently were not bothered by the odor. *Id.*

76. *Id.*

days before police obtained the search warrant, a woman either fell or was thrown out of a second story window of Sowell's home. She was naked and was taken away by an ambulance crew.⁷⁷ Only after numerous women either went missing, were found dead, or reported sexual assaults by Sowell did police finally spring into action. Sowell thus had the opportunity to choke, rape, and murder numerous Black women during the time period that police failed to take complaints about Sowell seriously and stop him.

Family members also found police unwilling to investigate the disappearances of loved ones. One woman organized a search for her niece herself, after officers at three different police stations refused to help her.⁷⁸ Another woman was treated terribly when she tried to file a missing-persons report on her daughter; police told her to wait awhile because her daughter would return "once all the drugs were gone."⁷⁹ Police inaction extended to reports they received from neighbors of bruised and battered women fleeing Sowell's home.⁸⁰

Sowell's victims were Black women, and many of them were known drug users.⁸¹ The law enforcement response to these crimes was to ignore them because the lives of Black women living at the margins were unimportant to them. As the sister of one victim said, "The police are still in the mindset that some people don't matter Shouldn't the police have noticed that we had so many black women missing before this?"⁸²

It is shocking that police did not suspect foul play given the obvious signs: eleven women went missing between 2005 and 2009; there was a horrific stench coming from Sowell's home for at least three years that police never noticed, despite their routine visits to his home (due to his status as a registered sex offender); and he had served prison time for rape. One would think that any officer paying minimal attention would have connected these dots. It is hard to imagine law enforcement turning a blinder eye to violence against Black women than they did here. Police inaction enabled Sowell's rapes and murders and likely emboldened him to commit additional crimes.

While Little's case is horrific because he accumulated dozens of victims over decades, his case may have been somewhat more challenging for law enforcement because he committed crimes across

77. *Id.*

78. Urbina & Maag, *supra* note 66.

79. *Id.*

80. Urbina, *supra* note 70.

81. Urbina & Maag, *supra* note 66; Mark Puente, *Death Count at Anthony Sowell's Home Rises to At Least 10*, CLEVELAND.COM, https://www.cleveland.com/metro/2009/11/body_count_at_anthony_sowells.html [<https://perma.cc/M5VP-S6ER>] (Nov. 4, 2009, 10:50 AM).

82. *Id.*

the country in a range of law enforcement jurisdictions. Officers in those jurisdictions were not necessarily aware of Little's crimes in other places. In contrast, Franklin and Sowell both murdered Black women right where they lived, putting in plain sight how police ignored complaints from community members and other evidence right in front of them. By ignoring Little, Franklin, and Sowell, police officers put into practice the lesson from Lord Justice Auld's FGM opinion—the mistreatment of Black women, whether in the form of FGM, rape, or murder, is simply normal. It is not a crime that requires the state to intervene to protect these women.

b. Perpetrators Count on Police Ignoring Crimes Against Black Women

By now the pattern is clear: Black female victims of rape and murder are frequently ignored by the police, and this neglect—or even negligence—is compounded by other intersecting oppressions they may experience, such as low socioeconomic status, drug use, and sex worker status.⁸³ But one more case is worth analyzing because it offers a lens into how perpetrators deliberately exploit these vulnerability dynamics in order to get away with crime. Perpetrators like Little, Franklin, Sowell, and others deliberately target vulnerable Black women, *knowing* that police will ignore complaints from such women.

In 2015, Daniel Holtzclaw, a former Oklahoma City police officer, was sentenced to 263 years in prison for numerous sexual assaults on Black women committed during unnecessary traffic stops over a six-month period from 2013 to 2014.⁸⁴ According to prosecutors, Holtzclaw targeted thirteen women, “singling out poor, black victims with criminal backgrounds whose stories would not be believed.”⁸⁵ Once he had stopped each woman, he coerced her into performing sexual acts, saying that he would have to take legal action against her—because of an outstanding arrest warrant or drug use—if she did not comply with his wishes.⁸⁶

83. See The Combahee River Collective, *The Combahee River Collective Statement*, in *HOW WE GET FREE: BLACK FEMINISM AND THE COMBAHEE RIVER COLLECTIVE* 15, 15–28 (Keeanga-Yamahtta Taylor ed., 1978); Pokorak, *supra* note 16, at 47–48.

84. See Dave Phillips, *Former Oklahoma City Police Officer Found Guilty of Rapes*, N.Y. TIMES (Dec. 10, 2015), <https://www.nytimes.com/2015/12/11/us/former-oklahoma-city-police-officer-found-guilty-of-rapes.html> [<https://perma.cc/LQ3N-2LT8>]; Sarah Kaplan, *A Serial Rapist Cop's 'Mistake': Assaulting the Grandmother Who Finally Reported Him*, WASH. POST (Dec. 11, 2015, 4:48 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/12/11/daniel-holtzclaws-mistake-assaulting-the-grandmother-who-finally-reported-him/> [<https://perma.cc/P3AW-HPQQ>].

85. Phillips, *supra* note 84.

86. *Id.*; Kaplan, *supra* note 84.

Holtzclaw used his position and power as a police officer to force women to stop and then to sexually assault them, targeting women who could not complain.⁸⁷ As prosecutors said, “He didn’t choose C.E.O.s or soccer moms; he chose women he could count on not telling what he was doing He counted on the fact no one would believe them and no one would care.”⁸⁸

Holtzclaw’s success in victimizing vulnerable women led him to make a mistake—in June 2014, he stopped and sexually assaulted a fifty-seven-year-old, Black grandmother with no criminal record.⁸⁹ After Holtzclaw forced her to perform oral sex, she reported the assault to police.⁹⁰ Holtzclaw was placed on administrative leave and a criminal investigation ensued.⁹¹

Prosecutor Lori McConnell told the jury that Holtzclaw’s focus on a certain type of victim was no accident. Holtzclaw, she said, “[T]argeted drug addicts and other women with felony records who he could intimidate with threats of being jailed in order to prevent them from reporting the assaults to authorities.”⁹² Holtzclaw’s victims made statements such as “What kind of police do you call on the police?” and “I didn’t think anyone would believe me. I’m a black female.”⁹³ According to McConnell, Holtzclaw’s attitude was “who will believe these women, and who will care?”⁹⁴

Holtzclaw’s defense team cast his victims as “liars and criminals whose testimony could not be trusted.”⁹⁵ But of course that was the point. As commentator Goldie Taylor has written,

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87. Sarah Larimer, *Disgraced Ex-Cop Daniel Holtzclaw Sentenced to 263 Years for On-Duty Rapes, Sexual Assaults*, WASH. POST (Jan. 22, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after-sex-crimes-conviction/> [https://perma.cc/EF3Y-RHSP].
88. Phillips, *supra* note 84.
89. Kaplan, *supra* note 84; Jessica Testa, *How Police Caught the Cop Who Allegedly Sexually Abused Black Women*, BUZZFEED NEWS (Sept. 5, 2014, 1:40 PM), <https://www.buzzfeednews.com/article/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city> [https://perma.cc/L5H4-49XA].
90. Kaplan, *supra* note 84; Testa, *supra* note 89.
91. Testa, *supra* note 89.
92. *Prosecutor: Ex-Cop Used Power to “Prey on Women,”* CBS NEWS (Dec. 8, 2015, 9:51 AM), <https://www.cbsnews.com/news/prosecutor-ex-cop-used-power-to-prey-on-women/> [https://perma.cc/H7AY-RQZW].
93. Kaplan, *supra* note 84.
94. Goldie Taylor, *White Cop Convicted of Serial Rape of Black Women*, DAILY BEAST, <https://www.thedailybeast.com/goldie-taylorwhite-cop-convicted-of-serial-rape-of-black-women> [https://perma.cc/4JDT-MFYB] (June 26, 2017, 12:20 PM).
95. *Id.*

Too many of us cannot imagine ourselves in the same shoes as an Oklahoma prostitute, a crack addict, or a teenage runaway. . . . We cannot imagine what it's like to have no voice. We cannot imagine ourselves black, poor, and powerless.

Holtzclaw knew we wouldn't give a damn. That's why he chose them.⁹⁶

Holtzclaw has now exhausted his appeals, but his advocates continue to portray his accusers as liars who cannot be trusted.⁹⁷

Black women scored a victory in the Holtzclaw trial. An all-white jury of eight men and four women convicted him, although they only convicted him of half of the thirty-six charges prosecutors brought—holding him accountable for his crimes against only eight of the thirteen women.⁹⁸ The defense succeeded in casting the other five women as not believable, even though police records show that they were also stopped by Holtzclaw. Still, the value of the case is in demonstrating how deliberately perpetrators will target a certain population of individuals, confident that they will not get caught because their victims are not credible.

Taken together, the cases discussed here demonstrate that extremely serious serial offenses against Black women are possible because these crimes are ignored, particularly when the victims have additional, intersecting vulnerabilities, such as low socioeconomic status and drug use. The victims are often afraid to go to the police and worried that no one will believe them, and family members who seek police help may have their fears and concerns trivialized. The result of this neglect and negligence on the part of the police is to leave perpetrators free to offend again and again.

3. Retaliation: Prosecuting Black Women and Girls Who Complain of Crime

Black women have good reason to fear not being believed when they report crimes to police. Retaliating against Black women who report crimes to the police is a strategy illustrated by two cases where rape victims were charged by police with false reporting.

96. *Id.*

97. *US Supreme Court Rejects Ex-Cop's Appeal of Rape Convictions*, AP NEWS (Mar. 9, 2020), <https://apnews.com/article/7e2b2a5d9561871d809f8819e40ed478> [<https://perma.cc/3NH3-BWXV>]; see, e.g., Daniel Holtzclaw's Family & Friends, *Holtzclaw Press Release: Accuser Now Testifies, "I Haven't Never Seen Him Before Trial,"* CHANGE.ORG (Mar. 7, 2022), <https://www.change.org/p/free-daniel-holtzclaw-an-innocent-man-wrongfully-convicted/u/30302416> [<https://perma.cc/4M48-XQ4N>].

98. Larimer, *supra* note 87; Taylor, *supra* note 94.

a. Danielle Hicks-Best: Raped at Eleven and Charged with False Reporting

The first case occurred in the Washington, D.C., area in 2008 when an eleven-year-old girl was twice grabbed off the street by young men in her neighborhood and taken to an apartment where she was repeatedly raped by multiple perpetrators.⁹⁹ As to what happened next, journalist Joanna Walters tells it best: “Despite medical evidence of sexual assault, records show that no suspects were arrested and the cases were given only sporadic attention by the police. Instead, in the second case, the police charged the girl, Danielle Hicks-Best, with filing a false report.”¹⁰⁰

Police records reveal that Hicks-Best was not interviewed according to best practice protocols, which require police to conduct the interview only after the victim has had the opportunity to get sufficient sleep and meet all of her physical needs.¹⁰¹ Victim interviewing should also follow trauma-informed protocols, which involve being sensitive to the memory difficulties that often occur after a traumatic event.¹⁰²

In contrast to best practices, police records show that Hicks-Best was interviewed in the hospital while she was still being treated for rape

99. Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*, *supra* note 5.

100. *Id.*

101. *Id.*; INT’L ASS’N OF CHIEFS OF POLICE L. ENF’T POL’Y CTR., INVESTIGATING SEXUAL ASSAULTS 4, 9 (2017), <https://evawintl.org/wp-content/uploads/IACPConceptsandIssuesPaper2017.pdf> [<https://perma.cc/BZ9V-LW48>] (noting that victims’ physical needs should be met prior to the victim interview); 725 ILL. COMP. STAT. 203/5 (2017) (finding that a victim’s completion of two sleep cycles before a comprehensive interview improves the victim’s recall); Jim Hopper, Kimberly A. Lonsway & Joanne Archambault, *Important Things to Get Right About the “Neurobiology of Trauma,” Part 3: Memory Processes*, END VIOLENCE AGAINST WOMEN INT’L 7–9 (Sept. 2020), https://evawintl.org/wp-content/uploads/TB-03_Memory-Processes.pdf [<https://perma.cc/V96E-7BWC>].

102. For instance, victims’ attention during trauma is often focused on central details of the traumatic event, with the result that the victim has no memory at all of peripheral details, such as the attacker’s appearance or apparel, the attack’s duration, or the sequence of events. Police following trauma-informed practices change their interviewing strategies to build trust with the interviewee and ask questions in ways that will aid the victim in recovering information, rather than shaming her or accusing her of lying when she cannot remember details. Kimberly A. Lonsway, Jim Hopper & Joanne Archambault, *Becoming Trauma Informed: Learning and Appropriately Applying the Neurobiology of Trauma to Victim Interviews*, END VIOLENCE AGAINST WOMEN INT’L 7, 12 (Oct. 2020), https://evawintl.org/wp-content/uploads/2019-12_TB-Becoming-Trauma-Informed-Trauma-to-Victim-Interviews.pdf [<https://perma.cc/G992-5PSQ>] [hereinafter Lonsway et al., *Becoming Trauma Informed*].

and had not slept.¹⁰³ There, a detective who was “hostile and skeptical of her account” interviewed her for over three hours and ultimately made the decision to charge her with false reporting.¹⁰⁴ The police report reveals the detective’s callousness towards this young, Black rape victim:

Over the next three-hour period, the Complainant proceeded to tell Detective Weeks a myriad of stories. . . . [She] continuously changed her stories whenever confronted with inconsistencies from the previous tale. It became apparent that the Complainant was determined to get any story across that she could, regardless of how incredible it might be.¹⁰⁵

It apparently did not occur to the detective that his hostile questioning of such a young girl, coupled with her trauma from the rape and her lack of sleep, was the source of the communication difficulties. Hicks-Best later stated, “I don’t remember giving lots of different accounts What I remember was being confused, and I was exhausted, and I was still wearing the same clothes and I felt horrible.”¹⁰⁶ Hicks-Best’s comments illustrate why the principles set out in rape investigation best practices are so important. She needed to sleep, shower, and change her clothes before being interviewed by police. Not being allowed to do so dehumanized her and enabled a hostile detective to further diminish her experience.

An additional factor in the outcome of this case was that no victim advocate was present. The presence of a victim advocate during a police interview is an important protective mechanism.¹⁰⁷ The advocate is a

103. Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*, *supra* note 5.

104. *Id.*; Joanna Walters, *District Seeks Improved Services for Young Victims of Sex Assault*, WASH. POST (Jan. 31, 2016), https://www.washingtonpost.com/local/public-safety/dc-seeks-to-improve-services-for-young-victims-of-sex-assault/2016/01/30/3116cacc-c06a-11e5-83d4-42e3bcee902_story.html [<https://perma.cc/UZ46-6EQK>] [hereinafter Walters, *District Seeks Improved Services for Young Victims of Sex Assault*].

105. Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*, *supra* note 5 (quoting the police report for the second assault).

106. *Id.*

107. Joanne Archambault, Kimberly A. Lonsway & Lisa Avalos, *Raped, Then Jailed: The Risks of Prosecution for Falsely Reporting Sexual Assault*, END VIOLENCE AGAINST WOMEN INT’L 11, 25 (Nov. 2020), https://evawintl.org/wp-content/uploads/2019-5_TB_Raped-Then-Jailed.pdf [<https://perma.cc/QH3D-MLR8>]; Heather Huhtanen, Lisa Avalos & Kimberly A. Lonsway, *Gender Bias in Sexual Assault Response and Investigation Part 4: Victim Recantations*, END VIOLENCE AGAINST WOMEN INT’L 13 (Mar. 2018), <https://www.falserapetimeline.org/false-rape-5181.pdf> [<https://perma.cc/893U-V46N>].

source of support for the victim and can also warn her if the police begin to question her as a suspect rather than a victim. According to Hicks-Best, “I think it would have made a big difference to have had someone advising me, because I felt frightened and bullied.”¹⁰⁸ After being charged, Hicks-Best “lost the rest of her childhood,” according to her mother.¹⁰⁹ She was convicted at age eleven and made a ward of the court, and subsequently spent time in detention centers.¹¹⁰ She received an apology from police after a *Washington Post* investigative journalist publicized her case.¹¹¹

Although it is not clear whether this detective had received training in rape investigation best practices, his treatment of Hicks-Best was clearly overly hostile and lacking in empathy for a very young, vulnerable victim.¹¹² In addition to being young, female, and Black, Hicks-Best had additional vulnerabilities that compounded the effects of these intersecting sources of oppression. Hicks-Best was adopted after experiencing drug exposure and physical abuse from her biological mother, who was addicted to crack.¹¹³ She had “severe behavioral, academic and mental-health issues” as a result of these early experiences.¹¹⁴

Rape is a difficult crime to investigate, and sometimes detectives take the easy way out, particularly when they are influenced by bias, whether implicit or explicit. When a victim has numerous vulnerabilities, including race and gender, that signals to such a detective that he can close the case however he wants, because neither the victim nor her family will be in a position to complain about him. In this case, however, Hicks-Best’s parents kept pushing police to investigate their daughter’s rapes, ultimately getting the *Washington Post* involved and eventually exposing how she had been treated.¹¹⁵

Two of the stereotypes of Black women played an obvious role in this case. The Jezebel stereotype was involved despite the fact that Hicks-Best was only eleven years old. An internal police email revealed

108. Walters, *District Seeks Improved Services for Young Victims of Sex Assault*, *supra* note 104.

109. Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*, *supra* note 5.

110. *Id.*

111. *Id.*

112. *Id.* Police interviewed Hicks-Best “in a manner that violated guidelines for handling child sexual assault cases.” Officers treated her with “extreme skepticism,” even calling her “promiscuous” in an email, despite her age. In addition, they misled her during the interview to induce contradictions in her story. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

that one lieutenant stated that she was “promiscuous” and that the “sex” was consensual.¹¹⁶ Moreover, a police report written by the officer who charged Hicks-Best with false reporting noted that one of the men Hicks-Best accused stated that he had seen Hicks-Best in the back bedroom of an apartment, “offering to have sex with any number of a group of young men, telling them she was 16.”¹¹⁷ That police relied on the notion that an eleven-year-old could be promiscuous and consent to sex with multiple men is both obvious—because they never considered statutory rape charges against Hicks-Best’s assailants, despite her age—and also extremely disturbing.¹¹⁸

Police also relied on the stereotype that Black women are not credible when they complain of sexual assault, as evinced by the fact that they overlooked actual evidence of sexual assault, as well as Hicks-Best’s age, and elected to charge her with false reporting instead.

Research has demonstrated that people often perceive Black girls to be older than they actually are, compared to how they perceive white girls.¹¹⁹ This type of perception can be very problematic in cases such as this one, where the result is to deprive a Black girl of the protections that are supposed to accompany childhood, such as statutory rape laws.

b. Arica Waters: Turning on the Victim to Protect a Privileged Defendant

A second case illustrates police turning on a Black crime victim in order to make her a scapegoat and protect a more powerful stakeholder.¹²⁰ In December 2021, Arica Waters was acquitted of falsely reporting a rape when a judge found that the prosecutors had no case

116. *Id.*

117. *Id.* (quoting the police report for the second assault).

118. *Id.*

119. See generally Rebecca Epstein, Jamilia J. Blake & Thalia Gonzalez, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD, GEO. L. CTR. ON POVERTY & INEQ. (2017), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf> [<https://perma.cc/D2K3-8ADD>]; Jamilia J. Blake & Rebecca Epstein, LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS, GEO. L. CTR. ON POVERTY & INEQ. (2019), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/Listening-to-Black-Women-and-Girls.pdf> [<https://perma.cc/W4XT-GHK4>]; A. Rochaun Meadows-Fernandez, *Why Won’t Society Let Black Girls Be Children?*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/parenting/adultification-black-girls.html> [<https://perma.cc/BN3U-3QPM>].

120. The author was involved in this case as an expert witness. Matt Westerhold, *Opinion: Justice or Agenda?*, SANDUSKY REG. (Dec. 9, 2021, 4:00 PM), <https://sanduskyregister.com/news/358208/opinion-justice-or-agenda/> [<https://perma.cc/9NG3-A8JE>].

against her.¹²¹ Although ultimately this case represents a victory for a Black crime victim, Waters never should have been charged with a crime at all. Probing into why she was charged reveals a reliance on stereotypes about Black women.

In July 2020, Waters was a newly hired, seasonal police officer in Put-in-Bay, Ohio, when she reported to Ottawa County, Ohio, police that she may have been sexually assaulted by Jeremy Berman, another Put-in-Bay officer.¹²² She had an unclear recollection of events because she suspected that Berman had put something in her drink.¹²³ The following morning, Waters had sex with Berman a second time, after he pressured her to do so and she agreed to “service” him out of fear that she would lose her job if she refused.¹²⁴

Unbeknownst to Waters, the man she accused, Jeremy Berman, had been accused of drug-facilitated sexual assault twice before.¹²⁵ Berman was wealthy, white, and had spent the last three years as a volunteer detective.¹²⁶ He also enjoyed a lot of power with the local force—power that he had cultivated through gifts to the force and hosting alcohol-fueled cookouts for them.¹²⁷

Prosecutors attempted to argue that Waters knew that she had not been raped, using arguments that reflected stereotypes about Black women as promiscuous, not credible, and aggressive. They presented testimony from Berman that Waters was “a willful, almost aggressive

121. Jon Stinchcomb, *Former Put-in-Bay Police Officer Acquitted of Making False Rape Charge*, PORT CLINTON NEWS HERALD, <https://www.portclintonnews herald.com/story/news/2021/12/16/lyndhurst-woman-arica-waters-acquitted-making-false-rape-charge/8921302002/> [https://perma.cc/V7WU-AFZN] (Dec. 16, 2021, 2:43 PM) [hereinafter Stinchcomb, *Put-in-Bay*].

122. Lynanne Vucovich, *Advocates Call for Action After False Rape Case Fails*, ADVERTISER-TRIB. (Dec. 21, 2021, 7:00 PM), <https://advertiser-tribune.com/news/360409/advocates-call-for-action-after-false-rape-case-fails/> [https://perma.cc/2HS7-YUHD]; Jon Stinchcomb, *Expert Says Waters Was Victim of ‘Quid Pro Quo’ Sexual Harassment*, PORT CLINTON NEWS HERALD (Dec. 17, 2021, 3:02 PM), <https://www.portclintonnews herald.com/story/news/2021/12/17/title-ix-expert-quid-pro-quo-sexual-harassment-not-consent/8936982002/> [https://perma.cc/3VZ3-MGUH] [hereinafter Stinchcomb, *Quid Pro Quo*].

123. Stinchcomb, *Put-in-Bay*, *supra* note 121.

124. *Id.*

125. Vucovich, *supra* note 122.

126. Stinchcomb, *Quid Pro Quo*, *supra* note 122; Rachel Aviv, *The Victim Who Became the Accused*, NEW YORKER (Sept. 5, 2022), <https://www.newyorker.com/magazine/2022/09/12/the-victim-who-became-the-accused> [https://perma.cc/AJB5-PW5K].

127. Stinchcomb, *Quid Pro Quo*, *supra* note 122 (noting that he offered free firearms to officers at award ceremonies).

participant.”¹²⁸ They relied on text messages sent after the incident, which prosecutors claimed showed that Waters was lying: “The evidence will show that the defendant knew she had not been raped. She knew it in the moment. She knew it afterwards. And she never forgot it.”¹²⁹ They relied on a further text message where Waters referenced having a “sugar daddy” to argue that she intended to take Berman’s money.¹³⁰ Using this evidence, prosecutors endeavored to paint a portrait of Waters as a conniving woman who was out to exploit Berman for financial gain.

However, the evidence actually demonstrated that the person who was aggressive, promiscuous, and a liar was Berman. Judge Janet Burnside found that Berman, a married father of young children, was in control of the relationship, had “[s]howed his determination to have sex with [Waters] immediately,” and had flaunted his power with the Put-in-Bay police department in such a way as to make Waters fear for her job if she did not give him what he wanted.¹³¹ In addition, a witness confirmed that he observed Berman serve Waters drinks on the night in question, despite Berman’s denying having done so.¹³² This witness also told the court that he tried to warn Waters that Berman made extremely strong drinks.¹³³

Judge Burnside was also swayed by evidence showing that Waters was indeed intoxicated during the sexual encounter with Berman—a witness described her as “blacked out”—that she had very little recollection of that encounter as a result, and that she had not used the word “rape” to describe what happened when she reported the assault to police.¹³⁴ That Waters was incapacitated during the first instance of sex and felt coerced and feared for her job during the second were disregarded by prosecutors.

128. Stinchcomb, *Put-in-Bay*, *supra* note 121.

129. Ellie Buerk, *Judge Finds Woman Not Guilty of Making False Rape Claim*, THE BLADE (Dec. 16, 2021, 3:31 PM), <https://www.toledoblade.com/local/courts/2021/12/15/judge-finds-woman-not-guilty-of-making-false-rape-claim/stories/20211215111> [<https://perma.cc/9WPP-WHBL>]; Ellie Buerk, *Testimony Starts in Trial of Woman Accused of False Rape Claim*, THE BLADE (Dec. 14, 2021, 9:49 PM), <https://www.toledoblade.com/local/courts/2021/12/14/testimony-starts-trial-woman-accused-rape/stories/20211214121> [<https://perma.cc/EN3U-G4AM>] [hereinafter Buerk, *Testimony Starts in Trial of Woman Accused of False Rape Claim*].

130. Buerk, *Testimony Starts in Trial of Woman Accused of False Rape Claim*, *supra* note 129.

131. Stinchcomb, *Put-in-Bay*, *supra* note 121; Aviv, *supra* note 126.

132. Stinchcomb, *Quid Pro Quo*, *supra* note 122.

133. *Id.*

134. Vucovich, *supra* note 122; Stinchcomb, *Quid Pro Quo*, *supra* note 122.

Ohio Attorney General Dave Yost brought the prosecution against Waters when local prosecutors refused to do so.¹³⁵ In bringing the prosecution, Yost also had to ignore the fact that Berman had been accused of drug-facilitated sexual assault by three separate women who did not know each other.¹³⁶ The other two women were white and were never charged with false reporting. One newspaper editor suggested that racism was behind the decision to bring charges against Waters:

This could be a case that is first of its kind in Ohio, charging a woman with a felony for allegedly lying about being raped, and it's not lost on me that Waters is a Black woman. Our judicial system treats Black people much more harshly than whites, and Yost [and other prosecutors] are all following that tradition.

Two other women—both white—made similar allegations that resulted in no charges against them, and Yost refuses to say why there's a different standard of justice in those cases.¹³⁷

Waters was fired by Put-in-Bay police after reporting that another officer had raped her and has now filed a lawsuit against two members of the Ottawa County Sheriff's Department for their handling of her case.¹³⁸

4. Excessive Punishment of Black Women and Girls

A close cousin to retaliating against Black women who report crime is the excessive punishment of Black female crime suspects. Sometimes Black women are given excessive sentences relative to others for crimes they did commit, and other times they are charged with and punished for crimes they did not commit at all.¹³⁹ These cases, along with the retaliation cases, serve the function of telling Black women that they should not report crimes to the police, nor should they attempt to exercise their rights as citizens, because if they do, police may turn them into crime suspects. These cases can chill Black women's exercise of their rights and civic participation.

135. Westerhold, *supra* note 120.

136. *Id.*

137. *Id.*

138. Vucovich, *supra* note 122; Complaint at 2, *Waters v. Gloor*, No. 3:22-cv-01182-JRK (N.D. Ohio Jul. 5, 2022).

139. ASHLEY NELLIS, SENT'G PROJECT, *IN THE EXTREME: WOMEN SERVING LIFE WITHOUT PAROLE AND DEATH SENTENCES IN THE UNITED STATES* 7, 10 (2021), https://950b1543-bc84-4d80-afie48-656238060c23.filesusr.com/ugd/0c71ee_da27bf7c161b46f4ae221347bea07d8e.pdf [<https://perma.cc/RP6S-RKUA>] (noting that “women of color are disproportionately subjected to extreme sentences compared to their white peers,” and noting the case of Naomi Blount Wilson, who served thirty-seven years in prison for a murder she did not commit).

Take the Memphis, Tennessee, case of Pamela Moses, who was sentenced to six years in prison for allegedly attempting to vote when she was ineligible due to a felony conviction.¹⁴⁰ Not only was the sentence excessive relative to others, but the evidence of her guilt was quite dubious, and the case against her was thrown out entirely after it captured national press attention.

Under Tennessee law, convicted felons are ineligible to vote while they are on probation.¹⁴¹ In mid-2019, Moses learned from election officials in Shelby County, as well as a judge, that she was still on probation and therefore ineligible to vote.¹⁴² But thinking that they might be mistaken, she went to the probation office to inquire there.¹⁴³ After checking the records, a probation office employee told her that she was eligible to vote and signed a certificate confirming her eligibility.¹⁴⁴ Moses then used that certificate to register to vote with the Shelby County Election Commission.¹⁴⁵ One day after Moses registered to vote, probation office officials realized that they had made an error and that Moses was in fact still on probation and ineligible to vote.¹⁴⁶

Prosecutors then charged Moses with voter fraud, and a jury convicted her on a single count in November 2021.¹⁴⁷ At her sentencing hearing in January 2022, Moses asked the judge for leniency, saying “I did not falsify anything All I did was try to get my rights to go back the way the people at the election commission told me and the

140. Sophie Kasakove & Eduardo Medina, *Charges Dropped Against Tennessee Woman Who Was Jailed over Voter Fraud*, N.Y. TIMES (Apr. 23, 2022), <https://www.nytimes.com/2022/04/23/us/pamela-moses-voter-fraud-charges-dropped.html> [<https://perma.cc/CBZ7-8A2G>] (“Moses had [sixteen] prior convictions, including several misdemeanor counts” for “perjury, stalking, and theft under \$500.”).

141. CHRIS UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDONAVA, SENT’G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION, 5 tbl.1 (October 30, 2020), <https://www.sentencingproject.org/wp-content/uploads/2020/10/Locked-Out-2020.pdf> [<https://perma.cc/65KQ-6HM8>].

142. Kasakove & Medina, *supra* note 140; Ken Otterbourg, *Pamela Moses*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6231> [<https://perma.cc/2P6A-3MVD>] (Apr. 29, 2022).

143. Kasakove & Medina, *supra* note 140.

144. *Id.*

145. *Id.*

146. *Id.*

147. Otterbourg, *supra* note 142. Moses was originally charged with fourteen counts of voter fraud after being indicted by a grand jury in November 2019, but twelve of those charges were dismissed. *Id.*

way the clerk did.”¹⁴⁸ But Judge Mark Ward took the view that Moses tricked the probation department into giving her a document saying she was off probation.¹⁴⁹

Did Moses actually trick the probation department? Her name was cleared only after the *Guardian* newspaper investigated further and located probation department correspondence proving that one of their employees had failed to diligently check the records.¹⁵⁰ Moses’s receipt of a certificate indicating that she was eligible to vote was the result of an honest mistake; she had not misled the probation department at all.¹⁵¹

Moses spent eighty-two days in prison before she was finally released, and it took the work of an investigative journalist to find the evidence that freed her.¹⁵² That evidence should have been turned over to her defense team at trial, according to the judge who reversed her conviction.¹⁵³ This case stands as an example of an unjustified and disproportionate zeal to prosecute Black women. If prosecutors had diligently examined the evidence, they would have realized that Moses had no case to answer. But they prosecuted her anyway.

Moreover, Moses’s six-year sentence is extraordinary compared to sentences handed down to white males who were in fact guilty of voter fraud and *actually* voted fraudulently, as opposed to simply registering to vote. For instance, in October 2021, Nevada voter Donald Kirk Hartle was convicted of voter fraud after forging his dead wife’s

148. *Id.*

149. Kasakove & Medina, *supra* note 140. Judge Ward also took into account, at sentencing, that Moses had voted six times as a convicted felon, but Moses explained that she “did not know that I had lost my rights to vote because nobody gave me notice of it.” Otterbourg, *supra* note 142.

150. Sam Levine, *New Evidence Undermines Case Against Black US Woman Jailed for Voting Error*, *GUARDIAN* (Feb. 24, 2022, 10:00 AM) <https://www.theguardian.com/us-news/2022/feb/24/fight-to-vote-newsletter-black-woman-jailed-voting-error-evidence> [<https://perma.cc/R6MB-HPA8>] (noting that according to the probation department, the employee in question “failed to review all of the official documents available through the Shelby county justice portal and negligently relied on a contact note from a court specialist in 2016”).

151. Otterbourg, *supra* note 142.

152. Sam Levine, *Prosecutor Drops All Charges Against Pamela Moses, Jailed over Voting Error*, *GUARDIAN* (Apr. 22, 2022, 2:30 PM), <https://www.theguardian.com/us-news/2022/apr/22/pamela-moses-prosecutor-drops-charges-memphis-tennessee> [<https://perma.cc/U79D-8XD7>] [hereinafter Levine, *Prosecutor Drops All Charges Against Pamela Moses, Jailed over Voting Error*]; Kasakove & Medina, *supra* note 140.

153. Kasakove & Medina, *supra* note 140 (stating that a judge ruled that the Tennessee Department of Correction had “improperly withheld evidence,” and that that evidence was later uncovered by the *Guardian*).

signature and voting with her ballot.¹⁵⁴ Although he was charged with two counts of voter fraud, and each fraud carried a maximum sentence of four years in prison, Hartle was sentenced to only one year of probation.¹⁵⁵ Hartle was a middle-aged, white, Republican voter and was the chief financial officer of a company at the time of his conviction, so his social position was very different from Moses's, and perhaps for that reason he was on the receiving end of much more compassion than Moses.¹⁵⁶

Similarly, Pennsylvanian Bruce Bartman received a comparatively lenient sentence when he completed online voter registration forms for his mother and mother-in-law, both of whom were dead.¹⁵⁷ Bartman, who is white, completed the voter registration forms in the summer of 2020 and then cast his late mother's vote for Donald Trump later that year.¹⁵⁸ After pleading guilty, he was sentenced to five years' probation, with the district attorney stating that "there's not a public benefit to him being incarcerated."¹⁵⁹

Rounding out these examples, a third white, male, Republican voter committed fraud by casting a ballot for a dead relative in October 2021.¹⁶⁰ In Edward Snodgrass's case, he completed his father's absentee ballot, which had been mailed to his father the day after he died.¹⁶¹ Snodgrass said he was "sleep-deprived and not thinking clearly," but also said he was "simply trying to execute a dying man's wishes."¹⁶² Snodgrass served just three days in jail and paid a \$500 fine.¹⁶³

154. *Id.*

155. Eduardo Medina, *Man Claimed Voter Fraud. Now He Faces Fraud Charges*, N.Y. TIMES, Oct. 24, 2021, at 28; Kasakove & Medina, *supra* note 140.

156. Medina, *supra* note 155; Kasakove & Medina, *supra* note 140.

157. Sam Levine, *A White Man Got Probation for Voting Fraud. A Black Woman Faced Six Years in Prison for an Error*, GUARDIAN (Mar. 3, 2022, 5:00 PM), <https://www.theguardian.com/us-news/2022/mar/03/voter-fraud-election-crime-sentencing-racial-disparity> [https://perma.cc/Z23N-E3S7].

158. *Id.*

159. *Id.*

160. Corky Siemaszko, *Republican Official in Ohio Faces Charge for Voting Twice in November Election*, NBC NEWS (June 22, 2021, 5:23 PM), <https://www.nbcnews.com/news/us-news/republican-official-ohio-faces-charge-voting-twice-november-election-n1271985> [https://perma.cc/H82J-PL6U]; *see also* Kasakove & Medina, *supra* note 140.

161. Siemaszko, *supra* note 160.

162. *Id.*

163. Steve Benen, *GOP Voter Gets Light Sentence After Casting Ballot for Deceased Wife*, MSNBC: MADDOWBLOG (Nov. 17, 2021, 8:40 AM), <https://www.msnbc.com/rachel-maddow-show/maddowblog/gop-voter-gets>

These men's sentences—two involving only probation, and the third involving just three days in jail—make Pamela Moses's sentence look extraordinary. Is Tennessee an outlier compared to Nevada, Ohio, and Pennsylvania? Perhaps, but the discrepancy may not be accidental. Tennessee has some of the strictest laws in the country linking disenfranchisement to involvement with the criminal justice system, and this may be an attempt to prevent its Black population from exercising the right to vote.¹⁶⁴ Tennessee has a higher percentage of Black residents than do Nevada, Ohio, and Pennsylvania.¹⁶⁵ The Sentencing Project estimates that over 20 percent of Tennessee's Black residents are unable to vote as a result of disenfranchisement linked to involvement with the criminal justice system.¹⁶⁶

The cases discussed in Parts I.B.3 and I.B.4 above feature excessive punishment of Black women who commit crimes (or are simply accused of committing crimes), as well as police retaliation against Black women who report crimes. These cases prove an important point: it is not merely a lack of resources that causes the neglect and negligence of those investigating crimes against Black women that we saw in the cases featured in Part I.B.2. The retaliation and excessive punishment cases demonstrate that plenty of resources have been made available to bring entirely meritless prosecutions against Black women. Danielle Hicks-Best and Arica Waters never should have been prosecuted because they were crime victims, not suspects, and Pamela Moses committed no crime when she inquired about her eligibility to vote and then registered to vote while relying on information obtained from a probation department official.

Taken together, the cases in this Part demonstrate a set of entrenched practices designed to prevent Black women from obtaining

-light-sentence-after-casting-ballot-deceased-wife-n1284011 [https://perma.cc/UE34-BXHX]; see also Siemaszko, *supra* note 160.

164. UGGEN ET AL., *supra* note 141, at 9.

165. *Black Population by State 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/black-population-by-state> [https://perma.cc/478W-HR3Q] (last visited Aug. 25, 2022). Tennessee's population is 17 percent Black as compared to Ohio (14 percent), Pennsylvania (12 percent), and Nevada (10 percent). *Id.* Tennessee is also the state where Black children have been jailed after playground fights and cursing. See Meribah Knight & Ken Armstrong, *Black Children Were Jailed for a Crime that Doesn't Exist. Almost Nothing Happened to the Adults in Charge*, PROPUBLICA (Oct. 8, 2021, 5:00 AM), <https://www.propublica.org/article/black-children-were-jailed-for-a-crime-that-doesnt-exist> [https://perma.cc/5E23-FNBL]; Lisa Desjardins, *Tennessee Judge Jailed Minors on Bogus Charges Following Playground Fights, Cursing*, PBS NEWS HOUR (Oct. 12, 2021, 6:35 PM), <https://www.pbs.org/newshour/show/tennessee-judge-jailed-minors-on-bogus-charges-following-playground-fights-cursing> [https://perma.cc/823D-YKQ2].

166. UGGEN ET AL., *supra* note 141, at 11; Levine, *Prosecutor Drops All Charges Against Pamela Moses, Jailed over Voting Error*, *supra* note 152.

justice. The oldest method is to write laws that render Black women invisible and deny them the benefit of equal protection. This is what Celia experienced back in 1855.¹⁶⁷ To the extent that laws can arguably be interpreted as granting equal rights to Black women, the next strategy for denying them justice is to construe those laws in ways that continue to render Black women invisible. This was the approach used against the first FGM-asylum-seekers in the United States and United Kingdom. Then, when Black women succeed in arguing that the equal protection of the law applies to them, law enforcement can dilute the effect of the law through neglecting Black female crime victims, even to the point of the negligence that we saw in the Samuel Little, Lonnie Franklin, and Anthony Sowell cases. Finally, law enforcement and prosecutors can retaliate against Black women by bringing meritless cases against them—a strategy that is designed to both punish Black women who come forward to report crimes, and also to dissuade them from exercising their rights. Judges then hop on the bandwagon by handing out sentences to Black women that are clearly excessive.

The legal actors who engage in these practices are practicing bias, although that bias may be implicit or explicit. To the extent that they are not consciously discriminating against Black women, they make choices with an awareness of what they can get away with in relation to the victims or suspects in question. They know that crime victims who are drug users, sex workers, or of low socioeconomic or educational status do not have the resources to challenge how they are treated and will not push back too much. Therefore, legal actors may be assuming that not as much effort needs to be spent on the crimes that such victims report, and that these victims can be punished with retaliation if they complain too much. People who enjoy higher social status receive better treatment.

Legal actors teach perpetrators what they can get away with by example. Samuel Little knew to “stay in the ghetto” if he wanted to get away with killing women. Sowell, Franklin, and Holtzclaw all learned the same lesson, even though they never said so to a reporter. Similarly, legal actors teach perpetrators, such as the men who raped Arica Waters and Danielle Hicks-Best, that raping certain women has effectively been decriminalized. Perpetrators pay close attention to law enforcement’s lessons and they exploit the police’s lack of concern. They continue to dehumanize certain types of victims, knowing there is no criminal penalty for sexually assaulting and even murdering them.

Legal actors have also sent the message that Black women who are suspected of voter fraud will be treated harshly, but white men will only get a slap on the wrist. Who is more likely to commit voter fraud in the future as a result of these lessons?

As long as bias against Black women and other groups is alive and well, attempts to change police practices by raising awareness of

167. See *supra* notes 13–22 and accompanying text.

implicit bias will only go so far. We need solutions that are designed to eliminate discretion in the criminal justice system and base decision making on well-researched best practices. I turn to that issue in the next Part.

II. SOLUTIONS FOR TACKLING THE UNDER-POLICING OF CRIMES AGAINST BLACK WOMEN

What can we do about the under-policing of crimes against women of color? We can first draw attention to the problem, as this Article, along with others, has done.¹⁶⁸ We also need to acknowledge that embedded negative stereotypes about Black women—that they are promiscuous and therefore unrapeable, that they are liars, and that they are aggressive and accustomed to living with violence—shape the response of both police and society more generally to this category of crimes. Solutions must then be powerful enough to overcome those stereotypes. The most effective solutions will limit the discretion of law enforcement and legal actors.

We also need global proposals capable of catalyzing the needed systemic change more broadly. The problem requires solutions that provide a mechanism for holding police accountable for doing the job of investigating crimes against women of color, regardless of the intersectional oppressions affecting those victims.

Holding police accountable for getting the job done can be accomplished by statutory reform. Illinois has pioneered a solution in relation to the investigation of sexual violence that can be adapted to the broader goal of ensuring that crimes against all Black women are properly investigated and prosecuted. In addition, the Equality Amendment that has been proposed by Catharine MacKinnon and Kimberlé Crenshaw could help by making it lawful to deploy special resources to investigate crimes against women marginalized by multiple intersecting oppressions. This Part addresses these two solutions and how they can work in tandem to produce more positive outcomes for Black women victims of crime.

A. The Illinois Sexual Assault Incident Procedure Act

The Illinois Sexual Assault Incident Procedure Act (the Act)¹⁶⁹ is a pioneering law that can be a springboard for further reform, particularly if other states follow Illinois's lead. The Act provides for police accountability in relation to sexual assault investigation by eliminating

168. See generally Jacobs, *supra* note 5. Jessica Lussenhop, *Daniel Holtzclaw Trial: Standing with 'Imperfect' Accusers*, BBC NEWS (Nov. 13, 2015), <https://www.bbc.com/news/magazine-34791191> [<https://perma.cc/W9NZ-MB6E>].

169. Pub. L. No. 99-0801, 2015–2016 Ill. Laws (Jan. 1, 2017) (codified at 725 ILL. COMP. STAT. 203).

excessive officer discretion. It requires police to follow certain procedures in relation to every sexual assault report, eliminating the opportunity to ignore crimes as a result of race, gender, or other bias against the victim.¹⁷⁰

The Act is a new approach. Most of the previous concern with police accountability has been in relation to curtailing officers' excessive use of force against civilians.¹⁷¹ Most departments have not deployed any mechanisms to ensure that police actually do the things that they are supposed to do; rather, law enforcement agencies have trusted police to do their jobs. Police neglect of crimes against Black women has demonstrated that we cannot make this assumption. Laws such as the Act provide accountability, requiring police to actually document that they have done their job.

Illinois implemented this law out of the recognition that sexual assault was an extremely serious yet underreported and underprosecuted crime, and that changes to police procedures were needed in order to improve the law enforcement response to sexual assault.¹⁷² The Illinois legislature was particularly concerned that sexual assault disproportionately impacts women, children, and LGBTQ individuals, and yet rarely results in a conviction.¹⁷³ The result of this state of affairs is that perpetrators are routinely left to reoffend.

The legislature also noted that the trauma of sexual assault leads to severe mental, physical, and economic consequences for the victim; that law enforcement's response to sexual assault affects victims' recovery from traumatic events; and that sexual assault investigation

170. 725 ILL. COMP. STAT. 203/1-30 (2017).

171. *HB 1727: The Bad Apples in Law Enforcement Accountability Act*, ACLU ILL., <https://www.aclu-il.org/en/legislation/hb-1727-bad-apples-law-enforcement-accountability-act-01> [https://perma.cc/L58M-3E69] (June 6, 2021); Samuel Walker, *Police Accountability: Current Issues and Research Needs* 2-5 (Nat'l Inst. Just., Working Paper No. 218583, 2007), <https://www.ojp.gov/pdffiles1/nij/grants/218583.pdf> [https://perma.cc/RX33-3BD3] (noting, inter alia, that “[a]dministrative rulemaking in policing is most highly developed in the area of police use of deadly force”); George L. Kelling, Robert Wasserman & Hubert Williams, *Police Accountability and Community Policing*, PERSP. ON POLICING, Nov. 1988, at 1 (noting police chiefs' worries over police “brutality; misuse of force, especially deadly force; [and] over-enforcement of the law,” issues that are “grist for the mill of persistent and influential watchdog groups concerned about impartial enforcement under the law”); NAT'L LAWS. GUILD, *Expanding Pathways to Accountability: State Legislative Options to Remove the Barrier of Qualified Immunity*, NAT'L POLICE ACCOUNTABILITY PROJECT 2-4, <https://www.nlg-npap.org/wp-content/uploads/2021/12/Qualified-Immunity-White-Paper-Final.pdf> [https://perma.cc/2U3V-5BDQ] (referencing numerous examples of police misconduct that involve the excessive use of force).

172. 725 ILL. COMP. STAT. 203/5(1).

173. *Id.*

could be improved if law enforcement officers took into account knowledge about victims' trauma in order to improve victims' ability to cooperate with investigations.¹⁷⁴ One example, noted by the Illinois legislature, is that allowing a victim to complete at least two full sleep cycles before an in-depth interview is beneficial because doing so facilitates memory consolidation after a traumatic event.¹⁷⁵

The legislature further noted that victim participation is critical to the prosecution process, and that it is therefore important to increase the tools that victims have to work alongside law enforcement to bring perpetrators to justice.¹⁷⁶ In addition, it noted that identification and successful prosecution of sexual predators prevent new victimization.¹⁷⁷ For this reason, improving the response of the criminal justice system to victims of sexual assault and sexual abuse is critical to protecting public safety.¹⁷⁸

1. What the Act Requires

The Act implements a sophisticated response to sexual assault that is required of all law enforcement agencies statewide, which includes provisions for written reports, officer training, evidence handling, information disclosure to victims, and other matters. As such, the Act takes such matters out of the discretion of individual officers and requires compliance with best practices.

First, all law enforcement agencies are required to adopt written policies regarding procedures for incidents of sexual assault or sexual abuse consistent with comprehensive guidelines developed under the Act.¹⁷⁹ Local agencies are not left to develop these policies on their own. Instead, the Office of the Attorney General, in collaboration with the Illinois Law Enforcement Training Standards Board and the Illinois State Police, developed comprehensive sexual assault investigation guidelines for "evidence-based, trauma-informed, victim-centered sexual assault and sexual abuse response and investigation," and made these guidelines available to all local agencies.¹⁸⁰ Each agency can then draw upon the statewide guidelines in fashioning their own policies. These guidelines are specific, detailed, and cover all aspects of the sexual assault investigation process.¹⁸¹

174. *Id.* at 203/5(2), (4)–(5), (7).

175. *Id.* at 203/5(5).

176. *Id.* at 203/5(6), 25.

177. *Id.* at 203/5(7).

178. *Id.*

179. *Id.* at 203/15(a).

180. *Id.* at 203/15(b).

181. *Id.*

Second, law enforcement agencies must implement sexual assault investigation training, required of all officers, that meets specific requirements established by the Act, and which is based on current best practices.¹⁸² The Act requires that training and policies be “evidence-based” and “trauma-informed.”¹⁸³ “Evidence-based” means that investigators must make decisions about case management and investigation based on the evidence and not based on any bias they may have toward the victim.¹⁸⁴ So, for instance, they cannot simply decide not to investigate a sexual assault because they think the victim is at fault for drinking too much; rather, they must move forward with collecting all available evidence and see what conclusion it ultimately supports. “Trauma-informed” means acting with an awareness of the role that trauma has played in the incident, and more broadly, in the victim’s life, and interacting with the victim in a way that is sensitive to these concerns.¹⁸⁵ This approach is critical to eliminating decision making based on implicit or explicit bias.

Third, the Act includes detailed provisions on the handling of sexual assault evidence collection kits (colloquially referred to as “rape kits”) and how quickly they must be processed.¹⁸⁶ Illinois has a tracking system that allows workers and victims to track the progress of each kit—from collection, to the laboratory, to reporting results to the police and victim.¹⁸⁷ Victims must be notified of the tracking system and given login information that allows them to track their evidence collection kit.¹⁸⁸ Importantly, victims have ten years from the date of the assault or from the time they turn eighteen, whichever is greater, to consent to having their rape kit tested.¹⁸⁹ This means that the state must store these kits for the duration of this time and cannot dispose of them prematurely.

Fourth, law enforcement officers are required to produce a written report in response to each and every sexual assault report they

182. *Id.* at 203/15(a).

183. *Id.* at 203/15(b).

184. *See generally* *A Brief History of EVAWI and Start By Believing and Other Victim-Centered, Trauma-Informed Approaches*, END VIOLENCE AGAINST WOMEN INT’L (May 2018), <https://www.startbybelieving.org/wp-content/uploads/2022/03/Brief-History-of-EVAWI-and-Start-by-Believing.pdf> [<https://perma.cc/8XFH-H5S6>].

185. 725 ILL. COMP. STAT. 203/10. *See generally* Lonsway et al., *Becoming Trauma Informed*, *supra* note 102, at 7.

186. 725 ILL. COMP. STAT. 203/30(a).

187. *Id.* at 203/20(a)–(d), 30(b), (f).

188. *Id.* at 203/11.

189. *Id.* at 203/30(d).

receive.¹⁹⁰ This includes reports received not only from victims assaulted in the particular jurisdiction, but also from third-party witnesses and individuals who report assaults that occurred in other jurisdictions.¹⁹¹ No law enforcement agency may refuse to complete a written report for any reason.¹⁹² This provision alone requires that each report be taken seriously and memorialized. The Act also sets out detailed and specific requirements as to which information must be included in the report and procedures that must be followed in order to assist complainants who report to the wrong jurisdiction.¹⁹³ This means that a police department may never turn away a complainant on the grounds that it does not have jurisdiction.¹⁹⁴

Fifth, the Act includes provisions empowering victims with information and equipping them to follow up. Among other things, victims must be notified about the time frame in which medical evidence can be collected after a sexual assault—they must be told that they can elect to have a sexual assault evidence collection exam within seven days of the assault, although the quality of the evidence deteriorates the longer they wait.¹⁹⁵ They also must be notified that they will not be charged for hospital emergency or forensic medical services associated with sexual assault, and that the sexual assault forensic evidence collected will not be used to prosecute the victim for any offense related to the use of alcohol, cannabis, or a controlled substance.¹⁹⁶

This latter provision is particularly important, since many sexual assaults involve alcohol or drugs, and victims can be reluctant to report for fear of being prosecuted for drug use.¹⁹⁷ Illinois has made the policy decision that getting sex offenders off the streets is more important than prosecuting sexual assault victims for minor drug offenses. This should give victims more comfort in coming forward.

190. *Id.* at 203/20.

191. *Id.*

192. *Id.* at 203/20(f).

193. *Id.* at 203/20(b)–(c).

194. *Id.* at 203/20(a)(1).

195. *Id.* at 203/25(a)(1)(c).

196. *Id.* at 203/25(a)(1)(b), (c-5).

197. SARAH DAWGERT, SUBSTANCE USE AND SEXUAL VIOLENCE: BUILDING PREVENTION AND INTERVENTION RESOURCES 28, 37 (2009), https://www.pcar.org/sites/default/files/pages-pdf/substance_use_and_sexual_violence.pdf [https://perma.cc/R2U2-JGD9]. In a similar vein, at least one university has chilled the reporting of sexual assault by punishing victims for alleged violations of the honor code. Jack Healy, *At Brigham Young, a Cost in Reporting a Rape*, N.Y. TIMES (Apr. 26, 2016), <https://www.nytimes.com/2016/04/27/us/rape-victims-brigham-young-university-honor-code-suspensions.html> [https://perma.cc/EVG2-GG3S].

In addition, victims must be provided with a summary of the civil remedies available after sexual assault, including Illinois's Civil No Contact Order Act and its laws concerning domestic violence, as well as a referral to at least one agency that can help a victim seek these remedies.¹⁹⁸ They also must be notified about the state's system for tracking rape kits.¹⁹⁹

Sixth, victims of sexual assault must be offered certain additional services, including transportation to a hospital for emergency care or forensic services and transportation to the nearest available judge for the purpose of obtaining a no contact order or other civil remedies.²⁰⁰ Transportation and agency referrals must be provided in a way that is accessible to each particular victim.²⁰¹

2. Police Accountability: The Difference that the Act Can Make

The Act was designed specifically to ensure that serious crimes committed against marginalized people—particularly women, children, and LGBTQ individuals—are taken seriously and investigated thoroughly. If an apparently intoxicated twenty-year-old shows up at a police station and complains of sexual assault, it is much easier for an officer to resolve the matter by charging the victim with underage drinking than to do the difficult work of collecting evidence and investigating the sexual assault. The officer's response would also have the effect of chilling the reporting of sexual assault when the victim's friends learn about how he or she was treated. They too will be reluctant to come forward after sexual assault victimization if they believe they could be charged with an offense themselves. But the likelihood of an officer behaving in this way will be based, in part, by how vulnerable the victim is, and whether the officer can therefore get away with this course of action. If the victim comes from a wealthy family and has good social support, the officer will face pushback if he arrests the victim and fails to record the sexual assault. But if the victim is from an economically depressed community and perhaps has other intersecting vulnerabilities, such as a poor educational background or a prior history of victimization, the officer is not likely to be challenged if he engages in this course of action.

The Act eliminates such counterproductive responses on the part of the police by requiring documented compliance with best practices and eliminating bias-based discretion. Several provisions help to make sure that all sex crimes are effectively investigated and prosecuted, regardless of who the victim is. Because every report of sexual assault must be memorialized in writing, officers cannot simply ignore victims.

198. 725 ILL. COMP. STAT. 203/25(a)(1)(E), (G).

199. *Id.* at 203/11.

200. *Id.* at 203/25(a)(2)–(3).

201. *Id.* at 203/25(a)(1)(G), (b)(2)–(3).

Because victims are empowered with information, they can track the progress of their rape kits and reach out to police to follow up. Victims who know they are entitled to free medical care and sexual assault evidence collection are more likely to engage with those processes. Victims who know about civil remedies and have transportation and other assistance in effectuating those remedies are more likely to avail themselves of them.

Officers who receive adequate, robust training and have the guidance of a law that specifically breaks down the investigation of complex crimes into concrete steps are less likely to write off a victim due to their own biases. They are more likely to follow the correct protocols, investigate, and build a strong case for prosecution.

In addition, many communities now use Sexual Assault Response Teams (SARTs) to provide survivors with a coordinated, community-wide response to sexual assault.²⁰² These teams are comprised of police officers as well as prosecutors, Sexual Assault Nurse Examiners, victim advocates, social workers, and others.²⁰³ The use of SARTs, along with the transparent nature of the Illinois law, equips the non-law enforcement members of a SART to help to hold the police accountable for handling all sexual assault cases appropriately.

3. The Transformative Power of the Act: Police Accountability in Relation to Other Crimes Against Black Women

The Act has a broader relevance to crimes against Black women for two reasons. First, the rape and murder of women are related crimes. We have seen that those who murder women also sexually assault them; indeed, such perpetrators may start out as rapists and then escalate to murder later on. Therefore, a robust law requiring best practices in sexual assault investigation is critical to increasing accountability for crimes against Black women. It can save women's lives and can reduce the number of sexual offenses that any one perpetrator commits.

Second, and more broadly, the Act has pioneered the principle that state statutes can hold police accountable for doing the difficult work of investigating serious crimes and for documenting that they have done so. Therefore, the Act can serve as a springboard for statutory reform that can improve the investigation of related crimes that disproportionately affect Black women, including domestic violence, homicide,

202. *Sustaining a Coordinated Community Response: Sexual Assault Response and Resource Teams (SARRT)*, END VIOLENCE AGAINST WOMEN INT'L, <https://evawintl.org/courses/evawi-08-sustaining-a-coordinated-community-response-sexual-assault-response-and-resource-teams-sarrt-2/> [https://perma.cc/QP4A-T3R5] (last visited Sept. 4, 2022).

203. KRISTEN LITTLE, KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, *SEXUAL ASSAULT RESPONSE AND RESOURCE TEAMS (SARRT): A GUIDE FOR RURAL AND REMOTE COMMUNITIES* 13, 19–23, 33 (2021), https://evawintl.org/wp-content/uploads/Module-16_Rural-SARRT.pdf [https://perma.cc/6X83-RXN9].

and missing-persons complaints. The Act could be adapted to the investigation of these other serious crimes, with different versions setting out accountability procedures for the police response to these other crimes as needed.

This type of statutory reform has great potential for holding police accountable for doing their jobs in relation to vulnerable members of their communities, helping to ensure that serious crimes are investigated rather than ignored. Consider, for instance, the effect of having a law like the Act in effect in Cleveland, where relatives of Sowell's victims tried to make missing-persons reports about their loved ones but were rebuffed. If Cleveland had had a law requiring police accountability procedures in relation to missing-persons reports, the results would have been very different and may have even saved some lives.

Recall that the aunt of one of Sowell's victims attempted to file a missing-persons report at three different police stations and was turned away at all three.²⁰⁴ Had police accountability procedures, modeled on the Act, been in place, the first police station she approached would have had to accept her complaint and memorialize it in writing. If the aunt was reporting in the wrong jurisdiction, the police station would still have taken the report and would have transferred it to the appropriate jurisdiction, informing the aunt that they had done so. The aunt would have received more respectful treatment by officers whose goal was not to shut down complaints but rather to identify perpetrators and get them off the streets. She would have left the station with knowledge of a tracking system and login credentials so that she could check the status of her complaint and the progress made in the investigation. A law similar to the Act would have given officers clear guidance on how to investigate complaints, ensured compassionate and equitable treatment of all complainants, and ensured that officers were provided with robust training enabling them to actually solve crimes rather than ignore them.

Consider also the effect of such a law on serial rapists and murderers of Black women. Recall that most of Holtzclaw's early victims had minor criminal records, outstanding arrest warrants, or unlawful drugs in their possession—all factors that compounded their belief that, as Black women, they could not expect to go to police and be helped and believed.²⁰⁵ They legitimately feared arrest. Suppose, instead, that these

204. See *supra* note 78 and accompanying text.

205. Kaplan, *supra* note 84; see also Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 93, 103 (Martha Alberton Fineman & Roxanne Mykitiuk eds., 1994) (noting that “[w]omen of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile”).

women had had greater faith in the ability of the police to help them rather than hurt them. Suppose they were aware of a law providing that those reporting sexual assault would not be prosecuted for possession of illegal drugs nor checked for outstanding warrants. In that case, police would have had the opportunity to investigate Holtzclaw earlier, ultimately preventing additional victims from being sexually assaulted.

If the police investigating murders in South Los Angeles—when Lonnie Franklin was in the early stages of offending—had put more effort and expertise into investigating those crimes, they could have saved many women’s lives. The same is true for those investigating Little and Sowell. How many Black women’s lives could have been saved with laws and policies in place that held police accountable and incentivized police to solve these crimes rather than ignore them? Laws similar to the Act have great potential to decrease violence against Black women.

Another benefit of police accountability laws is that they could ultimately save many taxpayer dollars. Law enforcement agencies routinely complain of resource constraints,²⁰⁶ and to the extent that they are underfunded, each state should consider the consequences of this underfunding. Perpetrators who commit more crimes get sentenced to longer prison terms, where they are supported at taxpayers’ expense. A perpetrator caught early in his offending career can initially serve a shorter, less expensive sentence, and he will have a greater chance of rehabilitation. At the time of his death, Samuel Little was serving life in prison with no possibility of parole.²⁰⁷ Consider also the fact that Franklin and Sowell were sentenced to death.²⁰⁸ Death sentences involve even greater expense for the state as defendants exhaust their opportunities to appeal.²⁰⁹ Investing resources into the thorough

206. Patrick Smith, *What Happens When Suburban Police Departments Don’t Have Enough Money?*, NAT’L PUB. RADIO (Jan. 22, 2018, 6:39 PM), <https://www.npr.org/2018/01/22/579778555/what-happens-when-suburban-police-departments-dont-have-enough-money> [https://perma.cc/M38U-ZAD9].

207. Vigdor, *Samuel Little, Serial Killer Who Confessed to 93 Murders, Dies at 80*, *supra* note 47; Marisa Gerber, *L.A. Serial Killer Gets 3 Life Terms, Screams, ‘I Didn’t Do It!’*, L.A. TIMES (Sept. 25, 2014, 11:31 AM), <https://www.latimes.com/local/lanow/la-me-ln-la-serial-killer-sentenced-life-terms-20140925-story.html> [https://perma.cc/P9WY-PFV4].

208. Vigdor, *Anthony Sowell, Serial Killer Who Terrorized Cleveland, Dies at 61*, *supra* note 68 (Sowell had been on death row since 2011); Mele, *supra* note 61 (Franklin had been on death row since 2016).

209. *Costs: Studies Consistently Find that the Death Penalty Is More Expensive than Alternative Punishments*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/costs> [https://perma.cc/N9HE-Z645] (last visited Sept. 13, 2022).

investigation and prosecution of each and every crime of violence against Black women can save much of these costs later in the process.

This Part has demonstrated that the Act holds much promise as an avenue for increasing conviction rates for serious crimes committed against Black women. It represents a new approach to police accountability, requiring police to document that they have actually done the job for which they are responsible. By eliminating much officer discretion, the Act eliminates many opportunities for decision making based on implicit or explicit bias. Eliminating bias can help ensure that victims are treated fairly, regardless of their race, gender, age, sexual orientation, socioeconomic or educational status, and other factors.

States should take two actions in response, both of which involve statutory reform. First, other states should follow Illinois's lead and implement a law similar to the Act in order to improve the law enforcement response to all reported sexual assaults. This action will go a long way toward aiding Black women who are victims of crime. Second, states should also build on this approach by implementing similar police accountability laws in relation to other serious crimes affecting Black women, such as domestic violence, missing persons, and homicide. Police accountability must include not only minimizing the use of excessive force, but also ensuring that law enforcement personnel complete the investigatory tasks entrusted to them.

B. The Equality Amendment

The Equality Amendment, which was proposed in 2019 by Catharine MacKinnon and Kimberlé Crenshaw, could give the police accountability reforms suggested here a robust constitutional foundation.²¹⁰ The United States of America is the only industrialized democracy in the world that does not currently enshrine a right of gender equality in its constitution.²¹¹ The proposed Equality Amendment is MacKinnon and Crenshaw's more inclusive take on the Equal Rights Amendment (ERA), which was originally drafted in 1972 and then ratified by only thirty-five of the required thirty-eight states before the original deadline for ratification in 1979.²¹² In this Part, I will

210. MacKinnon & Crenshaw, *supra* note 13, at 343.

211. Lena Felton, *How One of the Country's Leading Feminist Scholars Would Rewrite the ERA*, LILY (Feb. 4, 2020), <https://www.thelily.com/how-one-of-the-countrys-leading-feminist-scholars-would-rewrite-the-era/> [<https://perma.cc/K33N-L9KR>].

212. Roberta Francis, *The History Behind the Equal Rights Amendment*, EQUAL RTS. AMEND., <https://equalrightsamendment.org/faq> [<https://perma.cc/HW6B-TFLW>] (last visited Sept. 3, 2022). Since the original 1979 deadline, some states have rescinded their ratification while others, including Illinois, Nevada, and Virginia, have finally ratified the ERA. *ERA Explainer*, EQUAL. NOW, https://www.equalitynow.org/era_explainer/?gclid=EAIaIQobChMIs4eM65z--AIV2xatBh1WcQN4EAAy

explain what the Equality Amendment does and will then analyze the impact this Amendment could have on how crimes against Black women are investigated.

1. What Does the Equality Amendment Do?

The Equality Amendment makes four moves that are noteworthy and that distinguish it from the original ERA, which reads “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”²¹³ I will set out these points below and then explain their importance to the task of increasing accountability for crimes against Black women.

a. Affirmative Rights for All Women

First, the Equality Amendment sets out equal rights *affirmatively* rather than asserting that state and nonstate actors are *not allowed to interfere* with rights: “Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction.”²¹⁴ As the authors note, the amendment is framed in such a way that there is no state action requirement; this is because it recognizes that inequality results from “the social order—its structures, forces, institutions, and individuals acting in concert.”²¹⁵

ASAAEGllp_D_BwE [<https://perma.cc/FVN5-P7SE>] (last visited Sept. 3, 2022). The full text of the Equality Amendment reads:

Section 1. Women in all their diversity shall have equal rights in the United States and every place subject to its jurisdiction.

Section 2. Equality of rights shall not be denied or abridged by the United States or by any State on account of sex (including pregnancy, gender, sexual orientation, or gender identity), and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith). No law or its interpretation shall give force to common law disadvantages that exist on the ground(s) enumerated in this Amendment.

Section 3. To fully realize the rights guaranteed under this Amendment, Congress and the several States shall take legislative and other measures to prevent or redress any disadvantage suffered by individuals or groups because of past and/or present inequality as prohibited by this Amendment, and shall take all steps requisite and effective to abolish prior laws, policies, or constitutional provisions that impede equal political representation.

Section 4. Nothing in Section 2 shall invalidate a law, program, or activity that is protected or required under Section 1 or 3.

MacKinnon & Crenshaw, *supra* note 13, at 358–62.

213. *ERA Explainer*, *supra* note 212.

214. MacKinnon & Crenshaw, *supra* note 13, at 358.

215. *Id.* at 358.

The wording thus permits legal claims against both state and nonstate actors, regardless of whether those actors deliberately interfere with, or are simply oblivious to, Black women's equal rights. States have a responsibility to rectify inequality, whether the inequality was intentionally constructed or not. As the authors note,

[T]he Equality Amendment's language does not imply or permit an intent requirement. This is because discrimination is not a moral failing of individuals but a pervasive social practice of power—epistemic, practical, and structural. No one need intend to perpetuate discrimination for it to persist. Therefore, no showing of intent is required to legally undo and remedy it.²¹⁶

Moreover, the reference to women “in all their diversity” draws attention to the equal rights women enjoy irrespective of other statuses they hold. Women may differ by race, age, disability, and other variables, and yet all women are protected.

b. Recognition of Intersecting Oppressions

Second, the Equality Amendment can be distinguished from the 1970s' ERA in that it does not only cover sex, but rather recognizes numerous intersecting forms of inequality. Section 2 reads as follows:

Equality of rights shall not be denied or abridged by the United States or by any State on account of sex (including pregnancy, gender, sexual orientation, or gender identity), and/or race (including ethnicity, national origin, or color), and/or like grounds of subordination (such as disability or faith).²¹⁷

Note that section 2 applies not only to women, but to everyone. It recognizes that various forms of inequality often work together to disadvantage particular people and that it is not always possible to determine whether a particular form of disadvantage is responsible for a person's unequal treatment, or whether it is various forms of inequality working together. For instance, if police ignore a woman's complaint that someone tried to rape her and strangle her to death, is the state actor's neglect explained by the victim's gender? By her race? Her socioeconomic status? Or perhaps her sexual orientation? Or is it a result of all of these factors, along with others, working together to reinforce an officer's implicit bias against her? This section of the Equality Amendment encourages state actors to be aware of the intersectional nature of forms of oppression.

216. *Id.* at 361.

217. *Id.* at 359.

c. Proactive Remedies

Third, the Equality Amendment requires Congress and the states to affirmatively take legislative action to redress disadvantages suffered by people due to past or present inequality.²¹⁸ In other words, it requires proactive remedies. It thus anticipates the need for the creation of laws and policies that eliminate unfair advantages awarded to some groups and that equalize the playing field for everyone.

d. Counters “Reverse Discrimination” Concerns

And finally, the Equality Amendment notes that no program protected or required for the purpose of advancing equality can be invalidated.²¹⁹ The authors’ intent is to counteract judicial interpretations of equal protection doctrine that have had the effect of shoring up an unequal status quo. For instance, they point out that “[c]ourts in particular have dramatically and continuously undermined efforts to rectify race and gender subordination in society by rolling back what legal equality guarantees could have achieved.”²²⁰

They further note that “[l]ess than twenty years after the formal end of slavery, the Supreme Court characterized congressional efforts to remedy widespread discrimination against Black people as special treatment.”²²¹ The Court has also stated that discrimination must be intentional in order to be deserving of a remedy; if it is not, then, as Crenshaw notes, “an overwhelmingly disparate injury inflicted on a disadvantaged racial group [is] not enough to trigger equal protection concern even in the face of utterly predictable and proven outcomes.”²²² Section 4 is designed to remedy these interpretations of equal protection.

As the authors note, “Undoing discrimination is not discrimination.”²²³ There is a place for measures, such as affirmative action, that are meant to remedy past wrongs. This last point is particularly crucial to the task at hand in light of another observation of the authors: that a “deeper obstacle” to meaningfully remedying gender inequality is that “[s]ex discrimination is more often accomplished by omission of socially gendered experiences such as pregnancy or sexual assault than explicitly expressed in law.”²²⁴

The under-policing of crimes against Black women is an example of the ways in which sex discrimination occurs by omission of positive

218. *Id.* at 361–62.

219. *Id.* at 362.

220. *Id.* at 347.

221. *Id.* at 347–48.

222. *Id.* at 348; *Washington v. Davis*, 426 U.S. 229, 239–41 (1976).

223. MacKinnon & Crenshaw, *supra* note 13, at 362.

224. *Id.* at 349.

measures. These crimes are also the invisible corollary to police excessive use of force against Black men. Where women are concerned, discrimination is often accomplished through neglect and negligence rather than force; through laughing someone out of the police station rather than shooting them in the face.

2. Why Does the Equality Amendment Matter?

The Equality Amendment directly supports my proposal for designing police accountability mechanisms in ways that encourage the thorough investigation and prosecution of crimes against Black women.

Its simple and yet crucial move of affirmatively identifying the importance of equal rights for all women puts law enforcement agencies on notice that they must consider whether their actions uphold the equal rights of all citizens. These agencies' task is not limited to simply ensuring they do not deliberately discriminate against one group, which is all the law expects of them now. This emphasis should cause law enforcement agencies to consider whether they treat all reported crimes with the same seriousness and whether they give each one the investigatory attention it deserves.

In response to the Equality Amendment's mandate, law enforcement agencies should develop auditing mechanisms that track crime complainants by gender, race, sexual orientation, socioeconomic status, and other potential markers of vulnerability so that they can monitor their progress in meeting the objective of equal treatment. Doing so would help to move their treatment of Black women from the invisible sphere to the visible.

The Equality Amendment's recognition of intersecting oppressions can help law enforcement agencies also recognize the role of intersectionality in curtailing the rights of Black women. The auditing mechanisms just discussed will be useful in helping law enforcement agencies perceive that oppressions can be intersecting. Officers may not consciously realize, until they participate in an audit, that they treat a homeless Black woman who appears to be on drugs and has engaged in sex work very differently from a highly educated Black woman dressed in a suit and driving a Lexus, and that they treat both differently from a middle-aged white man dressed in a suit and driving a Mercedes. Those who are responsible for the public safety must understand the intersections of race, gender, and other oppressions if they are to fulfill their role of protecting everyone in the community.

The Equality Amendment's requirement of proactive measures and its recognition that special measures are required in order to undo discrimination are crucial to achieving lasting change. As MacKinnon and Crenshaw point out, "Undoing discrimination is not discrimination."²²⁵ There must be room to have specific and targeted laws and policies designed to rectify inequalities inflicted upon certain groups due

225. *Id.* at 362.

to race, gender, and other statuses. The Equality Amendment provides a constitutionally embedded justification—and indeed a requirement—for states to take measures to remedy the under-policing of crimes against women of color.

It thus reinforces the need for the statutory reform proposals offered in this Article. The Act is drafted without any reference to gender or other intersecting oppressions, and Black women everywhere would benefit if all states were to adopt a similar law. But achieving real change in the policing of crimes against Black women will require a special emphasis and focus on those communities where such crimes are facing the most neglect. If, for instance, a state were to pass a law similar to the Act and make funds available to communities for its implementation, the bulk of the money would most likely end up in more affluent communities with fewer highly marginalized and vulnerable Black women. Thus, resources must be targeted at communities where the most marginalized populations will receive the greatest benefit.

There will undoubtedly be objections to the statutory reform proposals offered here along the lines that they provide for “special treatment” for Black women. The Equality Amendment clears the way by acknowledging that specific and targeted measures are required to undo discrimination and that we cannot expect laws designed to be color-blind—or blind to other differences that are used to marginalize people—to do that work.

The Equality Amendment could provide a constitutional foundation for promoting policies that are specifically designed to rectify the disadvantages that women of color face by ensuring that resources are fully deployed to investigate and prosecute crimes committed against them. The Amendment encourages us to admit that color-blind and gender-blind policies do not rectify inequality. We need to attack the source of the inequality head-on.

C. A Synthesized Approach

As I have argued in this Article, we need police accountability laws that require police to do their job in relation to crimes against women of color and to document that they have done so. Such laws provide a mechanism for community oversight of the police function and can make our communities a safer place for women of color. The proposals here are not exhaustive. They should be joined, for instance, by efforts to ensure greater representation of Black women in police forces, prosecutors’ offices, and the judiciary. Still, they can go a long way toward creating the change we need.

The Act holds promise as a model for how additional laws could be drafted to provide for police accountability in relation to other crimes that also disproportionately affect women of color. Future legislatures should take laws modeled on the Act a bit farther, however; they should include complaint mechanisms that allow crime victims, or their

families, to report any instances where they believe a crime that they reported has not been adequately investigated. Such a mechanism could also allow victims to appeal the decisions of prosecutors not to take certain cases forward. The United Kingdom has already provided a mechanism like this for sexual assault cases.²²⁶ Such a mechanism would provide an additional layer of oversight and, if used effectively, would allow victims to feel heard and to participate more fully in the criminal justice process.

The Equality Amendment could in turn provide a constitutional foundation for certain measures that involve expending resources in ways specifically designed to rectify racial and gender disparities in fighting crime.

CONCLUSION

Serious crimes against women of color are another side of the coin of police use of force against communities of color. Ignoring these crimes, and women of color as victims, results in system-endorsed violence against women of color.

Both of the approaches proposed here—a statutory approach and a constitutional approach—could be powerful tools for placing under-policing of violence against women of color on the radar and creating the needed change.

226. *Victims' Right to Review Scheme*, CROWN PROT. SERV., <https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme> [<https://perma.cc/C2US-SG6>] (May 27, 2021) (stating that “the VRR scheme provides a victim with a specifically designed process to exercise the right to review certain CPS decisions not to start a prosecution or to stop a prosecution. If a new decision is required, it may be appropriate to institute or reinstitute criminal proceedings”).