NOTE

LESSONS FROM #METOO AND #BLACKLIVESMATTER: CHANGING NARRATIVES IN THE COURTROOM

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ABSTRACT

Vulnerable populations have experienced sexual and racial violence for centuries, and perpetrators of such violence have often been absolved of liability for their crimes. Recent social movements suggest that change is on the horizon—but what should that change look like within the legal system?

To answer this question, this Note explores the history of patriarchy and gender bias and of slavery and racial bias in the United States. It uncovers parallels between these seemingly distinct—though sometimes overlapping and often related—forms of violence. Tracing stereotypes and myths from their historical origins, this Note clarifies their influence in media, society, and the criminal justice system today. This Note proceeds to consider the successes and drawbacks of the #MeToo and #BlackLivesMatter movements in order to recommend changes in the legal system. Ultimately, it concludes that advocates and judges should take steps to improve storytelling within courtrooms and judicial opinions and that legal scholars and legislators should reconceptualize the harm of physical intrusion to more closely match the experience of victims of these unique forms of violence.

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INTRODUCTION

Legal conceptions of both sexual and racial violence have developed through narratives that have historically undermined the lived experiences of both women[1] and Black people,[2] and particularly of Black women. As a result, convictions for crimes of racial and sexual violence are rare, and society routinely fails to vindicate these harms.[3] In recent years, the #MeToo and #BlackLivesMatter movements have challenged the myths and stereotypes that dominate traditional narratives and have increasingly emphasized victims' narratives. The power of storytelling in these two contexts has had a demonstrated impact on society, and the legal system should respond by bringing these narratives into courtrooms.

In Part I, this Note will begin by exploring the legal history of gender- and race-based violence and abuses in the United States, as well as the stereotypes that developed to justify and sustain such conduct. In Part II, this Note will explain the lingering impact of these stereotypes that appear in traditional media and evaluate the success of social media movements in challenging biased

[1] This Note focuses primarily on the sexual violence experienced by women and its roots in patriarchy while acknowledging, and discussing to a more limited extent, that individuals across the gender spectrum experience similar violence.

[2] This Note focuses primarily on racial violence experienced by Black people in the United States and its historical roots in slavery, but the overall analytical framework developed here may be useful in considering the similar experiences of racial violence that many non-White people share. *See, e.g.*, Beth Shuster, *U.S. Strikes Back: Tracking Hate Crimes*, L.A. TIMES, Oct. 11, 2001, at A1 (discussing post-9/11 increase in hate crimes against people who appear Middle Eastern); Julissa Arce, *It's Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, TIME (July 21, 2020, 3:35 PM), https://time.com/5869568/latinos-police-violence/ [https://perma.cc/8M72-GGXQ] (exposing violent force that law enforcement employs in Latinx communities); Helier Cheung, Zhaoyin Feng & Boer Deng, *Coronavirus: What Attacks on Asians Reveal About American Identity*, BBC NEWS (May 27, 2020), https://www.bbc.com/news/world-us-canada-52714804 [https://perma.cc/MYP2-K3TA] (exploring increase in anti-Asian prejudice and violence in United States following onset of COVID-19); Maya Salam, *Native American Women Are Facing a Crisis*, N.Y. TIMES: IN HER WORDS (Apr. 12, 2019), https://www.nytimes.com/2019/04/12/us/native-american-women-violence.html (noting epidemic of violence that Indigenous women and girls face).

[3] This Note declines to express a view on the propriety of incarceration and instead accepts the existing justice system as the currently available recourse for harm and attempts to better utilize it unless and until it is replaced. Indeed, the calls for alternative justice systems may grow louder and receive more attention if those who have historically not faced punishment within the current system begin to face incarceration at rates on par with those who have. This Note proceeds from the premise that, at present, "[a] criminal prosecution is the most powerful social mechanism we have for expressing the judgment that a wrong has occurred," Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 713 (1996), and highlights arrest, conviction, and incarceration data accordingly. For a vision of the value of critical race feminist restorative justice as an alternative response to sexual and racial harms, see generally Johonna Turner, *Race, Gender and Restorative Justice: Ten Gifts of a Critical Race Feminist Approach*, 23 RICH. PUB. INT. L. REV. 267 (2020).

narratives. This Note will then show that prevalent sexist and racist myths commonly influence fact finders in the criminal justice system. Finally, in Part III, this Note will make several recommendations for actors within the legal system to change the narratives in courtrooms and prevent sexual and racial violence from continuing in today's changing society.

I. ORIGINS IN OPPRESSION AND ENDURING STEREOTYPES

To fully appreciate the presence of stereotypes throughout our social institutions and the narrative landscape before us today, it is helpful to return briefly to an earlier time in order to understand the origin and evolution of laws addressing sexual and racial violence.[4] Section I.A will review the development of the law of sexual violence, focusing particularly on how its origins as a means of protecting men's property interest in women has limited its efficacy in protecting victims of sexual violence. Section I.B will then review the development of police forces and the laws surrounding police violence with a particular focus on how origins in slavery have shaped the application of the criminal law in this context. Finally, Section I.C will consider the particular harms of sexual and racial violence experienced by Black women. While recognizing that police officers and ordinary community members alike perpetrate both sexual and racial violence,[5] this Note will focus predominantly on sexual violence inflicted by community members and racial violence inflicted by on-duty police officers. This said, many of the patterns identified here also

[4] *Cf.* Linda S. Greene, Lolita Buckner Inniss & Bridget J. Crawford with Mehrsa Baradaran, Noa Ben-Asher, I. Bennett Capers, Osamudia R. James & Keisha Lindsay, *Talking About Black Lives Matter and #MeToo*, 34 WIS. J.L. GENDER & SOC'Y 109, 144 (2019) ("Exploring the past illuminates how we got to be where we are, and why, despite clear gains, there are frequent setbacks in access to social and legal rights.").

[5] *See, e.g.*, Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1 (describing acquittal of George Zimmerman, a neighborhood watch volunteer who killed unarmed Black teenager Trayvon Martin); Karen Zraick, *Girl Who Reported Sexual Assault Is Assaulted by the Detective Sent to Investigate*, N.Y. TIMES, July 17, 2019, at A22; Fabiola Cineas, *The Sexual Assault Allegations Against an Officer Involved in Breonna Taylor's Killing Say a Lot About Police Abuse of Power*, VOX (June 12, 2020, 10:10 AM), https://www.vox.com/2020/6/12/21288932/police-officers-sexual-violence-abuse-breonna-taylor (describing pervasive problem of sexual violence committed by police); Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html (describing murder of Black jogger Ahmaud Arbery by White neighborhood residents Gregory and Travis McMichael). These distinct forms of violence interact with and encourage one another. For example, as attorney Andrea Ritchie explained in an interview earlier this year, "police are signaling by violently beating and abusing a Black trans woman in public that they certainly are not going to protect her and that violence against her is completely permissible and state sanctioned." *How to Stop Erasing Black Women from the Conversation Around Police Brutality*, NPR (July 15, 2020, 4:03 PM), https://www.npr.org/2020/07/15/891433292/how-to-stop-erasing-black-women-from-the-conversation-around-police-brutality [https://perma.cc/2L39-9WZH].

provide a useful lens for understanding the dynamics of official sexual violence and community racial violence.

A. *Heteropatriarchy and Sexual Violence*

At first glance, the very existence of laws punishing sexual violence appears to reflect a long-standing social interest in protecting sexual autonomy, which one may define as "the capability to codetermine sexual relations."[6] However, a closer look reveals a different picture. The crime of rape originated to protect a father's property interest in his daughter; in essence, the crime punished not the violation of a woman's sexual autonomy but rather the unauthorized use of a man's property.[7] "Because female sexuality was regarded as a 'commodity' a man could sometimes believe he had a right to 'take' his fiancée whether she consented or not; despotic fathers who regarded their children as their property could occasionally excuse their sexual abuse."[8] The commodification of female sexuality also meant that a sexually empowered woman lost the protection of the law.[9] Today, "[a] legislator, judge, or juror may not explicitly conceptualize women as property . . . but the approach to female victims of sexualized

[6] Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428, 446 (2015).

[7] *See, e.g.*, Francine Banner, *Honest Victim Scripting in the Twitterverse*, 22 WM. & MARY J. WOMEN & L. 495, 534 (2016) ("Historically, rape was treated as a crime against property, with the harm resulting not from the physical or emotional trauma inflicted on the victim but the devaluing of the victim's body in the eyes of (male) others."); Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117, 119 ("Early common law characterized sex with an underage female as harm to the father's property; loss of virginity decreased the child's value as a bride."); Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law Is Turned on Its Head*, 11 WIS. WOMEN'S L.J. 37, 51-52 (1996) ("Although legal systems have historically punished rapists, they have done so on behalf of the legal interests of patriarchs, reinforcing the male control of sexual access to women.").

[8] ANNA CLARK, WOMEN'S SILENCE, MEN'S VIOLENCE: SEXUAL ASSAULT IN ENGLAND 1770-1845, at 129 (1987). These justifications persist in the idea that "real rape" involves a stranger, whereas "where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date . . . the law . . . often tell[s] us that no crime has taken place." Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986). This myth does not reflect reality; in fact, eight out of every ten perpetrators of rape are known to the victim. *Perpetrators of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/perpetrators-sexual-violence [https://perma.cc/56JT-BEDZ] (last visited Nov. 12, 2020). This concept also has a racialized component; due to racial distance in American society, a Black man is more likely to be a stranger and a White man more likely to be an acquaintance to a White woman. *See, e.g.*, MARY FRANCES BERRY, THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT 218 (1999).

[9] *See* BERRY, *supra* note 8, at 210-11 ("If a defendant presented a convincing narrative that a complainant was a 'loose' woman, he would invariably win, because the rape story included the presumption that a loose woman . . . loses the right to refuse sex. A public woman, she circulated in a sexual market as a negotiable item.").

violence often belie[s] closely held gender bias, particularly the view that women's bodies are property."[10]

In early English law, an abducted woman who consented to sex *with her captor* could be punished along with him.[11] In this context, a woman's "[c]onsent was [considered] consistent with the force of captivity"[12]—that is, the law interpreted a woman's reluctant or strategic acquiescence under the conditions of captivity as her freely given consent.[13] Further, this meant that the law punished women for allowing premarital sexual contact with their own bodies, unless such sexual contact met the very high historical threshold of rape. The law thereby created "the concept that a woman is responsible for preventing her own rape"; today, this presumption still "creates a dynamic in which women are held responsible for controlling the sexual behaviors of men."[14] Male victims of sexual violence experience similar social blame "for violating the norm of not 'allowing' oneself to be penetrated by another man."[15]

A further examination of the law reveals high expectations placed upon victims to prevent their own rapes. Early laws defined rape as the "carnal knowledge of a female forcibly and against her will."[16] This language placed the burden on the victim to prevent sexual contact by requiring proof of the perpetrator's use of physical force and requiring the victim's utmost resistance to demonstrate nonconsent.[17] The traditional definition of rape also contemplated a female victim; therefore, by definition, men historically could

[10] Blanche Bong Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 BERKELEY J. CRIM. L. 147, 177 (2019).

[11] Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 456 (2016).

[12] *Id.*

[13] This fiction persists in more recent times. As of 2018, police officers in thirty-five states could claim that individuals in their custody consented to sex, relying on the same premise that someone can freely give consent while in the control or captivity of another. *See* Devon Link, *Fact Check: Sex Between Police Officers and Their Detainees Isn't Illegal in Many States*, USA TODAY (July 9, 2020, 5:33 PM), https://www.usatoday.com/story/news/factcheck/2020/07/09/fact-check-police-detainee-sex-not-illegal-many-states/5383769002/ [https://perma.cc/S28N-AAVG].

[14] *See* Kimberly Peterson, Note, *Victim or Villain?: The Effects of Rape Culture and Rape Myths on Justice for Rape Victims*, 53 VAL. U. L. REV. 467, 476-77 (2019).

[15] Kimberly D. Bailey, *Sex in a Masculinities World: Gender, Undesired Sex, and Rape*, 21 J. GENDER RACE & JUST. 281, 307 (2018).

[16] *See, e.g.*, Sanselo v. United States, 44 App. D.C. 508, 510 (1916).

[17] Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1946 (2016) ("A victim was expected to resist a sexual attack physically so that the attacker would have to use force, and so that the ensuing struggle would create corroborative evidence of the attack."); *see also* Estrich, *supra* note 8, at 1099 ("The definition of nonconsent as resistance . . . functions as a substitute for *mens rea* to ensure that the [perpetrator] has notice of the [victim]'s nonconsent.").

not be raped.[18] Further, rooted in part in the conception of women as property,[19] laws prohibiting sexual violence long contained a marital rape exemption so that, again by definition, women could not be raped by their husbands.[20]

Modern reforms have developed against this backdrop, attempting—often with limited success—to revise a legal definition with heteropatriarchal origins to protect the modern sexual autonomy of people of all genders and sexualities. Starting from the traditional force requirement, some states began to require no more force than that required to accomplish nonconsensual penetration—that is, the force intrinsic to the crime—and other states have eliminated the force requirement altogether.[21] Reevaluating the utmost resistance requirement, many states gradually changed their laws to require earnest resistance, then reasonable resistance, and eventually no resistance at all.[22] Rape shield laws aim to protect victims from harassment and embarrassment by "restrict[ing] information about the victim's sexual history, behavior, and preferences."[23] Despite these changes, though, some states still utilize definitions of consent that embody an element of

[18] *See, e.g.*, Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1288 (2011) [hereinafter Capers, *Real Rape Too*] (explaining common law's exclusion of male rape victims). Until the Supreme Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), however, the law of certain states punished men for exercising their sexual autonomy to engage in consensual sexual contact with other men. *Id.* at 573 (identifying varying state laws and enforcement practices regarding this conduct). Thus, the law actually explicitly punished—rather than protected—the exercise of sexual autonomy, and it criminalized sexual violence within the LGBTQ community only for its form and not its harm. Two Georgia statutes provide a helpful comparison to illustrate this paradox. *Compare* GA. CODE ANN. § 16-6-1(a)(1) (2019) ("A person commits the offense of rape when *he* has carnal knowledge of . . . [a] *female* forcibly and against *her* will . . . ." (emphases added)), *with* GA. CODE ANN. § 16-6-2(a)(1) (2019) ("A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."), *invalidated by* Powell v. State, 510 S.E.2d 18 (Ga. 1998).

[19] *See supra* text accompanying notes 7-10 (describing this belief, both in early law and modern assumptions).

[20] Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 356 (1995) ("Since a husband could not take what he already owned, a husband was no more capable of raping his wife than an owner was of stealing his own property."). Despite widespread reforms, marital rape is still regarded in one way or another as a "definitional impossibility" in twenty-six states. Karin Carmit Yefet, *Divorce as a Substantive Gender-Equality Right*, 22 U. PA. J. CONST. L. 455, 524 (2020); *accord* Madison Pauly, *It's 2019, and States Are Still Making Exceptions for Spousal Rape*, MOTHER JONES (Nov. 21, 2019), https://www.motherjones.com/crime-justice/2019/11/deval-patrick-spousal-rape-laws/ [https://perma.cc/G2U9-7Y5U].

[21] Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. J. SOC. POL'Y & L. 287, 302-03 (1997).

[22] Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 964-66.

[23] Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1598 (2007).

force, and a significant number of states still require extrinsic force.[24] Also, "courts today often evaluate a [victim]'s actions in the same way as they did when resistance was required."[25] Similarly, courts applying modern gender-neutral statutes often still frame their analyses around the traditional conception of rape that excluded male victims.[26] Finally, rape shield laws have failed to exclude much of the evidence or prevent much of the harassment that they intended to exclude and prevent.[27] When they do exclude evidence, they leave jurors to draw on available myths for want of information, which means that "women of color are less likely than white women to benefit from rape shield laws."[28] As predicted by radical feminists over three decades ago, "modest changes in the definition of crimes of sexual assault [did not] transform the cultural expression of sexual domination in a patriarchal system of law."[29]

Despite generations of reforms, the traditional common-law elements of rape still define the crime in practice and also subtly inform messaging in our society.[30] Many sex education programs in the United States reinforce the stereotypes that men cannot control sexual impulses and that women have the responsibility of fending off sexual advances,[31] and these programs often exclude any discussion of same-sex relationships.[32] Efforts to directly address

[24] John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1085-86 (2012).

[25] Anderson, *supra* note 22, at 967; *cf.* Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1038 (2018) ("[C]onvictions do not simply hinge on the letter of the law but also upon the willingness of factfinders to faithfully apply the law.").

[26] *See* Capers, *Real Rape Too*, *supra* note 18, at 1290 ("[T]he existence of a female victim seems to have become not only a *legal* precondition but also a natural one . . . . [B]ecause of this gendered script, we often fail to see male rape even in the face of overwhelming evidence . . . ."); *see also* Julie Goldscheid, *Gender Neutrality, the "Violence Against Women" Frame, and Transformative Reform*, 82 UMKC L. REV. 623, 634-35 (2014) (explaining how "violence against women" paradigm erases experiences of nonwoman victims).

[27] Orenstein, *supra* note 23, at 1599-602.

[28] I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 868 (2013) [hereinafter Capers, *Real Women*].

[29] Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 76 (1987).

[30] *See* Banner, *supra* note 7, at 533.

[31] Kristen N. Jozkowski, *Barriers to Affirmative Consent Policies and the Need for Affirmative Sexuality*, 47 U. PAC. L. REV. 741, 754 (2016).

[32] *See* ADVOCATES FOR YOUTH, ANSWER, GLSEN, HUMAN RIGHTS CAMPAIGN, PLANNED PARENTHOOD & SIECUS, A CALL TO ACTION: LGBTQ YOUTH NEED INCLUSIVE SEX EDUCATION 4 (2015), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/HRC-SexHealthBrief-2015.pdf?mtime=20200713133955&focal=none [https://perma.cc/Z6RS-46M3] ("Among Millennials surveyed in 2015, only 12 percent said their sex education classes covered same-sex relationships." (citing ROBERT P. JONES & DANIEL COX, PUB. RELIGION RESEARCH INST., HOW RACE AND RELIGION SHAPE MILLENNIAL ATTITUDES ON SEXUALITY AND REPRODUCTIVE HEALTH 13 (2015))).

sexual violence through education "[t]oo often . . . focus on teaching [victims] how not to get raped, rather than teaching perpetrators not to rape."[33] Self-defense and awareness skills can sometimes empower victims to protect themselves when they are assaulted, which benefits both individuals and society.[34] Even so, when the teaching of such skills is the only approach used to mitigate the widespread problem of sexual violence, it deflects responsibility from perpetrators and inappropriately holds victims responsible for what others do to them.[35] Perhaps as a result of this pervasive messaging, despite the numerous statutory revisions attempting to depart from the traditional definition of rape, "unless there is extrinsic force and some type of proof that the victim physically resisted, many people find it difficult to determine that a [victim] was raped beyond a reasonable doubt."[36]

Often left unprotected by the law, women are socialized to seek their own protection from men and "may submit to undesired sex in exchange for a promise, almost invariably implicit, of protection against potential violent assault by other men."[37] Thus, we have come full circle. Recall that sexual violence laws originated to protect and regulate men's access to women's bodies;[38] the modern parallel enables a woman to choose the man who may "own" access to her body, but it otherwise does not appear to depart drastically from the original model of protection as a practical matter.[39]

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[33] Chris Linder, *Telling Women How Not to Get Raped Won't Stop Sexual Violence on Campus*, GUARDIAN (Aug. 2, 2018, 2:30 PM), https://www.theguardian.com/higher-education-network/2018/aug/02/telling-women-how-not-to-get-raped-wont-stop-sexual-violence-on-campus [https://perma.cc/H2UU-74RQ].

[34] *See* Anderson, *supra* note 22, at 959 ("[S]tudies indicate that . . . rapists . . . can be deterred by a [victim]'s active, physical resistance. If a [victim] fights back and injures the rapist, [the rapist] may also choose not to assault another [victim] again." (footnote omitted)).

[35] *See* Kathleen C. Basile, Editorial, *A Comprehensive Approach to Sexual Violence Prevention*, 372 NEW ENG. J. MED. 2350, 2351 (2015) (arguing that the most effective way to enact a "population-level effect on violence" is to "focus on primary prevention with potential perpetrators as part of a comprehensive, multilevel approach").

[36] Bailey, *supra* note 15, at 293.

[37] Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1454 (1993); *cf.* Bailey, *supra* note 15, at 303 ("If a [male prisoner] partners with another prisoner for sex, he is expected to protect his feminized partner . . . from other would-be attackers . . . .").

[38] *See supra* note 7 and accompanying text.

[39] Consider, in this light, the targeting of lesbian-identified people for sexual violence, often explained as an attempt to change the victim's sexual orientation. *See, e.g.*, State v. Thomas, 423 S.E.2d 75, 79 (N.C. 1992) (recounting brutal rape and murder that followed argument between perpetrator and victim about why she was a lesbian); *see also* Janelle Griffith, *Salt Lake City Man Sexually Assaulted Lesbian, Saying He'd 'Fix the Gay,' Police Say*, NBC NEWS (Mar. 27, 2020, 1:59 PM), https://www.nbcnews.com/feature/nbc-out/salt-lake-city-man-sexually-assaulted-lesbian-saying-he-d-n1170431 [https://perma.cc/4ZYT-Y3FN]. One might consider this violence a sort of implicit enforcement (by some men, which creates a lingering threat to all women) of a cultural rule that requires a woman to choose

Actors within the criminal justice system—including police officers, prosecutors, judges, and juries—routinely overlook or decline to punish sexual assault. An analysis by the Rape, Abuse & Incest National Network ("RAINN") suggests that victims report only 230 out of every 1000 sexual assaults to police; on average, 46 of these reports lead to arrests and 9 are referred to prosecutors, resulting in a mere 4.6 incarcerations.[40] The response to one eleven-year-old Black girl's report of sexual assault to the police provides a particularly gut-wrenching illustration of the potential barriers faced by survivors who seek protection from the criminal justice system: despite a positive rape kit test, officers arrested the girl for filing a false report when the perpetrator, who was twice her age, claimed that she consented.[41] She served time in a juvenile facility after being pressured into a plea deal.[42]

B. *Slavery and Racial Violence*

The above reference to the number of sexual assaults reported to police highlights the expected role of police in protecting the public. Thus, this glaring and systemic failure to protect victims of sexual violence raises the question: Who *are* the police protecting? As this Section will explain, police forces were formed—and continue—to protect the current social order and racial hierarchy, containing perceived threats to both.[43]

American history has its roots in slavery, with an accompanying legal definition of people as property.[44] A body of law developed to protect those supposed property rights. For example, the Fugitive Slave Acts provided for the

between granting sexual access either to one man of her choice (as West, *supra* note 37, describes) or to men generally (reflected in an otherwise default presumption of sexual availability and consent), while not allowing her the choice to withhold sexual access from men altogether.

[40] *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/6BSW-ZF73] (last visited Nov. 12, 2020). Such statistics regarding sexual violence are notoriously difficult to collect, and data in this area are lacking; RAINN came to these conclusions through surveys of studies published between 2013-2017. *Id*. However, other more recent studies reach very similar conclusions. *See, e.g*., RACHEL E. MORGAN & BARBARA A. OUDEKERK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2018, at 8 (2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf [https://perma.cc/8NUA-ZCLK] (finding that 24.9% of sexual assaults were reported to police in 2018).

[41] Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 68 & n.206 (2017).

[42] *Id*. at 69 n.206.

[43] *See* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 27 (2019) ("Law enforcement continues to enforce the logic of slave patrols, to view black people as a threat to the security of propertied white[people], and to contain the possibility of black rebellion.").

[44] *See, e.g*., Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 395 (1857), *superseded by* U.S. CONST. amend. XIV.

return of enslaved people who escaped to free states.[45] Around the same time, slave patrols—the initial incarnation of police forces in the southern United States—arose to terrorize, capture, and punish both enslaved people who had escaped and free Black people.[46] "[T]he slave patrols' method of stopping and searching both free and enslaved Black[people] can be considered a predecessor to modern-day stop-and-frisk."[47] The slave patrols disappeared with the end of slavery, but police squads quickly arose to take their place in response to White people's continuing fears of Black people.[48] Indeed, "during Reconstruction, many local sheriffs functioned in a way analogous to the earlier slave patrols, enforcing segregation and the disenfranchisement of free[Black people]."[49] Today, marginalized communities remain subject to heavy police surveillance.[50] Police forces "control[] . . . marginalized communities through everyday physical intimidation"[51] and routinely engage in violent interactions with members of these communities.[52]

Unlike sexual violence, which the common law punished, leaving modern legal reforms therefore to simply attempt to modify the scope of the law, racialized violence and harassment initially did not face any specific legal prohibition; accordingly, reform required the creation of a new body of law. Shortly after ratification of the Thirteenth Amendment,[53] Congress passed the Civil Rights Act of 1866, which included "the precursor to the present 18 U.S.C. § 242."[54] Today, this statute remains "among the lonely survivors of Reconstruction legislation that provided federal protection to free[Black people]"[55] and is the federal mechanism for the criminal prosecution of police

[45] Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (strengthening 1793 Act by, for example, requiring law enforcement officials to either comply with the Act or face large fine) (repealed 1864); Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (1793) (allowing slave owners to seize or arrest escaped enslaved persons, even in free states, and providing penalties for those who obstructed this process) (repealed 1864).

[46] Adam Hudson, *Beyond Homan Square: US History Is Steeped in Torture*, *in* WHO DO YOU SERVE, WHO DO YOU PROTECT?: POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 47, 49 (Maya Schenwar, Joe Macaré & Alana Yu-lan Price eds., 2016); Roberts, *supra* note 43, at 20-22.

[47] Hudson, *supra* note 46, at 49.

[48] *Id*.

[49] Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM), https://time.com/4779112/police-history-origins/ [https://perma.cc/SZH4-N43E].

[50] Hudson, *supra* note 46, at 50.

[51] Roberts, *supra* note 43, at 24.

[52] *Id*. at 24-26.

[53] U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . .").

[54] Richard H.W. Maloy, *"Under Color of"—What Does It Mean?*, 56 MERCER L. REV. 565, 570-71 (2005).

[55] David Dante Troutt, Screws, Koon*, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 54 (1999).

officers for their illegal uses of force.[56] It provides that "[w]hoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . by reason of his color, or race . . . shall be" subject to criminal penalties.[57] Following the Supreme Court's decision in *Graham v. Connor*,[58] in which the plaintiff brought a claim under 42 U.S.C. § 1983[59]—the civil law analog to § 242—use-of-force claims proceed as violations of the Fourth Amendment's protection against "unreasonable" seizures.[60] The Court explained that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them."[61] Complicating enforcement under § 242, the implicit bias of the fact finder easily influences this reasonableness inquiry.[62] Moreover, the Supreme Court established in *Screws v. United States*[63] that the "willfulness" element of the statute also "require[s] proof of bad faith"—that is, proof "of a specific intent to deprive a person of a federal right made definite by decision or other rule of

[56] Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 465 (2004). Some states have comparable laws, and prosecutors can also bring charges under traditional state criminal laws prohibiting assault, murder, and other violent crimes. *Id.* However, as explained later in this Section, few police officers face charges or convictions under local criminal law, and "criminal liability under the federal civil rights statutes ha[s] had only limited success in curbing governmental misconduct." *Id.*

[57] 18 U.S.C. § 242 (2018).

[58] 490 U.S. 386 (1989).

[59] Every person who, under color of any [law] . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2018).

[60] *Graham*, 490 U.S. at 395; *see also* Osagie K. Obasogie, *More than Bias: How Law Produces Police Violence*, 100 B.U. L. REV. 771, 779-80 (2020) (discussing significance of *Graham* to Fourth Amendment analysis). This entire framework may be impacted in the near future when the Supreme Court decides whether, as the Tenth Circuit held, a police shooting that injures but does not halt an individual falls outside of this Fourth Amendment framework and, therefore, the protection of § 1983 and § 242. *See* Torres v. Madrid, 769 F. App'x 654, 657-58 (10th Cir.), *cert. granted*, 140 S. Ct. 680 (2019); Brief for Petitioner at i, Torres v. Madrid, No. 19-292 (U.S. filed Jan. 31, 2020). Oral argument for this case occurred on October 14, 2020.

[61] *Graham*, 490 U.S. at 397.

[62] Zach Newman, Note, *"Hands Up, Don't Shoot": Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 HASTINGS CONST. L.Q. 117, 150 (2015). For a fuller discussion, see *infra* Section II.B.

[63] 325 U.S. 91 (1945) (plurality opinion).

law."[64] To cut to the heart of the issue, "the *Screws* Court chose not to . . . acknowledge [broader social context, including the racial composition of the parties] as a meaningful aspect of the defendants' willful purpose."[65]

Like sexual violence, racial violence committed by police officers is inadequately reported, investigated, and prosecuted, and few police officers face convictions.[66] The federal government does not maintain complete or comprehensive data on the number of police shootings,[67] but independent trackers have recorded close to 1000 fatal shootings annually in recent years.[68] Recent analyses found that "[a]bout 1 in 1,000 black men and boys in America can expect to die at the hands of police,"[69] and "Black women and girls are, like Black men and boys, subject to police abuse that runs the gamut from profiling to excessive force to murder."[70] And yet, since 2005, only 110 police officers

[64] *Id*. at 103. Earlier this year, the U.S. House of Representatives passed a bill that would, among other reforms, amend the willful standard of § 242 to one of knowledge or recklessness. *See* George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 101(1) (2020).

[65] Troutt, *supra* note 55, at 72.

[66] Freeman, *supra* note 3, at 703; Meikhel M. Philogene, *Why the Black Man Is Really Gray*, 76 NAT'L LAWS. GUILD REV. 49, 56-57 (2019); *see also, e.g*., Steve Schmadeke & Jeremy Gorner, *Anger Follows Acquittal in Rare Trial of City Cop*, CHI. TRIB., Apr. 21, 2015, at C1 (discussing acquittal of then–Chicago police officer Dante Servin, who fatally shot Rekia Boyd while off duty); Timothy Williams & Mitch Smith, *Jurors Decline Charges in Death of Cleveland Boy*, N.Y. TIMES, Dec. 29, 2015, at A1 (discussing Cleveland prosecutor Timothy McGinty's decision to not charge Timothy Loehmann, the officer who killed Tamir Rice); Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges for Officer in Michael Brown's Death*, NPR: TWO-WAY (Nov. 24, 2014, 3:37 PM), https://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case [https://perma.cc/JW9H-MYY3].

[67] Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014, 3:22 PM), https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/. The federal government does collect data on police shootings, but the numbers are generally self-reported by local law enforcement agencies and widely regarded as unreliable. *Id*.

[68] John Sullivan, Liz Weber, Julie Tate & Jennifer Jenkins, *Four Years in a Row, Police Nationwide Fatally Shoot Nearly 1,000 People*, WASH. POST (Feb. 12, 2019, 11:26 AM), https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html. In the first half of 2020, police killed more people than they had in the first half of any of the previous five years. *See Police Violence Map*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org [https://perma.cc/ZT62-5M4C] (last updated Oct. 28, 2020).

[69] Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019, 5:00 AM), https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-for-black-men.

[70] KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE WITH RACHEL ANSPACH, RACHEL GILMER & LUKE HARRIS, AFRICAN AM. POLICY FORUM & CTR. FOR INTERSECTIONALITY & SOC. POLICY STUDIES AT COLUMBIA LAW SCH., SAY HER NAME: RESISTING POLICE BRUTALITY

were prosecuted for shootings, and "[t]here were convictions in less than 42 cases," usually on lesser charges.[71] In recent years, "neither the number of officers charged nor the number of convictions has meaningfully increased."[72]

Often left unprotected by the law, Black children learn to moderate their own conduct to try to obtain safety. In the words of one mother:

> I must ensure that my son lives. Despite the terror that is this state, he must live.
>
> Do not reach into your pockets when stopped by police.
>
> Do not flinch or swerve and do not ever, ever run.
>
> When the police ask for your identification, ask them for permission to get it. Ask them for permission to reach into that exact pocket or bag before you get the very thing that they just told you to get.
>
> Maintain your cool while all this is happening.[73]

Although it seems necessary, the same mother "do[es] not want to instruct [her] son in this way."[74] The conversation is widely known as "the talk"—"the one where [Black parents] remind [their] young men and women that when they leave the safety of their homes, they have to keep their guard up, mouths shut, and hands on the wheel in even the most casual encounters with law enforcement."[75] Teaching Black children to avoid racial violence through conversations like this one places a burden on them to prevent or control the actions of others, similar to the burden often placed on victims of sexual violence to control their attacker's sexual conduct. The focus of ultimate responsibility—of the ability to control the outcome—once again shifts away from the perpetrator of violence and toward the victim. Recognizing the fallacy in this focus, one father writes: "If a cop wants to harm our children, our children will be harmed—which is why our unrelenting focus should be on reforming the

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AGAINST BLACK WOMEN 2 (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf [https://perma.cc/VFV5-PX6E].

[71] Mariame Kaba & Andrea J. Ritchie, *We Want More Justice for Breonna Taylor than the System that Killed Her Can Deliver*, ESSENCE (July 16, 2020), https://www.essence.com/feature/breonna-taylor-justice-abolition/ [https://perma.cc/D3DU-BVKF]. Between 2005-2015, a total of 358 nonfederal law enforcement officers faced charges for civil rights violations. *Search by Crimes*, BOWLING GREEN STATE UNIV. HENRY A. WALLACE POLICE CRIME DATABASE, https://policecrime.bgsu.edu/Home/Crimes [https://perma.cc/N3CC-4EHX] (follow "Other Offenses" hyperlink; then follow "Civil Rights Violations" hyperlink) (last visited Nov. 12, 2020).

[72] Amelia Thomson-DeVeaux, Nathaniel Rakich & Likhitha Butchireddygari, *Why It's So Rare for Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (Sept. 23, 2020, 4:53 PM), https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/ [https://perma.cc/BM5D-XSZB].

[73] Eisa Nefertari Ulen, *Black Parenting Matters: Raising Children in a World of Police Terror*, *in* WHO DO YOU SERVE, WHO DO YOU PROTECT?, *supra* note 46, at 103, 105.

[74] *Id*. at 106.

[75] Judy Belk, Opinion, *'The Talk' Needs an Update*, L.A. TIMES, Nov. 3, 2019, at A20.

system and not burdening our kids with responsibilities not even the most mature adult could hope to uphold."[76]

C. *Intersectionality and Sexual/Racial Violence*

Of course, "the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately,"[77] and these intersections appear clearly in this context. The forms of violence discussed above intersect in Black women's lives, as do the identities—woman and Black—that correlate with a failure to vindicate the harm caused by that violence. In addition to the many other methods of violence and torture used to control enslaved people,[78] enslaved women experienced sexual violence that faced no legal prohibition.[79] Because laws made children—including those conceived through rape—born to an enslaved mother the property of the enslaver, sexual violence during this time not only subjugated Black women but also generated property and wealth for White enslavers.[80] The legal system at the time, recognizing that "sexual violence functioned to improve the functionality of chattel slavery through reproductive labor,"[81] perpetuated the practice by excluding enslaved Black women from the legal definition of rape.[82] Accordingly, while the law prohibited sexual violence against White women in order to protect their "value" as a sexual commodity owned by White men,[83] it explicitly declined to punish the same violence against Black women because of the value that such violence brought to White men. Black women continue to experience sexual violence at alarming rates, notably at the hands of law enforcement.[84] The history of this specific

[76] Issac J. Bailey, *I Refuse to Have 'The Talk' with My Black Son*, POLITICO MAG. (Dec. 1, 2015), https://www.politico.com/magazine/story/2015/12/why-i-refuse-to-have-the-talk-with-my-black-son-213406 [https://perma.cc/DA8M-MRFK].

[77] Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991). In other words, "[o]ppression has no one single form or effect, simply because there is no one single . . . definition of 'woman.' Rather, various forms of oppression intersect, interact, reform and transform each other." Omi, *Naming the Unheard Of*, 15 NAT'L BLACK L.J. 109, 142 (1997) (footnote omitted).

[78] *See* Hudson, *supra* note 46, at 49.

[79] Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L.J. 651, 673-75 (2016) (describing how common law specifically precluded possibility of raping enslaved women).

[80] *Id*. at 674.

[81] *Id*. at 674-75.

[82] Jacobs, *supra* note 41, at 47 ("Every colonial state that adopted a rape statute defined the crime as an offense that happened to White women. No White man could ever rape a slave woman. Even as between slaves, forcible intercourse against the consent of the Black female slave was not rape." (footnotes omitted)).

[83] *See supra* note 7 and accompanying text.

[84] *See* Jacobs, *supra* note 41, at 69-72; *see also* CRENSHAW ET AL., *supra* note 70, at 26 ("An entirely hidden dimension of police violence against Black women is reflected in victim

experience of violence and its continued perpetration by police officers highlights that much of the sexual violence against Black women has both a sexual and a racial component. In addition, when Black women experience sexual violence, it is less likely to be punished than when *White* women experience the same form of violence,[85] and when Black women experience racial violence, it is less likely to be recognized as compared to when Black *men* experience the same form of violence.[86] As this Note will explain further in Part II, myths about Black women permeate both media narratives and criminal trials. Part II will also generally discuss the enduring impact of the historical origins reviewed in Part I and assess the impact of social media movements in changing the narratives that associated myths and stereotypes have historically built and reinforced.

II. COMMON MYTHS AND EMERGING COUNTERNARRATIVES

The need to justify the violence discussed in the previous Part resulted in the creation and widespread acceptance of various myths. "By uniting metaphors in a larger narrative that appeals to our most basic human and social needs, . . . myths assert a stranglehold on our world perceptions"[87] and thereby impair the legal decision-making process. "[T]he myths created in a patriarchal and racist society reinforce each other," and "[a]n important part of the task of deconstructing the consciousness of rape is revealing the linkages between the social mechanisms that empower violence against both racial groups and women."[88] In Section II.A, this Note explores the myths perpetuated through narratives in traditional media, as well as the challenging of those myths through counternarratives in social media movements. In Section II.B, this Note summarizes a theory of decision-making in sexual and racial violence cases, in which fact finders apply these myths to blame victims and absolve perpetrators.

A. *Narratives in Traditional and Social Media*

News media coverage of sexual and racial violence continues to incorporate harmful stereotypes of victims and perpetrators, and this coverage reinforces social acceptance of these stereotypes because "media content helps citizens make sense of the world around them, especially for depictions of people of

reports of sexual abuse perpetrated by officers."); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105, 117 (2018) ("The fact is that black women's lives are routinely affected by police brutality, as black women are frequent victims of such brutality, which includes sexualized violence by the police."); Sankofa, *supra* note 79, at 683 ("Police sexual violence [particularly against Black women] is invisible in mainstream media and legal reform efforts.").

[85] Jacobs, *supra* note 41, at 76 ("Sexual assaults against Black women are under-reported, under-investigated, and under-prosecuted, in comparison to cases where White women are attacked." (footnote omitted)).

[86] *Id*. at 52-53.

[87] Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 430 (1996).

[88] Bumiller, *supra* note 29, at 88.

different backgrounds."[89] Ultimately, both "law and language only serve to carry out an earlier decision not to see what exists, a decision made by a whole culture, a decision which is itself made invisibly."[90]

Traditional media coverage of sexual violence has often proceeded through narratives that perpetuate rape myths, and "research specific to rape indicates that news reports may have profound effects including influencing a juror's credibility assessments and impacting standards used to determine guilt."[91] Men dominate traditional media sources, and "[w]omen are not equal partners in telling the story, nor are they equal partners in sourcing and interpreting what and who is important in the story."[92] Because men and women often interpret sexual violence in different ways,[93] news stories written, selected, and edited predominantly by men have tended to highlight facts that perpetuate patriarchal myths about sexual violence. Further, like police departments, newsrooms are not separate from the society in which we live and no less immune from sexual violence and a culture that accepts it as the norm.[94] Newsrooms so constituted produce stories that engage in various forms of victim blaming—that is, subtly suggesting that the victim invited or deserved an assault—by, for example, reporting the victim's alcohol consumption,[95] suggesting that the victim enjoyed

[89] Mia Moody-Ramirez & Hazel Cole, *Victim Blaming in Twitter Users' Framing of Eric Garner and Michael Brown*, 49 J. BLACK STUD. 383, 387 (2018).

[90] SUSAN GRIFFIN, RAPE: THE POLITICS OF CONSCIOUSNESS 58 (3d rev. & updated ed. 1986).

[91] Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 246-48 (2007). Media coverage of sexual violence trials also "remind[s] women of their vulnerability by implicitly offering warnings about what can happen to nonconforming or independent women." Bumiller, *supra* note 29, at 90.

[92] WOMEN'S MEDIA CTR., THE STATUS OF WOMEN IN THE U.S. MEDIA 2017, at 2 (2017), https://wmc.3cdn.net/10c550d19ef9f3688f_mlbres2jd.pdf [https://perma.cc/7VRM-VU5M].

[93] *See infra* notes 177-83 and accompanying text (explaining influence of rape culture and gender differences in interpreting unwanted sexual encounters).

[94] *See* WOMEN'S MEDIA CTR., THE STATUS OF WOMEN IN THE U.S. MEDIA 2019, at 11 (2019), https://tools.womensmediacenter.com/page/-/WMCStatusofWomeninUSMedia2019.pdf [https://perma.cc/KR42-FLA3] ("Roughly half of the [surveyed] women journalists from 50 countries, including the United States . . . said that they faced a range of physical and verbal abuse in the course of their work.").

[95] *See, e.g.*, Thomas Fuller, *Court Records Fill In Details of Stanford Sexual Assault*, N.Y. TIMES, June 13, 2016, at A8 ("In addition to the four shots of whiskey she had at home, Jane Doe reported having two shots of vodka and 'some beer' once she had reached the Stanford campus."); Maria Cramer, *19 Women Sue Lyft as Sexual Assault Allegations Mount*, N.Y. TIMES (Dec. 5, 2019), https://www.nytimes.com/2019/12/05/business/lyft-sexual-assault-lawsuit.html ("[One victim] was out drinking . . . when she used Lyft to go back to her apartment [and was assaulted by the driver]." (citing Maria Cramer, *Two Women Just Wanted to Get Home. Instead, They Say, Their Lyft Drivers Raped Them*, BOS. GLOBE (Oct. 9, 2019, 7:35 AM), https://www.bostonglobe.com/metro/2019/10/09/two-women-just-wanted-get-home-instead-they-say-their-lyft-drivers-raped-them/JWkh0FBOVg4UqnmBLXpCJP/story.html)).

the perpetrator's advances,[96] or questioning the victim's motives.[97] At the same time, media reports often focus on a (White) perpetrator's positive qualities.[98] On the whole, many media narratives begin to read like a "rationale" for sexual violence.[99]

There are racial disparities here as well. Traditional news media often fail to even report sexual violence cases involving Black victims.[100] Moreover, in cases involving White perpetrators, media accounts tend to scrutinize the victim's conduct and highlight the perpetrator's otherwise good behavior, whereas in cases involving Black perpetrators, reports highlight the race of the defendant and proceed through narratives that perpetuate violent stereotypes.[101] These violent stereotypes also appear, often more subtly, in traditional media coverage of police violence.[102] Traditional media sources vary in their placement of blame for incidents of violence on either the victim or the police officer.[103] News coverage of police violence tends to highlight the victim's behavior and appearance (emphasizing size and strength) at the time of death, the location of

[96] *See, e.g.*, Emily Bazelon, *The Undergraduate and the Mentor*, N.Y. TIMES MAG., Feb. 15, 2015, at MM26 ("[The victim]'s emails to [the perpetrator] welcomed his attention.").

[97] *See, e.g.*, Ben Shpigel, *Ex-Trainer Accuses Brown of Sexual Assault*, N.Y. TIMES, Sept. 11, 2019, at B10 ("The statement characterized Taylor's lawsuit as motivated by money. It was not clear whether Taylor reported her accusations to the police.").

[98] *See, e.g.*, Naomi LaChance, *Media Continues to Refer to Brock Turner as a "Stanford Swimmer" Rather than a Rapist*, INTERCEPT (Sept. 2, 2016, 1:45 PM), https://theintercept.com/2016/09/02/media-continues-to-refer-to-brock-turner-as-a-stanford-swimmer-rather-than-a-rapist/ [https://perma.cc/H9GQ-746T].

[99] *Cf.* Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 48-49 (1993) (discussing certain "rationales" for sexual violence that have been persuasive in courts).

[100] *See* Capers, *Real Women*, *supra* note 28, at 864-65 (noting that Black women "face higher rape victimization rates than white women" and yet are generally absent from public conceptions of sexual violence).

[101] Kosse, *supra* note 91, at 252-53; *accord* Taslitz, *supra* note 87, at 453-57 (discussing historic and modern depictions of Black men); German Lopez, *The Media's Racial Double Standard in Covering Sexual Assault Cases, in 2 Tweets*, VOX (June 6, 2016, 5:10 PM), https://www.vox.com/2016/6/6/11871228/brock-turner-rape-race (identifying disparate coverage of White and Black perpetrators of sexual violence).

[102] *Cf.* Ulen, *supra* note 73, at 104 ("I fear more than police brutality. . . . I fear the systemic way stories about Black people's encounters with the police are twisted and turned by the voice of the state."); Morgan Parker, *A Brief History of the Present*, LITERARY HUB (Aug. 11, 2015), https://lithub.com/a-brief-history-of-the-present/ [https://perma.cc/39KL-H9CU] ("I might become an autopsy, and the reason won't matter, only my understanding, my swallowing of my rightful place, tectonic plates clicking like a jaw, and—stubbornly, like history—my mouth becoming their mouth speaking who I am.").

[103] Kim Fridkin, Amanda Wintersieck, Jillian Courey & Joshua Thompson, *Race and Police Brutality: The Importance of Media Framing*, 11 INT'L J. COMM. 3394, 3400-01 (2017) (providing statistical analysis of media coverage of an incident of police violence).

the death, and the victim's overall lifestyle,[104] subtly suggesting that the victim was in some way to blame. At the same time, media reports tend to portray White killers in a positive light, highlighting qualities that may subtly cast doubt on whether they deserve punishment.[105] Black people have little control over these mainstream narratives; comprising approximately 13% of the population in the United States, they still fill only around 7% of staff and leadership positions in newsrooms.[106] Because White people and Black people are likely to draw from very different personal experiences with the police when reporting on police violence,[107] news stories that exclude Black perspectives in their editing and production processes will tend to perpetuate racist myths.

Media framing of police violence has been shown to influence individual perceptions of the reasonableness of the officer's conduct. Significantly, one study found that participants viewing the same dashcam video rated the officer's conduct more positively or negatively depending on whether they first read a law-and-order or police brutality frame of the incident.[108] The study concluded that "[i]f the news media adopt certain frames over others, these preferred frames can influence the public's policy priorities,"[109] which, in turn, tend to influence outcomes within the legal system.[110]

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[104] Philogene, *supra* note 66, at 58; *see also* John Eligon, *A Teenager Who Was Grappling with Problems and Promise*, N.Y. TIMES, Aug. 25, 2014, at A1 ("His 6-foot-4 frame lay face down in the middle of the warm pavement . . . . Mr. Brown tended to use his size to scare away potential trouble . . . ."); Richard A. Oppel Jr., *National Questions over Police Hit Home in Cleveland*, N.Y. TIMES, Dec. 9, 2014, at A16 ("Some residents say they won't let their children play at the recreation center where the shooting happened because it is known for fights and gangs."); Sheryl Gay Stolberg & Ron Nixon, *Another City, Another Death in Public Eye*, N.Y. TIMES, Apr. 22, 2015, at A1 ("[P]eople remembered [Freddie Gray] Tuesday as a likable young man who sometimes got into trouble with the law. Maryland court records show he had at least two arrests for drug-related charges since December.").

[105] *See* Nick Wing, *When the Media Treat White Suspects and Killers Better than Black Victims*, HUFFPOST (Sept. 21, 2017), https://www.huffpost.com/entry/when-the-media-treats-white-suspects-and-killers-better-than-black-victims_n_59c14adbe4b0f22c4a8cf212 [https://perma.cc/K42N-YA5R]; *see also, e.g.*, Jake Halpern, *The Cop*, NEW YORKER (Aug. 3, 2015), https://www.newyorker.com/magazine/2015/08/10/the-cop ("[Darren] Wilson, a former Boy Scout with round cheeks and blue eyes, speaks with a muted drawl.").

[106] Joe Davidson, *Black Journalists Are Making Their Voices Heard. Will Newsrooms Listen?*, NAT'L ASS'N BLACK JOURNALISTS (July 7, 2020), https://www.nabj.org/news/515985/Black-journalists-are-making-their-voices-heard.-Will-newsrooms-listen.htm [https://perma.cc/R2LS-KWVM].

[107] *See infra* notes 195-98 and accompanying text (explaining impact of White people's likely experience of police as protective).

[108] Fridkin et al., *supra* note 103, at 3404-05.

[109] *Id.* at 3410.

[110] *Cf.* Cook, *supra* note 10, at 185 (discussing how implicit and explicit bias shapes enforcement of law).

In recent years, however, social media platforms have begun to surpass traditional news media as sources for information in the United States,[111] and new narratives and frames have begun to appear on these platforms. For example, survivors of sexual violence have connected through the #MeToo movement, while activists working toward racial justice have organized around the #BlackLivesMatter movement. These movements have a lot in common. They both gained momentum through social media. Black women started both movements[112] and then were, in many ways, left behind as the movements grew and focused more on other groups (White women and Black men, respectively).[113] Responding to the pressures on women and Black people to modulate their conduct in attempts to prevent the routine violence inflicted on them, as discussed in Part I of this Note,[114] both movements also share "a commitment to asserting that neither black people nor women have to don the 'appropriate' dress, speak the 'right' language, or move in the 'correct' spaces to deserve justice and humane treatment from the government, from the police, or from others in their community."[115] And, as most relevant for the remainder

[111] Katherine Schaeffer, *U.S. Has Changed in Key Ways in the Past Decade, from Tech Use to Demographics*, PEW RES. CTR.: FACTTANK (Dec. 20, 2019), https://www.pewresearch.org/fact-tank/2019/12/20/key-ways-us-changed-in-past-decade/ [https://perma.cc/8JUR-TAUJ].

[112] *Cf.* FEMINISTA JONES, RECLAIMING OUR SPACE 13-14 (2019) ("The imperative to create and hold space for the often erased, generally ignored Black woman has reached its pinnacle and Black women's voices have been refreshingly explosive in the self-affirming, self-preserving digital communities we have formed.").

[113] *See* Greene et al., *supra* note 4, at 119 ("[W]hile Black Lives Matter and #MeToo were founded by black feminists who embraced an intersectional analytical framework, there is a case to be made . . . that many participants in both movements are increasingly moving toward the same single axis, or notion that activists can and should focus on one oppression at a time, that has defined earlier movements."). *But see id.* at 172-73 (noting benefits, particularly in litigation, of the #MeToo movement for "disabled women, women of color and women working for minimum wage"). Consider the disparate responses to the murders of George Floyd, whose horrific death has resulted in charges for four officers, and Breonna Taylor, whose equally horrific death did not result in any charges related to her death. *Compare* Tim Arango, *Ex-Officers in Floyd Case Will Stand Trial Together*, N.Y. TIMES, Nov. 6, 2020, at A17, *with* Alisha Haridasani Gupta, *Since 2015: 48 Black Women Killed by the Police. And Only 2 Charges.*, N.Y. TIMES: IN HER WORDS (Sept. 24, 2020), https://www.nytimes.com /2020/09/24/us/breonna-taylor-grand-jury-black-women.html ("After more than 100 days of protests demanding justice for Breonna Taylor, a grand jury's decision on Wednesday to not bring charges related to her death against the police officers involved landed with a thud for those who had hoped for more, and stronger, charges."). For an account of the historical exclusion of women of color from feminist movements despite their critical role in advancing the movement to end sexual harassment and violence, see Onwuachi-Willig, *supra* note 84, at 106-08. For an account of the historical marginalization of Black women in the movement to advance racial equality, see Omi, *supra* note 77, at 147-48.

[114] *See supra* notes 73-76 and accompanying text (discussing institutions and narrative forces encouraging children to act in certain ways to avoid sexual assault and police violence).

[115] Greene et al., *supra* note 4, at 125.

of this Note, both movements teach important lessons about the power of narratives.

Activist Tarana Burke first created the concept behind the #MeToo movement in 2006 as a way to connect survivors of sexual violence.[116] In 2014, discussion of sexual violence began to find a home on social media when writer Zerlina Maxwell "started the hashtag #RapeCultureIsWhen on Twitter [in order to] spark a public dialogue about rape culture and shift the conversation away from the myths that shame so many survivors into silence."[117] Many people weighed in while the hashtag "trended nationally for hours."[118] Then, in 2017, actress Alyssa Milano encouraged people to tweet "me too" if they had ever been sexually harassed or assaulted in order to spread the word and capture the magnitude of the problem.[119] "Social media acted as a powerful accelerant; the hashtag #MeToo has now been used millions of times in at least 85 countries."[120] The collective narrative produced by survivors participating in the #MeToo movement has raised awareness surrounding rape culture and has led society to hold powerful men accountable for sexual harassment and violence that previously went unpunished.[121] Within the legal system, the recent jury conviction of Harvey Weinstein for two felony sex crimes, a prosecution that many have credited the #MeToo movement with bringing about, "could prove a symbolic turning point" and "reshap[e] public beliefs about which victims deserve their day in court."[122]

As the movement has grown, however, survivors with intersecting oppressed identities have often been pushed to the margins of the emerging national dialogue. According to Burke, "the lack of representation of black women and women of color or any marginalized group in the media since Me Too has gone viral has been clear and gross."[123] Others have raised similar critiques about the

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[116] Morgan Jerkins, *The Way Forward for Me Too, According to Founder Tarana Burke*, VOX (Oct. 15, 2019, 8:30 AM), https://www.vox.com/identities/2019/10/15/20910298/tarana-burke-morgan-jerkins.

[117] Zerlina Maxwell, Opinion, *Rape Culture Is Real*, TIME (Mar. 27, 2014, 2:01 PM), https://time.com/40110/rape-culture-is-real/ [https://perma.cc/YS72-3DYZ].

[118] *Id.*

[119] Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976.

[120] Edward Felsenthal, *The Choice*, TIME, https://time.com/time-person-of-the-year-2017-silence-breakers-choice/ [https://perma.cc/SF9G-9MRQ] (last visited Nov. 12, 2020).

[121] *See* Kaitlynn Mendes, Jessica Ringrose & Jessalynn Keller, *#MeToo and the Promise and Pitfalls of Challenging Rape Culture Through Digital Feminist Activism*, 25 EUR. J. WOMEN'S STUD. 236, 244 (2018).

[122] Megan Twohey & Jodi Kantor, *'Perfect Test' to Push Old Boundaries*, N.Y. TIMES, Feb. 25, 2020, at A1.

[123] Jerkins, *supra* note 116; *accord supra* note 113 and accompanying text (discussing current and historical marginalization of women of color—particularly Black women—from movements for gender and racial equality).

exclusion of LGBTQ and disabled survivors.[124] Also, due to its nature as an accessible platform where anyone can share information and opinions, social media has simultaneously amplified the message of those who still endorse harmful stereotypes about sexual violence: "In perpetuating negative images about accusers, groups of like-minded commenters display a 'cultural logic . . . normatively biased towards and comfortable with the violent discipline of women in order to keep them in their perceived place.'"[125]

In 2013, following the acquittal of George Zimmerman for the murder of Trayvon Martin, organizers Alicia Garza, Patrisse Cullors, and Opal Tometi started the #BlackLivesMatter movement to highlight and combat the violence and oppression endured by Black people in America.[126] The movement gained widespread attention in 2014 following the death of Michael Brown,[127] and by 2018, the hashtag had already been used almost 30 million times on Twitter.[128] After a Black man, George Floyd, died on May 25, 2020 with then–Minneapolis police officer Derek Chauvin's knee pressed against his neck,[129] the movement gained renewed and unprecedented momentum and national attention, with #BlackLivesMatter appearing on Twitter "an average of just under 3.7 million times per day . . . from May 26 to June 7" of 2020.[130] However, support for the movement declined some in the later part of the year, "particularly . . . among White and Hispanic adults."[131]

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[124] *See* Rosalind Gill & Shani Orgad, *The Shifting Terrain of Sex and Power: From the 'Sexualization of Culture' to #MeToo*, 21 SEXUALITIES 1313, 1319 (2018) (considering LGBTQ survivor Jess Fourneir's critique that #MeToo movement "relegate[ed] [queer experiences] to the margins of a conversation about pervasive sexual violence that definitely concerns [queer individuals]").

[125] Banner, *supra* note 7, at 512 (alteration in original) (quoting Kirsti K. Cole, *"It's Like She's Eager to Be Verbally Abused": Twitter, Trolls, and (En)Gendering Disciplinary Rhetoric*, 15 FEMINIST MEDIA STUD. 356, 357 (2015)).

[126] *Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory/ [https://perma.cc/9N56-WDNU] (last visited Nov. 12, 2020).

[127] *See* Moody-Ramirez & Cole, *supra* note 89, at 391.

[128] Monica Anderson, Skye Toor, Lee Rainie & Aaron Smith, *Activism in the Social Media Age*, PEW RES. CTR. (July 11, 2018), https://www.pewresearch.org/internet/2018/07/11/activism-in-the-social-media-age/ [https://perma.cc/MFM7-4PZK].

[129] Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[130] Monica Anderson, Michael Barthel, Andrew Perrin & Emily A. Vogels, *#BlackLivesMatter Surges on Twitter After George Floyd's Death*, PEW RES. CTR.: FACTTANK (June 10, 2020), https://www.pewresearch.org/fact-tank/2020/06/10/blacklivesmatter-surges-on-twitter-after-george-floyds-death/ [https://perma.cc/V9U3-KVK6].

[131] Deja Thomas & Juliana Menasce Horowitz, *Support for Black Lives Matter Has Decreased Since June but Remains Strong Among Black Americans*, PEW RES. CTR.: FACTTANK (Sept. 16, 2020), https://www.pewresearch.org/fact-tank/2020/09/16/support-for-black-lives-matter-has-decreased-since-june-but-remains-strong-among-black-americans/ [https://perma.cc/6YXC-JQFH].

Users post the hashtag #BlackLivesMatter primarily to show support for the movement or to engage in broader discussions about race;[132] importantly, "activists used [social media] to generate alternative narratives about police violence to counter the so-called neutrality of the mainstream press."[133] The movement has successfully forced attention toward stories that traditional media sources previously ignored or misrepresented[134] and, according to one recent study, has reduced both implicit and explicit pro-White attitudes among White people.[135] While most men likely know some women closely enough to empathize with their reported experiences of sexual violence, or at least understand that their experiences of the world may understandably differ significantly from men's experiences, "many white people, including those in power, are not at all proximate to either black people or their experiences."[136] This creates an additional barrier to the understanding and validation of experiences of violence that the #BlackLivesMatter movement faces in a way that the #MeToo movement does not,[137] making video footage more critical for documenting racial violence.[138]

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[132] *See* Monica Anderson, *3. The Hashtag #BlackLivesMatter Emerges: Social Activism on Twitter*, PEW RES. CTR. (Aug. 15, 2016), https://www.pewresearch.org/internet/2016/08/15/the-hashtag-blacklivesmatter-emerges-social-activism-on-twitter/ [https://perma.cc/33EA-HCTP]; *cf.* JONES, *supra* note 112, at 16 ("[H]ashtags have been important mechanisms in modern movement-building, and Black women, Black feminist women especially, have exemplified best practices when it comes to hashtag utilization.").

[133] DEEN FREELON, CHARLTON D. MCILWAIN & MEREDITH D. CLARK, CTR. FOR MEDIA & SOC. IMPACT, BEYOND THE HASHTAGS: #FERGUSON, #BLACKLIVESMATTER, AND THE ONLINE STRUGGLE FOR OFFLINE JUSTICE 78 (2016), https://cmsimpact.org/wp-content/uploads/2016/03/beyond_the_hashtags_2016.pdf [https://perma.cc/AS5E-P53H].

[134] *See id.* at 43-44 (analyzing Twitter conversations following Michael Brown's murder that attracted national attention to his case and criticized national media outlets for suggesting that Brown's actions made him responsible for his own murder); Corinthia A. Carter, Note, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 546-47 (2017) (crediting social media for allowing people to spread information about police violence quickly and independently).

[135] *See* Jeremy Sawyer & Anup Gampa, *Implicit and Explicit Racial Attitudes Changed During Black Lives Matter*, 44 PERSONALITY & SOC. PSYCHOL. BULL. 1039, 1054 (2018).

[136] Greene et al., *supra* note 4, at 135.

[137] *Id.*

[138] *Id.* at 140 & n.129. A contemporaneous article described the video of George Floyd's death as "the match" that lit the flame of national outrage and protests surrounding racial violence in 2020. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), https://time.com/5847967/george-floyd-protests-trump/ [https://perma.cc/DM4S-EDHK]. At the same time, the videos of police violence shared on social media are often traumatic to watch, particularly for people who share a racial identity with the victims. Felicia Campbell & Pamela Valera, *"The Only Thing New Is the Cameras": A Study of U.S. College Students' Perceptions of Police Violence on Social Media*, 51 J. BLACK STUD. 654, 661-63 (2020) (reporting that some college students feel "unprotected and paranoid" watching videos of racialized police violence and fear they or their families "might be next" (emphases omitted)).

Many "black Americans say [social media] sites promote important issues or give voice to underrepresented groups,"[139] and these platforms have certainly facilitated allyship and critical analysis of racial violence in the wake of the #BlackLivesMatter movement and related social media movements.[140] As with hashtag-fueled discussions around sexual violence, however, "[s]ocial media provide[s] a platform for both factions to share messages," and many people have also engaged in victim blaming on social media following reports of racial violence.[141] Another complication is that, as with #MeToo, intersectional identities have been pushed to the margins. Although the founders of the #BlackLivesMatter movement embraced intersectionality,[142] other users of the hashtag did not share that focus, and overall, the movement has failed to elevate the names and experiences of racial violence victims of all gender identities proportionately to its focus on cisgender male victims.[143]

On the whole, these movements have been successful in "call[ing] attention to the narrative frames granted authority in and beyond the law."[144] Although these social media movements have had some documented successes in promoting broader social change, application of the criminal law today is often steeped in the same old myths and biases that many traditional media sources continue to perpetuate.

B. *Narratives in Application of the Criminal Law*

These myths result in "an internalization of the dominant discourse so totalizing that the victim and jury believe in the righteousness of the victim's victimization and the perpetrators' entitlement to it."[145] Individuals functioning

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[139] Anderson et al., *supra* note 128.

[140] *See* Moody-Ramirez & Cole, *supra* note 89, at 398-400 (discussing #CrimingWhileWhite Twitter campaign, which sought to juxtapose passive police response to White criminal activity and violent police response to perceived criminal activity by Black people).

[141] *Id*. at 398; *accord* FREELON, MCILWAIN & CLARK, *supra* note 133, at 28 (discussing backlash on Twitter to protests in Ferguson which "marshaled a variety of rhetorical tactics to attack and vilify protestors and victims").

[142] *Herstory*, *supra* note 126 ("To be intentional about not replicating harmful practices that excluded so many in past movements for liberation, we made a commitment to placing those at the margins [such as women and LGBTQ people] closer to the center.").

[143] FREELON, MCILWAIN & CLARK, *supra* note 133, at 83 (lamenting lack of attention paid to Black women victims of police violence); Laura Thompson, *The Police Killing You Probably Didn't Hear About This Week*, MOTHER JONES (May 29, 2020), https://www.motherjones.com/crime-justice/2020/05/tony-mcdade-tallahassee-florida-police-shooting-death/ [https://perma.cc/TAF2-Z2BX] (drawing attention to the killing of Tony McDade, a Black trans man killed by police four days after death of George Floyd). For a powerful account of the erasure of Black women's experience of police violence by Boston's poet laureate, see Button Poetry, *Porsha Olayiwola - "Rekia Boyd,"* YOUTUBE (Aug. 30, 2015), https://www.youtube.com/watch?v=MNP7H6TxO7s.

[144] Tal Kastner, *Policing Narrative*, 71 SMU L. REV. 1117, 1119 (2018).

[145] Cook, *supra* note 10, at 187.

within the legal system often hold biased beliefs and accordingly make determinations without conscious awareness of the influence of prejudice—the result of a phenomenon termed implicit bias.[146] Implicit biases "reflect a national consciousness created by our media, history, news, and political policy."[147] In our culture, the national consciousness includes gender stereotypes and related myths about sexual violence,[148] as well as racial bias and related myths about racial violence.[149] These widely held assumptions subtly influence the decisions made within our justice system.[150] Beyond their defined role of evaluating the evidence to determine whether certain conduct took place and meets the definition of a charged crime,[151] juries in criminal cases make determinations about whether victims deserve protection and whether defendants deserve punishment. Below, Section II.B.1 will explain the influence of myths in the evaluation of a victim's conduct and worthiness of protection. Section II.B.2 will explain the influence of myths in the evaluation of a perpetrator's conduct and worthiness of punishment.

1. Blaming the Victim

Juries decide whether to punish sexual and racial violence first by assessing the victim's entitlement to the protection of the criminal justice system. In sexual violence cases, this determination is informed by the group identity of the victim,[152] as well as by pervasive myths and historical ideas about what

[146] *See* Philogene, *supra* note 66, at 55. For a helpful discussion of "the biological and psychological roots of prejudice" and implicit bias, see Susan T. Fiske, *Look Twice*, GREATER GOOD MAG. (June 1, 2008), https://greatergood.berkeley.edu/article/item/look_twice [https://perma.cc/4LKN-B9T2].

[147] Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, JUDGES' J., Fall 2015, at 20, 22.

[148] *See, e.g.*, Peterson, *supra* note 14, at 473-77.

[149] *See, e.g.*, William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 28 (2015) ("[M]any individuals automatically associate black men with violence."); Scott Holmes, *Resisting Arrest and Racism – The Crime of "Disrespect,"* 85 UMKC L. REV. 625, 645-46 (2017) (describing mental processes and effects of implicit bias, noting that "irrational assumptions based upon race" become fear, which in turn perpetuates false stereotypes and "vilification").

[150] *Cf.* Cook, *supra* note 10, at 185 ("Implicit bias is particularly problematic in white heteropatriarchal dominated institutions, like law, where both implicit and explicit bias . . . constrained the influence of women and persons of color on adjudication.").

[151] *See* Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255, 1260-61.

[152] *See* Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 62-63 (2010) ("Sexual assaults upon white victims remain more likely than sexual assaults upon nonwhites to be investigated and tried, to result in conviction, and to result in longer sentences—especially if the assailant is black."); Dorothy E. Roberts, *Foreword: The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1, 7-8 (1994) ("Juries decide whether a rape occurred by judging the man's entitlement to sexual access and the woman's entitlement to the law's protection.").

constitutes rape.[153] "Historically, only a 'real' woman could be raped" and achieve retribution through the criminal law.[154] According to social construction, a "real" woman had specific characteristics—such as innocence, passivity, and Whiteness—which left sexual violence perpetrated against sexually empowered women and women of color largely invisible before the law.[155] As we have seen, such history tends to repeat itself, sometimes quietly, and research shows that legally irrelevant factors still influence sexual violence prosecutions and convictions today.[156]

Even where a jury finds no consent, it may still find the victim blameworthy and refuse to enforce the law's protection where, for example, the victim's mode of dress or conduct fails to conform to traditional gender norms.[157] Paradoxically, precisely such a victim may be most in need of the law's protection: "A woman is especially vulnerable to rape when acting as though she were free—that is, when she is not observing conventional restrictions on dress, physical mobility, and social initiative."[158] This conduct thus leaves victims even more vulnerable *after* experiencing sexual violence as gender bias guides the evaluation of their entitlement to protection during the trial.

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[153] Capers, *Real Rape Too*, *supra* note 18, at 1288-89 (finding that jurors still use the "rape script" based on the four common-law elements of rape, which "gender[ed] rape" and failed to recognize sexual violence in marital relations as rape, to determine whether rape occurred despite developments in the law); Taslitz, *supra* note 87, at 439 ("Because few alternative tales to the patriarchal ones are available, the jurors' internal sense of narrative coherence will cause them to judge the victim's tale by patriarchal standards."); Peterson, *supra* note 14, at 486 (noting that jurors use their own experiences—and by extension beliefs about rape myths—to determine verdicts).

[154] Bailey, *supra* note 15, at 316; *accord* Capers, *Real Rape Too*, *supra* note 18, at 1290 ("Th[e traditional rape] script has often rendered the 'rape' of a man as 'not rape.'").

[155] BERRY, *supra* note 8, at 211 ("[L]oose white women—and all African American women—were tarnished, in the view of the white legal system; they were defined by patriarchal imagination as sexual objects, available and thus without rights."); Bailey, *supra* note 15, at 316 (describing focus group conversation of college women where several participants suggested that a woman friend deserved to be forcibly groped); Estrich, *supra* note 8, at 1130-31 (describing case which found defendant's conduct "would have been . . . a shocking outrage toward a woman of virtuous sensibilities" but found same conduct acceptable when directed at a Black woman (quoting Christian v. Commonwealth, 64 Va. (23 Gratt.) 954, 959 (1873))); Roberts, *supra* note 152, at 4 ("[T]he criminal law has enforced the racial meaning of rape by denying rape's injury to Black women.").

[156] *See* CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT 9 (2014) (finding that "the relationship between the victim and offender, the racial composition of the suspect-victim dyad, and stereotypes regarding 'real rapes' and 'genuine victims'" in part determined thoroughness of investigation and severity of charges); Capers, *Real Women*, *supra* note 28, at 863 ("Summoning preexisting rape scripts, jurors are less likely to find that a rape occurred when the accuser's behavior does not comport with their understanding of what they believe rape victims do.").

[157] Bailey, *supra* note 15, at 295-96.

[158] JUDITH HERMAN, TRAUMA AND RECOVERY 62 (2015).

Within prisons, correctional officers often believe that gay and transgender victims of sexual violence deserve—or even want—to be raped.[159] More broadly, actors at all levels of the criminal justice system tend to view incarcerated victims as undeserving of protection. Police and prosecutors use the threat of sexual violence in prison to obtain confessions and negotiate plea deals,[160] and this conduct implies "that prison rape is not something that the law intends to remedy, but rather that rape is part of the prisoner's punishment."[161] Inside the prison itself, "[c]orrections officers may even be complicit in facilitating rapes in order to punish certain prisoners and reward others."[162] A criminal charge, then, may remove the protection of the justice system from a victim of sexual violence.

Similarly, in police violence prosecutions, jurors tend to neither believe nor empathize with victims, whom police often claim they suspected of criminal activity prior to their use of violence.[163] Again, paradoxically, precisely such victims are most in need of the law's protection; police officers specifically target vulnerable, criminalized victims for harassment and violence because they expect these victims will not be believed or vindicated.[164] The "experience [of police violence and harassment] is even worse for . . . those who do have criminal records that give cops even more reason to harass them."[165]

Other biases go further and appear to justify racial violence. Negative stereotypes about Black men as dangerous often produce a belief that some victims of police violence in fact instigated the violence that they suffered.[166]

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[159] Bailey, *supra* note 15, at 302; Capers, *Real Rape Too*, *supra* note 18, at 1269.

[160] Bailey, *supra* note 15, at 306.

[161] *Id*. at 285.

[162] Capers, *Real Rape Too*, *supra* note 18, at 1269.

[163] Armacost, *supra* note 56, at 466; Troutt, *supra* note 55, at 98.

[164] *See* BLACK WOMEN'S BLUEPRINT & YOLANDE M.S. TOMLINSON, INVISIBLE BETRAYAL: POLICE VIOLENCE AND THE RAPES OF BLACK WOMEN IN THE UNITED STATES ¶ 5 (2014) [hereinafter BLACK WOMEN'S BLUEPRINT & TOMLINSON, INVISIBLE BETRAYAL], https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18555_E.pdf [https://perma.cc/PNU8-44H5] ("[O]fficers tend to profile victims whose credibility will likely be doubted, and victims of police crimes are, understandably, reluctant to report the crime to their perpetrators, the police."); *see also* Andrea J. Ritchie, *#SayHerName: Racial Profiling and Police Violence Against Black Women*, 41 HARBINGER 187, 189 (2016); Sankofa, *supra* note 79, at 654 (describing Daniel Holtzclaw, a former Oklahoma City police officer who assaulted thirteen Black women and "deliberately chose women with criminal records and living in an impoverished area because he felt certain no one would believe them"); *see also* Andrew Denney, *Judge Explains No-Jail Deal for Ex-NYPD Cops Who Had Sex with Suspect*, N.Y. POST (Aug. 29, 2019, 7:52 PM), https://nypost.com/2019/08/29/judge-explains-no-jail-deal-for-ex-nypd-cops-who-had-sex-with-suspect/ [https://perma.cc/4HMV-Q52Y] ("The Brooklyn judge who gave zero jail time to two former NYPD officers — despite their admitting they had sex with a teen in their custody — declared in court that 'both sides' had committed crimes." (citation omitted)).

[165] IJEOMA OLUO, SO YOU WANT TO TALK ABOUT RACE 88 (2018).

[166] Freeman, *supra* note 3, at 697-98. Compare this to the belief that sexually assertive women invite sexual violence, discussed at *supra* note 155 and accompanying text.

Along with historical stereotypes, portrayals of Black men as violent in the news and other media prime jurors "to receive and believe the narratives of police officers who claim self-defense after killing black men."[167] In sum, violence against Black people is "often justified by reference to their 'superhuman' strength and aggression, another form of dehumanization" that parallels the dehumanization of victims of sexual violence.[168]

Due to these entrenched stereotypes, the victim's conduct, though thoroughly scrutinized, often matters little. The reasonableness of the perpetrator's conduct in both contexts is established, in part, through assumptions that the victim invited it—through supposed desire in sexual violence cases and through alleged aggression in police violence cases. In sexual violence cases, this form of victim blaming often occurs subtly through a determination that a victim deserved what happened because they desired it and that they must have desired it simply because they exist within a particular identity. This biased reasoning has historically appeared as a manner of justifying the unjustifiable—and not just in the United States. In 1896 Vienna, for example, psychologist Sigmund Freud published a paper linking what he called "hysteria"—a parallel to what might today be termed post-traumatic stress disorder—to sexual violence, ranging from unwanted sexual contact to more traditionally violent assaults, in childhood.[169] A year later, troubled that the prevalence of the disorder suggested widespread sexual violence against children,[170] Freud denied such a reality and insisted on an alternative explanation for his patients' symptoms and accounts of their experiences: "[H]e insisted that women imagined and longed for the abusive sexual encounters of which they complained."[171] In the United States, a similar justification was utilized for sexual violence against enslaved women: the myth that "Black women seek out their own rape and sexual exploitation, and therefore cannot be raped because they wanted it—it's in their nature."[172] In fact, myths of this sort appeared to justify the entire institution of slavery: some

[167] Olwyn Conway, *"How Can I Reconcile with You When Your Foot Is on My Neck?": The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. ST. L. REV. 1349, 1380; *cf.* Freeman, *supra* note 3, at 697 ("The demonization of people of color makes police violence against them politically defensible."). Recall in Section II.A the discussion of the media's tendency to highlight negative qualities of Black victims of police violence while highlighting positive characteristics of White killers. *See supra* notes 103-05 and accompanying text.

[168] Greene et al., *supra* note 4, at 135 (footnote omitted). The "dehumanization" of victims of both racial and sexual violence is particularly salient in light of the history, discussed in Part I, in which "marriage and slavery each gave men property rights in persons." Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450, 465 (2020).

[169] 3 SIGMUND FREUD, *The Aetiology of Hysteria*, *in* THE STANDARD EDITION 187, 199-201 (James Strachey, Anna Freud, Alix Strachey & Alan Tyson eds. & trans., 1962).

[170] HERMAN, *supra* note 158, at 13-14.

[171] *Id.* at 19.

[172] BLACK WOMEN'S BLUEPRINT & TOMLINSON, INVISIBLE BETRAYAL, *supra* note 164, at 3.

influential men of the time took "the view that slaves actually chose to be slaves," and they "were perceived to have consented by the fact that they seemed to like it."[173] For most readers, this last statement likely brings to mind the dynamics of a modern sexual violence prosecution.[174] In police violence prosecutions, victim blaming occurs through a subtle determination that the victim deserved what happened because they were aggressive or threatening and that they were aggressive or threatening simply because of their racial identity. "The use of authority narratives to invoke [myths] of black male dangerousness and criminality maintains a status quo in which victims of color are easily objectified, dehumanized, and physically and verbally violated."[175] In all of its many forms, victim blaming serves to justify the perpetrator's actions in sexual and racial violence cases[176] so that the jury, the judge, and society may more comfortably proceed to the next step: absolving the perpetrator.

2. Absolving the Perpetrator

Even when a victim overcomes this first invisible hurdle and convinces a jury that they deserve protection, the jury next seems to consider the defendant's entitlement to sexual access (in a sexual violence prosecution) or the reasonableness of their apprehension of a threat (in a police violence prosecution). Biases and myths again inform these determinations.

The criminal law is designed to punish morally culpable behavior that deviates from social norms; in sexual violence cases, "[j]uries do not want to blame men for acquaintance rape when their behavior is viewed as normal and not particularly culpable."[177] A defendant's conduct in this context, although experienced as a harmful violation by the victim, may easily fall within socially acceptable bounds of the expected performance of masculinity.[178] Research shows that many potential perpetrators accept the norms of the rape culture that

[173] Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 320 (2003).

[174] Consider, for example, the highly publicized 2016 case in which Brock Turner was convicted of sexual assault and served only three months in jail. The victim, Chanel Miller, recalled learning about the details of her assault in a newspaper article (she was unconscious when Turner assaulted her) and "read[ing] that according to him, [she] liked it." Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17 PM), https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra#.caxXXyWGK [https://perma.cc/2TW6-CBNV].

[175] Troutt, *supra* note 55, at 116-17.

[176] *See* Greene et al., *supra* note 4, at 144 (explaining that racialized "troubling claims are less often explicitly articulated as contemporary rationales . . . but they nonetheless continue to exist as *sub rosa* rationales").

[177] Bailey, *supra* note 15, at 294-95.

[178] *Id*. at 295.

surrounds them,[179] and they "may believe [that] pursuing sex post-refusal is part of their masculine gender role"[180] or that "their sexual contacts [are] free of 'force' because the aggression was that which is part of fair gamesmanship" in what they consider "the game of sex."[181] Victims of sexual violence "quickly learn that rape is a crime only in theory; in practice the standard for what constitutes rape is set not at the level of [a victim's] experience of violation but just above the level of coercion acceptable to men,"[182] who are usually the ones to evaluate the perpetrator's conduct and often determine whether criminal punishment is appropriate.[183]

In particular, "categories of entitlement reflecting relationships of power in society determine the meaning of rape," and the determination of a perpetrator's entitlement to sexual access depends, in large part, on race.[184] The visual image of punishable sexual violence in our society often appears only as a "black male attack on white femaleness."[185] During the Jim Crow era, White men used myths

[179] Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1, 24 (2016).

[180] Jozkowski, *supra* note 31, at 767; *accord* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 631 (2009) ("One popular view is that procuring sex is the aim toward which the man must proceed, and achieving sex is a victory, especially with an initially reluctant woman.").

[181] Taslitz, *supra* note 87, at 450.

[182] HERMAN, *supra* note 158, at 72; *cf.* Deborah L. Rhode, *Sexual Harassment*, 65 S. CAL. L. REV. 1459, 1463 (1992).

[183] Consider that in 2019, only 34% of state court judges were women. *2019 US State Court Women Judges*, NAWJ, https://www.nawj.org/statistics/2019-us-state-court-women-judges [https://perma.cc/5FML-8R79] (last visited Nov. 12, 2020). Historically, women were often excluded from juries as well, although there has been much improvement on this front. *See* Laughlin McDonald, *A Jury of One's Peers*, ACLU (Mar. 18, 2011, 11:20 AM), https://www.aclu.org/blog/smart-justice/mass-incarceration/jury-ones-peers [https://perma.cc/6M7S-X47U].

[184] Roberts, *supra* note 152, at 7.

[185] Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 626 (2005). Juries are therefore less likely to absolve Black perpetrators of sexual violence; their racial disadvantage prevents them from behaving in the same manner as White men with impunity. For a recent example that was widely recognized as a victory for the #MeToo movement, see David A. Love, *Bill Cosby's Fall Ripples Through the #MeToo Movement*, NBC NEWS (Sept. 26, 2018, 5:47 PM), https://www.nbcnews.com/news/nbcblk/bill-cosby-s-fall-ripples-through-metoo-movement-n913361 [https://perma.cc/3CYS-8XMN]. Consider whether the reverse may also hold some truth—that is, White women's social disadvantage may subject them to punishment for racial violence to a greater extent than what White men face. *Compare* Jan Ransom, *Woman Who Called 911 on Black Man Is Charged*, N.Y. TIMES, July 7, 2020, at A17 (reporting that White woman Amy Cooper who called New York City police on Black man Christian Cooper who asked her to put her dog on a leash was charged with filing false police report), *and* Eliott C. McLaughlin & Steve Almasy, *Amber Guyger Gets 10-Year Murder Sentence for Fatally Shooting Botham Jean*, CNN (Oct. 3, 2019, 4:05 AM), https://www.cnn.com/2019/10/02/us/amber-guyger-trial-sentencing/index.html [https://perma.cc/VE82-DBTC] (reporting that White woman off-duty police officer received

about this form of sexual violence to justify their own violence against Black men, while the same White men—including police officers—simultaneously continued to use sexual violence to dominate and terrorize women, especially Black women.[186] "In a repressive racial climate, such as the antebellum South, the prosecution of rape arose as a tool to selectively sanction blacks, affirming white male property interests and making the women's actual nonconsent an unquestionable assumption."[187] Much of this violence was intertwined, instrumental, and symbolic: White men used sexual violence against Black women to also assert dominance over Black men,[188] while they simultaneously used myths of Black male sexuality to both justify their killings of Black men and remind White women of their vulnerability.[189] As such, "[t]he history of rape, as the law has been enforced in this country, is a history of both racism and sexism,"[190] and "[t]he cultural meaning of rape is rooted in a symbiosis of racism and sexism that has tolerated the acting out of male aggression against women and, in particular, black women."[191]

Police officers' violence, sometimes lethal, against Black people displays additional examples of racial bias and related deference to perpetrators. A study of implicit bias among police officers "revealed that in speed and accuracy, the decision to shoot an armed target was faster when the target was Black, whereas the decision not to shoot an unarmed target was faster when the target was

ten-year sentence after shooting Black man in his apartment), *with* Katie Benner, *No U.S. Charge Against Officer in Garner Case*, N.Y. TIMES, July 17, 2019, at A1 (reporting that Attorney General Barr ordered that U.S. attorney drop case against White police officer Daniel Pantaleo who held his arm around a Black man Eric Garner's neck until he suffocated). While recognizing the existence of these disparities, feminists should reject any attempts by White women to obtain the racist power that White men hold, and antiracists should similarly reject any attempts by Black men to obtain the gender-based power that White men hold. *See* Greene et al., *supra* note 4, at 144-45. True accountability for crimes of sexual and racial violence must consistently hold people of all races and gender identities responsible for the harm they cause, and as additional charges and cases unfold in both areas, it will be worth watching these patterns and responses to them closely.

[186] Chelsea Hale & Meghan Matt, *The Intersection of Race and Rape: Viewed Through the Prism of a Modern-Day Emmett Till*, 44 HUM. RTS., December 2019, at 21, 21-22.

[187] Bumiller, *supra* note 29, at 86.

[188] Charles R. Lawrence III, *Cringing at Myths of Black Sexuality*, 65 S. CAL. L. REV. 1357, 1358 (1992) ("An integral part of this story has been the historical use of violence against black women as a way to deliver a message of white domination to black men: 'You are not a man in this patriarchal world if you do not . . . have control over and access to your women's sexuality as we do.'").

[189] BERRY, *supra* note 8, at 203 ("[W]hite men used the construct of the black male rapist to reinforce white women's fear and dependency on them."). For an account of parallel trends in the more recent prosecution of George Zimmerman for the killing of Trayvon Martin, see generally Angela Onwuachi-Willig, *From Emmett Till to Trayvon Martin: The Persistence of White Womanhood and the Preservation of White Manhood*, 15 DU BOIS REV. 257 (2018).

[190] Estrich, *supra* note 8, at 1089.

[191] Bumiller, *supra* note 29, at 88.

White."[192] The average police officer, then, responds "normally," as compared to their peers of every race, when they shoot a Black person without first fully assessing the situation. Of course, "even if the 'typical' American [or police officer] believes that black[people]s' 'propensity' toward violence justifies a quicker and more forceful response when a suspected assailant is black, this fact is legally significant only if the law defines *reasonable* beliefs as *typical* beliefs."[193] As the excessive force doctrine has evolved today, it perpetuates this racial bias by "allow[ing] courts to defer to the *average* decisions of *average* officers in the moment for assessments of reasonableness."[194] Further, White people often experience police encounters as comforting and protective, and they are inclined to refer to these experiences when evaluating the "reasonableness" of an officer's conduct[195]—in other words, they will think that *they* individually have not experienced police violence, so someone who has must have done something to trigger that violence. They are also likely influenced by their own racial biases against the victim,[196] which filter their evaluations of the situation that the officer encountered. Thus, drawing from their own experiences and the racist myths that permeate our society, White jurors[197] may interpret police violence as a legitimate form of protection.[198] This view of the police produces, at least in part, "society's unwillingness to penalize the representative of its authority," the police officer.[199] Prosecutors may decline even to bring charges, "view[ing] criminal sanctions as unjustifiably harsh when used against a police officer who is 'just trying to do his job.'"[200]

As such, at the same time that fact finders within the criminal justice system blame victims of sexual and racial violence, they also justify perpetrators' behavior and frequently decline to punish what they might consider reasonable—or at least understandable—conduct. In this manner, implicit bias guides jurors toward a preconceived narrative of who must be at fault and who must have acted reasonably.

> Implicit bias is the meaning we attach to objects and bodies in the unfiltered and unregulated mind. It is the nanosecond associations of a societally

[192] Philogene, *supra* note 66, at 56.

[193] Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 788 (1994).

[194] Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 963 (2020).

[195] Holmes, *supra* note 149, at 645-46.

[196] *See* Chris Mooney, *Across America, Whites Are Biased and They Don't Even Know It*, WASH. POST (Dec. 8, 2014, 12:40 PM), https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/.

[197] Consider that "White jurors still constitute a disproportional majority on most U.S. juries." Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 LAW & HUM. BEHAV. 232, 232 (2019).

[198] Freeman, *supra* note 3, at 697-98.

[199] Troutt, *supra* note 55, at 74-75.

[200] Armacost, *supra* note 56, at 466.

> vulnerable body, whether it is raced, gendered, or classed with suspicion, dangerousness, and the need to be controlled and the equally immediate pairing of a societally privileged body with innocence, righteousness, entitlement, and the need to be vindicated. . . . This dichotomy is fundamentally operative throughout sexualized violence cases as well as cases involving societally vulnerable victims and privileged perpetrators, such as cases involving white police officers shooting black victims.[201]

Essentially, jurors likely hold some biased beliefs, and they filter evidence through those the lens of those beliefs.[202] This leads to an increased focus on certain evidence that confirms their preexisting beliefs and a reduced focus on evidence that challenges those beliefs; pieces of the story grow and shrink accordingly, distorting the narrative to highlight or incorporate expected characteristics and tendencies of various social groups.[203]

Jurors also arrive in the courtroom with predetermined expectations of the proper conduct of alleged victims and alleged perpetrators in various scenarios. Focusing unduly on these expectations, the jury believes that only one narrative constitutes a harm, a crime, or a punishable offense—and discounts other narratives accordingly.[204] This results in a denial of lived experiences.[205]

III. REWRITING STORIES AND RECONCEPTUALIZING HARM

The #MeToo and #BlackLivesMatter movements have demonstrated the power of individual narratives,[206] and actors within the legal system should similarly use these narratives to challenge the myths and stereotypes operating within the courtroom. Section III.A will recommend that advocates provide as complete an account of victims' lived experiences as possible along with all possible corroborating evidence, and it will also recommend that judges take steps to improve the storytelling that takes place in their own interpretations of events and in their written opinions in order to avoid perpetuating stereotypes. Section III.B then recommends that legal scholars and legislators reconceptualize the harms of sexual and racial violence and recognize any intrusion on a person's bodily autonomy as harmful.

A. *Rewriting the Narratives*

As a result of the competing narratives in traditional discourse and social media and of the prevalence of negative stereotypes about victims of sexual and racial violence, fact finders bring to the courtroom preconceived notions about what happened in each new sexual or police violence case. Advocates must work to overcome these biased expectations, and judges must ensure that they themselves neither rely upon nor reinforce them. The importance of narrative in

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[201] Cook, *supra* note 10, at 184-85 (footnotes omitted).

[202] *See* Taslitz, *supra* note 87, at 413-14.

[203] *See id*. at 414-17.

[204] *See id*. at 418.

[205] *See id*. at 419.

[206] *E.g*., Greene et al., *supra* note 4, at 131-32.

law is not a new concept, but social receptivity to counternarratives both demonstrated and enhanced by the movements described above make it particularly relevant at this point in time.[207] Below, in Section III.A.1, this Note will explain the various methods of storytelling available to advocates and prosecutors, drawing on the lessons developed in Part II. In Section III.A.2, this Note will highlight the importance of narrative in judicial writing and make several suggestions for overcoming judges' implicit biases.

1. Storytelling in Evidence

Standing alone, stereotypes lead fact finders within the criminal justice system to "perform a legal construction of identity" based on beliefs about members of various social groups, and "[i]ndividual narratives are reduced to oppressive stereotypes with stock stories" as a result.[208] Advocates, including criminal prosecutors and any private attorneys retained by the victim for the prosecution or a follow-on tort action, should tell victims' stories as fully as possible in court in order to avoid gap filling by jurors who believe they already understand the narrative—in other words, the victim in each individual case should be able to "rewrite" the stereotype-drenched stories that precede and often minimize their lived experience.[209] Research shows that the availability of personalized information reduces the likelihood that a person's sex or race will activate stereotypes in a decision maker.[210] In a courtroom, therefore, the telling of a victim's complete story with an emphasis on individuating facts can help avoid the influence of stock stories on the decision maker's understanding of the

[207] Consider that "[t]he Black Lives Matter and Me Too movements have influenced most people—lawyers and judges included—to reflect in a focused way on [their] biases." Evelyn Z. Wilson, *Random Thoughts*, J. KAN. B. ASS'N, June 2018, at 15, 15. Advocates can build upon this foundation and achieve different results through the portrayal of lived-experience narratives in this new climate, where many fact finders may already be primed to question their own assumptions and implicit biases.

[208] Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147, 151 (2012). Consider that "[t]he dominant group justifies its privileged position by means of stories, stock explanations that construct reality in ways favorable to it." Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2438 (1989).

[209] *Cf.* Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1608 (2015) ("[O]utsider narratives serve a neutralizing, counter-story function by not only acknowledging the bias behind the dominant narrative but also providing alternative accounts that can begin to transform that bias.").

[210] *See* Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 278, 311 (2014) ("Psychological research also shows that avoiding the influences of stereotypes in decision-making requires a decisionmaker to put forth more effort and time to gathering individuating information about the litigant, rather than relying on her triggered stereotypes.").

case.[211] In this regard, unique challenges arise and must be addressed in both sexual and police violence cases.

Generally, in sexual violence prosecutions, "[t]he prosecutor submits the victim's testimony in order to bolster the professional's case—not to reveal the 'complexities and ambiguities of real life but . . . the black and white conceptions of the adversarial trial.'"[212] The difficulty is that the fact-finding process generally demands clear and consistent testimony that stands up to cross-examination, but trauma narratives tend to contain uncertainty due to the difficulty victims face in trying to make sense of an attack and understand why they were victimized, often while simultaneously confronting gaps in memory.[213] Victims' narratives may also change over time: for example, victims of sexual violence often blame themselves initially as they try to reconcile their experiences with social myths that imply that the violence that they suffered only affects those who invite or deserve it.[214] Victims are no more immune to harmful myths than are fact finders, of course.[215] Advocates will need to understand that victims may be reluctant to tell their complete story[216] and should therefore be prepared to offer appropriate support and to discuss with the victim the role and purpose of storytelling. When actors in the legal system scrutinize a victim's testimony and conduct, "often superimpos[ing] a preconceived view of both the nature of the traumatic event and the range of appropriate responses," such scrutiny interferes with the victim's recovery process by compounding their self-blame and isolation.[217] Unfortunately, fact finders often do not believe evolving trauma narratives standing alone,[218] but prosecutors should still encourage

[211] *See id*. at 312 (arguing that attorneys should tell clients' "complete stor[ies]," by emphasizing individuating facts to combat stereotyping).

[212] Bumiller, *supra* note 29, at 84 (alteration in original) (quoting Doreen McBarnet, *Victim in the Witness Box—Confronting Victimology's Stereotype*, *in* CRIMINAL LAW IN ACTION 328, 332 (William J. Chambliss ed., 2d ed. 1984)).

[213] HERMAN, *supra* note 158, at 176-81.

[214] Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 142 (1992).

[215] *Cf*. Kastner, *supra* note 144, at 1123 ("Master narratives, or so-called 'stock stories,' influence the meaning of experiences for groups in society and guide how people judge and assess *their experiences*." (emphasis added)).

[216] *Cf*. Isabel Marcus, Paul J. Spiegelman, Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 39 (1985) (explaining that, in the context of abortion, women felt that they could not present the true and complex picture of their experiences in an adversarial legal setting). Indeed, the trauma of sexual violence can render victims completely unwilling, or psychologically unable, to tell much or any of their own stories in court. Thus, while the individualized facts of each such crime are essential to overcoming stereotypes and myths, individual circumstances may also put more or less pressure on prosecutors to gap fill and support narratives with evidence other than victim testimony.

[217] HERMAN, *supra* note 158, at 66.

[218] Scheppele, *supra* note 214, at 144-45.

victims to testify fully about their experiences[219] and provide any necessary corroboration for gaps in memory or changed perspectives of events through expert testimony that explains the impact of trauma in order to improve jurors' understanding.[220]

Police violence prosecutions present different challenges. In these prosecutions, as in other criminal cases, jurors complete screening questionnaires inquiring whether they would automatically believe testimony from a law enforcement officer, and they cannot proceed to selection if they answer "yes."[221] However, despite this formal screening for explicit bias, which only jurors with the requisite self-awareness will be able to report honestly, judges should be mindful that many jurors do in reality accept police testimony at face value and weigh it heavily in their consideration of the evidence.[222] To mitigate this problem, judges presiding over police violence prosecutions should carefully and repeatedly instruct jurors not to evaluate or weigh police testimony differently from lay witness testimony[223] and remind jurors that any testifying officer likely has an interest in the outcome of the case.[224] Additionally, prosecutors should focus on bringing charges more frequently against officers who use excessive force that causes harm but does not end the victim's life. This increases the likelihood that victims will be available to testify to their own experience and contradict the narratives offered by both stock stories and testifying officers.[225] Perhaps even more critical in § 242 prosecutions, advocates should work to introduce video evidence wherever possible, as this

[219] Consider that sociologists "have found an association between the degree to which a society silences its women and the prevalence of rape," highlighting the significance of storytelling in this context. Taslitz, *supra* note 87, at 442.

[220] For an example of the successful use of expert testimony in this manner, see Ann Farmer, *Lessons of the Harvey Weinstein Case*, ABA (May 20, 2020), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2020/may/lessons-the-harvey-weinstein-case/ [https://perma.cc/F6VN-D3K8] (using expert testimony to explain coexistence of consensual and coerced sex in victims' experiences, claiming that "[i]t's part of the narrative, and we're going to explain it through experts").

[221] *Cf*. Adam Benforado, *Reasonable Doubts About the Jury System*, ATLANTIC (June 16, 2015), https://www.theatlantic.com/politics/archive/2015/06/how-bias-shapes-juries/395957/.

[222] *See* Ikedi O. Onyemaobim, *The Michael Brown Legacy: Police Brutality and Minority Prosecution*, 26 GEO. MASON U. C.R.L.J. 157, 169 (2016).

[223] *Id*. at 170-72.

[224] *See* Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 298-99 (2017) ("Not giving those instructions about police officer testimony when requested by the defense is unfair and contrary to reality.").

[225] For a discussion of the effectiveness of personal narratives about experiences with stop and frisk in the civil rights litigation context, see Futrell, *supra* note 209, at 1626-27. Pursuing such prosecutions and accordingly opening the door for such testimony will have a great impact on judges who, by virtue of their role in presiding over a courtroom, will hear such testimony far more frequently than any individual juror. *See infra* notes 235-38 and accompanying text.

evidence has also proved critical in the #BlackLivesMatter movement on social media.[226] Sometimes even helping to counteract the weight of police testimony, "[v]ideo evidence is at its most powerful and least ambiguous when it can contradict a false account given by the police."[227] In some cases, video evidence may also provide an avenue for victims to provide a narrative when they otherwise could not—although George Floyd cannot testify to his infamous interaction with the Minneapolis police, in the video of his killing, we can hear him begging former officer Chauvin to remove his knee from his neck, stating that he would willingly enter the police vehicle, and making clear that he could not breathe as a result of the pressure on his body against the ground.[228] Video evidence like this can come from police body cameras[229] or, where officers are not so equipped, surveillance cameras and witnesses' cellphones.[230]

It is important to note that none of these solutions would be effective in isolation. For example, "[a]s long as police officers and the public continue to unjustifiably perceive black people as criminal, dangerous, aggressive, super- and sub-human, the cameras [capturing violence against them] will only reflect and affirm that narrative."[231] Therefore, the narratives perpetuated within the criminal justice system must be evaluated next. Once stories have been told in the courtroom, they appear first in a judge's mind as internalizations of the events and then in judicial writing as recitations of facts. As the next Section will explain, this offers another opportunity to improve storytelling and counteract myths.

2. Storytelling in Judicial Opinions

Judges have the opportunity to present a final narrative of each case before them when they issue written orders and opinions, and they should aim to

[226] *See supra* notes 137-38 and accompanying text.

[227] Caren Myers Morrison, *Body Camera Obscura: The Semiotics of Police Video*, 54 AM. CRIM. L. REV. 791, 797 (2017).

[228] *See* Hill et al., *supra* note 129.

[229] *See* Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NEWS HOUR (June 25, 2020, 4:41 PM), https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability [https://perma.cc/WWP4-FJA3] (highlighting two high-profile cases in which "body camera footage has been used against officers in trials that led to convictions").

[230] *See* Ashley Luthern, *'He Was Not Treated Like a Human'; Jacob Blake's Family Speaks After Shooting by Police*, MILWAUKEE J. SENTINEL, Aug. 26, 2020, at A9 ("A bystander's video of the shooting that swept across social media appeared to show the officer grab Blake by the back of his shirt as he tried to get into the SUV, then shoot him seven times at point-blank range.").

[231] Greene et al., *supra* note 4, at 151; *see also* Morgan A. Birck, Note, *Do You See What I See? Problems with Juror Bias in Viewing Body-Camera Video Evidence*, 24 MICH. J. RACE & L. 153, 172 (2018) ("[B]ody-camera footage . . . when viewed and not given context or qualified with warnings of implicit bias, does nothing more than reinforce beliefs that a juror already has."). Recall the impact of media framing on study participants' view of a dashcam video, discussed *supra* at text accompanying notes 108-09.

include a fair representation of the lived-experience narratives presented to them.[232] Because "[j]udicial opinions select from among the many facts adduced at trial those 'relevant' to what is deemed to be the case's issue to construct a statement of the case[,] the resulting rendition of 'the facts' can thus be seen as a story crafted to support the court's holding."[233] Although practical considerations require judges to include and highlight certain facts and omit others, "decisions about what facts to include can fundamentally change the nature of the opinion and affect the legitimacy of the holding and outcome," and "bias sometimes arises more subtly through omission of facts" than through framing of the facts included.[234]

Advocates can likely begin to overcome some of that bias through the repetition of lived-experience narratives whenever possible in cases involving sexual and/or racial violence. Over time, if judges hear "the particularized accounts of each, and if [they] find that they have an acceptable degree of internal consistency," judges may "begin to have a belief that is not based on [their] own experiences."[235] It is also particularly important to provide judges with counternarratives in the courtroom; as compared to jurors, overextended trial judges actually "may be more likely unconsciously to fall back on the stereotypes and stories, which we all use as a shorthand to categorize people and events in our lives."[236] One judge "describes implicit bias as the result of stereotype formation from one's upbringing, which implicitly becomes a part of one's judicial discretion."[237] Unlike explicit judicial bias, which the appellate process can easily cure, implicit bias subtly influences decisions and often remains undetected.[238]

With a close look, however, evidence of implicit bias does begin to appear. A recent examination of judicial opinions revealed that many of the rape myths found in traditional media "are enduring frames that circle in judicial considerations and writing about sexual violence."[239] In addition to these and

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[232] For a thorough discussion of social counternarratives in judicial opinions, see Kastner, *supra* note 144, at 1129-49.

[233] Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 142 (1997).

[234] Linda L. Berger, Kathryn M. Stanchi & Bridget J. Crawford, *Learning from Feminist Judgments: Lessons in Language and Advocacy*, 98 TEX. L. REV. ONLINE 40, 49 (2019).

[235] *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 1002 (1991); *accord* Delgado, *supra* note 208, at 2439 ("Listening to stories makes the adjustment to further stories easier; one acquires the ability to see the world through others' eyes.").

[236] Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 444-45 (2000).

[237] Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1067 (2019); *see also* Delgado, *supra* note 208, at 2413 ("They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for ourselves.").

[238] *See* Marks, *supra* note 147, at 22.

[239] Holly Boux, *"If You Wouldn't Have Been There That Night, None of This Would Have*

other sex-based stereotypes,[240] there is evidence that judges rely on race-based stereotypes in their interpretations and analyses.[241] This becomes particularly problematic when judges omit race from the recorded facts because racial stereotypes may still explain the opinion's reasoning, and the omission of race makes unconscious reliance on these stereotypes harder to detect.[242]

This reality highlights the importance of transparency in judicial opinions and begins to hint that effective improvements must go beyond simply addressing stereotype-driven word choices or noticeably problematic frames in written decisions. Judges base their decisions "on a mosaic of factors, and [they] must ensure that all are visible and none are distorted."[243] In order to accurately record their assumptions and reasoning in their opinions, however, individual judges must become aware of the influence of implicit bias on their own thinking—that is, they need to understand how they are writing the story in their minds as the trial proceeds, and why.[244] This can proceed through either a judge's own introspection[245] or formal testing designed to uncover implicit biases[246]—or, even better, a combination of the two. For example, the Implicit Association

Happened to You": Rape Myth Usage in the American Judiciary, 40 WOMEN'S RTS. L. REP. 237, 259 (2019).

[240] Ifill, *supra* note 236, at 447 ("[Scholars] have identified the male-centered narratives that undergird legal norms and doctrine.").

[241] *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 5 (1994) ("Today most judges and scholars accept the common wisdom concerning race, without pausing to examine the fallacies and fictions on which ideas of race depend.").

[242] *See* Berger, Stanchi & Crawford, *supra* note 234, at 48-49 (first citing Angela Onwuachi-Willig, *Rewritten Opinion in* Meritor Savings Bank v. Vinson, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 303, 303-21 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016); and then citing Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)) (discussing Dean Angela Onwuachi-Willig's rewrite of *Meritor Savings Bank* to include race of the parties); Troutt, *supra* note 55, at 67-68 (describing deliberate deracialization of facts and its impact on analysis in *Screws*).

[243] Marks, *supra* note 147, at 21.

[244] Good work on this front is already being done by some members of the judiciary. For example, Chief Justice Richard Robinson of the Supreme Court of Connecticut has spoken frequently on the effects of implicit bias on judges and has instituted implicit bias training for Connecticut state judges. For a more in-depth exploration of Chief Justice Robinson's work, see Julia Bergman, *Video: Seeing the Whole Picture on Race*, DAY (Nov. 7, 2019, 7:22 PM), https://www.theday.com/article/20191106/NWS01/191109541 [https://perma.cc/8CD2-UJN8].

[245] *See* Marks, *supra* note 147, at 21 (providing first-person account of judge's decision-making process).

[246] John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 8 (2010) ("Testing for implicit biases might help judges better understand their own potential implicit biases and the extent to which those biases might influence their decisions.").

Test ("IAT") measures implicit attitudes and beliefs,[247] and results from this test can help judges become aware of and take steps to reduce their own implicit biases.[248]

Armed with knowledge about their own implicit biases, judges can then benefit from training about "how th[ose biases] most likely influence judicial decision-making and how their impact can be minimized."[249] Many scholars have expressed support for such training programs, noting that they should be mandated[250] and that existing judicial education programs in most jurisdictions already provide the infrastructure.[251] Further,

> [w]hen judges are aware of the necessity of monitoring their own reactions to check for the influence of implicit biases, coupled with a motivation to defeat those biases, they seem able to overcome them. Thus, increasing awareness of the problems with implicit bias may be the best solution for reducing the impact of these biases in judicial decisions.[252]

However, the success of these efforts requires motivation on the part of each individual judge to overcome their implicit biases, which may be difficult for many judges because "acknowledging that one's decision-making is prone to bias based on race, gender, sexual orientation, and other aspects of identity conflicts with the notion of judicial impartiality."[253] Therefore, formal testing and training programs run the risk of appearing to solve the problem while leaving some judges' enduring implicit biases undetected,[254] necessitating a more comprehensive solution.

"Some researchers posit that [improving] judicial diversity can [also] be a remedy to counter implicit bias; the creation of a diverse bench introduces ideas that were once viewed as foreign to becoming the norm in decision making."[255] Further, greater law clerk diversity could greatly assist all judges in this area—"[a] wider array of experiences and perspectives from people from all walks of

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[247] *Overview*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/education.html [https://perma.cc/W8RB-YCC6] (last visited Nov. 12, 2020).

[248] *See* Breger, *supra* note 237, at 1066 (arguing for usefulness of IAT as part of training for new judges).

[249] Irwin & Real, *supra* note 246, at 8; *accord* Breger, *supra* note 237, at 1066 ("Training for new judges, as well as for sitting judges, is an important step in decreasing the effects of implicit bias in the judiciary."); Bergman, *supra* note 244 (discussing trainings taking place in Connecticut).

[250] Breger, *supra* note 237, at 1065.

[251] Irwin & Real, *supra* note 246, at 8.

[252] Negowetti, *supra* note 210, at 313-14 (footnote omitted).

[253] Anna Spain Bradley, *The Disruptive Neuroscience of Judicial Choice*, 9 U.C. IRVINE L. REV. 1, 27 (2018).

[254] *See* Christina LaRocca, *Evidence as an Avenue for Bias and Prejudice: What Is Missing from the Model Code of Judicial Conduct Rule 2.3*, 31 GEO. J. LEGAL ETHICS 705, 713 (2018) (arguing that "eradicating an adjudicator's own implicit bias would depend upon their level of interest in doing so").

[255] Breger, *supra* note 237, at 1079. Recall the impact of a lack of diversity on the storytelling in traditional media. *See supra* text accompanying notes 92-97, 105-07.

life adds immense value to the judicial decision-making process."[256] An increase in judicial and law clerk diversity could be supported by an increase in diversity within the legal profession as a whole, which is over 85% White[257] and 65% male.[258] It also requires increased awareness of the influence of implicit bias in the recruitment process for judges, which can often be addressed through measures such as standardized interview questions and formal evaluation criteria.[259] These efforts toward an increase in diversity, especially in key areas within the legal profession, would challenge many of the myths and norms that currently infect the legal decision-making process.

The law—often through the judicial opinions that interpret it—both mirrors and influences the broader society in which it operates.[260] When judges unconsciously perpetuate stereotype-based myths, it "validates and sanctions these myths in other institutional and social contexts."[261] In this way, "the attitudes that [judges] project and the ramifications of the decisions [they] make can easily become threads in the fabric of the implicit biases of tomorrow."[262] Therefore, when left unchecked, judicial implicit bias continues to perpetuate the harmful stereotypes discussed earlier in this Note.[263] Of course, this also means that the efforts discussed in this Section hold the potential to reduce the implicit biases of not only the judiciary but also eventually the greater public, further amplifying the impact of existing social movements.[264]

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[256] Danielle Barondess, *New Initiative Seeks to Boost Diversity of Law Clerks in the Federal Judiciary*, ABA: BEFORE THE BAR (July 8, 2020), https://abaforlawstudents.com/2020/07/08/law-clerks-for-diversity-federal-judiciary/ [https://perma.cc/72N5-X9NB] (discussing barriers faced by diverse clerkship applicants and new mentorship program designed to support them).

[257] KATE BERRY, BRENNAN CTR. FOR JUSTICE & AM. BAR ASS'N JUDICIAL DIV., BUILDING A DIVERSE BENCH: SELECTING FEDERAL MAGISTRATE AND BANKRUPTCY JUDGES 9 (2017), https://www.brennancenter.org/sites/default/files/publications/Building_A_Diverse_Bench_0726.pdf [https://perma.cc/5ZYC-FF2B].

[258] *See* Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, ABA (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ [https://perma.cc/D36Q-YJ5D].

[259] BERRY, *supra* note 257, at 17-20 (listing best practices for judicial interviews and organizational meetings).

[260] Franciska Coleman, *Between the "Facts and Norms" of Police Violence: Using Discourse Models to Improve Deliberations Around Law Enforcement*, 47 HOFSTRA L. REV. 489, 500 (2018).

[261] Holly Jeanine Boux & Courtenay W. Daum, *At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge the "Real" Rape Myth in the Criminal Justice System*, 2015 U. ILL. J.L. TECH. & POL'Y 149, 162.

[262] Marks, *supra* note 147, at 22.

[263] *See supra* Part II.

[264] In particular, consider the power and impact of judicial opinions, contrasted with narratives shared on social media platforms, which opponents quickly minimize and attempt

B. *Reconceptualizing the Harm of Physical Intrusion*

While recognizing that changes to the written law often have minimal immediate impact on the day-to-day decision-making within the criminal justice system,[265] this Note would be incomplete without a call for a new legal recognition of the harm of unwanted physical contact in the sexual and police violence contexts.[266] A better understanding and further acknowledgment of this harm should flow naturally from the hearing of lived-experience narratives, as advocated in Section III.A,[267] and from the fact that the criminal law already punishes any nonconsensual physical contact.[268] Therefore, unwanted—yet unpunished—sexual and police contact represent a sort of exception to this general rule, perhaps developed from the historical legal classification of both women and Black people as property rather than persons.[269] Today, the line between harmful and "acceptable" violations of bodily autonomy often blurs in these contexts.

"Sexual violence happens on a spectrum — everything from someone making you uncomfortable . . . to actual physical violence,"[270] and our society normalizes and accepts many forms of violence along this continuum. Most

to silence. For a discussion of such backlash in the #MeToo and #BlackLivesMatter movements, see *supra* text accompanying notes 125 and 141.

[265] *See supra* notes 21-29 and accompanying text (evaluating impact of progressive changes to laws defining consent and force).

[266] The intended goal of this formal legal recognition would not be to prosecute every unwanted contact but rather to create more awareness of the real harm experienced along the full spectrum of physical contact in both sexual harassment and police interactions. Over time, this awareness should help shift the social meaning of interactions that are currently interpreted as normal and routine, perhaps even unnoticed by the average bystander, to recognize that they are harmful. In other words, this should reset the baseline of expected physical contact for all people to where it is set for White men—that is, that other people should not invade one's bodily autonomy. From this baseline, more extreme forms of sexual and police violence become more clearly visible to fact finders as crimes deserving of punishment.

[267] *See supra* Section III.A; *see also* Futrell, *supra* note 209, at 1635 ("The outsider narratives of the anti-stop and frisk movement uncover the ways that aggressive policing causes psychological damage to both individuals and communities.").

[268] *See, e.g.*, Commonwealth v. Burke, 457 N.E.2d 622, 624-25 (Mass. 1983) (applying common law to explain that "it is the *nonconsensual* imposition upon one's person that makes a touching offensive and it is the offensiveness that makes the touching a [criminal] battery"). Of course, the legal definition of such nonconsensual physical contact, and the extent to which the criminal law punishes it, are jurisdiction-specific questions.

[269] *See supra* note 168 (discussing historical dehumanization of women and Black people); *see also* Eva Illouz, *The Key Issue Black Lives Matter and #Metoo Have in Common*, HAARETZ (June 27, 2020), https://www.haaretz.com/us-news/.premium.MAGAZINE-the-key-issue-black-lives-matter-and-metoo-have-in-common-1.8949081 [https://perma.cc/Z8G7-EPFA] ("Power is . . . by definition the access that one group has to the bodies of another group, an access that seems natural to the former and thus goes unpunished.").

[270] Jerkins, *supra* note 116.

would likely agree that the law has been most concerned with the "actual physical violence" end of the spectrum, and many likely believe that its focus should remain there. Nevertheless, the question remains: What exactly is the "violence" inherent in sexual violence? Even where unwanted penetration occurs, rape committed without external force is often not punished or is at least punished less severely, minimizing the very real harm of unwanted sexual contact.[271] "The politics of rape reform needs to go beyond the goal of creating a 'refuge in which women's words are believed,' to that of creating a language in which the full impact of the stories of victims are heard."[272] Toward this end, the law should recognize that "rape, by its nature, is intentionally designed to produce [the harm of] psychological trauma"[273] and send a clear message that such harm is not socially acceptable.[274] Desired sex—more than just consent—should become the normative goal in our society.[275] By striving to eliminate all forms of undesired sex, society can change social norms and expectations, which will eliminate much more conduct that is legally classified as rape.[276]

Police violence also happens on a spectrum, with less extreme forms similarly normalized. For example, to the recipient, a frisk feels intrusive and violative of bodily autonomy in similar ways to a sexual assault.[277] In fact, some scholars have observed that the performance of a frisk includes a sexual dynamic often obscured by heteronormative assumptions.[278] Further, the routine nature of this particular bodily violation likely helps to minimize all types of physical contact between police and citizens, so that "police 'violence' is not *called* violence"[279]

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[271] Allen, *supra* note 25, at 1062; *see also* Anderson, *supra* note 185, at 635 ("Implicit in the subjective assertion that sexual penetration is pleasurable and not harmful is the idea that the extrinsic, violent assault of the classic rape narrative is the central harm of rape.").

[272] Bumiller, *supra* note 29, at 82 (footnote omitted) (quoting GRIFFIN, *supra* note 90, at 26).

[273] HERMAN, *supra* note 158, at 58.

[274] Some scholars have characterized this proposed shift in the law as a necessary but not sufficient condition for such behaviors becoming universally unacceptable. *See* Graw Leary, *supra* note 179, at 34 ("What society needs, rather, is a cultural shift in which society deems the negative behavior no longer socially acceptable. Changes in the law may be necessary to achieve this goal, but they are never sufficient in addressing social problems with criminal dimensions.").

[275] Bailey, *supra* note 15, at 297 (defining desired sex as important normative goal); *cf.* Maya Dusenbery, *Dispatch from the Post-Rape Future: Against Consent, Reciprocity, and Pleasure*, *in* THE FEMINIST UTOPIA PROJECT 17, 17-27 (Alexandra Brodsky & Rachel Kauder Nalebuff eds., 2015) (vividly imagining a world in which desire is the standard and rape no longer exists).

[276] Bailey, *supra* note 15, at 297-98.

[277] Josephine Ross, *What the #MeToo Campaign Teaches about Stop and Frisk*, 54 IDAHO L. REV. 543, 551 (2018).

[278] *See* Paul Butler, *Sexual Torture: American Policing and the Harassment of Black Men*, GUARDIAN (Aug. 14, 2017, 7:00 AM), https://www.theguardian.com/us-news/2017/aug/14/stop-and-frisk-policing-black-men-torture-sexual-harassment-paul-butler [https://perma.cc/VP7R-DQ84].

[279] Newman, *supra* note 62, at 132.

but is considered—and accepted as—merely a routine legal intervention for the benefit of public safety.[280] The landmark stop and frisk case *Terry v. Ohio*[281] acknowledged that such contact "is a serious intrusion upon the sanctity of the person,"[282] but applied a reasonableness test to find such intrusion acceptable.[283] As recognition grows of the historical discounting of the experience of bodily intrusion by disadvantaged groups, the balance reached in this case may be ripe for reassessment. Critical consideration of stop and frisk practices could be a first step in establishing a norm of respect for Black people's bodily autonomy in public spaces. This, in turn, could influence evaluation of more severe forms of police violence in § 242 prosecutions. To help this process along, prosecutors should pursue more cases concerning police use of nonlethal force, which would also support the narrative creation discussed in Section III.A.[284]

CONCLUSION

Under the current model, harmful stereotypes and preconceived narratives still influence assessments of sexual and police violence prosecutions. As a result, fact finders are often reluctant to protect certain victims or to punish certain offenders. However, recent social activism has challenged the stereotypical narratives in our society, and the legal system should follow suit. By encouraging victims to tell their stories fully where possible and by providing appropriate jury instructions and corroborating evidence where necessary, advocates and judges can help ensure that lived experiences—not stock stories—create the narratives in the courtroom. Judges can compound the transformative power of these narratives by writing opinions and orders that accurately convey those experiences, even—in fact, particularly—where a victim's experience departs from a judge's preconceived narrative. Finally, legal scholars and legislatures should reconsider what degree and manner of physical contact constitutes a legally cognizable harm and what contact should continue to be allowed and expected within the bounds of social norms.

[280] *Id.* at 131-33.

[281] 392 U.S. 1 (1968).

[282] *Id.* at 17.

[283] *See id.* at 21-30.

[284] *See supra* text accompanying note 225 (noting that pursuing more prosecutions where victims are alive and available to testify would bring out more testimony concerning police violence).