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The Under-Enforcement of Crimes Against Black Women

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The Under-policing of Crimes Against Black Women

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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 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 a female slave's right to sexual autonomy to a prosecutor's 2021 decision to prosecute a Black rape victim for alleged false reporting, this article explores the systemic neglect of crimes against Black women while it 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 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 approach—the Illinois Sexual Assault Incident Procedure Act, arguing for other states follow Illinois' 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 & 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 is a rate that 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 twenty percent of all fatal police shootings even though they are only thirteen percent of the population.² Victims of fatal police shootings are overwhelmingly male; less than five 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, 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.⁴ Moreover, crimes against Black women often receive very

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¹ *Fatal Force*, WASH. POST (last updated Jul. 11, 2022), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

² *Id.*

³ *Id.*

⁴ 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 MAG. (Mar. 12, 2015) https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html?utm_term=.62c432beaf97 [https://perma.cc/7Q39-BG6C] (account of child rape victim Danielle Hicks-Best); 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. OF GENDER, RACE AND JUSTICE 459, 482-83 (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-up).

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.⁵ 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 One 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 Two 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.

PART ONE: 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 dehumanizing stereotypes of Black women and girls. Underenforcement is then practiced through a series of counterproductive police responses to crimes reported against such women.

A. Stereotypes of Black Women & 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.⁶ 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

⁵ See, e.g., Treva Lindsey, *The Media Failed Black Women By Not Covering This Rape Trial*, COSMOPOLITAN (Dec. 15, 2015); Jacobs, *supra* note 4 at 52-53, 55-58 (noting numerous cases of serious violence against Black women which were not covered by the media or where the victims were not identified as Black).

⁶ Jacobs, *supra* note 4 at 46-52.

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where the victim is a Black woman, as well as how juries see Black females as victims.⁷

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.⁸ The second stereotype is the notion that Black women often lie, particularly about being sexually assaulted, and so therefore are lacking in credibility.⁹ The third stereotype is that Black women are overly aggressive, even mannish, and are therefore accustomed to violence in the home.¹⁰ These stereotypes have been pressed into service since the days of slavery, and they are still alive and well today.¹¹ 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 have difficulty seeing a Black woman as a crime victim rather than as a willing partner, in sexual violence cases, or as a mutual combatant, in domestic violence cases.

B. Underenforcement of Crimes Against Black Women

Once set in motion by negative stereotypes, the legal system's 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 correctives 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 charges against *them*, and, more generally, (4) excessive punishment of Black women crime suspects. While these are all strategies that have been used against women more broadly, this section 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.

⁷ *Id.* at 76-79, see also Jennifer Wriggins, *Race, Racism and the Law*, 6 HARVARD WOMEN'S LAW JOURNAL 103, 123 (1983) (noting that “the rape of Black women has been denied by the legal system”).

⁸ Jacobs, *supra* note 4 at 47-48.

⁹ *Id.* at 48-50.

¹⁰ *Id.* at 50-52.

¹¹ See generally, *id.* at 47-52.

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.¹² This section highlights how these omissions have affected case outcomes where the issue involved a Black woman's experience of the intersection oppressions of race and gender. The first example involves the sexual assault of a female slave, and the second example involves the treatment of female genital mutilation under asylum law.

a. Celia the Slave Murders Her Master

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 United States 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.”¹³ This Constitution purposely excluded any mention of rights for women and enslaved people and took measures to not alienate the slave-owning states.¹⁴

It is well-documented that sexual assault against female slaves was ubiquitous.¹⁵ The case of Celia, a slave in pre-civil war Missouri, illustrates this principle. Celia was purchased at age fourteen and raped by her master, elderly widower Robert Newsom, for the next five years.¹⁶ In 1855, when she was nineteen and pregnant with her third child by Newsom, she killed him in

¹² Catharine MacKinnon and Kimberlé Crenshaw, *Reconstituting the Future: The Equality Amendment*, 129 YALE L.J. FORUM 343, 344-45 (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”).

¹³ MacKinnon Crenshaw, *supra* note 12 at 344.

¹⁴ *Id.* at 344.

¹⁵ See, e.g., Jacobs, *supra* note 4 at 47-48; 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 7 at 118-19; HARRIET A. JACOBS, INCIDENT IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF 27-30, 265 n.2 (1987 ed., 1861).

¹⁶ DeNeen L. Brown, *Missouri v. Celia, a Slave: She killed the white master raping her, then claimed self-defense*, WASH. POST (Oct. 19, 2017).

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order to avoid yet another rape.¹⁷ 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.”¹⁸ But the judge refused to give the jury an instruction to that effect because Celia was a slave.¹⁹ 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.”²⁰ Celia was punished by hanging for her transgression of resisting sexual assault.²¹ 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 master’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 forced to return. Most of the women who are victims of FGM worldwide are Black.²²

FGM “comprises all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (punctuation added).

²¹ *Id.*

²² FGM is most commonly practiced in 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*, UNITED NATIONS POPULATION FUND (Feb. 2022), https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#fgm_ethnicity.

out for traditional, cultural or religious [i.e. nonmedical] reasons.”²³ All forms of FGM are harmful and can result in severe consequences including extreme pain and bleeding, psychological trauma, infections, damage to the urinary track, and even death.²⁴ As a form of gender-based violence that inflicts severe harm on its victims, FGM is a form of persecution and even torture under human rights law.²⁵

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 1951.²⁶ That convention has been codified into American law.²⁷ It grants protection to refugees and asylum-seekers fleeing persecution on a protected ground; those protected grounds include race, religion, nationality, political opinion, or membership in a particular social group.²⁸ Gender is not listed as a protected ground, nor has the Refugee Convention ever been updated to include it. The drafters’ choice to recognize race as a potential grounds for persecution while ignoring 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 falls.

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 attempted to deny asylum claims based on FGM.²⁹ 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 persecution if it was embraced by most people in the society. In *Fornah v. Secretary of State for the Home Department* he wrote:

²³ GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO FEMALE GENITAL MUTILATION, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 4 (May 2009), <https://www.refworld.org/pdfid/4a0c28492.pdf> [hereinafter, “UNHCR FGM REPORT”].

²⁴ *Id.*

²⁵ *Id.* at 7; REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, MANFRED NOWAK, U.N. HUMAN RIGHTS COUNCIL 17 (Jan. 15, 2008) [hereinafter, “NOWAK REPORT”].

²⁶ Both refugees and asylum-seekers are persons who seek international protection. The difference is that refugees seek permission to enter, and protection, before they enter the protection-granting country, whereas asylum seekers apply for protection from within the safe country or at a port of entry. Clare Felter, James McBride & Diana Roy, *How Does the U.S. Refugee System Work?*, COUNCIL ON FOREIGN RELATIONS (Apr. 13, 2022).

²⁷ 8 U.S.C.A. § 1158.

²⁸ 8 U.S.C.A. § 1158(b)(1)(B)(i); U.N. Refugee Convention, Art. I(A)(2).

²⁹ See notes 30-39 and accompanying text.

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"The practice, however repulsive to most societies outside Sierra Leone, is clearly accepted and 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."³⁰

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."³¹

Lord Justice Auld's position is quite the paradox, because he recognized that FGM constituted a violation of Article 3 of the European Convention on Human Rights, which prohibits torture and cruel, inhuman or degrading ("CID") treatment.³² And yet he could not bring himself to say that a society discriminates when it inflicts torture or CID treatment on its female members. Auld does not see 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 CID treatment in order to be accepted into 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 U.S., 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 forced to undergo" the procedure.³³ In both cases, the judges saw no legal claim because there was no recognition that a Black woman's right to bodily autonomy was being 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.³⁴

³⁰ *Fornah v. Secretary of State for the Home Dept.*, [2005] ¶44(1) EWCA Civ 680
In The Supreme Court Of Judicature
Court Of Appeal (Civil Appeals Division)
On Appeal From Immigration Appeal Tribunal.

³¹ *Id.* at ¶44(3).

³² *Fornah*, *supra* note 30 at ¶1.

³³ *In Re Kasinga*, 21 I.&N. Dec. 357 (BIA) (Jun. 13, 1996). *Kasinga* appealed from the original immigration judge's decision of Aug. 25, 1995. *Id.* 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 LAW QUARTERLY 46, 54 (Dec. 10, 2015).

³⁴ Sierra Leone, the country at issue in *Kasinga*, has one of the highest prevalence rates for FGM, with 83% 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. 2, 2022, https://www.equalitynow.org/press_release/fgm-sierra-leone-130-womens-rights-groups-feb/#:~:text=Sierra%20Leone%20has%20one%20the,the%202019%20Demographic%20H

Both countries later reversed their positions and now recognize FGM as valid grounds for asylum.³⁵ The United Nations High Commissioner for Refugees later provided authoritative guidance on how gender-based asylum claims should be treated.³⁶ It advises framing such claims as involving persecution falling within the “particular social group” classification, and it states that gender-based violence may be grounds for asylum.³⁷ 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.³⁸ 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.³⁹ The continued prevalence of FGM, in a world where foot-binding and deforming corsets have largely disappeared, demonstrates Black women have had to uniquely fight to have their right to bodily autonomy recognized.

ealth%20Survey. Similarly, over 90% of Somali girls and women have been subjected to FGM, while 92% of Egyptian girls and women have done so. *Daughters of Somalia, a continuous pledge to end female genital mutilation*, UN NEWS, (Feb. 4, 2022), <https://news.un.org/en/story/2022/02/1111242>; *Egypt: New Penalties for Female Genital Mutilation*, HUMAN RIGHTS WATCH (SEP. 9, 2016), https://www.hrw.org/news/2016/09/09/egypt-new-penalties-female-genital-mutilation?gclid=EA1aIQobChMI5Yb--Kj-QIVtm1vBB0e-AOFEAAYAAEgIqo_D_BwE.

³⁵ Musalo, *supra* note 33 at 46-47; UNHCR FGM REPORT *supra* note 23 at 6-7.

³⁶ *See generally*, UNHCR’S VIEWS ON GENDER BASED ASYLUM CLAIMS AND DEFINING “PARTICULAR SOCIAL GROUP” TO ENCOMPASS GENDER, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Nov. 2016), <https://www.unhcr.org/en-us/5822266c4.pdf>.

³⁷ *Id.* at 1-3.

³⁸ *Fornah*, *supra* note 30, at ¶1. Despite that, Justice Auld did not think FGM was “discriminatory.” *Id.* at ¶44(3).

³⁹ 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>.

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2. Denying Black Women Equal Protection Through Neglect or Negligence

We have seen, in the section 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 *supra* concerned rights to 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 of all people regardless of race, gender, or other statuses, those in positions of authority have developed additional strategies to enable them to deny Black women the equal protection of the law. Neglect and negligence in relation to crimes against Black women are key.

Prosecutors have discretion in relation to choosing which cases to take to trial. Police, in turn, have some discretion in carry 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. 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 she gets the message that solving certain types of crimes will help her career, whereas solving other types of crimes will not. In this way, decisions about what crimes get investigated can be closely tied to knowledge about what 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 will be able to investigate more crimes than those who have fewer. 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 complain very much if their 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 section 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 laws 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.

a. Neglect and Negligence in Action: Samuel Little, Lonnie Franklin & 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 35 years, from 1970 to 2005.⁴⁰ According to the FBI, Little confessed to having committed ninety-three murders, at least fifty of which have been verified by law enforcement.⁴¹ Incredibly, Little was not apprehended until 2014, at which time he was convicted in relation to just three of the murders, and he died in prison in 2020.⁴² Little liked to draw, and he drew numerous pictures of his murder victims.⁴³ Authorities released many of his drawings in 2019 in the hopes that the public can help them identify some of Little's other victims whose killings remained unsolved.⁴⁴

How does a man get away with murdering dozens of women over thirty-five years? Little told us himself: by staying in the ghetto.⁴⁵ 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.*"⁴⁶

Little paid close attention to who his victims were and how those victims were regarded by the authorities. All of his known victims were Black women.⁴⁷ And in addition to experiencing the intersecting effects of sexism

⁴⁰ *FBI Seeking Assistance Connecting Victims to Samuel Little's Confessions*, FBI.GOV (Oct. 6, 2019), <https://www.fbi.gov/news/stories/samuel-little-most-prolific-serial-killer-in-us-history-100619>.

⁴¹ *Id.*

⁴² 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>.

⁴³ *FBI Seeking Assistance Connecting Victims to Samuel Little's Confessions*, FBI.GOV (Oct. 6, 2019).

⁴⁴ *Id.*

⁴⁵ Jillian Lauren, *How Serial Killer Samuel Little Was Caught*, THE CUT, (Dec. 20, 2018) (emphasis added), <https://www.thecut.com/2018/12/how-serial-killer-samuel-little-was-caught.html>.

⁴⁶ *Id.*

⁴⁷ *FBI Seeking Assistance Connecting Victims to Samuel Little's Confessions*, FBI.GOV (Oct. 6, 2019).

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and racism, many of his victims were marginalized in other ways.⁴⁸ They were typically young women who were estranged from their families, and struggling with poverty and addiction.⁴⁹

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 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.”⁵⁰

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.”⁵¹

Other serial offenders target Black women for the same reason—successfully evading detection because the victims would 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. His murder spree began in the 1980s and continued until 2007; his nickname result from the fact that he apparently took a hiatus from killing between 1988 and 2002.⁵² But police later concluded, after linking him to six additional murders, that Little had not taken a hiatus from killing; they had just missed some of his victims.⁵³ Police also found photos at his home that suggested he may have had thirty-five additional victims who remained

⁴⁸ Neil Vigdor, *Samuel Little, Serial Killer Who Confessed to 93 Murders, Dies at 80*, N.Y. TIMES (Dec. 31, 2020).

⁴⁹ *Id.*

⁵⁰ Jim Bueermann, former police chief of Redlands, Calif., & former president of the National Police Foundation. Quoted in *Why Did It Take So Long to Find Prolific Serial Killer?*, CRIME AND JUSTICE NEWS (Oct. 9, 2019), <https://thecrimereport.org/2019/10/09/why-did-it-take-so-long-to-find-prolific-serial-killer/>.

⁵¹ *FBI Seeking Assistance Connecting Victims to Samuel Little’s Confessions*, FBI.GOV (Oct. 6, 2019).

⁵² Mike McPhate, *Los Angeles Man Is Convicted in ‘Grim Sleeper’ Serial Killer Case*, N.Y. TIMES (May 5, 2016).

⁵³ Joel Rubin, *Police Link 6 More Slayings to Grim Sleeper Suspect*, L.A. TIMES (Oct. 29, 2011).

unidentified at the time of his trial.⁵⁴ 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 2020.⁵⁵ 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.⁵⁶ Officials described Franklin as “hiding in plain sight” because he lived within a few miles of where his victims’ bodies were found.⁵⁷ He had also had a rape conviction on his record from when he served with the American army in Germany.⁵⁸ Despite these facts, police were not able to apprehend him for decades. Family members and victim advocates believe the police did not treat the murders with urgency because the victims were marginalized Black women, doing sex work or using drugs.⁵⁹

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.⁶⁰ The crimes went undetected for years, despite a horrific stench coming from the house.⁶¹ He was finally convicted in 2011, and he died on death row in 2021.⁶²

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.⁶³ 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.⁶⁴ Police made regular trips to Sowell’s home to confirm his whereabouts as a sex offender.⁶⁵ But they never inquired about the

⁵⁴ Hillel Aron, *As Grim Sleeper Murder Trial Nears, Police Can’t Find 35 Women in Photos*, LA WEEKLY (Feb. 5, 2016).

⁵⁵ Christopher Mele, *Serial Killer Known as ‘Grim Sleeper’ Dies in Prison*, N.Y. TIMES (Mar. 30, 2020).

⁵⁶ McPhate, *supra* note 52; Rubin, *supra* note 53.

⁵⁷ McPhate, *supra* note 52.

⁵⁸ *Grim Sleeper Suspect had conviction for gang rape in Germany, DA discloses*, ABC7 (May 4, 2016), <https://abc7.com/grim-sleeper-lonnie-franklin-serial-killer-trial/1324202/>.

⁵⁹ McPhate, *supra* note 52.

⁶⁰ Ian Urbina & Christopher Maag, *After Gruesome Find, Anger at Cleveland Police*, N.Y. TIMES (Nov. 5, 2009); *Anthony Sowell Timeline*, CLEVELAND.COM (Nov. 8, 2009), https://www.cleveland.com/metro/2009/11/anthony_sowell_timeline.html.

⁶¹ Urbina & Magg, *supra* note 60.

⁶² Neil Vigdor, *Anthony Sowell, Serial Killer Who Terrorized Cleveland, Dies at 61*, N.Y. TIMES (Feb. 9, 2021).

⁶³ *Id.*

⁶⁴ *Id.*; Ian Urbina, *Neighbor Says Police Knew About Rapist’s House*, N.Y. TIMES (Nov. 2, 2009).

⁶⁵ *Id.*

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overpowering stench, which was obvious to people in the neighborhood for at least three years prior to Sowell's arrest.⁶⁶ The owner of a sausage factory business right next door to Sowell went to great lengths to ensure that his business was not responsible for the smell.⁶⁷

In addition, law enforcement's flagrant disregard for Sowell's vulnerable victims was unmistakable. Police failed to progress the investigation 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.⁶⁸ 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.⁶⁹ In both cases, police attributed their lack of progress to the victims' alleged unwillingness to speak to police.⁷⁰ 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."⁷¹ 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 the September 22 complaint, but not before Sowell had attacked yet another woman.⁷² On October 20, 2009, seven days before police obtained the search warrant, a woman either fell or was thrown out of a second story window of Sowell's home.⁷³ She was naked and was taken away by an ambulance crew.⁷⁴ 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/or murder numerous Black women when police failed to take complaints seriously and stop him.

Families members also found police unwilling to investigate the disappearances of loved ones. One woman organized a search for her niece

⁶⁶ Mark Puente, *Anthony Sowell's neighbors wonder how stench of rotting bodies went unidentified for years*, CLEVELAND.COM, (Nov. 3, 2009), https://www.cleveland.com/metro/2009/11/neighbors_wonder_how_stench_of.html.

⁶⁷ Urbina & Maag, *supra* note 60.

⁶⁸ *Anthony Sowell Timeline*, *supra* note 60.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *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.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

herself, after officers at three different police stations refused to help her.⁷⁵ Another woman was treated terribly when she tried to file a missing-person report on her daughter; police told her to wait a while because her daughter would return “once all the drugs were gone.”⁷⁶ Police inaction extended to reports they received from neighbors of bruised and battered women fleeing Sowell’s home.⁷⁷

Sowell’s victims were Black women, and many of them were known drug users.⁷⁸ The law enforcement response to these crimes was to ignore them because the lives of Black women living at the margins were unimportant. As the sister of one victim said, “[t]he 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?”⁷⁹

And yet it is still 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; police made regular visits to Sowell’s home, given his sex offender status; 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 since he committed crimes across the country. 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 their eyes and ears. 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 requiring the state to intervene to protect the 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, even negligence, is

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Urbina, *supra* note 64.

⁷⁸ Urbina & Maag, *supra* note 60.

⁷⁹ *Id.*

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compounded by other intersecting oppressions they may experience, such as socioeconomic status, drug use, and sex worker status.⁸⁰ 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 during a six month period in 2013-2014.⁸¹ According to prosecutors, Holtzclaw's thirteen victims "were mostly poor, black Women with criminal backgrounds or histories of drug use, whose stories would not be believed."⁸² 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.⁸³

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.⁸⁴ As prosecutors said, "[h]e 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."⁸⁵

Holtzclaw's success in victimizing vulnerable women led him to make a mistake—in June 2014, he stopped and sexually assault a fifty-seven-year-old Black grandmother with no criminal record.⁸⁶ After Holtzclaw forced her

⁸⁰ See generally, COMBAHEE RIVER COLLECTIVE STATEMENT, COMBAHEE RIVER COLLECTIVE (1978).

⁸¹ Dave Phillips, *Former Oklahoma City Police Officer Found Guilty of Rapes*, N.Y. TIMES (Dec. 10, 2015).

⁸² *Id.*; Sarah Kaplan, *A serial rapist cop's 'mistake': Assaulting the grandmother who finally reported him*, WA. POST (Dec. 22, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/12/11/daniel-holtzclaws-mistake-assaulting-the-grandmother-who-finally-reported-him/>.

⁸³ *Id.*; Jessica Testa, *How Police Caught The Cop Who Allegedly Sexually Abused Black Women*, BUZZFEED NEWS (Sep. 5, 2014), <https://www.buzzfeednews.com/article/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city>

⁸⁴ Sarah Larimer, *Disgraced ex-cop Daniel Holtzclaw sentenced to 263 years for on-duty rapes, sexual assaults*, WA. 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/>.

⁸⁵ Phillips, *supra* note 81.

⁸⁶ Kaplan, *supra* note 82; Testa, *supra* note 83.

to perform oral sex, she reported the assault to police.⁸⁷ Holtzclaw was placed on administrative leave and an investigation ensued.⁸⁸

Prosecutor Lori McConnell told the jury that Holtzclaw's focus on a certain type of victim was no accident. Holtzclaw, she said, "targeted 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."⁸⁹ Holtzclaw's victims made such statements as "[w]hat kind of police do you call on the police?" and "I didn't think anyone would believe me. I'm a black female."⁹⁰ According to McConnell, Holtzclaw's attitude was "Who will believe these women, and who will care?"⁹¹

Holtzclaw's defense team cast his victims as "liars and criminals whose testimony could not be trusted."⁹² But of course that was the point. As commentator Goldie Taylor has written:

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.⁹³

Holtzclaw has now exhausted his appeals, but his advocates continue to portray his accusers as liars who cannot be trusted.⁹⁴

Black women scored a victory in the Holtzclaw trial. An all-white jury of eight men and four women convicted him, although only in relation to half of the thirty-six charges prosecutors brought, and only in relation to eight of the thirteen women.⁹⁵ The defense succeeded in casting the other five women as not believable, and yet police records show that they were also stopped by Holtzclaw. Still, the value of the case is in demonstrating how deliberately

⁸⁷ Kaplan, *supra* note 82; Testa, *supra* note 83.

⁸⁸ Testa, *supra* note 83.

⁸⁹ Larimer, *supra* note 84.

⁹⁰ Kaplan, *supra* note 82.

⁹¹ Goldie Taylor, *White Cop Convicted of Serial Rape of Black Women*, DAILY BEAST, (Dec 10, 2015, updated Jun. 26, 2017),

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *US Supreme Court rejects ex-cop's appeal of rape convictions*, AP NEWS (Mar. 9, 2020), <https://apnews.com/article/7e2b2a5d9561871d809f8819e40ed478>. 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).

⁹⁵ Larimer, *supra* note 84.

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perpetrators will target a certain population of individuals, confident that they will not get caught because their victims are unbelievable.

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/or 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.

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 11-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.⁹⁶ 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 had the girl, Danielle Hicks-Best, charged with filing a false report.”⁹⁷

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

⁹⁶ Joanna Walters, *An 11-year-old reported being raped twice, wound up with a conviction*, WASH. POST MAG. (Mar. 12, 2015), https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html.

⁹⁷ *Id.*

her physical needs⁹⁸ Victim interviewing should also follow trauma-informed protocols, which involves being sensitive to the memory difficulties that often occur after a traumatic event.⁹⁹

In contrast to best practices, police records show that Hicks-Best was interviewed in the hospital while she was still being treated for rape and had not slept.¹⁰⁰ 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.¹⁰¹ 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.”¹⁰²

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

⁹⁸ *Id.*, INVESTIGATING SEXUAL ASSAULTS, INT’L ASS’N OF CHIEFS OF POLICE 9 (2005) (noting the need for victims’ physical needs to be met prior to the victim interview); 725 Ill. Comp. Stat. 203/5(5) (West) (noting the need to conduct comprehensive victim interview after victim has completed two full sleep cycles); JIM HOPPER, KIMBERLY LONSWAY, & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT’L, IMPORTANT THINGS TO GET RIGHT ABOUT THE “NEUROBIOLOGY OF TRAUMA” PART 3: MEMORY PROCESSES 7-9 (2020), https://evawintl.org/wp-content/uploads/TB-03_Memory-Processes.pdf

⁹⁹ 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 what the attacker was wearing, what he looked like, how long the attack lasted, and how the victim got away. 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 LONSWAY, JIM HOPPER, & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT’L, BECOMING TRAUMA INFORMED: LEARNING AND APPROPRIATELY APPLYING THE NEUROBIOLOGY OF TRAUMA TO VICTIM INTERVIEWS 7-8, 17-20 (2020), https://evawintl.org/wp-content/uploads/2019-12_TB-Becoming-Trauma-Informed-Trauma-to-Victim-Interviews.pdf.

¹⁰⁰ Walters, *supra* note 96 (stating that Hicks-Best was interviewed in the hospital after being up all night, and that the detective lied to her in order to get her to change her story).

¹⁰¹ *Id.*

¹⁰² *Id.*

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the same clothes and I felt horrible.”¹⁰³ 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.¹⁰⁴ The advocate is a source of support for the victim and can also warn her if the police began 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.”¹⁰⁵ After being charged, Hicks-Best “lost her childhood,” according to her mother.¹⁰⁶ She was convicted at age eleven and made a ward of the court, and subsequently time in detention centers.¹⁰⁷ She received an apology from police after a Washington Post investigative journalist publicized her case.¹⁰⁸

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.¹⁰⁹ In addition to being young, female and Black, Hicks-Best had additional vulnerabilities that compounded the effects of intersecting sources of oppression. Hicks-Best was adopted after experiencing drug exposure and physical abuse from her biological mother, who was addicted to crack.¹¹⁰ She had “severe behavioral, academic, and mental-health issues” as a result of these early experiences.¹¹¹

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

¹⁰³ *Id.*

¹⁰⁴ JOANNE ARCHAMBAULT ET AL., END VIOLENCE AGAINST WOMEN INT’L, RAPED, THEN JAILED: THE RISKS OF PROSECUTION FOR FALSELY REPORTING SEXUAL ASSAULT 25 (2019); HEATHER HUHTANEN, LISA AVALOS & KIMBERLY LONSWAY, END VIOLENCE AGAINST WOMEN INT’L, GENDER BIAS IN SEXUAL ASSAULT RESPONSE AND INVESTIGATION PART 4: VICTIM RECANTATIONS 14 (2018).

¹⁰⁵ Joanna Walters, *supra* note 96.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Police interviewed Hicks-Best “in a manner that violated guidelines for handling child sexual assault cases.” In addition, officers treated her with “extreme skepticism,” even calling her “promiscuous” in an email, despite her age. They also admitted to misleading her during the interview.

¹¹⁰ *Id.*

¹¹¹ *Id.*

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 ultimately exposing how she had been treated.¹¹²

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 that one lieutenant stated that she was "promiscuous" and that the "sex" was consensual.¹¹³ 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."¹¹⁴ 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.¹¹⁵

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 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, as compared to how white girls are perceived.¹¹⁶ 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.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See generally REBECCA EPSTEIN, JAMILIA J. BLAKE, & THALIA GONZALEZ, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD, GEORGETOWN LAW CENTER ON POVERTY AND INEQUALITY (2017), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf>; JAMILIA J. BLAKE & REBECCA EPSTEIN, LISTENING TO BLACK WOMEN AND GIRLS: LIVED EXPERIENCES OF ADULTIFICATION BIAS, GEORGETOWN LAW CENTER ON POVERTY AND INEQUALITY (2019), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/Listening-to-Black-Women-and-Girls.pdf>; 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>.

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b. Arica Waters: Turning on the Victim To Protect A Privileged Defendant¹¹⁷

A second case illustrates police turning on a Black crime victim in order to make her a scapegoat and protect a more powerful stakeholder. In December 2021, Arica Waters was acquitted of falsely reporting a rape when a judge found that the prosecutors had no case against her.¹¹⁸ 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.¹¹⁹ She had an unclear recollection of events because she suspected that Berman had put something in her drink.¹²⁰ 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.¹²¹

Unbeknownst to Waters, the man she accused, Jeremy Berman, had been accused of drug-facilitated sexual assault twice before.¹²² Berman was wealthy, white, and had spent the last three years as a volunteer detective.¹²³ 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.¹²⁴

Prosecutors attempted argue to 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 participant.”¹²⁵ They

¹¹⁷ The author was involved in the Arica Waters case as an expert witness. Matt Westerhold, *Opinion: Justice or agenda?* SANDUSKY REGISTER (Dec. 9, 2021), <https://sanduskyregister.com/news/358208/opinion-justice-or-agenda/>.

¹¹⁸ Jon Stinchcomb, *Former Put-in-Bay police officer acquitted of making false rape charge*, PORT CLINTON NEWS HERALD (Dec. 16, 2021).

¹¹⁹ Lynanne Vucovich, *Advocates call for action after false rape case fails*, THE ADVERTISER-TRIBUNE (Dec. 22, 2021); Jon Stinchcomb, *Title IX expert: ‘Quid pro quo’ sexual harassment is not consent*, PORT CLINTON NEWS HERALD (Dec. 17, 2021).

¹²⁰ Stinchcomb, *supra* note 118.

¹²¹ Lynanne Vucovich, *supra* note 119.

¹²² *Id.*

¹²³ Jon Stinchcomb, *Title IX expert: ‘Quid pro quo’ sexual harassment is not consent*, PORT CLINTON NEWS HERALD (Dec. 17, 2021).

¹²⁴ *Id.* (noting that he offered free firearms to officers at award ceremonies).

¹²⁵ Jon Stinchcomb, *Former Put-in-Bay police officer acquitted of making false rape charge*, PORT CLINTON NEWS HERALD (Dec. 16, 2021).

relied on text messages sent after the incident which, prosecutors claimed showed that Waters was lying: “[t]he 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.”¹²⁶ They relied on a further text message where Waters referenced having a “sugar daddy” to argue that she intended to take Berman’s money.¹²⁷ Using this evidence, prosecutors endeavored to paint a portrait of Waters as a conniving woman who was out to exploit Berman for financial gain.

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 she wanted.¹²⁸ In addition, a witness confirmed that he observed Berman serve Waters drinks on the night in question, despite Berman’s denying having done so.¹²⁹ This witness also told the court of trying to warn Waters that Berman made extremely strong drinks.¹³⁰

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 to police.¹³¹ 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.

Ohio Attorney General Dave Yost brought the prosecution against Waters when local prosecutors refused to do so.¹³² In bringing the prosecution, Yost also had to ignore the fact that Berman had been accused of drug-facilitated

¹²⁶ Ellie Buerk, *Judge finds woman not guilty of making false rape claim*, THE BLADE (Dec. 16, 2021).

¹²⁷ *Id.*

¹²⁸ Jon Stinchcomb, *Former Put-in-Bay police officer acquitted of making false rape charge*, PORT CLINTON NEWS HERALD (Dec. 16, 2021) For instance, he took Waters on an impromptu \$300 helicopter ride and texted the mayor about a full-time position for Waters. *Id.*; Jon Stinchcomb, *Title IX expert: ‘Quid pro quo’ sexual harassment is not consent*, PORT CLINTON NEWS HERALD (Dec. 17, 2021).

¹²⁹ Jon Stinchcomb, *Title IX expert: ‘Quid pro quo’ sexual harassment is not consent*, PORT CLINTON NEWS HERALD (Dec. 17, 2021).

¹³⁰ *Id.*

¹³¹ Vucovich, *supra* note 119; Jon Stinchcomb, *Title IX expert: ‘Quid pro quo’ sexual harassment is not consent*, PORT CLINTON NEWS HERALD (Dec. 17, 2021).

¹³² Matt Westerhold, *Opinion: Justice or agenda?* SANDUSKY REGISTER (Dec. 9, 2021), <https://sanduskyregister.com/news/358208/opinion-justice-or-agenda/>.

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sexual assault by three separate women who did not know each other.¹³³ 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.¹³⁴

Waters was fired by Put-In-Bay police after reporting that another officer had raped her and has now filed a lawsuit against the Ottawa County Sheriff's Department for their handling of her case.¹³⁵

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 women 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.¹³⁶ 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.

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

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Vucovich, *supra* note 119; Compl., *Waters v. Gloor & Levorchick*, Case 3:22-cv-01182-JRK (Jul. 2, 2022).

¹³⁶ ASHLEY NELLIS, IN THE EXTREME: WOMEN SERVING LIFE WITHOUT PAROLE AND DEATH SENTENCES IN THE UNITED STATES, THE SENTENCING PROJECT 7, 10 (2021) (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) https://950b1543-bc84-4d80-ae48-656238060c23.filesusr.com/ugd/0c71ee_da27bf7c161b46f4ae221347bea07d8e.pdf.

due to a felony conviction.¹³⁷ Not only was the sentence excessive relative to others; 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.¹³⁸ 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.¹³⁹ But thinking that they might be mistaken, she went to the probation office to inquire there.¹⁴⁰ After checking the records, a probation office employee told her that she was eligible to vote and signed a certificate confirming her eligibility.¹⁴¹ Moses then used that certificate to register to vote with the Shelby County Election Commission.¹⁴² Two days 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.¹⁴³

Prosecutors then charged Moses with voter fraud, and a jury convicted her on a single count in November, 2021.¹⁴⁴ 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 way the clerk did.”¹⁴⁵ But Judge Mark Ward took the view that Moses tricked the probation department into giving her a document saying she was off probation.¹⁴⁶

¹³⁷ Moses had sixteen prior convictions, including several misdemeanor counts for perjury, stalking, and theft under \$500. Sophie Kasakove & Eduardo Medina, *Charges Dropped Against Tennessee Woman Who Was Jailed Over Voter Fraud*, N.Y. TIMES (Apr. 23, 2022).

¹³⁸ Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT, TABLE. 1 (last visited Jul. 17, 2022), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

¹³⁹ Kasakove & Medina, *supra* note 137; *Pamela Moses*, NATIONAL REGISTRY OF EXONERATIONS (last visited Jul. 17, 2022), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6231> [hereinafter NATIONAL REGISTRY].

¹⁴⁰ Kasakove & Medina, *supra* note 137.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 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. *Pamela Moses*, NATIONAL REGISTRY, *supra* note 139.

¹⁴⁵ *Id.*

¹⁴⁶ Kasakove & Medina, *supra* note 137. 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.” NATIONAL REGISTRY, *supra* note 139.

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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.¹⁴⁷ 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.¹⁴⁸

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.¹⁴⁹ That evidence should have been turned over to her defense team at trial, according to the judge who reversed her conviction.¹⁵⁰ 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 signature and voting with her ballot.¹⁵¹ Although he was charged with two counts of voter fraud, and each fraud carried a maximum sentence of four years, Hartle was sentenced to only one year of probation.¹⁵² 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.¹⁵³

¹⁴⁷ Sam Levine, *New evidence undermines case against Black US woman jailed for voting error*, *GUARDIAN* (Feb. 24, 2022), <https://www.theguardian.com/us-news/2022/feb/24/fight-to-vote-newsletter-black-woman-jailed-voting-error-evidence> (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.”)

¹⁴⁸ NATIONAL REGISTRY, *supra* note 139.

¹⁴⁹ Sam Levine, *Prosecutor drops all charges against Pamela Moses, jailed over voting error*, *GUARDIAN* (Apr. 22, 2022), <https://www.theguardian.com/us-news/2022/apr/22/pamela-moses-prosecutor-drops-charges-memphis-tennessee>; Kasakove & Medina, *supra* note 137.

¹⁵⁰ Kasakove & Medina, *supra* note 137 (stating that a judge ruled that the Tennessee Dept. of Correction had “improperly withheld evidence,” and that that evidence was later uncovered by the *Guardian*).

¹⁵¹ Kasakove & Medina, *supra* note 137.

¹⁵² Eduardo Medina, *Nevada Man Is Charged With Voting Using His Dead Wife's Ballot*, *N.Y. TIMES* (Oct. 23, 2021).

¹⁵³ *Id.*

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.¹⁵⁴ 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.¹⁵⁵ After pleading guilty, he was sentenced to five years' probation, with his lawyer arguing that "there's not a public benefit to him being incarcerated."¹⁵⁶

Rounding out these examples, a third white, male Republican voter committed fraud by casting a ballot for a dead relative in October, 2021.¹⁵⁷ In Edward Snodgrass's case, he completed his father's absentee ballot, which had been mailed to his father the day after he died.¹⁵⁸ Snodgrass said he was "sleep-deprived and not thinking clearly," but also said he was "simply trying to execute a dying man's wishes."¹⁵⁹ Snodgrass served just three days in jail and paid a \$500 fine.¹⁶⁰

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 it 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 disenfranchise its Black population.¹⁶¹ Tennessee has a higher percentage of Black residents than do Nevada, Ohio, and Pennsylvania.¹⁶² The Sentencing Project

¹⁵⁴ 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), <https://www.theguardian.com/us-news/2022/mar/03/voter-fraud-election-crime-sentencing-racial-disparity>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Corky Siemaszko, *Republican official in Ohio faces charge for voting twice in November election*, NBC NEWS (Jun. 22, 2021), <https://www.nbcnews.com/news/republican-official-ohio-faces-charge-voting-twice-november-election-n1271985>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Uggen et al., *supra* note 138.

¹⁶² Tennessee's population is 17% Black as compared to Ohio (14%), Pennsylvania (12%) and Nevada (10%). *Black Population by State*, WORLD POPULATION REVIEW (last visited Jul. 17, 2022), <https://worldpopulationreview.com/state-rankings/black-population-by-state>. Tennessee is also the state where Black children have been jailed after playground fights and cursing. 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), <https://www.propublica.org/article/black-children-were-jailed-for-a-crime-that-doesnt-exist>; Lisa Desjardins, *Tennessee judge jailed minors on bogus charges following playground fights, cursing*, PBS.ORG (Oct. 12, 2021), <https://www.pbs.org/newshour/show/tennessee-judge-jailed-minors-on-bogus-charges-following-playground-fights-cursing>.

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estimates that over twenty percent of Tennessee's Black residents are unable to vote as a result of disenfranchisement linked to involvement with the criminal justice system.¹⁶³

The cases discussed in Sections 3 and 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—that it is not merely a lack of resources that cause the neglect and negligence of crimes against Black women that we saw in the cases featured in Section 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 section demonstrate a set of entrenched practices designed to prevent Black women from obtaining 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 the Slave experienced. 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 laws applies to them, law enforcement can dilute the effect of the law through neglecting Black women 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 crime, 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

¹⁶³ Uggen, *supra* note 138.; Sam Levine, *Prosecutor drops all charges against Pamela Moses, jailed over voting error*, GUARDIAN (Apr. 22, 2022), <https://www.theguardian.com/us-news/2022/apr/22/pamela-moses-prosecutor-drops-charges-memphis-tennessee>.

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, not as much effort needs to be spent on the crimes they report, and they 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 Black 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 raise awareness of 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 session.

PART TWO: 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.¹⁶⁴ 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 have the power to

¹⁶⁴ See generally Michelle Jacobs, *supra* note 4; Jessica Lussenhop, *Daniel Holtzclaw trial: Standing with 'imperfect' accusers*, BBC NEWS (Nov. 13, 2015), <https://www.bbc.com/news/magazine-34791191>.

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overcome those stereotypes, and we can do that by limiting 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 provides 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, 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 section 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 Act is a pioneering law that can be a springboard for further reform, particularly if other states follow Illinois' lead. The Act provides for police accountability in relation to sexual assault investigation by eliminating much 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.¹⁶⁵

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.¹⁶⁶ Most departments have not deployed any

¹⁶⁵ 725 Ill. Comp. Stat. 203 (West)

¹⁶⁶ *HB1727: The Bad Applies In Law Enforcement Accountability Act*, ACLU ILLINOIS (undated) <https://www.aclu-il.org/en/legislation/hb-1727-bad-apples-law-enforcement-accountability-act-01>; Samuel Walker, *Police Accountability: Current Issues and Research Needs*, NATIONAL INSTITUTE OF JUSTICE POLICE PLANNING RESEARCH WORKSHOP 5-9 (May 2007) (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 et al., *Police Accountability and Community Policing*, PERSPECTIVES ON POLICING 1 (Nov. 1988) (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 watchdogs groups concerned about impartial enforcement under the law”); EXPANDING PATHWAYS TO ACCOUNTABILITY: STATE LEGISLATIVE OPTIONS TO REMOVE THE BARRIER OF QUALIFIED IMMUNITY, NATIONAL POLICE ACCOUNTABILITY PROJECT, 2-4 (undated) (citing numerous examples of police misconduct that involve the excessive use of force),

mechanisms to ensure that police actually do the things that they are supposed to do; rather, law enforcement agencies have relied on police to simply do their jobs. The 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 recognition that sexual assault was an extremely serious and yet under reported and under prosecuted crime, and that changes to police procedures were needed in order to improve the law enforcement response to sexual assault.¹⁶⁷ The Illinois Legislature was particularly concerned that sexual assault disproportionately impacts women, children, and LGBTQ individuals, and yet rarely results in a conviction.¹⁶⁸ 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 the law enforcement response to sexual assault affects victims' recovery from traumatic events, and that sexual assault investigation could be improved if law enforcement officers took into account knowledge about victims' trauma in order to improve victims' ability to cooperate with law enforcement investigations.¹⁶⁹ One example, noted by the 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.¹⁷⁰

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.¹⁷¹ In addition, they noted that identification and successful prosecution of sexual predators prevents new victimization.¹⁷² 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.¹⁷³

<https://www.nlg-npap.org/wp-content/uploads/2021/12/Qualified-Immunity-White-Paper-Final.pdf>;

¹⁶⁷ 725 Ill. Comp. Stat. 203/5(1) (West)

¹⁶⁸ 725 Ill. Comp. Stat. 203/5(1) (West)

¹⁶⁹ 725 Ill. Comp. Stat. 203/5(2), (4) & (5) (West)

¹⁷⁰ 725 Ill. Comp. Stat. 203/5(5) (West)

¹⁷¹ 725 Ill. Comp. Stat. 203/5(6) (West)

¹⁷² 725 Ill. Comp. Stat. 203/5(7) (West)

¹⁷³ 725 Ill. Comp. Stat. 203/5(7) (West)

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1. What the Act Requires

The Act implements a sophisticated response to sexual assault that is required of all law enforcement agencies statewide, and which makes provisions for written reports, officer training, for the handling of sexual assault evidence collection kits, providing victims with information, 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.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶

Second, law enforcement agencies must have sexual assault investigation training, required of all officers, that meets specific requirements established by the Act, and which is based on current best practices.¹⁷⁷ The Act requires that training and policies be “evidence-based” and “trauma-informed.”¹⁷⁸ “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.¹⁷⁹ 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

¹⁷⁴ 725 Ill. Comp. Stat. 203/(15)(a) (West)

¹⁷⁵ 725 Ill. Comp. Stat. 203/(15)(b) (West)

¹⁷⁶ 725 Ill. Comp. Stat. 203/(15)(b)(1)-(18) (West)

¹⁷⁷ 725 Ill. Comp. Stat. 203/(15)(a) (West)

¹⁷⁸ 725 Ill. Comp. Stat. 203/(10) (West)

¹⁷⁹ See generally, END VIOLENCE AGAINST WOMEN INT’L, A BRIEF HISTORY OF EVAWI AND START BY BELIEVING AND OTHER VICTIM-CENTERED, TRAUMA-INFORMED APPROACHES (2018), <https://www.startbybelieving.org/wp-content/uploads/2022/03/Brief-History-of-EVAWI-and-Start-by-Believing.pdf>.

interacting with the victim in a way that is sensitive to these concerns.¹⁸⁰ This approach is critical to eliminating decision-making based on bias, whether implicit or explicit.

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.¹⁸¹ 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 to the victim.¹⁸² Victims must be notified of the tracking system and given log-in information that allows them to track their evidence collection kit.¹⁸³ 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.¹⁸⁴ 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 report received of sexual assault.¹⁸⁵ This includes reports received not only from victims assaulted in the particular jurisdiction, but also from third party witnesses, and individuals who report an assault that occurred in another jurisdiction.¹⁸⁶ No law enforcement agency may refuse to complete a written report for any reason.¹⁸⁷ This provision alone requires that each report be taken seriously and memorialized. The Act also sets out detailed and specific requirements as to what information must be included in the report, and procedures that must be followed when the complainant reports to the wrong jurisdiction and the report must be transferred to the jurisdiction where the attack took place.¹⁸⁸ This means that a police department will never turn away a complainant on the grounds that it does not have jurisdiction.¹⁸⁹

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

¹⁸⁰ 725 Ill. Comp. Stat. 203/(10) (West); *see generally*, LONSWAY, HOPPER, & ARCHAMBAULT, BECOMING TRAUMA INFORMED, *supra* note 99.

¹⁸¹ 725 Ill. Comp. Stat. 203/30(a) (West)

¹⁸² 725 Ill. Comp. Stat. 203/20(West)

¹⁸³ 725 Ill. Comp. Stat. 203/11 (West)

¹⁸⁴ 725 Ill. Comp. Stat. 203/30(d) (West)

¹⁸⁵ 725 Ill. Comp. Stat. 203/20(West)

¹⁸⁶ 725 Ill. Comp. Stat. 203/20(West)

¹⁸⁷ 725 Ill. Comp. Stat. 203/20(f)(West)

¹⁸⁸ 725 Ill. Comp. Stat. 203/20(c)(West)

¹⁸⁹ 725 Ill. Comp. Stat. 203/20(a)(1)(West)

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the quality of the evidence deteriorates the longer they wait¹⁹⁰ They also must be notified that they will not be charged for hospital emergency or forensic medical services associated with sexual assault¹⁹¹ They also must be notified that 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.¹⁹²

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.¹⁹³ 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.

In addition, victims must be provided with a summary of the civil remedies available after sexual assault, including Illinois' Civil No Contact Order Act and their laws concerning domestic violence, as well as a referral to at least one agency that can help a victim seek these remedies¹⁹⁴ They also must be notified about the state's system for tracking rape kits.¹⁹⁵

Sixth, victims of sexual assault must be offered certain additional services, including transportation to a hospital for emergency care or forensic services,¹⁹⁶ and transportation to the nearest available judge for the purposes of obtaining a civil no contact order or other civil remedies.¹⁹⁷ Transportation and agency referrals must be provided in a way that is accessible to each particular victim.¹⁹⁸

2. Police Accountability: the Difference the Act Can Make

¹⁹⁰ 725 Ill. Comp. Stat. 203/25(a)(1)(c) (West)

¹⁹¹ 725 Ill. Comp. Stat. 203/25(a)(1)(b) (West)

¹⁹² 725 Ill. Comp. Stat. 203/25(a)(1)(C-5) (West)

¹⁹³ SUBSTANCE USE AND SEXUAL VIOLENCE: BUILDING PREVENTION AND INTERVENTION RESOURCES, PENNSYLVANIA COALITION AGAINST RAPE 36-37 (2009); https://www.pcar.org/sites/default/files/pages-pdf/substance_use_and_sexual_violence.pdf. 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>.

¹⁹⁴ 725 Ill. Comp. Stat. 203/25(a)(1)(E) & (G) (West)

¹⁹⁵ 725 Ill. Comp. Stat. 203/11 (West)

¹⁹⁶ 725 Ill. Comp. Stat. 203/25(a)(2)(West)

¹⁹⁷ 25 Ill. Comp. Stat. 203/25(a)(3)(West)

¹⁹⁸ 725 Ill. Comp. Stat. 203/25(a)(1)(G), 203/25 (b)(2), 03/25 (b)(3) (West)

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. 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, perhaps with other vulnerabilities such as a poor educational background and/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 counter-productive responses on the part of the police by requiring documented compliance with best practices and eliminating biased-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. Because victims are empowered with information, they can track the progress of their rape kits and reach out to police for 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 a law that specifies breaks down the investigation of complex crimes into concrete steps are less likely to write off a victim as a result of racial or gender bias and are more likely to follow the correct protocols, investigate, and build a strong case for prosecution.

In addition, many communities now use SARTs, or Sexual Assault Response Teams—to provide survivors with a coordinated, community-wide response to sexual assault.¹⁹⁹ These teams are comprised of police officers as well as prosecutors, Sexual Assault Nurse Examiners, victim advocates,

¹⁹⁹ SUSTAINING A COORDINATED COMMUNITY RESPONSE: SEXUAL ASSAULT RESPONSE AND RESOURCE TEAMS (SARRT), END VIOLENCE AGAINST WOMEN INTERNATIONAL, (undated) <https://evawintl.org/courses/evawi-08-sustaining-a-coordinated-community-response-sexual-assault-response-and-resource-teams-sarrt-2/>.

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social workers, and others. They promote a community wide response to sexual assault. 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 cases of sexual assault 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, we should assume that people who murder women also sexually assault them, and indeed they 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.

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 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, and complaints of missing persons. The Act could be adapted to the investigation of these other serious crimes, with 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.²⁰⁰ Had police accountability procedures, modeled on the Act, been in place, the first police station she approached would have had to accept her complainant and memorialize it in writing. If the aunt was reporting in the wrong jurisdiction, the police station would still take the report and would

²⁰⁰ Urbina & Maag, *supra* note 60.

transfer it to the appropriate jurisdiction, informing the aunt that they had done so. The aunt would be assured of being treated respectfully by officers whose goal was not to shut down complaints but rather to identify perpetrators and get them off the streets. She would leave the station with knowledge of a tracking system and log-in credentials so that she could check the status of her complaint and the progress made on the investigation. A law similar to the Act would give officers clear guidance as to how to investigate complaints, would ensure compassionate and equitable treatment of all complaints, and would ensure that officers were provided with robust training enabling 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 had 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.²⁰¹ They legitimately feared arrest. Suppose, instead, that these 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 Illinois Sexual Assault Incident Procedure 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, and to the extent that they are under funded, each state should consider the consequences of this underfunding. Perpetrators who commit more crimes get sentenced to longer prison terms, where they

²⁰¹ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in MARTHA FINEMAN & RIXANNE MYKITIUK (EDS.), *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 93, 99 (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”).

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are supported at tax payer 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.²⁰² Consider also the fact that Franklin and Sowell were sentenced to death.²⁰³ Death sentences involve even greater expense for the state as defendants exhaust their opportunities to appeal. Investing resources into thorough investigation and prosecution of each and every crimes of violence against Black women can save much of these costs later in the process.

This section has demonstrated that the Illinois Sexual Assault Incident Procedure Act holds much promise as an avenue for increasing conviction rates for serious crimes committed against Black women. It represents a new type of police accountability approach, 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 status 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' 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.²⁰⁴ The United

²⁰² 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>.

²⁰³ Neil Vigdor, *Anthony Sowell, Serial Killer Who Terrorized Cleveland, Dies at 61*, N.Y. TIMES (Feb. 9, 2021)(Sowell had been on death row since 2011); Christopher Mele, *Serial Killer Known as 'Grim Sleeper' Dies in Prison*, N.Y. TIMES (Mar. 30, 2020) (Frankling had been on death row since 2016).

²⁰⁴ MacKinnon & Crenshaw, *supra* note 12 at 343.

States of America is the only industrialized democracy in the world that does not currently enshrine a right of gender equality in the Constitution.²⁰⁵ The proposed Equality Amendment is MacKinnon's and Crenshaw's more inclusive take on the Equal Rights Amendment, which was originally drafted in 1972 and then ratified by only thirty-five of the required thirty-eight states before the deadline for ratification came in 1979.²⁰⁶ In this section, I will 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 which 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.”²⁰⁷ I will set out these points below and then explain

²⁰⁵ Lena Felton, *How one of the country's leading feminist scholars would rewrite the ERA*, THE LILY (WASH. POST) Feb. 4, 2020, <https://www.thelily.com/how-one-of-the-countrys-leading-feminist-scholars-would-rewrite-the-era/>.

²⁰⁶ Roberta Francis, *The History Behind the Equal Rights Amendment*, <http://equalrightsamendment.org/history.htm> (undated; last visited Jul. 16, 2022). Since that deadline, some states have rescinded their ratification while others, including Illinois, Nevada, and Virginia, have finally ratified the ERA. *ERA Explainer*, EQUALITY NOW, https://www.equalitynow.org/era_explainer/?gclid=EAIaIQobChMI4eM65z--AIV2xatBh1WcQN4EAAAYASAAEgIip_D_BwE (undated; last visited Jul. 16, 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 12 at 358-62.

²⁰⁷ *ERA Explainer*, EQUALITY NOW, https://www.equalitynow.org/era_explainer/?gclid=EAIaIQobChMI4eM65z--AIV2xatBh1WcQN4EAAAYASAAEgIip_D_BwE (undated; last visited Jul. 16, 2022).

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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 non-state 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.”²⁰⁸ As the authors note, the amendment is framed in such a way that there is no state action requirement; this is because “[i]t recognizes that inequality results from the social order: “its structures, forces, institutions, and individuals acting in concert.”²⁰⁹

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.²¹⁰

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 Equal Rights Amendment in that it does not cover only sex but rather recognizes numerous intersecting forms of inequality. Section 2 reads as follows:

²⁰⁸ MacKinnon & Crenshaw, *supra* note 12 at 358.

²⁰⁹ *Id.* at 358.

²¹⁰ *Id.* at 361.

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).²¹¹

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 intersection nature of forms of oppression.

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.²¹² In other words, it requires proactive remedies. It thus anticipates the need for the creation of laws and policies that eliminate unfair advantage 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 inequality can be invalidated.²¹³ 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, "[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."²¹⁴

²¹¹ *Id.* at 359.

²¹² *Id.* at 361-62.

²¹³ *Id.* at 362

²¹⁴ *Id.* at 347.

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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.”²¹⁵ The Court has also stated that discrimination must be intentional in order to be deserving of a remedy; if it is not, then “an overwhelmingly disparate injury inflicted on a disadvantaged racial group was not enough to trigger equal protection concern even in the face of utterly predictable and proven outcomes.”²¹⁶ Section Four is designed to remedy these interpretations of equal protection.

As the authors note, “[u]ndoing discrimination is not discrimination.”²¹⁷ 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.”²¹⁸

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

²¹⁵ *Id.* at 347-48.

²¹⁶ *Id.* at 348; *Washington v. Davis*, 426 U.S. 229, 240-41 (1976).

²¹⁷ MacKinnon & Crenshaw, *supra* note 12 at 362.

²¹⁸ *Id.* at 349.

In response to this 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 to perceive that oppressions can be intersecting. Officers may not consciously realize, until they participate in an audit, 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 male 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."²¹⁹ There must be room to have specific and targeted laws and policies designed to rectify inequalities inflicted upon certain groups due 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 Illinois Sexual Assault Incident Procedure 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 for communities where the most marginalized populations will receive the greatest benefit.

²¹⁹ MacKinnon & Crenshaw, *supra* note 12 at 362.

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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 colorblind—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 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 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 towards creating the change we need.

The Illinois Sexual Assault Incident Procedure 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 a certain case forward. The United Kingdom has already provided a mechanism like this for sexual assault cases.²²⁰ 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.

²²⁰ Get UK info-Prof Avalos obtaining.

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.