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CONSTRUCTING RACE AND GENDER IN MODERN RAPE LAW: THE ABANDONED CATEGORY OF BLACK FEMALE VICTIMS

Jacqueline Pittman*

ABSTRACT

Despite the successes of the 1960s Anti-Rape Movement, modern state rape statutes continue to prioritize white male perspectives and perceptions of race, ultimately ignoring the intersectional identity of Black women and leaving these victims without legal protection. This Note examines rape law’s history of allocating agency along gendered and racialized lines through statutory construction and other discursive techniques. Such legal constructions both uphold and cultivate the white victim/Black assailant rape dyad primarily by making the Black male the “ultimate” and most feared assailant. Rape law’s adherence to a white baseline sustains stereotypes of Black men as criminals and predators, which ultimately relegates Black women to a category of lesser and undeserving victims. Re-focusing rape reform and feminist movements on Black female experiences, as well as a rhetorical restructuring of rape laws, can improve rape law uniformity and remove white normativity standards. A departure from the current rhetorical and realized white baseline can eliminate rape law’s delineations of femininity that silence women of color.

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INTRODUCTION

Modern ideas of rape being largely committed by Black men against white women have led to the overcriminalization of Black men and the banishment of Black women from legal protection against sexual violence.\(^1\) As Black men in the United States continue to be incarcera-

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\(^1\) The scope of this Note is limited to sexual assault occurring between a male perpetrator and a female victim. Although there are male victims of sexual assault and female perpetrators of sexual assault, and sexual assault occurs between people of the same gender, these instances are beyond the scope of this Note. The analysis is purposefully limited to male perpetrator-female victim dynamics because this is the context in which modern United States rape laws developed. Additionally, as will be discussed, the relegating of Black female rape victims is partially a product of the white-victim/Black-assailant rape dyad that has and continues to dominate racialized rape myths for many years.
ated at disproportionately high rates and Black women are left out of social justice movements and conversations, these stereotypes have proven especially harmful. This Note engages with racialized baselines that are presumptively neutral\(^2\) to show the ways in which modern rape law prioritizes white male perspectives and perceptions of race. Modern rape law’s adoption of this baseline sustains and centers narratives on the white woman victim/Black male assailant rape dyad, ultimately ignoring the intersectional identity of Black women.

Part I of this Note examines rape law’s history of allocating agency along gendered and racialized lines through statutory construction and other discursive techniques. Part II demonstrates how these legal structures have both cultivated and perpetuated the white victim/Black assailant rape dyad primarily by making the Black male the “ultimate” and most feared assailant, both with racialized heuristics and other criminal laws. Most importantly, Part II explains one detrimental consequence of allowing this white baseline to command the narrative: the abandonment of Black female victims. Section B of Part II details how the law is blind to the intersection of these victims’ racial and gender identities because of the dominating rape dyad and its prioritization of white female victimhood. Lastly, this Note proposes a re-focusing of rape reform and feminist movements on Black female experiences, as well as a rhetorical restructuring of rape laws to improve their uniformity and remove white normativity standards.

This Note critically analyzes the ways in which a white baseline and its resulting delineations of femininity silence women of color\(^3\) in the context of rape laws. By looking at the harms that Black men are subjected to through this dominating baseline—including the perpetuation and recreation of taboos of white female and Black male relationships—one can see how the narratives of Black female victims are dispelled from reform efforts and conversations about violence against women. An assessment of the privileges legally conferred to white assailants and white victims reveals the subordination of Black victims simply by virtue of their nonconformity to the white baseline.\(^4\) The Note argues that the

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3. Carbado and Crenshaw argue that societal circumscriptions of femininity prioritize white women and label this proclivity the “intrafemale separate sphere” which “polic-es the boundaries of female identity in ways that make white women the ‘natural embodiment of women’ and ignore Black women’s experiences.” *Id.* at 117.

modern rape law’s adherence to a white baseline sustains stereotypes of Black men as criminals and predators, which ultimately relegates Black females to a category of lesser and underserving victims.

I. BACKGROUND

In 1972, Angela Davis wrote that, “Black men and women could always contrast their chains with the nominally free status of white working people.” This remains true in modern rape law, where Black men can contrast their designation as sexual predators with white men’s insulation from rape accusations, and Black women can contrast their sexual exploitation with white women’s cherished and protected chastity. While modern rape law feigns neutrality, in reality it endorses white heteropatriarchal ideas of Black criminality and, consequently, allows white victimhood to reign. The tenure of white heteropatriarchy in U.S. rape law is most clearly explained and analyzed through what this Note will refer to as the “white baseline.”

A. The White Baseline

The idea of racialized baselines was first proposed by Devon W. Carbado and Kimberlé W. Crenshaw, who argued that antidiscrimination law “created hidden baselines against which courts frame Black women’s allegations of discrimination as...unfeasible.” Modern rape law can best be analyzed through this same idea of racialized baselines, which, for the purposes of this Note, is specifically a white baseline and will be defined as an invisible mechanism that employs whiteness as a

an ideological proposition imposed through subordination.”) [hereinafter Harris, Whiteness as Property].


6. White heteropatriarchy has been defined by legal scholar Blanche Cook as “a racialized system of power and control based on compulsory heterosexuality, patriarchy, and an imposed gender-binary system.” Blanche Bong Cook, Biases and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh, 85 UMKC L. REV. 567, 573 (2017).

7. See Carbado & Crenshaw, supra note 2, at 118 (designating processes like this and their effects as “colorblind intersectionality”). According to Carbado and Crenshaw, whiteness serves as a baseline where it forms a “cognizable social category,” rather than just modifying certain identities. Id. at 118-19.

8. Id. at 111.

9. Id. at 110.
control group in order to construct and determine innocence and guilt. This baseline functionally centers white narratives and privileges white ideals, while falsely presenting itself as neutral. This Note understands the white baseline as a heteropatriarchal one, in that it prioritizes the white heterosexual male perspective and societal standing over any other conceptions of relationships, sex, or power. In the context of antidiscrimination law, the white baseline operationally pushes Black women to the margins by making gender inequality legible only through white women, and race inequality legible only through Black men. It functions similarly in the context of modern rape law in that it “makes whiteness an unstated baseline” for victimhood, “rather than a modifier of it.” Within rape law, the white baseline is evidenced by determinations of who is, and who is not, a legally legible victim.

Citizenship transmission laws and NHI designations are two other legal areas where whiteness is similarly and silently used as a guideline for rapeability: both non-white foreign women and sex workers, under these laws, lie outside the bounds of legal protection given their incongruity with white normativity (including chastity and ideal allocations of authority and influence). Under current U.S. citizenship transmission laws, white male autonomy is prioritized at the expense of foreign women’s safety and reproductive autonomy. These modern laws provide that an unwed man with American citizenship who fathers a child with a foreign woman abroad is granted the discretion to extend U.S. citizen-

10. See Aya Gruber, Rape Law Revisited, 13 OHIO STATE J. CRIM. L. 279, 295 (2016) (noting the “very gendered and heteronormative nature of current rape dialogue”); see also Cook, supra note 6, at 573 (explaining how gender, class, sexuality, and race functioned to promote and protect white hetero-patriarchal order in the context of the Michael Brown trial, and creating the phrase “white heteropatriarchy” more generally to describe “white supremacy and heteropatriarchy” in areas where both gender and race are important to the functioning of a system and to the analysis of that system).

11. Carbado & Crenshaw, supra note 2, at 113, 118.

12. Id. at 118.

13. See Blanche Bong Cook, Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the “WHP”), 62 YALE J.L. & FEMINISM 57, 64 (2019) (outlining how § 1409 prioritizes white male interest by legalizing their sexual enjoyment of foreign women and excluding non-white persons from citizenship guarantees) [hereinafter Cook, Johnny and the WHP]; Hannah Giorgis, When They See Us and the Persistent Logic of “No Humans Involved,” THE ATLANTIC (June 3, 2019), [https://perma.cc/ZA65-JMWX] (explaining that “NHI” labels contribute to the incarceration of Black men).
ship to that child, or to refuse that child U.S. citizenship. Contrarily, citizenship is transmitted automatically to a child born abroad to an unwed woman with American citizenship and a foreign father. This legalized gender discrepancy leaves non-white, foreign women vulnerable to the leverage of white male power, and “creates a white heteropatriarchal property right in philandering, sexual exploitation, and rape” of women abroad. While non-white men can also exclude their foreign-born children from citizenship, it is nevertheless non-white women and their children who are disadvantaged. Additionally, these laws protect men of the military, which remains both predominantly white and crucial to the American polity, which “as an institution, is synonymous with whiteness.” Therefore, § 1409 not only condemns women who choose to have sexual relations with those outside of the United States, but ultimately “control[s] women’s bodies [both inside and outside of the United States] for racial purity and sexual pleasure.”

A second example of the white baseline functioning in the legal realm is in the phrase “no humans involved” (“NHI”), which has been used by law enforcement to label cases involving Black men, as well as cases involving sex workers. The phrase has been unofficially used by police departments to “describe the murders of people of color” and other cases where the victims are part of marginalized groups. Even as the term has fallen out of favor among law enforcement, “the attitude that the term represents remains pervasive... and finds its parallel in...
the treatment of missing and murdered Indigenous women and girls (MMIWG), thereby continuing the dehumanization and devaluation of particular non-white victims.

Ultimately, modern rape law fails to create a cognizable space for Black women by making fragility legible only through white femininity, and criminality legible only through Black masculinity. Consequently, rape law falls victim to what Carbado and Crenshaw label “colorblind intersectionality”—an “instance[] in which whiteness helps to produce and is part of a cognizable category but is invisible or unarticulated as an intersectional subject position.” This unstated baseline manifests into tangible discriminatory consequences and patent instances of racism, ultimately damaging the Black community. Efforts to dismantle this baseline must match ongoing efforts to extinguish rape culture itself. Efforts to extinguish rape culture have accomplished important changes (such as expanding the legal definition of rape and increasing victim reporting through movements like #MeToo), but still fail to address racial biases within rape law and reform efforts themselves (including cultural and legal stereotyping that selectively legitimize victims and grant impunity to perpetrators).

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24. Id.

25. This Note acknowledges that such blind spots are not unique to sexual assault laws. The intersectional identity of Black female victims has also been analyzed as being invisible in antidiscrimination laws, police arrests, and international human rights law. See, e.g., Carbado & Crenshaw, supra note 2, at 118; Douglas A. Smith, Christy A. Visher & Laura A. Davidson, Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions, 75 J. CRIM. L. & CRIMINOLOGY 234, 244 (1984) (finding that “Black females are significantly more likely to be arrested than their white counterparts”); Gauthier de Beco, Protecting the Invisible: An Intersectional Approach to International Human Rights Law, 17 HUM. RTS. L. REV. 633 (2017).

26. Carbado & Crenshaw, supra note 2, at 118. Modern rape law is one example of colorblind intersectionality, in that white femininity conspicuously articulates legitimate victimhood. Id.

27. See Jasmine B. Gonzalez Rose, Toward a Critical Race Theory of Evidence, 101 MINN. L. REV. 2243, 2252 (2017) (“White normativity and transparency inflict as much damage as overt discrimination and are even more pervasive and difficult to remedy under our current jurisprudence.”).

B. The History of U.S. Rape Law

The word “rape” originates from the Latin word *rapere*, or “to seize.” The label has proven apt for the crime, which emerged as a property crime, committed when one man infringed on the interest of another man by harming or devaluing any white woman under his control. The rape of a woman—whether she be white (as his wife) or Black (as his slave)—by a white man fell neatly into his bundle of property rights. Thus, the white baseline that now exists in modern rape law was not just a consequence of America’s longstanding patriarchy but was actively established by granting white men complete authority over how rape was, and still is, punished and prosecuted. This baseline was also exhibited in the early rape of Black women, which was altogether disregarded—regardless of the assailant’s race—unless it encroached on white men’s property as slaveowners. By grounding rape law in a white baseline, the American legal system has overcriminalized the Black male, and ultimately branded Black women as undeserving and unseen victims. Each element of modern rape law serves as a functional reflection of white male normativity.

31. See, e.g., Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status*, 94 LAW LIBR. J. 459, 463 (2002) (explaining how courts used to not recognize the crime of marital rape and husbands had an automatic immunity from prosecution); Linda A. Foley, Christine Evancic, K. Karnik, Janet King & Angela Parks, *Date Rape: Effects of Asailant and Victim and Gender of Subjects on Perceptions*, 21 J. BLACK PSYCH. 6, 8-9 (1995) (“A White man who raped a Black woman received no penalty.”) [hereinafter Foley et al.].
32. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600 (1990) (“[B]oth the law of rape and Southern miscegenation laws were part of a patriarchal system through which white men maintained their control over the bodies of all black people . . . .”); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103, 118 (“The rape of Black women by white men during slavery . . . was used as a crucial weapon of white supremacy.”).
33. See, e.g., Linda Meyer Williams, *Race and Rape: The Black Woman as Legitimate Victim*, NAT’L INST. MENTAL HEALTH, 21 (explaining how the rape of Black slave women “was regarded as a crime only to the extent that it involved” encroachment on white men’s property); Wriggins, *supra* note 32, at 123 (“During slavery, the rape of Black women by Black men was legal.”).
34. Cf. Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of The Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming*, 17 AGGRESSION & VIOLENT BEHAV. 443, 447 (2012) (“Research has iden-
The primary elements of state rape statutes include: (1) consent as a key determiner,\(^\text{35}\) (2) subtle or outright references to force or coercion,\(^\text{36}\) and (3) the required mental state of the assailant.\(^\text{37}\) A look into the history and current state of these elements shows how rape law follows and maintains the white baseline.

1. The Centrality of Consent

Consent is the central element of all modern rape statutes in the United States and has been since the crime’s outset.\(^\text{38}\) In order to be convicted, an assailant had to have intended to penetrate a non-consenting victim. Unfortunately, definitions of consent, or lack of consent, “continue[ ] to be ‘the single most unresolved issue in the area of rape reform.’”\(^\text{39}\) As of 2008, only seventeen states had included a definition of “consent,” “nonconsent,” “lack of consent,” or “without consent” within their statutes.\(^\text{40}\) Despite its lack of rhetorical clarity in many state statutes, “female nonconsent has long been viewed as the key ele-


\(^{36}\) See, e.g., 10 U.S.C.A. § 920(a) (West) (includes the word “force” four times in the general definition of rape); Craig T. Byrnes, *Putting the Focus Where it Belongs: Mens Rea, Consent, Force, and the Crime of Rape*, 10 YALE J. L. & FEMINISM 277, 278 (1998) (“Many states still require the state to show that force was used in compelling the prosecuting witness’s compliance.”).

\(^{37}\) See, e.g., Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 261 (2018) (crimes are defined by the actual conduct (actus reus) and the mental state of the perpetrator (mens rea)).


ment in the definition of rape." Regardless of its definition, the emphasis on consent makes rape a wholly unique crime by requiring victims “to demonstrate their ‘wishes’” to the assailant. While other crimes may also turn largely on the defendant’s mental state, few so heavily depend on the victim’s role to prove or disprove said mental state. The crime of burglary, for example, requires that the defendant not only knowingly have entered the property, but also intended to steal another’s property. The burglary victim’s efforts to protect or hide their property, or their behavior while the burglary was occurring, are not used as evidence of the defendant’s guilt. The paradox of using consent as a central element of rape while defining it so poorly can often dilute the focus that should be given to an assailant’s behavior, instead shifting attention to the victim’s consenting or nonconsenting behaviors.

Rape laws’ disproportionate focus on consent therefore means that women, “bear[ ] the risk of miscommunication or abuse.” Placing this risk on female victims is the first way in which U.S. rape law adheres to a white baseline. While consent’s inconsistent definition disadvantages white and Black women alike by requiring victims to work against longstanding beliefs of female sexual passivity, presuming that victims have equal opportunity to revoke or deny consent disproportionately injures Black women. Consent requires judicial examination of a victim’s behavior before and during the crime, which still often leads to scrutiny of a victim’s sexual history. White women have historically

41. SUSAN ESTRICH, REAL RAPE 29 (1987); see also Robin D. Wiener, Shifting the Communication Burden: A Meaningful Consent Standard in Rape, 6 HARV. WOMEN’S L.J. 143, 143-44 (1983) (“Traditionally, criminal statutes defined rape as sexual intercourse with a woman without her consent . . . .”); Jeffrey J. Pokorak, Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities, 7 NEV. L.J. 1, 22 (2006) (both the antebellum and postbellum South dictated victimhood by presuming that white women would never consent to sex with Black men, and Black women had no such ability to consent).

42. Susan Estrich, Rape, 95 YALE L.J. 1087, 1122 (1986).

43. Byrnes, supra note 36, at 278.

44. Andrew E. Taslitz, Race and Two Concepts of the Emotions in Date Rape, 15 WIS. WOMEN’S L.J. 3, 16 (2008).

45. See id. at 20-24 (explaining how, throughout history, there has been an idea that “normal women” have “little sensual desire” and “lessened need”) (quoting PEGGY REEVES SANDAY, A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL 126 (1996)). Without a uniform definition of consent, passivity fills in as a substitute, or proxy, for determining female sexual desire. Id. at 29-30 (“Because the law rarely defines consent, jurors’ own normative notions of consent thus become the law for the particular case . . . . The gendered conceptions of the emotions so permeate our culture that they will at least subconsciously affect juries’ judgments of responsibility.”).

46. Byrnes, supra note 36, at 278.
been granted more legal protection from rape than Black women, making rape, both culturally and legally, “something that [could] only happen[ ] to white women.” Assuming that consent is an equally viable option for all victims, regardless of race, ignores the law’s history of deeming Black women unrapeable. The reality is that history has functionally impaired Black female victims’ ability to fulfill requirements of nonconsent and to overcome such judicial scrutiny. Modern rape law fails to ask: To whom has the emergency “nonconsent” exit sign historically been offered to, and who has had to consent to survive?

2. Force, Coercion, Resistance, and Acquaintance Rape

Prior to the 1960s, the majority of state rape statutes included an “utmost resistance” provision, requiring evidence of physical resistance on the part of the victim in order to prove their lack of consent. Today, over 50% of states still have forcible-compulsion requirements for first-degree rape. State definitions of “forcible compulsion” and “force” vary from “physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person” to “the use of physical force or physical violence” or the use of threats to use such violence. Louisiana state law still includes an “utmost resistance” re-

47. Infra Part II.B.; Harris, supra note 32, at 599.
48. Harris, supra note 32, at 599.
49. See Foley et al., supra note 31, at 14-15 (finding that Black women “maintain that vestiges of the sexual mores dating back to slavery still exist in modern American culture—rape of a Black woman still is not considered criminal behavior” and as such, Black women do not feel that they would be perceived as “real rape victims”); see also Reema Sood, Biases Behind Sexual Assault: A Thirteenth Amendment Solution to Under-Enforcement of the Rape of Black Women, U. MD. L. J. RACE, RELIGION, GENDER & CLASS 405, 409 (2018) (“The mentality of White slave owners created a lasting stereotype of Black women that contributes to their disparate treatment.”).
50. See supra notes 47-48 and accompanying text.
51. Estrich, supra note 42, at 1099, 1122 n.105, 1123; see also Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51, 55-57 (2002); Harris, supra note 35, at 619-20. It wasn’t until 2013 that the FBI removed the word “forcible” from its definition of rape. Federal Bureau of Investigation, Rape, FBI: UNIF. CRIME REP. (2013), [https://perma.cc/PF3X-6LYV].
53. ARK. CODE ANN. § 5-14-101 (West 2021); N.M. STAT. ANN. § 30-9-10 (West 1978).
54. N.M. STAT. ANN. § 30-9-10 (West 1978).
quirement by the victim for claims of first-degree rape, while a minority of other states, including Washington, require “resistance” when words or conduct “seem to imply consent.” Here, the word “seem” acts as an escape hatch, allowing any assailant to avoid liability by asserting their subjective conclusion that consent was present. It simultaneously requires women to physically resist as compensation for men failing to take other non-physical communications of nonconsent at face value.

Statutory incorporation of physical resistance and force is a subscription to the white baseline. It assumes that all victims have the requisite level of agency and safety to resist their assailants in the vulnerable moments of an attack. Thereby, it implicitly favors those victims who might feel more confident that their claims will be believed, those who might perceive police intervention as relief rather than as a threat in itself, and those who do not fear retaliation from their assailant or a third party. This component of modern rape statutes also ignores the prevalence of frozen fright reactions—a common neurological reaction to danger, where one’s fear circuitry impairs or paralyzes an individual’s mobility, preventing them from resisting regardless of consent.

Most importantly, conditioning certain rape convictions on victim resistance, use of physical force, violence, or threats by the assailant, also severely lessens protections for rape victims by overlooking instances of acquaintance rape. Eighty percent of rapes are committed by someone the victim knows. This number jumps to 93% in the case of adoles-

57. See, e.g., Pokorak, supra note 41, at 22 (requiring proof of force or physical resistance is equivalent to proof of nonconsent).
58. See infra notes 95-97 and accompanying text; Byrnes, supra note 36, at 281 (force requirements incorrectly assess a victim’s communication of consent or nonconsent).
59. James W. Hopper, Why Many Rape Victims Don’t Fight or Yell, THE WASH. POST (June 23, 2015), [https://perma.cc/L5HR-WEBG].
60. Acquaintance rape does not involve reactions such as “screaming, fighting, crying, and pleading,” and therefore “is less likely to be perceived as ‘real rape’ . . . [that it] may be seen . . . as within the realm of normative acts.” R. Lance Shotland & Lynne Goodstein, Just Because She Doesn’t Want to Doesn’t Mean It’s Rape: An Experimentally Based Causal Model of the Perception of Rape in a Dating Situation, 46 SOC. PSYCH. Q. 220, 220 (1983) (citations omitted).
cent victims. A survey of more than 6,000 victims of acquaintance rape found that only 27% considered themselves victims of rape, even though all of their assaults met the crime’s legal definition. The “known attackers” involved in acquaintance rape are “the least likely to be arrested, prosecuted, and convicted.”

Since acquaintance rape is less likely to involve typical notions of physical violence, including these terms in judicial opinions and rape statutes leaves a large portion of rape victims unprotected by the law. Unfortunately, “the difficulties of an African American woman who is sexually assaulted by an acquaintance or a date are intensified.” Black female victims tend not to be believed when reporting sexual assault involving a Black male assailant (who may be the victim’s acquaintance or romantic partner), given the disproportionate focus on the white victim/Black assailant dyad. In other words, it is simultaneously true that most rapes are acquaintance rapes, and the tendency to not believe Black women victims is amplified when a Black male assailant is involved. Therefore, allowing instances of acquaintance rape to fall through the cracks of modern rape law with force and resistance clauses disproportionately harms Black women. The physical combativeness el-

62. Id.
63. Acquaintance Rape, ILL. COAL. AGAINST SEXUAL ASSAULT 1 (2021), [https://perma.cc/HFX3-7LNR].
64. Robinson, supra note 40, at 628 (quoting Estrich, supra note 41, at 11).
65. Id. at 657:

[M]ost acquaintance rape victims do not suffer physical . . . . Although victims may experience physical manifestations of their emotional harm, such as sleep and eating pattern disturbances, acquaintance rape victims rarely suffer external or internal physical injuries. Acquaintance rapists typically rely on verbal coercion or manipulation in combination with their size, rather than physical violence, to secure the victim’s submission. As a result, the circumstances surrounding acquaintance rape often fail to meet the statutory definition of rape.

See also Byrnes, supra note 36, at 267 (noting that acquaintance rape can “arise from more ambiguous circumstances” that would not result in any physical altercation or resistance).
66. Foley et al., supra note 31, at 8.
67. Id. (“White women reporting being sexually assaulted by Black men are believed, whereas Black women reporting being sexually assaulted by Black men tend not to be believed. Therefore, the difficulties of an African American woman who is sexually assaulted by Black men tend not to be believed.”).
68. Racism and Rape, NAT’L ALL. TO END SEXUAL VIOLENCE (last visited Feb. 6, 2022), [https://perma.cc/f669-Z6VR] (identifying a “cultural obsession with black-on-white stranger rape cases” that comes “at the expense of the vastly more common intra-racial acquaintance rape”) (emphasis added).
69. See infra notes 70-71.
ement that is rarely present in acquaintance rape reflects the law’s adherence to white normativity: “White women are not required to resist Black men, but Black women are.”

3. Knowledge as Mens Rea

U.S. rape laws overwhelmingly include both an actus reus and a mens rea. Actus reus describes the actual act that “comprise[s] the physical elements of a crime as required by statute” or, put differently, the action that the assailant has to do to have actually committed the crime. Conversely, mens rea is “the state of mind statutorily required in order to convict a particular defendant.” Actus reus proves to be of little importance in rape laws, whereas mens rea is crucial to determining culpability. As a general intent crime, rape includes a mens rea that typically focuses on whether the assailant wanted to have sex without consent (the case in many stranger rape cases) or knew he did not have consent (the case in many acquaintance rape cases). In either case, knowledge is the minimum requirement: did the assailant know that the victim was not consenting? Requiring a mens rea of knowledge for the nonconsent aspect of rape places the narrative squarely in the assailant’s hand, thus depriving victims of agency not only during their assault, but afterwards as well, as they attempt to prove their assailant’s state of knowledge.

70. Foley et al., supra note 31, at 9 (“The standard for defining forced sexual intercourse as rape when it involves a Black woman and a Black man is higher than that required when the participants are a White woman and a Black man.”).

71. The act (or actus reus) that had to have been intended by the assailant is, nearly universally, either: (1) intercourse without consent, or (2) intercourse coerced by force or threat. Robin Charlow, Bad Acts in Search of a Mens Rea: Anatomy of a Rape, 71 FORDHAM L. REV. 263, 268-69 (2002).

72. Cornell Law School, Actus Reus, LEGAL INFO. INST. (last visited Dec. 14, 2021), [https://perma.cc/AFN6-JUC7].

73. Cornell Law School, Mens Rea, LEGAL INFO. INST. (last visited Oct. 24, 2021), [https://perma.cc/Y3CH-8S63].

74. Robinson, supra note 40, at 633. Classifying a crime as general intent means that the defendant had to have intended to “perform some act, but without a wish for the consequences that result from that act.” Cornell Law School, General Intent, LEGAL INFO. INST. (last visited Oct. 24, 2021) [https://perma.cc/D95T-TSB7]. See generally Cornell Law School, Specific Intent, LEGAL INFO. INST. (last visited Oct. 24, 2021), [https://perma.cc/L3N]-55K] (As compared with general intent, specific intent is an “actual intent to perform some act, along with a wish for the consequences that result from that act.”). In other words, the assailant, to be convicted, had to have intended to penetrate a non-consenting victim, but can be convicted absent any evidence that he intended to cause physical harm, fear, or pain to the victim.

75. Charlow, supra note 71, at 268-69.
Here, the law curates itself through a white baseline: rape cases disproportionately turn on the assailant’s state of mind towards the victim’s consent.76

[A]lthough it is his mental state that matters, it is her actions that are scrutinized at trial, from her moral judgments77 to her behaviors on the night the crime occurred.78 Rapists often argue that the victims behaved in ways that led him to believe that she consented . . . [t]hus, the trial process itself diminishes and demeans her further.79

Allowing the assailant’s state of mind to determine consent does double damage to the Black community. While a white male assailant can control their narrative with ease, a Black male assailant has a much more difficult time, having to work against deeply engrained assumptions of Black criminality.80 Simultaneously, the Black female victim is further disempowered and silenced through the mens rea of knowledge. Already lacking agency and believability of their experiences given ideas of Black female promiscuity,81 Black female victims are harmed in a fundamentally different way by the assailant’s narrative control than are white female victims.82 While the latter possess an outward conformity to the white baseline that often leads to reflexive assumptions of fragility and innocence,83 the former lack even the option of conformity in order to combat the assailant’s relaying of the incident.84

76. Id.
77. See, e.g., Clare McGlynn, Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence, 81 J. CRIM. L. 341, 371-72 (2017).
78. See, e.g., Eithne Dowds, Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force, 83 MOD. L. REV. 1, 48 (2020) (consent-based models “invite a disproportionate focus on the actions or inactions of the complainant, rather than on the behaviour of the defendant”).
79. Taslitz, supra note 44, at 62.
80. See infra Part II.A.
81. See infra Part II.B.1.
82. See, e.g., Foley et al., supra note 31, at 8 (“The history of race relations in this country makes accusations of sexual assault more difficult for Black women than for women from other ethnic backgrounds.”).
83. Blanche Bong Cook, Something Rots in Law Enforcement and It’s the Search Warrant: The Breonna Taylor Case, 102 B.U. L. REV. 1, 74 (2022) (identifying the “unyielding narratives of innocence that cling to white bodies” versus “the ceaseless demonization of Black bodies”) [hereinafter Cook, Something Rots in Law Enforcement].
84. “There is a difference between the hope that the next makeup kit or haircut or diet will bring you salvation and the knowledge that nothing can.” Harris, supra note 32, at 597.
In many ways, a mens rea of knowledge seems to reestablish the resistance requirement that the legal system is so widely praised for having removed. Actively resisting her assailant by creating physical evidence on his body to prove that she fought back would be the most airtight way for a Black woman victim to prove that she conferred knowledge of her nonconsent onto her assailant. Seemingly, only through evidence of physical hardship and active defiance, may the victim turn the subjective analysis of the assailant’s knowledge to an objective fact, thereby outwardly refusing the presumption that Black women are always consenting. Consequently, absent a “he said-she fought back” narrative, rape is a “he said-she said” crime and a losing narrative for Black women.

A mens rea of knowledge inevitably allows victim-blaming strategies to be used in legal determinations of guilt—strategies that adhere to the white baseline by advancing white ideals of fragility and chastity. Prior to the 1970s Anti-Rape Movement, it was common for a victim’s sexual history to be admitted as evidence and used to argue the probability of her consent, or lack thereof. Although rape shield laws, adopted by most states by the 1980s, barred the admission of victims’ sexual histories, victim-blaming remains rampant. For example, women that continue relationships with their assailants are considered “imperfect witnesses” given that they had previously “consented” over a period of time, and certain victim attributes can still be called into evidence, including what they were wearing and how much they were drinking on the night of their assault. Allowing such evidence perpetuates archaic

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85. See supra notes 51-56 and accompanying text.
86. See infra Part II.B.1.
87. See Barbara Bradley Hagerty, American Law Does Not Take Rape Seriously, The ATLANTIC (Jan. 28, 2020), [https://perma.cc/5H AD-MRDC]. Importantly, studies show that “about 5 percent of rape allegations turn out to be false—no higher than any other crime.” Id.
88. See infra Part II.B.1; Grubb & Turner, supra note 34, at 447 (“[W]omen who do not behave in a manner consistent with the cultural stereotypes of a ‘good girl’ will be more likely to be blamed . . . and will be regarded as deserving to be raped.”).
89. Byrnes, supra note 36, at 280.
91. Grubb & Turner, supra note 34, at 444 (“A large body of literature has . . . revealed that individuals who have become the victims of crime are often judged as being responsible for their own fate.”).
92. See Hagerty, supra note 87.
93. See, e.g., Hagerty, supra note 87 (“Society . . . may have abandoned the chastity standard and accepted women should be as free to express their sexuality as men. But in effect, the law has not caught up.”); OHIO REV. CODE ANN. § 2929.12(C)(1)-(2) (2014) (allowing the sentencing court to consider, “as indicating that the offender’s conduct is less serious than conduct normally constituting the offense”: (1) whether
ideas of some women being more or less rapeable than others and ignores complex power dynamics inherent in rape. 94 Legally making rape into a crime of violence, where any reasonable victim would run afterwards, rather than a crime of power, where a woman’s relationship to their assailant might be far more complicated in the aftermath of an assault, disproportionately harms Black female rape victims. These victims may feel a greater obligation to stay with their assailant out of loyalty to their community, 95 are more likely to lack the resources necessary to leave their assailant, 96 and may feel discouraged to seek help. 97 Inarguably, any statutory element that encourages, or even permits, victim blaming is an adherence to the white baseline, given that such victim blaming strategies disproportionately harm Black women, while preserving white heteropatriarchy. 98

“[t]he victim induced or facilitated the offense” and (2) “[i]n committing the offense, the offender acted under strong provocation”); Foley et al., supra note 31, at 9 (“Seldom are witnesses present at the rape, leading to a case involving the word of the male defendant against the word of the female victim . . . . Jurors who believe the victim contributed to the victimization attribute less guilt to the defendant.”); Grubb & Turner, supra note 34, at 445 (citing findings that “prosecutors were less likely to take on rape cases when a victim admitted to having flirted with an offender prior to an incident, allowed him to take her home, consented to some sexual acts, or was intoxicated at the time of the assault”).

94. See, e.g., EUGENE D. GENOVESE, ROLL JORDAN ROLL 428 (1976):

[Black enslaved] women paid a higher price than the white women or the men, white and black, for it was they who suffered the violence and the attendant degradation of being held responsible for their own victimization, while their white mistresses . . . became, with or without their own consent, symbols of asexual purity.

See also Sood, supra note 49, at 409 (stereotypes of promiscuity that justified the systematic rape of Black women in slavery inform modern understandings of their sexual abuse, as “the biases and judgments embedded themselves in modern consciousness”); cf. Gruber, supra note 10, at 295 (emphasizing that sexual assault can stem from a variety of inequities, including but not limited to prison dynamics and homophobia).


97. Foley et al., supra note 31, at 17 (citing Black women’s continued reluctance to report sexual assaults).

98. See, e.g., Deborah Tuerkheimer, How U.S. Sexual-Harassment Law Encourages a Culture of Victim Blaming, TIME (Oct. 5, 2021), [https://perma.cc/W5CM-6JDE] (discussing Meritor Savings Bank v. Vinson and noting that evidence admitted at trial re-
Expanding the analysis beyond the Black/white paradigm is useful in this instance to reveal how a mens rea of knowledge is reflective of a white baseline that emphasizes violence over power. Requiring undocumented immigrant women to come forward and make claims against their assailants is often unfeasible, since doing so could risk their immigration status, employment, or even deportation. Additionally, incarcerated females—a population where Black, American Indian, and lesbian or bisexual women are overrepresented—who experience rape by correctional officers lack equitable agency in relation to their assailants and thus are ill-positioned to challenge assailants claiming consent was present. In both of these instances, non-white victims are damaged by a mens rea of knowledge, given their lack of power to either physically or verbally combat assailant claims of consent.

II. ANALYSIS

A. Black Men as Perpetrators

An analysis of modern rape law’s intersectional blind spot for Black women would be incomplete without considering the legal treatment of accused Black men. The law’s inordinate focus on Black male assailants is operative in its concurrent neglect of Black female victims. A

99. See Nat’l All. to End Sexual Violence, supra note 68, ("[U]ndocumented immigrant women who are raped often cannot turn to the authorities because they fear deportation.").


101. See Terry A. Kupers, Role of Misogyny and Homophobia in Prison Sexual Abuse, 18 UCLA WOMEN’S L.J. 107, 122 (2010) (analyzing prison rape and noting that prisons are designed to maintain a huge power imbalance).

102. See, e.g., Foley et al., supra note 31, at 10 (“Black men who rape White women still receive the harshest sentences.”).

103. Although many historians impute white southerners’ fear and sexual paranoia of Black men into the antebellum period, this anxiety and obsession over Black on white rape is largely manifested in Reconstruction years amid larger efforts of white retaliation. Diane Miller Sommerville, The Rape Myth in the Old South Reconsidered, 61 J.S. Hist. 481, 504-06 (1995) [hereinafter The Rape Myth]; GENOVESE, supra note 94, at 461-62; see also Bardaglio, infra note 104, at 751 (studying cases of rape in the Old
glimpse into the history of rape law makes obvious how the most feared and prosecuted rape dyad became the Black male assailant with the white female victim—what will be referred to as the “rape prototype” hereinafter. It is important to note that, despite emphasis on this dyad, 57% of accused rapists are white compared to 27% being Black, and intraracial rape is far more common than interracial rape. This confirms that such beliefs and their manifestations are products of racialized fear and stereotypes, not reality.

The early property component of rape law reflected white men’s complete legal authority over their white wives. Ancillary coverture laws denied these women any separate legal existence from their husbands. Granting white men these property and legal rights eliminated the possibility of them being perceived as a threat to white women—such laws embodied romantic paternalism, framing white men as overseers and protectors to their white spouses, rather than as threats or as potential assailants themselves. Black men, as a result, were the residual-

104. See, e.g., Peter W. Bardaglio, Rape and the Law in the Old South: "Calculated to Excite Indignation in Every Heart," 60 J.S. HIST. 749, 749-53 (1994) (outlining appellate decisions in the Old South to demonstrate "the preoccupation of legislators and judges with preventing sexual relations between white women and [B]lack men"); Jacquelyn Dowd Hall, "The Mind That Burns in Each Body": Women, Rape, and Racial Violence, in POWERS OF DESIRE, THE POLITICS OF SEXUALITY 334 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983) (lynchings in the 1920s and 1930s resulted from the image of the lustful and dangerous "black rapist" and "the white victim—young, blond, virginal"); Williams, supra note 33, at 7 (referring to this phenomenon as "the myth of the brutal black rapist"); Angela Onwuachi-Willig & Anthony Alfieri, (Re)Framing Race in Civil Rights Lawyering, 130 YALE L.J. 2052, 2077 (2021) (explaining America’s "longstanding fears of miscegenation and stereotypes about [B]lack-male sexual predators who uncontrollably desire white women and must be tamed by lynchings").

105. RAPE, ABUSE, & INCEST NAT’L NETWORK, supra note 61; NAT’L ALL. TO END SEXUAL VIOLENCE, supra note 68.

106. CATHERINE CLINTON, THE PLANTATION MISTRESS: WOMAN’S WORLD IN THE OLD SOUTH 33 (1982) (noting that plantation mistresses were “deprived” of any legal identity as a result of the rules made “by males in the legislature and in the courts"); SALLY G. McMILLEN, SOUTHERN WOMEN: BLACK AND WHITE IN THE OLD SOUTH 46 (Wiley & Sons 2017) (1992) (“Slaves and women had to accept their inferior position, and white men had the right to command those they felt were innately subordinate. Social relations in the private sphere affected political ideas and institutions in the public sphere.”).

ly identified danger: threatening white women’s perceived chastity and infringing on white men’s property rights and enjoyment. Because white women were legally encompassed with their husband, any transgression against them equated to a transgression against the domineering white man.

As white women gained economic and legal autonomy within their marriages after the Civil War, surviving provisions of rape laws still ensured the continued vilification of Black men. Prior to the Civil War, eight jurisdictions required the death penalty for any Black man who raped or attempted to rape a white woman, while zero jurisdictions mandated the death penalty for white assailants. Between 1930 and 1979, 89% of the men executed for rape in the United States were Black. Additionally, as late as 1969, some states, including Georgia, only required alleged assailants to be within “striking distance” of a victim, rather than to have actually made physical contact with the victim, in order to obtain a conviction for attempted rape. As such, “it was assumed that there would be no cause for confrontation of a white female by a black male unless there was the intent to rape.”

These laws not only functioned to preserve white men’s spot on top of the prevailing racial hierarchy by protecting both their property and social position, but also continued the criminalization and dehumanization of Black men that had begun during slavery. After emancipation, a new “violent intolerance” of white female-Black male intimate re-

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108. See Crenshaw, supra note 28, at 1276 n.118.
109. See Hong, supra note 37, at 261 (early rape laws were structured to compensate the husband or father of the victim, not to make the victim whole).
111. Williams, supra note 33, at 17.
112. Harris, supra note 32, at 600.
113. See Williams, supra note 33, at 20 (citing Jackson v. State, 91 Ga. 322 (1893)).
114. Id.
115. Crenshaw, supra note 28, at 1276 n.118; see also Sood, supra note 49, at 409 (slave-owners’ legal right to, and exploitation of, enslaved women’s bodies supported white masters’ goals of “increase[ing] their power and dehumanize[ing] their property”); Hall, supra note 104, at 332 (sexual access to Black women was a “cornerstone of patriarchal power”).
116. See Elizabeth Kennedy, Victim Race and Rape: A Review of Recent Research, THE FEMINIST SEXUAL ETHICS PROJECT AT BRANDEIS UNIVERSITY, at 6 (Sept. 2003), [https://perma.cc/Y7E2-8KJC] (“[t]he one-sided effect of rape laws—punishing almost exclusively black men accused of raping white women—may also have served as a more subtle means of perpetuating slavery” by reinforcing racial hierarchies); Williams, supra note 33, at 9 (explaining how rape law made any contact between white women and black men seem threatening).
relationships developed as Black men’s newfound power encroached on white men’s control over social and political narratives. The beginning of the Reconstruction years carried with it the “new Negro crime”—a label conceived by Klansman to refer to Black men’s desire to rape white women. Anti-miscegenation laws that criminalized interracial marriage and intimate relationships, constitutional for nearly a century after the Reconstruction era, reinforced taboos surrounding intimate relationships between white women and Black men. Throughout these years, white men used these taboos as well as their control over white women as an avenue to persecute Black men and control Black bodies. In having access to both Black men and white women, white men fueled the rape prototype to maximize their own power, and rape laws were fashioned to reflect these mechanisms of power.

Despite the appearance of passivity, white women played their own critical role in the slaveholding South and in the unrelenting brutality


120. Calvin John Smiley & David Fakunle, *From 'Brute' to 'Thug': The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 1, 5 (2016) (outlining how accusations of raping a white woman were the most prevalent foundations for continued lynching of Black men post-slavery); Patton & Snyder-Yuly, *supra* note 117, at 863 (explaining how the new Negro crime was a continuation of Klansman using “women as markers in symbolic power plays between men”); Harris, *supra* note 32, at 599-600 (explaining how, even in the late 1800s, scholars such as Ida B. Wells recognized rape and miscegenation laws as a source for racial persecution and control).

121. See Sommerville, *supra* note 38, at 247 (“In perpetuating the rape myth, the white South assured its women that only greater dependence on men and restricted mobility could ensure their safety and protection. The rape myth not only served the political ends of white supremacists but reined in wayward white women as well.”); Williams, *supra* note 33, at 15.

122. E.g., Stephanie E. Jones-Rogers, *They Were Her Property: White Women as Slave Owners in the American South* 8-13 (2019); Catherine Clinton, *The Plantation Mistress: Woman’s World in the Old South* xv, xvi (1982); Becky Little, *The Massive, Overlooked Role of Female Slave Owners*, History (Mar. 12, 2019), [https://perma.cc/3RHP-52G8] (white women made up approximately 40% of all slaveowners).
against Black men.\textsuperscript{123} In an effort to hide socially unacceptable relationships with Black men, white women would claim rape in instances of consensual sex or stay silent when their Black partners were terrorized.\textsuperscript{124} Again, the spirit and effects of these transgressions continued long \textit{after} Emancipation.\textsuperscript{125} Reconstruction introduced a new language of sexualized politics that retreated from republicanism to, instead, reveal the dangers of racial equality.\textsuperscript{126} The cultivation of this fear had tangible, persisting consequences: one incident of a white woman accusing a Black male of sexual assault in the early 20th century resulted in the death of approximately 300 Black people and in 9,000 Black people losing their homes.\textsuperscript{127} These accusations also advanced ideas of white women being particularly vulnerable to the supposed aggression of Black men.

By regulating and criminalizing intimate relationships between Black men and white women, the law actively constructed the rape prototype\textsuperscript{128}—a crucial element to rape law’s white baseline. Today, an overemphasis and over prosecution of Black men raping white women maintain perceptions of Black men as cognizable threats.\textsuperscript{129} This rape prototype is a racially fueled myth: in reality, 76\% of rapes and sexual assaults for whites are intraracial, and approximately 86\% of rapes and sexual assaults for Blacks are intraracial.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{123} See Harris, \textit{supra} note 32, at 599 (“[F]or Black people . . . ‘rape’ signified the terrorism of black men by white men aided and abetted, passively (by silence) or actively (by ‘crying rape’), by white women.”).
\item \textsuperscript{124} \textit{Id}; Patton & Snyder-Yuly, \textit{supra} note 117, at 864.
\item \textsuperscript{125} See, e.g., Nora Elizabeth Grace Williams, \textit{They Done a Very Bad Act: Rape in the Civil War and Reconstruction} 97 (2021) (Honors thesis, Wofford College) (on file with Digital Commons, Wofford College) (“The ways in which white and Black women redefined womanhood were greatly influenced by the sociopolitical environment of Reconstruction. Rape, citizenship, white supremacy, Southern nationalism, and misogyny all coexisted in the fractured postwar Southern society.”).
\item \textsuperscript{126} Martha Hodes, \textit{The Sexualization of Reconstruction Politics: White Women and Black Men in the South after the Civil War}, 3 J. HIST. SEXUALITY 402, 404 (1993).
\item \textsuperscript{127} Smiley & Fakunle, \textit{supra} note 120, at 5 (referencing the 1921 Tulsa race massacre).
\item \textsuperscript{128} See BRIDGES, \textit{supra} note 119, at 132-33 (explaining illegal and voidable nature of inter-racial relationships); IAN HANEY LÓPEZ, \textit{WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE} 78, 79 (10th anniversary ed., 2006) (the law “construct[s] social systems of meaning” and influences the meanings we ascribe to looks).
\item \textsuperscript{129} Onwuachi-Willig & Alfieri, \textit{supra} note 104, at 2077 (arguing that “the lawyering process serves as a rhetorical site for constructing racialized narratives and racially subordinated visions” of certain racial groups).
\item \textsuperscript{130} Patton & Snyder-Yuly, \textit{supra} note 117, at 864.
\end{itemize}
1. Odds Already Stacked

The legal system has set the scene for the Black male to be the ultimate criminal and perpetrator of rape, thus automatically creating a losing game for Black assailants when they are inevitably compared to white assailants.\(^{131}\) Black men are seen and conceptualized against a backdrop of laws that have unrelentingly overcriminalized and racialized their behaviors. The overpolicing of Black neighborhoods,\(^{132}\) 1970s war on crime,\(^{133}\) mandatory minimums,\(^{134}\) and three-strikes laws all operationally associated Blackness with criminality and have left hundreds of thousands of Black Americans in prison today.\(^{135}\) Even outside of the context of rape, Black men have a one in three lifetime likelihood of imprisonment, as compared to a one in seventeen likelihood for white

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131. See Bridges, supra note 119, at 138 (identifying mass incarceration as an area where the law ideologically constructs race).

132. Akwasi Owusu-Bempah, Race and Policing in Historical Context: Dehumanization and the Policing of Black People in the 21st Century, 21 THEORETICAL CRIMINOLOGY 1, 29 (2017) (detailing the statistics on Black over-representation in policing outcomes and how such over-representation results in “criminality [being] viewed as an inherent Black characteristic”).

133. See, e.g., Lauren Wright, Black, White, and Read All Over: Exploring Racial Bias in Print Media Coverage of Serial Rape Cases 4 (2017) (Ph.D. dissertation, University of Central Florida) (on file with University of Central Florida Library) (explaining how policies meant to address drug crimes in the 70s were, in reality, a war on race with consequences that have “persisted for decades”); Knoll D. Lowney, Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws? 45 WASH. U. J. URB. & CONTEMP. L. 121, 123 (1994) (demonstrating how, in the midst of the war on drugs, African Americans were only 12% of illegal drug users in the U.S. but 44% of all drug arrests).

134. Mandatory minimums prolong incarceration by requiring judges to impose minimum prison sentences without the possibility of parole. Marc Mauer, Long-Term Sentences: Time to Reconsider the Scale of Punishment, 87 UMKC L. REV. 113 PROJECT (2018). These laws focus on first time drug-offenders, meaning the affected defendants are “almost uniformly” African Americans. Eduardo RC. Capulong, Andrew King-Ries & Monte Mills, “Race, Racism, and American Law”: A Seminar From the Indigenous, Black, and Immigrant Legal Perspectives, 21 ST. MARY’S L. REV. ON RACE & SOC. JUST. 1, 16-17 (2019).

135. Three strikes laws mandate harsher penalties for defendants with three felony convictions—usually life sentences. Ranya Shannon, 3 Ways the 1994 Crime Bill Continues to Hurt Communities of Color, CTR. AM. PROGRESS (May 10, 2019), [https://perma.cc/Q78M-9B8H]. Like mandatory minimums, these sentencing laws disproportionately impact people of color—for example, in California, Black people were 12 times more likely than white people to be incarcerated under three strikes laws. Id. At the end of 2018, there were approximately 465,200 Black inmates in state or federal prison. John Gramlich, Black Imprisonment Rate in the U.S. has Fallen by a Third Since 2006, PEW ROCH. CTR. (May 6, 2020), [https://perma.cc/8BGK-8D8K].
men. Additionally, while Black Americans make up 14% of the U.S. population, they accounted for approximately 39% of the total prison population, as of February 2022. Unfortunately, these laws are not just working retroactively but continue to disproportionately harm young Black men today. The same 1994 Crime Bill that introduced mandatory minimums and three strikes laws, and was supported by Secretary of State Clinton, also included sentencing enhancements for youth believed to be gang-involved—now, two-thirds of Americans convicted to life sentences while under the age of 18 are Black.

These laws’ ripple effects into modern conceptions of Blackness are evident. The facially neutral construction of these laws camouflages the cycle they perpetuate: one where Black communities are under-prioritized, over-policed, and over-sentenced, ultimately reinforcing and normalizing ideas of Black men as criminals, as well as stereotypes that associate Black men with hypersexuality, aggression, and violence. Modern rape laws mirror prior criminal laws in that they are both facially neutral. However, in their implementation, modern rape laws sentence Black men who rape white women the harshest, reifying ideas of Black male criminals and underplaying the role of white men in rape. Since the law has already placed Black men at a disadvantage in any subsequent comparison to white men in a criminal context, the evolution of modern rape law has been particularly harmful to Black men. Today’s rape prototype maintains this comparison, ultimately legitimating the idea that Black men are social threats and subjecting them “to legal and extralegal violence.”


137. Inmate Race, FED. BUREAU PRISONS (Jan. 28, 2023), [https://perma.cc/7MNF-8VWA].


139. Id.

140. See LÓPEZ, supra note 128, at 86 (explaining how law reifies race by transforming ideas into concrete things, “making the categories seem natural, rather than human creations” and how seemingly race-neutral doctrines still work to reinforce discrimination); Dara Lewis & Philip Young P. Houng, Incapacitated Fatherhood: The Impact of Mass Incarceration on Black Father Identity, 8 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 1, 2-3 (2020) (finding that fathers made up 92% of incarcerated parents and 1.7 million children are left without one or both of their parents each year as a result of mass incarceration).

141. See, e.g., Patton & Snyder-Yuly, supra note 117, at 864.

142. E.g., Crenshaw, supra note 28, at 1266.
2. Legal Discourse

Rhetorical comparisons of Black assailants with their white male counterparts, as well as with white female victims, are equally catastrophic. During slavery, racist ideas of Black men being biologically different than white men were used to explain the illusory idea of Black men rampantly raping white women.†143 These narratives have created a “long history of overt racial discrimination in rape cases.”†144 Although such explicitly racist narratives are no longer acceptable, rhetorical techniques that emphasize the Black assailant remain. Modern court opinions and media reports adhere to the white baseline by discursively highlighting the race of Black assailants in rape cases involving white female victims.†145 Comparatively, the race of white assailants does not play the same role.†146 Take, for example, the case of Brock Turner, a white male accused of forcibly digitally penetrating a young Asian American woman.†147 The judge who presided over the case referred to Turner as a “19-year-old Stanford freshman.”†148 In the course of the trial, Judge Persky also stated that he took “[Turner] at his word,” and labeled the trial as an “imperfect process” after the jury found Turner guilty on all counts.†149 Importantly, Turner’s race was never mentioned.†150 As a comparison, take the case of Marcus Robinson, who was accused of sexually assaulting a white woman four years after Brock Turner’s sentencing.†151 In this case, the prosecutor stated:

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†143. Ibram X. Kendi, How to be Antiracist 48 (2019); see also Genovese, supra note 94, at 429.
†144. Taslitz, supra note 44, at 38.
†145. See, e.g., Renae Fraunik, Jennifer L. Seefelt & Joseph A. Vandello, Prevalence of Rape Myths in Headlines and Their Effects on Attitudes Toward Rape, 58 Sex Roles 790, 794 (2008) [hereinafter Fraunik et al.].
†146. See, e.g., Chelsea Hale & Meghan Matt, The Intersection of Race and Rape Viewed Through the Prism of a Modern-Day Emmett Till, Am. Bar Ass’n (July 16, 2019), [https://perma.cc/XJE4-BMUB] (“Research shows that laws and procedural mechanisms applied in cases involving African American men accused of raping white women void the presumption of innocence or apply a different standard of the law than in the case of a white man accused of raping an African American woman.”).
†149. Michele Dauber, Law Professor: Judge Should Be Recalled for His Role in the Stanford Sexual Assault Case, THE WASH. POST (June 21, 2016), [https://perma.cc/Y223-MWQX].
†150. Turner, 2018 WL 3751731, at *1.
†151. People v. Robinson, 454 P.3d 229 (Colo. 2019).
[The victim is] actually pretty pasty. She’s pasty white. And you obviously have seen [the assailant] is dark. He is an African American of dark complexion. [The witness] look[ed] over and she [could] see a dark penis going into a white body. That’s how graphic she could see [sic].\textsuperscript{152}

When these statements were made, the court did not intervene \textit{sua sponte} nor did the defense counsel object.\textsuperscript{153} On appeal, the court found that, although the prosecutor’s comments were “improper” due to a lack of probative value, they “did not rise to the level of reversible plain error” because they did not “undermine the fairness of Robinson’s trial.”\textsuperscript{154}

The cases of Turner and Robinson exemplify a disturbing legal pattern where an assailant’s race is highlighted only when he is Black, and the victim is white. A 2014 study confirmed this pattern of Black-crime conflation, finding that non-white assailants are not only characterized as “behaving normally for the group in which they are a part,”\textsuperscript{155} but their cases are often supplemented with references to poverty, low levels of education, “fear related topics,” and “anxiety surrounding offenders.”\textsuperscript{156} White assailants do not receive the same hostile framing. The same study found that white offenders are often depicted as “behaving in a way that is rare for the group to which they belong,”\textsuperscript{157} ultimately humanizing these assailants and justifying or overlooking their crimes.\textsuperscript{158}

These discursive tendencies not only highlight the Blackness of the assailant, but also position this Blackness as a reasonable explanation for the criminal behavior in question. By rhetorically assembling a Black defendant’s criminal acts with poverty and low education levels and, given that “people of color disproportionately bear the burdens of poverty in this country,”\textsuperscript{159} judges and courts are effectively equating Blackness

\begin{footnotes}
\item[152] Onwuachi-Willig & Alfieri, \textit{supra} note 104, at 2077 (citing Robinson, 454 P.3d at 231).
\item[153] \textit{Id.} at 2077 n.128 (citing Robinson, 454 P.3d at 231).
\item[154] Robinson, 454 P.3d at 230.
\item[155] Wright, \textit{supra} note 133, at 12 (emphasis added). These patterns perpetuate ideas that criminal behavior is “normal” for Black Americans. Conversely, white assailants are viewed as bad apples—their criminal behavior is rare and out of character for their demographic, rather than an extension of their whiteness. See \textit{id.}
\item[156] Wright, \textit{supra} note 133, at iii, 12.
\item[157] \textit{Id.} at 12 (emphasis added).
\item[158] \textit{Id.} at 10-11.
\item[159] Bridges, \textit{supra} note 119, at 151.
\end{footnotes}
with crime. These associations uphold the rape prototype by making Black men the easily presumable assailants.

Comparatively, the qualities used to garner sympathy for white assailants stem from their racial privilege—in the case of the Stanford swimmer, his prestigious education and perceived probity from his high socioeconomic status. Only in instances where Black assailants embody white ideas of success and power are they freed from this punitive rhetoric. Take, for example, the Kobe Bryant rape case of 2004. Although Bryant, a 6’6” Black man, was accused of raping a younger white female, he was ultimately found not guilty. Headlines covering the case rhetorically reflected and catered to Bryant’s innocence, rather than his guilt by overwhelmingly using words such as “accuser” rather than “victim.” Out of 141 examined headlines that used the term ‘alleged victim,’ ‘victim,’ or ‘accuser,’ “90.8% of these articles used ‘accuser.’” Only 1.3% of articles covering the case mentioned the race of Bryant or of his victim. Many scholars argue that Bryant’s freedom and favorable media coverage were because of his success and prestige as a famous American athlete—skills highly valued and capitalized on by the white community. Of course, while Bryant’s race was subordinate to his class status, race still played a role. Bryant’s defense team was the first to bring up race as a possible motive of a white female accuser; however, this argument was not entertained by the presiding judge.

Using white male offenders—who are framed as individuals behaving abnormally for their race and as deserving of sympathy—as the baseline, Black men are comparatively worse and should elicit more fear

160. See, e.g., Gregor Aisch, Larry Buchanan, Amanda Cox & Kevin Quealy, Some Colleges Have More Students From the Top 1 Percent Than the Bottom 60, N.Y. TIMES (Jan. 18, 2017), [https://perma.cc/3X2H-FS5K] (finding that 38 U.S. colleges had more students from the top 1% than the bottom 60%).


162. Franuik et al., supra note 145, at 794.

163. Id.

164. Id.


167. Bryant, 2004 WL 869618; Kobe Lawyer Plays Race Card, CBS NEWS (Feb. 2, 2004), [https://perma.cc/WQH5-X982] (noting how Bryant’s defense team was the first to openly suggest in court that “race was a possible motive for the accusations of the woman herself” when they stated, “[t]here is lots of history about black men being falsely accused of this crime by white women . . . I don’t think we want to get dragged down into this history”).
from any potential victim. In their juxtaposition of the Black assailant and the fragile white victim, the law and media maximize public fear of the rape prototype and make Black men the ultimate perpetrators of rape.\footnote{Wright, supra note 133, at 43 (“White victims may generate more fear within the general public.”).} This rhetorical framing is then reified by the courts’ tendencies to punish Black assailants of white victims more harshly than white assailants, whether their victim be white or Black.\footnote{Id. at 20; Wriggins, supra note 32, at 116 (“[T]he legal system has consistently treated the rape of white women by Black men with more harshness than any other kind of rape.”). Studies suggest that “lawyers adjust their strategy to reduce the effect of race in a Black offender-White victim dyad. For example, lawyers will raise misidentification as an offense rather than consent, since the effect of race is likely to be strongest in a consent defense case.” Taslitz, supra note 44, at 37. This demonstrates how the law has normalized the idea that a white woman would be unlikely to consent to sex with a Black man. By comparison, with whiteness as the baseline, misidentification of a Black man is far more understandable and more likely to lead to an acquittal. See id.}

The effects of curating Black men as the ultimate assailants go beyond falsely accused or over-criminalized defendants, but also provide a platform for the law to ignore Black women as an underrepresented and unworthy subset of victims. Actively constructing this rape prototype positions white women as untouchable, guarded victims and abandons Black women as a category of victims.

**B. Black Women as Lesser Victims**

The abandoned category of Black female rape victims is a result of the white baseline and its construction of the rape prototype.\footnote{Crenshaw, supra note 28, at 1277 (arguing that when discrimination is based off struggle between Black and white men, “the racism experienced by Black women will be seen only in terms of white male access to them”).} Black women do not pose a great enough threat to white male power—as Black men do—or embody the characteristics of white femininity enough to garner attention. As a result, they are less worthy of protection in the eyes of the law\footnote{See Williams, supra note 33, at 12 (traditions make the rape of Black women seem “provoked . . . by her sexual nature, accessibility, and ‘moral looseness’”).} and are fundamentally harmed by rape laws’ subscription to a white baseline. White men have historically focused on the threat of Black men to existing racial and social hierarchies. By chiefly framing Black men as dangerous and eliminating themselves as possible threats to white women, white men erase any concerns over
sexual violence against Black women. In other words, so long as the criminal justice system only treats interracial rape as “raising issues” and only white women as victims, white men escape the possibility of being labeled assailants. The repudiation of Black women is not novel to modern rape law’s white baseline. American children born into slavery legally inherited along matrilineal lines, so as to insulate white plantation owners from any monetary or legal responsibility for their children born out of their rape of Black women. This functioned not only to obfuscate any connection between Blackness and victimhood, but also to ensure white male control of women and U.S. citizenry. After emancipation, white retaliation in the South resuscitated stereotypes of Black women and resulted in continued sexual violence against them. The survival of these antebellum patterns has manifested itself in the rape prototype.

Importantly, the centrality of the white female victim in criminalizing Black men and preserving the rape prototype creates the ideal victim—“someone who is weak, respectable, and often garners much sympathy in the eyes of the public.” White women serve as the representative for all women, but Black women—having been deemed incongruous with fragility, submissiveness, and other American prerequisites for stereotypical womanhood—cannot. This comes back two-

172. See Crenshaw, supra note 28, at 1277 (“[T]he way the criminal justice system treats rapes of Black women by Black men and rapes of white women by white men is not seen as raising issues of racism because Black and white men are not involved with each other’s women.”).
173. Id.
174. Cook, Johnny and the WHP, supra note 13, at 64.
175. See id. (explaining that matrilineal succession and citizenship rights “is vital to” white men’s control of “women’s bodies for racial purity and sexual pleasure” as well as exploitation and domination of mothers); see also Dred Scott v. Sandford 60 U.S. 393, 407 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV (stating that African Americans “had no rights which the white man was bound to respect”).
176. Pokorak, supra note 41, at 7 (postbellum legal changes and the Thirteenth and Fourteenth Amendments did little to protect Black women from rape).
177. See Part II; cf: Dominique R. Wilson, Sexual Exploitation of Black Women from the Years 1619–2020, 10 J. RACE, GENDER, & ETHNICITY 122, 125 (2021) (“[d]uring the 100 years after the Civil War, rape, lynching, genitalia/reproductive mutilation, . . . [and] hypersexualized stereotypes” proliferated, with the additions of “negative media portrayals” and new civil rights struggles).
178. Wright, supra note 133, at 9.
179. See Carbado & Crenshaw, supra note 2, at 113 (discussing how in anti-discrimination cases, courts determined “that Black women were too different to represent all women”).
fold to harm Black women who experience rape. These victims, based off the rape prototype, are inevitably contrasted with white female victims. Today, regardless of assailant race, harsher sentences are given for the rape of white women than of Black women. Kimberlé Crenshaw aptly summarizes this effect of the rape prototype in saying: “The primary beneficiaries of policies supported by feminists and others concerned about rape tend to be white women; the primary beneficiaries of the Black community’s concern over racism and rape, Black men.”

Black and white assailants alike have consistently avoided responsibility for the rape of Black women, creating a “well-known history of rendering [Black] women ‘unrapeable’” that can be easily retraced to slavery. Until the late 19th century, the rape of Black women was not a legally acknowledged crime. While white women were unrapeable as a result of marital confines, Black women were deemed unrapeable simply “by virtue of race,” regardless of their slave status. As such, while legal developments largely freed white women from this idea of irrevocable consent, the same cannot be said for Black women, whose assailants rarely, if ever faced prosecution until the late twentieth century. As will be discussed in this Section, this entrenched history of Black women lacking legally acknowledged rights to their own body makes consent-based rape statutes prejudicial to Black victims and advantageous to white men and women.

180. Cf. Wright, supra note 133, at 9 (“findings suggest that society has deemed the race of the victim as more important than the race of the offender”).
182. Crenshaw, supra note 28, at 1269.
183. Taslitz, supra note 44, at 41.
185. Williams, supra note 33, at 24 (“The Black woman . . . as a result of the stereotypes which had their early origins in slavery, is denied full protection of the law.”).
186. Harris, supra note 32, at 599.
188. See Harris, supra note 32, at 598-99 (even after emancipation, Black women were “uniquely vulnerable to sexual harassment and rape”).
189. See, e.g., Paula C. Johnson, At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing, 4 Am. U. J. Gender & L. 1, 33 n.212 (“From emancipation through more than two-thirds of the twentieth century, no Southern white male was convicted of raping or attempting to rape a black woman.”); Williams, supra note 33, at 21 (“[T]here is little historical evidence of cases where either white men or black men were charged with raping, attempting to rape, or attempting to attempt to rape black women. This reflects the proposition that black women cannot be raped.”).
190. See supra Part I.A.
en to speak out against particular assailants, while refusing to confer the same accusatory power to Black women, even in the presence of overwhelming evidence.\(^\text{191}\)

White victimhood—which dictates that only those exhibiting archaic ideals of fragility, submissiveness, whiteness, and femininity actually qualify as victims—is a myth. In fact, Black women are victims of rape at higher rates than white women:\(^\text{192}\) “More than 20 percent of Black women are raped during their lifetimes—a higher share than among women overall.”\(^\text{193}\) And yet, to receive legal protection under today’s modern rape law, it is crucial to be white.\(^\text{194}\) White fragility has become a culture and the white baseline ensures that acculturation for Black women is not an option.

1. The Law Embracing Black Female Stereotypes

In leaving the Black female victim to be contrasted with the white female victim,\(^\text{195}\) the law perpetuates and embraces harmful stereotypes of Black women. These stereotypes inhibit Black women’s ability to conform to ideas of white victimhood, which are necessary to be granted legal protection under modern rape laws\(^\text{196}\) given the centrality of consent and the mens rea of knowledge innate in most state rape statutes.\(^\text{197}\)

During slavery, Black women were subject to a catastrophic composite of sexual inflictions that laid today’s foundation for the under-

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\(^{191}\) An apt example of this is the case of Betty Jean Owens, who was raped by four armed white boys in 1959 who had stated their intentions of “‘get[ting] a nigger girl’” and having an “all night party.” Hale & Matt, supra note 146. Although Owens was forcibly raped seven times, had been found bound by a police officer, and came to court armed with “confessions from the attackers, eyewitness testimony, and physical evidence,” none of the boys were convicted. Id.


\(^{193}\) Jameta Nicole Barlow, Black Women, The Forgotten Survivors of Sexual Assault, AM. PSYCH. ASS’N (Feb. 2020), [https://perma.cc/X4GK-FZTQ].

\(^{194}\) See, e.g., Harris, supra note 32, at 601.


\(^{196}\) See, e.g., supra notes 161-65 and accompanying text; Wriggins, supra note 32, at 124 n.129 (“The stereotype of the delicate, helpless white woman has never applied and has never been applied to Black women . . . . [T]he notion that Black women are not feminine persists.”).

\(^{197}\) See supra Part I.B.3.
acknowledged rape of Black women. In early years, Black women’s sexuality was seen as “wild, uncontrollable, bestial, and even criminal,” and as such, Black women were seen as always desiring of sex. Early biological determinism meant Black people were seen as inherently inferior to white people. These stereotypes resulted in disproportionate incidences of white men raping Black women under the guise of protecting the perceived chastity and purity of white women. Even more disturbing, the rape of enslaved women was often seen as an economical way to expand the workforce for white slave owners. This trend demonstrates the beginning formations of a white baseline. Prioritizing and filtering life through the white lens meant legalizing the exploitation of slave women in order to increase whites’ economic assets. Children were taken from their mothers at a young age to serve the interests of white slaveholders. Now, white women serve as the baseline for motherhood. This historical oversexualization of Black women divides victims into “prepackage[d]” groups of “good women

198. See Kennedy, supra note 116, at 5 (“[S]exual stereotypes that justified enslavement served also to justify the law’s refusal to perceive the rape of black women as a crime.”).
199. Patton & Snyder-Yuly, supra note 117, at 862.
200. Williams, supra note 33, at 12.
201. Biological determinism is the idea that “human behavior is governed primarily by preexisting conditions,” specifically, an individual’s genetic makeup. Determinism, BLACK’S LAW DICTIONARY (11th ed. 2019).
203. Kennedy, supra note 116, at 5. Due to the aforementioned stereotypes and the denial of humanity inherent in slavery, white men were only expected to show sexual restraint in relation to white women, who were perceived as having social autonomy, humanity, and purity that Black slave women did not. See Wriggins, supra note 32, at 118-21 n.94.
204. See, e.g., Kennedy, supra note 116, at 5-6; Harris, Whiteness as Property, supra note 4, at 1719. Therefore, men could freely and guiltlessly expose Black women to their sexual desires. Additionally, the rape of Black women provided an avenue for sustaining white supremacy in a way that white women did not. Wriggins, supra note 32, at 119.
205. See Harris, Whiteness as Property, supra note 4, at 1719 (“The cruel tension between property and humanity was also reflected in the law’s legitimation of the use of Black women’s bodies as a means of increasing property.”).
206. Davis, supra note 5, at 83.
207. See, e.g., Dorothy E. Roberts, Unshackling Black Motherhood, 95 MICH. L. REV. 938, 950 (1997) (“For centuries, a popular mythology has degraded Black women and portrayed them as less deserving of motherhood . . . The stereotype of Black women as sexually promiscuous helped to perpetuate their devaluation as mothers.”).
who can be raped” as a result of their vulnerability, “and bad women who cannot” as a result of their presumed promiscuity.\footnote{Crenshaw, supra note 28, at 1271.}

Precluding Black women from self-determinations of consent started in the antebellum South, but its effects are still felt widely today. Antebellum customs meant to subjugate women slaves have translated into modern stereotypes about Black women. A Georgetown Law report found that “adults view Black girls as less innocent and more adult-like than their white peers.” \footnote{Finoh & Sankofa, supra note 192; see also Taslitz, supra note 44, at 42 (“[T]he Black virgin is nonexistent, an oxymoron, in white mythology.”).}

Stereotypes today depict Black women as “always willing,” \footnote{Taslitz, supra note 44, at 42.} and “hot-natured.”\footnote{See, e.g., Carbone-López, supra note 95, at 34 (citing P. GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984)) (citations omitted) (explaining how this “renders [the Black woman] unable to be a victim of unwanted sexual interaction”); Morgan C. Jerald, L. Monique Ward, Lolita Moss, Khia Thomas, & Kyla D. Fletcher, Subordinates, Sex Objects, or Sapphires? Investigating Contributions of Media Use to Black Students’ Femininity Ideologies and Stereotypes About Black Women, 43 J. BLACK PSYCH. 608, 610 (2016) (explaining the Jezebel stereotype, which depicts Black women “as hypersexual and insatiable and originated from slavery as a means to rationalize the pervasive sexual assault of Black slave women by White men”) [hereinafter Jerald et al.]; Taslitz, supra note 44, at 42 (the modern stereotype of welfare queens associates Black femininity with promiscuity and laziness).} These stereotypes are situated in stark comparison to the white female as the “prototypic victim, pure and innocent.”\footnote{Adopting the white victim as a baseline makes fragility and helplessness the yardstick for femininity. Since chastity is only attached to the white body, Black women are illegible as victims of rape because they have no similar virtue to lose. The ubiquity of these stereotypes, as reified in the law, makes Black women and victimhood irreconcilable.\footnote{In the absence of perceived fragility, Black women are unable to prove their own nonconsent in the way white women are able. So long as virtue and fragility determine a woman’s credibility, the presence of nonconsent will be insufficient to legally validate Black victimhood.} This baseline, coupled with stereotypes of Black femininity, puts Black women at a detrimental disadvantage both inside and outside the

208. Crenshaw, supra note 28, at 1271.
209. Finoh & Sankofa, supra note 192; see also Taslitz, supra note 44, at 42 (“[T]he Black virgin is nonexistent, an oxymoron, in white mythology.”).
210. Taslitz, supra note 44, at 42.
211. See, e.g., Carbone-López, supra note 95, at 34 (citing P. GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984)) (citations omitted) (explaining how this “renders [the Black woman] unable to be a victim of unwanted sexual interaction”); Morgan C. Jerald, L. Monique Ward, Lolita Moss, Khia Thomas, & Kyla D. Fletcher, Subordinates, Sex Objects, or Sapphires? Investigating Contributions of Media Use to Black Students’ Femininity Ideologies and Stereotypes About Black Women, 43 J. BLACK PSYCH. 608, 610 (2016) (explaining the Jezebel stereotype, which depicts Black women “as hypersexual and insatiable and originated from slavery as a means to rationalize the pervasive sexual assault of Black slave women by White men”) [hereinafter Jerald et al.]; Taslitz, supra note 44, at 42 (the modern stereotype of welfare queens associates Black femininity with promiscuity and laziness).
212. Carbone-López, supra note 95, at 34; see also Wright, supra note 133, at 9 (explaining how the “ideal victim” is “often young, white females” on the basis of their weakness and respectability).
213. Cook, supra note 6, at 568.
214. See Carter, supra note 195, at 421 (“The dominant culture’s construction of victimhood awards the status of victim to someone who loses something—property, physical safety—because of the predation of someone else.”).
courtroom. Modern “Strong Black Woman” stereotypes (which portray Black women as innately resilient to trauma and vulnerability) are irreconcilable with ideals of female passivity and fragility supposedly embodied by white victims. Thus, Black women are more vulnerable to statutory rhetoric requiring or preferring evidence of force and resistance when compared to their white counterparts. Additionally, assailants who claim they were ignorant of a Black woman’s nonconsent are more believable against the backdrop of these stereotypes; a judge or jury may be more likely to believe that a Black woman was “always willing” or that she could have physically resisted, given her innate strength. Misconceptions that Black women are more resilient to pain now manifest, not only in the law’s neglect of Black female rape victims, but also in police violence against Black women and higher rates of maternal mortality in Black female populations than in white female populations. These harms committed against Black women, like rape, are often absent both in mainstream news narratives and within legal conversations.
2. The Law’s Blind Spot

The white baseline, and its Black assailant-white victim prototype, blinds the law to the intersectional harms that Black women experience as victims of rape. Black assailants are disproportionately punished when raping white women, signaling that “Black women are unworthy of society’s equal concern and protection.” This reality is a result of how, and who, constructed modern rape laws. As previously outlined, white perspectives have carefully informed modern rape laws and their interpretation, and the law has continued to adhere to a white baseline. While Black women face distinct obstacles from white women throughout all aspects of life, modern rape law presents them with unique difficulties and neglect.

While the role of power is underemphasized in incidences of rape with white women, power and agency play an entirely different role for Black rape victims. Black women have been historically stripped of agency in ways that white women have not, from slavery to suffrage, and their voices are all too often muted. White female leaders of the suffrage movement “intended to take neither issues of racial oppression nor Black women themselves seriously.” Additionally, Black slave women’s contributing voices in resistance are often underplayed and underacknowledged and this erasure continues today in the con-

222. See Harris, supra note 32, at 598 (“For black women, rape is a far more complex experience, and an experience as deeply rooted in color as in gender.”).
223. Taslitz, supra note 44, at 63.
224. See supra Part I.
225. Cf. Cook, Something Rots in Law Enforcement, supra note 83, at 75 (“All the unspoken yet shared convictions about who is dangerous, suspicious, and in need of taming become normative principles around which doctrine is created and ordered.”).
226. See, e.g., Wiggins, supra note 32, at 116-17 (“[I]n treating Black offender/white victim illegal rape much more harshly than all coerced sex experienced by Black women and most coerced sex experienced by white women, the legal system has implicitly condoned the latter forms of rape.”).
227. As explained in Part I.B, the history of rape law has framed the crime largely as one of violence and cruelty, rather than power and manipulation, in the context of both white and Black victims.
228. See Harris, supra note 32, at 598 (“The paradigm experience of rape for black women has historically involved the white employer in the kitchen or bedroom as much as the strange black man in the bushes.”).
229. See Harris, supra note 32, at 586-87.
230. Id.
231. Davis, supra note 5, at 84.
text of social justice movements.232 Black liberation often disproportionately focuses on the very legitimate struggles and resistance of Black men but, unfortunately, “very little [is said] about the unique relationship Black women bore [and continue to bear] to the resistance of struggles.”233 An ongoing pattern of overlooking the impacts of slavery and Jim Crow on today’s Black experience eradicates Black female narratives of gender discrimination.234 Without these narratives, Black women lack agency to speak out against the sexual violence they experience and the intersectional issues they face often remain unaddressed.235 This historical suppression of voices of Black women, along with the disempowerment already baked into modern rape law, inordinately harms Black rape victims. Because the legal system has failed to reconcile or remedy its racist past, or confer agency onto minority victims, the erasure of Black female experiences continues today.

Lastly, modern rape laws depend on victim reporting to identify instances of rape in the first place. Unlike other crimes, where police work to identify suspicious or completed criminal activity on their own, rape often goes unnoticed if not for victim reporting and cooperation.236 Again, this aspect of modern rape law completely alters the legal experience for Black female victims in comparison to white female victims. While Black women experience rape and sexual assault at higher rates throughout their lives than do white women, Black women are far less likely than white women to report rape to the police.237 For every Black

232. See, e.g., Treva Lindsey, Black Women Have Consistently Been Trailblazers for Social Change. Why Are They So Often Relegated to the Margins?, TIME (July 22, 2020, 3:24 PM), [https://perma.cc/693J-VCJQ].

233. Davis, supra note 5, at 84.

234. Carbado & Crenshaw, supra note 2, at 117 (discussing how historical court cases ignore the role of sex and gender throughout slavery and Jim Crow, which results in the banishment of Black female experiences “from constitutionally relevant narratives” and creates an intersectional failure).

235. See, e.g., Next Generation Leadership Institute, Elevating the Voices of Black Women through Storytelling, NAT’L BLACK WOMEN’S REPROD. JUST. AGENDA (Nov. 4, 2021), [https://perma.cc/PT5E-7JU7] (discussing the link between uplifting Black women’s voices and influencing public policy through incorporation of intersectional issues); Jane Mansbridge, How Did Feminism Get to Be, THE AM. PROSPECT (Dec. 19, 2001), [https://perma.cc/GFH2-MKCG].

236. W. David Allen, The Reporting and Underreporting of Rape, 73 S. ECON. J. 623, 624 (2007) (discussing how rape victims are typically the only witness to the crime, making them essential to identifying and developing the crime).

237. See, e.g., Carbone-López, supra note 95, at 32; Black Women and Sexual Violence, NAT’L ORG. FOR WOMEN 2-3 (2018), [https://perma.cc/EM55-UKKZ] (“African American women are less likely to seek out help from law officials and law enforcement.”).
woman who reports rape, at least fifteen Black women do not report.\textsuperscript{238} This underreporting is the result of many factors, almost all of which relate back to Black victims’ intersectional identities. Some studies indicate that Black women are reluctant to report sexual assault because of concerns over police behavior, including the credible belief that police are insensitive toward the needs of Black women, especially in comparison to white women.\textsuperscript{239} Others attribute it to a “community ethic against public intervention,” loyalty to the Black community, or loyalty to the Black assailant himself with whom the victim may have a personal relationship.\textsuperscript{240} While the history of relationships between police and the Black community fosters fear and aversion, the same cannot be said for white women.\textsuperscript{241} White women do not, and have not ever, experienced police brutality at the same rate as Black women,\textsuperscript{242} and their communities are not equally exploited by the carceral system.\textsuperscript{243} In fact, evidence shows that white women who embody the same characteristics that U.S. rape laws prioritize are given preferential treatment by police

\begin{footnotesize}
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\item \textsuperscript{238} Barlow, supra note 193.
\item \textsuperscript{239} See, e.g., Carbone-López, supra note 95, at 33; Michelle S. Jacobs, \textit{The Violent State: Black Women’s Invisible Struggle Against Police Violence}, 24 WM. & MARY J. WOMEN & L. 39, 41-44 (2017) (Black women experience state-sponsored violence from the state qualitatively and quantitatively differently than white women, and this violence is both pervasive and multilayered); see generally Ritchie, supra note 218.
\item \textsuperscript{240} Carbone-López, supra note 95, at 32.
\item \textsuperscript{241} See, e.g., Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force, \textsc{Prison Pol’Y Initiative} (May 14, 2019), [https://perma.cc/7YAM-RENX].
\item \textsuperscript{242} See, e.g., Frank Edwards, Hedwig Lee & Michael Esposito, \textit{Risk of Being Killed By Police Use of Force in the United States By Age, Race-Ethnicity, and Sex}, 116 PROC. NAT’L ACAD. U.S. 34, 34 (“Black women . . . are significantly more likely than white women and men to be killed by police.”) [hereinafter Edwards et al.]; Mary-Elizabeth Murphy, \textit{Black Women Are The Victims of Police Violence, Too}, \textsc{The Wash. Post} (July 24, 2020), [https://perma.cc/X]44-DUMY [evidencing that “white police officers continue to associate [B]lack women with criminality.” resulting in them being “over-policed[ed]” and “twice as likely to serve time in prison as white women”—a trend that can be traced back to the 1920s and 30s).
\item \textsuperscript{243} See, e.g., Edwards et al., supra note 242, at 35:

\begin{itemize}
\item Violent encounters with the police have profound effects on health, neighborhoods, life chances, and politics. Policing plays a key role in maintaining structural inequalities between people of color and white people in the United States . . . . [A] substantial body of evidence shows that people of color, especially African Americans, are at greater risk for experiencing criminal justice contact and police-involved harm than are whites.
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officers. Making rape statutorily contingent on victim reporting, resistance, and clear displays of nonconsent preferences whiteness by assuming an amicable relationship with the carceral system. Thus, Black victims operate in a system that fails to treat them as equal to their white counterparts, fails to recognize their efforts to offset violence against their community, and fails to protect them generally.

III. RESISTANCE: NARRATIVE BUILDING AND RHETORICAL PRECISION

Modern stereotypes and harms are the progeny of a ubiquitous white baseline and rape prototype. The consequences of these stereotypes are wide-reaching. The overcriminalization of Black men and relegation of Black female victims results in fewer legal protections for Black Americans altogether. By prioritizing the white baseline, the law allows white men to bypass liability and white women to control

244. See, e.g., Christy A. Visher, Gender, Police Arrest Decisions, and Notice of Chivalry, 21 CRIMINOLOGY 5, 23 (1983) (finding that white women who exhibit a deferential treatment to police officers are given preferential treatment, whereas Black women receive no preferential treatment); Jacobs, supra note 239, at 58 (Black women are arrested and murdered at disproportionately higher rates than white women).

245. See, e.g., Michele R. Decker, Charvonne N. Holliday, Zaynab Hameeduddin, Roma Shah, Janice Miller, Joyce Dantzler & Leigh Goodmark, "You Do Not Think of Me as a Human Being": Race and Gender Inequities Intersect to Discourage Police Reporting of Violence Against Women, 96 J. URB. HEALTH 772, 777 (2019) (finding that Black women feared consequences for their partner, their family's economic stability, and for themselves when interacting with police, whereas white women had "no such incarceration-related fears"); Drew Desilver, Michael Lipka & Dalia Fahmy, 10 Things We Know About Race and Policing in the U.S., PEW Rsch. CTR. (June 3, 2020), [https://perma.cc/KY3R-DHWX] (finding that only 33% of Black adults said "police in their community did an 'excellent' or 'good' job in using the right amount of force" as compared to 75% of whites); Laura Santhanam, Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do., PBS (June 5, 2020), [https://perma.cc/47QA-RCWQ].

246. See Harris, supra note 32, at 601 ("Black women have simultaneously acknowledged their own victimization and the victimization of black men by a system that has consistently ignored violence against women while perpetrating it against men.").

247. Some scholars argue that these stereotypes result in Black women being "instruments" to fight discrimination against Black men rather than being "beneficiaries" of any progress. See Crenshaw, supra note 28, at 1277.

248. See id. (Black women’s rapists “are less likely to be charged with rape, and when charged and convicted, are less likely to receive significant jail time than the rapists of white women.”); Patton & Snyder-Yuly, supra note 117, at 864 ("Black men who rape White women receive the longest and most severe punishments.").
narratives of femininity and legitimate victimhood.249 Black men, as a result, are positioned as the ultimate scapegoat for crimes of sexual violence,250 leaving Black women abandoned and unprotected. This legal treatment perpetuates misconceptions of Black criminality and of Black women as unrapeable, which in turn, continually constructs the white baseline that informs our legal system. As these misconceptions bleed into society, they return to the legal system, presenting themselves as implicit biases in the courtroom and creating severe sentencing disparities.251 This cycle ripples into Black communities in a myriad of ways, including through the perpetual incarceration of Black men and continued delegitimization of Black women’s health, safety, and experiences.252 Additionally, in its subscription to a white baseline, modern rape law conceives notions of “whiteness as property”—which posits that “in protecting settled expectations based on white privilege, American law has recognized property interest in whiteness.”253 Cheryl Harris, who originally proffered the concept, argued that rights were only as valuable and as real as one’s ability to exercise them.254 The law legally concretizes whiteness as property in modern rape laws by making legal protection contingent on whiteness and fragility.255 Without whiteness, Black

249. Williams, supra note 33, at 17 (noting that it is not taboo for white men to be interested in or have relations with Black women).
250. Patton & Snyder-Yuly, supra note 117, at 872 (summarizing the “continued legacy of scapegoating Black males for falsified rape claims”).
251. LÓPEZ, supra note 128, at 190 (explaining how the current legal system is constructed so that “criminals who are Black or who victimize Whites will continue to be incarcerated more often and for greater lengths of time, thus reinforcing stereotypes of Black criminality and White victimhood”). In 1980, Black men accused of assaulting white women accounted for 23% of all rape cases, but for 45% of those incarcerated and 50% of those sentenced to more than six years of prison time. G.D. LaFree, Effect of Sexual Stratification by Official Reactions to Rape, 45 AM. SOCIO. REV. 842, 843 (1980).
252. E.g., Part II.A; Carbone-López, supra note 95, at 34 (outlining evidence that “victimized women have internalized [Black female] stereotypes and, as a result, “Black women often do not perceive themselves as ‘real’ victims’”); see also Visher, supra note 244, at 17 (stereotypes affecting police decisions to arrest Black women); Cynthia Prather, Taleria R. Fuller, William L. Jeffries IV, Khiya J. Marshall, A. Vyann Howell, Angela Belyue-Umole & Winifred King, Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity, 2 HEALTH EQUITY 249, 255-57 (2018) (antebellum stereotypes affecting reproductive health outcomes of Black women).
253. See generally Harris, Whiteness as Property, supra note 4, at 1745 (arguing that whiteness evolved into a form of property as a result of the law conferring both social and economic benefits onto white actors).
254. Id.
255. See, e.g., id. at 1731 (stating that the law recognized white privilege which, in turn, became tantamount to property and the right to exclude); Davis, supra note 5, at 87
women have extreme difficulty exercising their right to bodily autonomy. Lacking the feminine capital\textsuperscript{256} to proceed in the courtroom, Black women are silenced\textsuperscript{257} and are rarely seen as victims of discrimination in their own right.\textsuperscript{258}

Alleviating these problems requires targeted efforts at dismantling and subverting the actual institutional and societal norms disadvantaging Black victims.\textsuperscript{259} In other words, while the continued work of sexual assault prevention is still crucial to uplifting white and Black women alike, addressing the white heteropatriarchal backdrop of rape laws and the messages that this backdrop conveys should be prioritized.\textsuperscript{260} This Note proposes a two-pronged approach: (1) a departure from the criminal legal system in favor of non-legal avenues that confer agency on Black female victims, and (2) a model statute to enact at the state level. Each prong functions to remedy the law’s colorblind and deficient treatment of Black female rape victims that result from the white baseline.

A. Reforming Rape Laws Without the Criminal Legal System

This Note adopts what Aya Gruber, a scholar who focuses on crimes against women, labels a “neofeminist” approach.\textsuperscript{261} Gruber’s approach clearly accounts for the intersectional nuances of victimhood:

\begin{itemize}
\item[(arguing that feminine ideologies did not apply to Black slave women, and thus, Black slave women were not sheltered or protected); see also BRIDGES, supra note 119, at 137 (explaining how societal ideologies are legitimated and recreated by laws).]
\item[256. This is similar to the idea that white individuals hold “representational capital” in the context of anti-discrimination laws. Carbado & Crenshaw, supra note 2, at 111-12. The similar ways in which individuals need to possess certain “capital” to maintain their rights, reveals how both areas of law subscribe to a white baseline.]
\item[257. Id. at 117 (arguing that equal protection laws and white victimhood “seem[ ] to suggest that gender discrimination is that which disadvantages or limits the opportunities of white women”) (emphasis added).]
\item[258. Crenshaw, supra note 28, at 1277.]
\item[259. Cf. Gruber, supra note 10, at 296 (citing advocacy “for a theory of rape that is more attuned to the agency of those who suffer sexual harms”).]
\item[260. See id. at 294 (explaining how current rape discourse on college campuses and the use of Title IX as a solution has been critiqued for “not actually address[ing] patriarchal structures and cultures within the [u]niversit[ies] which “undermines the legislation’s transformative potential”) (citing Erin Collins, The Criminalization of Title IX, 13 OHIO ST. J. CRIM. L. 365 (2016)) (citation omitted).]
\item[261. Aya Gruber, #MeToo and Mass Incarceration, 17 OHIO ST. J. CRIM. L. 275, 290 (2020) [hereinafter Gruber, #MeToo].]
\end{itemize}
This approach holds that sexual misconduct and battering constitute pressing social problems that reflect and reinforce women’s subordination and concedes that offenders’ impunity exacts a social price. At the same time, neofeminism is acutely conscious that criminal law causes real injuries and views feminist participation in the penal system with a jaundiced eye. It is also mindful that gender is one of multiple intersecting sites of hierarchy, along with class, race, and economic status.262

The neofeminist approach is an appropriate launching point for protecting and acknowledging Black victims, given its incorporation of race and intersectional junctures.263 The current anti-rape movement disproportionately focuses on punishment and retribution through strict zero-tolerance laws264 and policies that aim to “get at the untouchable power brokers who appear immune from law.”265 Rejecting the view of the current anti-rape movement, this Note proposes that prosecution should be a last resort for rape victims, and is not the appropriate remedy for rape law’s deficiencies.266

Punitive measures disproportionately harm Black communities,267 and prisons themselves are sites of sexual violence.268 To endorse a carceral solution for rape laws’ rejection of Black victims would be counterproductive, as it would ultimately contribute to sexual misconduct by

262. Id. at 290.
263. See id. (explaining that the neofeminist approach “is also mindful that gender is one of multiple intersecting sites of hierarchy, along with class, race, and economic status”).
264. Zero tolerance proposals and laws are “more unforgiving than intolerance” and advocate for criminal prosecution as the ultimate solution for sexual assault. Id. at 282. Additionally, these laws “necessarily occur[ ] against the backdrop of rape law’s racist past and present.” Id. at 283.
265. See id. at 283. In this instance, the power brokers are those benefiting from the white heteropatriarchy uplifted by modern rape law.
266. See generally AUDRE LORDE, The Master’s Tools Will Never Dismantle the Master’s House, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110 (1984) (arguing that “stretching across the gap of male ignorance” to educate men as to women’s existence and needs actually maintains oppression and is “a diversion of energies and a tragic repetition of racist patriarchal thought”).
267. See infra Part II.A.1; Gruber, #MeToo, supra note 261, at 283 (“Rich and powerful men have the corrupt influence to evade even toughened laws, placing the burden of increased criminalization on the poor minorities who form the policed segment of the population. Today, many feminists regret that feminist law-and-order policies contributed to a carceral regime that disservices marginalized people, including women.”).
268. Id. at 281.
feeding perpetrators to violent institutions and fracturing the communities to which Black women are central. Mass incarceration has already “had potentially profound effects on the family life of those caught in the web of the criminal justice system.” Less severe, but still ruinous, is the fact that Black women are imprisoned at twice the rate of white women. Thus, any proposal that relies on the criminal legal system to prevent rape would only perpetuate modern rape law’s disparate treatment of Black assailants and Black victims. Ultimately, carceral solutions for rape are misaligned with the support of Black women:

It is one thing for those of us who are relatively privileged and who are not victims of abuse to say that abusers must be locked up. It is another thing entirely for us to say this on behalf of, and in effect speak for, those who are not so privileged. Consider the domestic violence victim who may be evicted without the abuser’s contribution to the rent. Or the victim with children, who feels conflicted about having their father incarcerated. Or the minority victim who knows from experience and from community “pools of knowledge” about racialized policing, about racially disparate sentencing, about how a conviction will only compound difficulties minorities have in securing employment and housing, or in matters of immigration. Now add to this the increasing risk—a byproduct of mandatory arrest laws—that the victim will be arrested alongside the abuser.

269. See, e.g., id. at 283 (“[T]he U.S. penal system is a site of racial and socioeconomic inequality.”).

270. Bruce Western & Christopher Wildeman, The Black Family and Mass Incarceration, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 222 (2009). Black men are incarcerated at more than five times the rate of white men, and, as of 2014 made up 34% of the total correctional population, despite making up just eighteen percent of the population at that time. Criminal Justice Fact Sheet, NAACP (last visited Feb. 6, 2022), [https://perma.cc/GW9B-V6MU] [hereinafter NAACP].

271. NAACP, supra note 270.

1. Alternatives

Black women will not be equally protected as compared to white women until they themselves are legible as victims. Therefore, a unilateral disavowal of the criminal justice system is not enough to alleviate the law’s blind spot. Alternative measures should be embraced that empower Black victims to manage their own experience of rape and to be legitimized not only legally, as victims of rape, but socially, as human beings worthy of sexual self-determination. This will guarantee protection at the front-end and bypass the courtroom altogether.

Primarily, Black female victims can be legitimized through non-criminal reporting avenues. Allowing Black women to report incidences of rape to social workers or community therapists instead of policemen can help bridge the gap in reporting rates between white and Black women, while still granting them the agency to appraise their own experiences and proceed as they wish. This approach would also account for the interlaced interests that Black women face, including loyalty to the Black community. Alternate reporting avenues could help women of color leave potentially sexually abusive relationships

273. See generally Carter, supra note 195, at 421-22 (“The dominant culture’s construction of victimhood awards the status of victim to someone who loses something—property, physical safety—because of the predation of someone else.”).

274. See Black Women and Sexual Violence, supra note 237. (“For women of color, reporting crimes of sexual assault are rooted in relationships to institutions of power and commitments to community…Law enforcement and the legal system are not seen as viable avenues of recourse, as these systems continue to oppress and discriminate against people of color.”).

275. See generally id. (“For every 15 Black women who are raped, only one reports her assault.”); see also Bonnie S. Fisher, Leah E. Daigle, Francis T. Cullen & Michael G. Turner, Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women, 30 CRIM. JUST. & BEHAV. 6, 7-9 (2003) (finding that most incidences of rape are not reported to police but are reported to close friends, and the perceived “believability” of victims contributes to their likelihood to report).

276. See Aya Gruber, Anti-Rape Culture, 64 UNIV. KAN. L. REV. 1027, 1044-45 (condemning any reform efforts that frame female’s sexual experiences for them, or impose feelings of trauma or obligation to prosecute when no such feelings actually exist: “Is it a good thing when a victim ‘discovers’ she is traumatized and in need of intense psychological intervention, when she might otherwise have moved on?”) [hereinafter Gruber, Anti-Rape].

277. See, e.g., Harris, supra note 32, at 614 n.160 (“Black women have often actively embraced patriarchal stereotypes in the name of racial solidarity.”); Julie D. Lawton, Am I My Client? Revisited: The Role of Race in Intra-Race Legal Representation, 22 MICH. J. RACE & L. 13, 40 (2016) (untangling the view that belonging and insider status require loyalty to one’s race).
without feeling as though they have betrayed or worked against the plight of the Black man. By providing alternative opportunities for Black women to heal and seek help outside of prosecution, rape reform can transcend the criminal legal system and cultivate pockets of agency for Black women within their communities.

Carving out alternative sectors for penalizing assailants is another way to extend protection to Black women. Rather than looking to the criminal legal system, reform efforts should focus on vocational and educational systems that can condemn and impart consequences on assailants, without forcing Black women to go through the criminal legal system and without encouraging a carceral theory of the state. Addressing white assailants through revocations of professional or educational prestige has the possibility of alleviating the incarceration of Black male assailants, while also belatedly forcing meaningful responsibility on white male assailants.

2. Storytelling

Since Black women are partially illegible as victims due to the aforementioned stereotypes, rape reform must work to dismantle notions of Black promiscuity and sexual willingness. Instead, narrative control should be entrusted to Black women for them to contextualize their encounters and feelings of trauma.

Unfortunately, current rape reform and mainstream feminist movements have failed to include Black female narratives that would resist harmful typecasts of Black women. The introduction of the #MeToo movement in 2007 ushered in an age where women became increasingly comfortable speaking out against their assailants; however, the movement has also been sufficiently guilty of monopolizing rape narratives at the expense of Black victims. Not only did the movement rise in popularity only in response to a white woman’s (Alyssa Milano) adoption of a Black woman’s (Tarana Burke) concept, without any due credit given, but it has consistently prioritized the protection of white

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278. See Part II.B.1.
279. E.g., Alison Phipps, White Tears, White Rage: Victimhood and (as) Violence in Mainstream Feminism, 24 EUR. J. CULTURAL STUD. 81, 90 (2021).
victims over Black victims. Subsequently, “[m]ost of the key figures in the viral iteration of #MeToo were Western, white and middle or upper-class.” In the instances where Black women have been supported by the movement, their assaults have been explained through exclusively gendered lenses that fail to account for the accompanying racialized facet which make their experiences with rape, harassment, and assault fundamentally different than white women’s. The #MeToo movement’s focus on “evil” actors and individuals limits understanding of sexual assault as existing only along gendered lines of stereotypic passive female sexuality and power-hungry male sexuality, rather than as something that is systemically racialized.

Feminist movements and rape reforms must refocus and expand their efforts to recognize and remedy the unique obstacles facing Black women. Storytelling has long been heralded by critical theorists as one method to center these marginalized voices. Prioritizing the narratives

281. See, e.g., id. at 111 (noting the disparities in #MeToo’s outward support of white actress Rose McGowan’s claims and the movement’s relative silence in response to Black actress Leslie Jones’ and Black sportscaster Jemele Hill’s claims).
282. Phipps, supra note 279, at 82.
283. See Onwuachi-Willig, supra note 280, at 113 (noting that, even when harassment involves “clear references to gender and sex, the racialized nature of the harassment” is invisible and unrelatable to white women, making it incognizable as part of their own movements); see also Gruber, Anti-Rape, supra note 276, at 120 (“[A] survivor’s ability to pursue justice may be a function, not just of gender and sexiness, but of class status that is policed by other women.”).
284. See Gruber, #MeToo, supra note 261, at 279, 290 (proposing a refocusing of these movements on social decay).
285. See Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 813 (1991) (explaining how rape law’s history and founding is “a history of both sexism and racism”); Nunn, supra note 202, at 297, summarizing scholarly critique of the “monolithic” voice put forward by popular feminist movements that “silences the particular experiences of women of color”). Other traditional feminist attempts to reject white victimhood, including Slut Walks and sexual liberation movements, disserve Black women, who are often raped because of their oversexualization. Gruber, #MeToo, supra note 261, at 289 (noting “the previous generation’s support for sexual liberation” and Millennial feminist practice of “slut walks” to reject sexual expectations of White women). It is important to note that these sexual liberation movements have been harmful to white women as well. Id. at 289 n.61 (citing Mona Charen, Real Message of #Metoo: The Sexual Revolution Has Not Been Kind to Women, NAT’L REV. (Jan 18, 2018)).
of Black women within feminist movements would expand normative perceptions of victimhood beyond white fragility and perceived chastity. Adding marginalized voices radically shifts the controlling narrative—Black female narratives have the ability to debunk the white baseline and achieve legal protection for non-white victims without requiring conformity to white normativity.287 These narratives must move conversations away from recounts of formidable assailants and, instead, to storytelling that combats stereotypes perpetuating ideas of Black women as unrapeable.288 This will require white women to not only acknowledge their own complicity in constructing and perpetuating the rape prototype,289 but also reject white victimhood in ways other than extreme sexual liberalization.290 In their simplest form, narratives and stories from Black women will belatedly tell the world that Black female lives matter.291

("Storytelling is pedagogical inasmuch as it educates readers about what racial disenfranchisement in the modern era looks like and, perhaps more importantly, feels like when one has to endure it.").

287. See, e.g., Delgado, supra note 286, at 2413-15, 2438 (arguing that stories and counter stories “can help us understand when it is time to reallocate power” and can be “destructive” by attacking complacency, alternative viewpoints, and “subvert[ing] th[e] ingroup reality”); See Christian et al., supra note 286, at 1735-56 (counter-storytelling technique can challenge the White mainstream narrative of things and validate the lived experiences of racism’s intended victims).

288. Gruber, #MeToo, supra note 261, at 285 (arguing that “[t]he public’s appetite […] for salacious stories of rich and famous men tormenting their female [victims]” ignored the ”entrenched racial discrimination and socioeconomic marginalization” that Black women face); see also Delgado, supra note 286, at 2415 (arguing that the cure for oppression is counter-storytelling because these stories can show “that what we believe is ridiculous, self-serving or cruel” and “help us understand when it’s time to reallocate power”).

289. Harris, supra note 32, at 601 (attributing “the rift between white and black women over the issue of rape” to feminist analyses that have “minimize[d] white women’s complicity in racial terrorism”).

290. See Peggy C. Davis, Law As Microaggression, 98 Yale L.J. 1559, 1565 (1989) (“It is difficult to change an attitude that is unacknowledged.”); cf. Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323, 398-99 (1987) (“By listening to those who have paid the greater price for their commitment to a just world, we can move forward with them, closer to the place of peace.”).

291. Cf. Gruber, supra note 10, at 296 (“We need to consider the cultural messages about sex and gender that are being generated in this moment of intense activism.”).
B. Model Statute

Although this Note rejects the criminal legal system as a site of resolution for protecting Black victims, it also acknowledges that addressing the inherent deficiencies in modern rape law is still imperative, and that the courtroom remains the primary place for victims to hold their assailants accountable. Additionally, criminal law, and rhetoric in particular, can function not just as an avenue for prosecution, but also as a directive for, and creator of, societal values and meaning. As such, the Note proposes a model statute to enact at the state level that will, at the most, increase protection for Black women but, at the least, will further highlight how rape law is driven by white male heteropatriarchy:

MODEL STATUTE. Rape.

(1) A person is guilty of rape when the person engages in sexual intercourse with another person:

(a) by failing to make reasonable communicative efforts to determine the victim’s consent;

(b) by ignoring reasonable communicative efforts on the part of the victim to convey nonconsent; or

(c) by coercion; or

(d) who is unconscious or incapacitated.

(2) For the purposes of this statute, the listed terms are defined as follows:

292. The ways in which this model statute would play out in court are beyond the scope of this Note. Rather, this Note takes the perspective that legal rhetoric and the construction of laws also influences societal perceptions and ideas of innocence and guilt. The Note is primarily concerned with how legal rhetoric can make Black females legible as deserving victims. See, e.g., Douglas, supra note 216, at 75 (outlining how discourse is “critical to the actualization of power,” teaches people “to behave in a certain manner” and socializes people “almost seamlessly, into supporting the realities of unjust power”); Taslitz, supra note 44, at 62 (“The disparate treatment of Black suspects and victims . . . reflects a censurable theory of human worth.”).

293. See Bardaglio, supra note 104, at 751-52 (statutes provide insight on society’s values, attitudes, and behavioral preferences); Cook, Something Rots in Law Enforcement, supra note 83, at 11 (criminal laws function not only to deter crime, but to dictate what is and is not normal); see also Onwuachi-Willig & Alfieri, supra note 104, at 2077 (“In . . . criminal cases, the lawyering process serves as a rhetorical site for constructing racialized narratives and racially subordinating visions of client, group, and community identity.”).
(a) Consent: an autonomous, conscious, and continuous decision to assent to sexual intercourse.

(b) Coercion: methodically persuading another to assent, either by leveraging one’s positionality against another, or exerting institutionally acknowledged power over another.

1. Decentralizing Consent

The proposed model statute primarily, and most notably, departs from the white baseline by decentralizing consent. Unlike current consent-centered rape statutes, the model statute does not condition victimhood on a woman’s ability to actively confront their assailant. Rather, under the proposal, a woman can legally be considered a victim solely as a result of the assailant’s behavior, since the perpetrator must make efforts to determine and interpret consent. Shifting consent responsibility from the victim to the assailant acknowledges that revoking consent, or expressing nonconsent, is not a universal privilege. Andremedying these barriers communicates that consent should not be a privilege, but a right. Section 1(a) of the statute will make it easier for Black women to satisfy the legal standard for nonconsent. Rather than being evaluated against a backdrop of stereotypes that lead jurors to reflexively assume consent was present, Black women can shift the burden of proof onto the assailant to prove that they did, in fact, look for the presence of consent in real time. By making autonomy a prerequisite for consent and requiring communicative efforts by both parties, the model statute ensures that Black female victims will be seen as agents of their own bodily autonomy, undermining any presumptions of promiscuity.

The three words under the definition of consent—autonomous, conscious, and continuous—are crucial to the equal protection of Black women. Any encroachment on the victim’s autonomy, at any point in an intimate encounter, proves nonconsent. Including words such as “au-

294. See, e.g., Foley et al., supra note 31, at 9 (“Rape of a Black woman is not considered as serious as rape of a White woman, legally or psychologically.”).

295. See Teri A. McMurtry-Chubb, Still Writing At The Master’s Table: Decolonizing Rhetoric in Legal Writing for a “Woke” Legal Academy, 21 Scholar 255, 259-60 (2019) (“[L]anguage . . . acts to create the experience or reality it seeks to describe—language is epistemic.”); Taslitz, supra note 44, at 69 (outlining ideas of communicative sexuality and proposing that juries may be evaluate the defendant’s behavior when determining if consent was present and mutual).
tonomous” and “conscious” in the definition implicitly associates consent with female power and self-determination. Rhetoric implying female agency can serve a dual role by (1) counteracting the conflation of victimhood with passivity and fragility, and (2) rejecting ideas of non-white women being unrapeable. The former undermines white victimhood, while the latter beats discrimination at its own game: it rhetorically constructs autonomy where implicit biases have always assumed otherwise. Both the former and the latter better account for Black women’s intersectional identities.

Including non-verbal behavior under the umbrella of acceptable communicative acts ensures the victim is not required to verbally give an affirmative “yes.” In other words, it does not adopt an “affirmative consent” standard. While some scholars now advocate for affirmative consent, this Note believes that an “only yes means yes” position would overcriminalize accused rapists and become the inverse of antiquated resistance requirements of affirmative “no”s. 296 Section 1(d) of the model statute essentially imposes the same requirements as affirmative consent would. 297 It recognizes the value in requiring affirmative communication and bilateral communication, while taking into account the realities of intimate interactions. Advocates of affirmative consent often argue that conduct, rather than verbal communication, is too ambiguous to provide evidence of culpability. 298 This Note, however, takes the position that “normative power need not entail a communication.” 299 Humans have evolved in a myriad of ways to communicate, learn, and express emotions non-verbally. Requiring women to explicitly communicate, while proposed as a protective mechanism for victims, allows men to claim ignorance where there likely is none and legally legitimates lower expectations for males’ ability to communicate. Additionally, the conduct of both parties is analyzed under the model statute—meaning that men who worry about the ambiguity of a woman’s action can still protect themselves by making their own communicative efforts under Section 1(a) of the model statute.

296. See Hong, supra note 37, at 262 (affirmative consent would be overinclusive given that consensual intimacy often does not involve affirmative communication or complete sobriety).
297. See Gruber, supra note 10, at 292 (“[O]ne is left to wonder—exactly what is the affirmative consent standard doing that existing unconsciousness, incapacitation, and force standards cannot do?”).
298. See, e.g., Ferzan supra note 35, at 398-99 (including conduct as something that can communicate “yes” gives inadequate guidance to men and fails to protect victims given its ambiguity).
299. Id. at 404.
2. Force, Coercion, and Resistance

Under the proposed model statute, rhetorical references to force and resistance are no longer necessary; however, this does not mean that acts of resistance on the part of the victim would not be legally acknowledged. Instead, they would fall under the umbrella of communicative acts to be interpreted by the assailant under subsection (b). The central purpose of delegating a separate subsection to rape by coercion is to broaden legal acknowledgment of intraracial acquaintance rape. Delineating coercion as a unique subsection of rape recognizes that undue influence can be present even in the absence of force or threats—a victim’s relationship with the assailant in and of itself can create vulnerabilities for the assailant to exploit. Recognizing that rape can exclusively be a crime of power concretizes acquaintance rape as equally detrimental and worthy of protection as rape involving physical violence.

Excluding linguistic references to force or resistance means that force can no longer act as a surrogate for nonconsent. The separation of the latter element and the removal of the former element in state rape statutes are critical departures from the white baseline. Not only would the crime be more inclusive of acquaintance rapes, but Black women would no longer be required to prove consent twice: initially through a showing of physical resistance, and again when the actual question of consent arises. Black women would therefore be believed without having to resist their physical safety and can assert their claims without the burden of disproving the Strong Black Woman stereotype that expects Black women to fight back.

3. Discarding Knowledge

The final way that the model statute combats the white baseline is by abandoning knowledge as an appropriate mens rea for rape, and tran-

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300. These relationships may include, but are not limited to, intimate partner relationships, relationships with the father of one’s child, or power-disparate relationships. See Murphy, supra note 242 ("[C]ases of police rape and sexual assault are an ongoing problem. Even today, the ACLU reports that in 35 states, police officers can use consent as a defense against sexual assault of arrestees while in custody.").
301. Byrnes, supra note 36, at 285.
302. See Pokorak, supra note 41, at 22 (force element of rape statutes codifies harmful stereotypes about Black women).
303. Id. (force requires victims to prove nonconsent before the actual defensive issue of consent is even raised); Byrnes, supra note 36, at 285 (force elements make victims prove nonconsent twice in the same statute).
sitioning to a more appropriate mens rea of recklessness. Feminist scholar Lois Pineau previously proposed that “a man who failed to make the necessary efforts to obtain affirmative evidence of a woman’s voluntary consent to sexual intercourse” should be guilty of rape “even if he sincerely believed that the woman was consenting to the act.” This Note’s model statute similarly excludes any consideration of whether an assailant had knowledge of consent, or lack thereof, while rejecting Pineau’s proposal that a man should be guilty of rape even if he “sincerely believes” that the woman was consenting. Such an approach is not only unrealistic given modern sexual interactions, but it also embraces a strict liability approach that is too punitive to be considered beneficial. Instead, this Note proposes rape by recklessness. Under the statute, criminal conduct has occurred only when an assailant has consciously disregarded the risk of nonconsensual sex by failing to communicate, in some way, with the victim. This guarantees that Black women are granted communicative agency while eliminating the knowledge requirement that harms victims and assailants alike.

Importantly, the model statute does not go so far as to impose a mens rea of negligence. Only individuals who consciously disregard the risk of nonconsent, by failing to speak with or observe the victim’s communicative acts, would be guilty. Any equivalent expectations that the assailant consider non-communicated feelings, or receive a verbal

304. Taslitz, supra note 44, at 63 (recognizing that re-defining the mental state of a rape assailant can help remedy racial disparities); see LEGAL INFO. INST., supra note 73 (a defendant that has acted recklessly “consciously disregarded a substantial and unjustified risk”).

305. Taslitz, supra note 44, at 4 (citing Lois Pineau, Date Rape: A Feminist Analysis, in DATE RAPE: FEMINISM, PHILOSOPHY AND THE LAW 1, 6-7 (Leslie Francis ed., 1996)).

306. See Gruber, supra note 10, at 284 (arguing that current rape reform discourse and policy “often conceive[s] of drunken, casual, messy, or ambivalent sex as psychologically devastating and socially stigmatizing” which reflects “an older, distinctly unfeminist view about women” who choose to participate in this kind of sex). Importantly, if a woman is of “higher social status” she has a greater “freedom to engage in sexual experimentation without reputational damage.” Gruber, Anti-Rape, supra note 276, at 1046.

307. Taslitz, supra note 44, at 5 (explaining that Pineau’s proposal has been criticized for involving “strict liability” and for being too “utopian”); see also Part III.A.

308. Given that affirmative knowledge is “one of the most difficult mental states to prove in criminal law,” it can make rape criminally overinclusive for men, who may be unable to prove they had actual knowledge when consent is actually present, and underinclusive for women, who may have not communicated extensively enough to rise to a level of conferring knowledge when consent is not present. See Hong, supra note 37, at 262.

309. See LEGAL INFO. INST. supra note 73 (a defendant that has acted negligently “was not aware of the risk, but should have been aware of the risk”) (emphasis added).
affirmative “yes,” do not exist. Disposing of any analysis of whether the defendant knew if the victim was consenting, while still allowing evidence that a reasonable person in the same situation would sincerely believe the victim was consenting, still alleviates legal disparities between Black and white victims. While “knowledge” rhetorically implies that one party is all knowing and that there is one true account of the situation, “belief” insinuates that there are two sides to the story. Therefore, the statute no longer permits one narrative to dominate and eclipse the narratives of Black women. Instead, assailants can speak to their own perspective, but must also leave room for the perspectives of Black victims. Shifting agency away from the assailant’s narrative and towards the victim’s narrative dilutes the potential influence of racial stereotypes. Additionally, Section 1(c) of the statute opens an avenue for victims to present counterevidence of undue influence or coercion if communication was ambiguous.

To better outline this solution, it would be useful to return to the example of Brock Turner. As mentioned earlier, Brock Turner was a privileged, young white man who received a relatively low sentence for the digital rape of an unconscious Asian-American young woman.

310. Affirmative consent standards themselves lead to confusion, even among supporters, given the many varying ways sexual desire and consent can be, and is, communicated. See Gruber, Anti-Rape, supra note 276, at 1037.

311. While considering the assailant’s bona fide belief still poses a risk of placing victims under a patriarchal microscope, including a requirement of reasonable communicative efforts ensures that a bona fide belief on its own is not enough to vindicate an assailant—a bona fide belief that “relie[s] on a background assumption” is insufficient without credible evidence. See generally Helen Power, Towards a Redefinition of the Mens Rea of Rape, 23 OXFORD J. L. STUD. 379, 392 (2003) (explaining that convicting an assailant with a “bona fide belief in the victim’s consent” but who has also “relied on background assumption in arriving at [this belief] without taking care to see that it pertains to the victim’s current situation” is imposing a mens rea of negligence).

312. In advancing a reasonable person standard, this Note endorses Angela Onwuachi-Willig’s proposal to adopt particularized objective standard that “examines the facts of each case from the lens of a reasonable person in the complainant’s intersectional and multidimensional shoes,” Onwuachi-Willig, supra note 280, at 119 (emphasis added).

313. Charlsw, supra note 71, at 270-71 (“It might be more reasonable to expect a defendant to discern something about his own behavior (whether he has acted in such a fashion as to have coerced consent) than to expect him to perceive something about someone else’s state of mind (whether the complainant’s apparent consent was sincere).”).

314. See Taslitz, supra note 44, at 63 (recognizing that putting less weight on the assailant’s perception of whether or not consent was present makes “stereotypes about Black women’s sexual hunger matter less”).

Professor Kari Hong asked in 2018, “What if Brock Turner deserved this proverbial break?” The issue with Brock Turner’s case was less the three-month prison term and more the reasons for this leniency—the law protects those that conform to the white baseline and delegitimizes victims of color. Ideally, community reporting avenues would have deterred Turner from committing assault in the first place. Young men of privilege might often feel immune from the carceral arm of the U.S. legal system. In Turner’s case, this feeling of immunity proved, yet again, to be unfailingly rational. These community organizations could more effectively communicate to men the social expectations of intimate relationships, and the legal consequences if these aren’t met. Most importantly, they might have better served the victim, perhaps saving her from the judgmental eyes of the legal system and instead helping her move forward feeling that her strength, autonomy, and credibility were intact. Lastly, in the aftermath of the case, Turner could have been expelled from Stanford and he could have received comprehensive education on rape and sexual assault in lieu of a three-month stay in a prison with no rehabilitative requirements.

In response to Professor Hong’s proposed question, Brock Turner possibly did deserve this proverbial break. Having been socialized in a world where his accomplishments immunized him from any perceptions of criminality, Turner likely didn’t see his three-month sentence coming because he failed to see himself in the legal landscape of rape in the first place. Turner has no role in the rape prototype but adhered perfectly to notions of success and “goodness” from a white baseline perspective. As such, the law would, and did, protect him. Turner’s conscious disregard of nonconsent (given that his victim was unconscious) would nevertheless been sufficient for conviction under the proposed model statute. Reform efforts must expose why Brock Turner felt that he could publicly assault an unconscious girl without consequence, and they must expose how the law had legitimized these feelings long before his three-month prison sentence commenced. This would not only free sexual misconduct from the lens of the rape prototype and from its white heteronormative roots, but it would also uplift and legitimize non-white victims historically relegated to a lesser category of victimhood.

316. Hong, supra note 37, at 269.
CONCLUSION

Modern rape laws’ adherence to the white baseline constructs and perpetuates notions of Black criminality and white victimhood. The ubiquity of these stereotypes, and their concretization in the law, leave Black female victims of rape unacknowledged and under protected at the intersection of their racial and gender identity—as they have been, and continue to be, throughout the legal and carceral systems. Exposing the presence and weaponization of this baseline is essential to protecting Black women.

Incorporating counter-storytelling in feminist and rape reform movements can empower Black women who have experienced rape or sexual assault. Additionally, rhetorically tailoring rape statutes has the potential to not only confer agency onto Black victims, but to remove legal obfuscation of white heteropatriarchal prioritization. Regardless of the chosen approach, the legal system must grapple with intersectional identities and reject racialized perspectives, or risk continued victim discrimination on the basis of race:

Who knows what the black woman thinks of rape? Who has asked her? Who cares?[^318] –Alice Walker

[^318]: Wriggins, supra note 32, at 117 (citing Alice Walker, Advancing Luna—and Ida B. Wells, in You Can’t Keep A Good Woman Down 85, 93 (1981)).