

## Reconciling #MeToo and Criminal Justice

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### I. INTRODUCTION

Depending on who you ask, the #MeToo movement is either overdue or overreaching, but it seems everyone has heard of it. The response to actress Alyssa Milano’s tweet inviting women who experienced sexual harassment or assault to tweet “#MeToo” was overwhelming.<sup>1</sup> “MeToo” was retweeted nearly half a million times within twenty-four hours.<sup>2</sup> Several celebrities tweeted “#MeToo” or shared their stories, including Anna Paquin, Debra Messing, Rosario Dawson, Gabrielle

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<sup>1</sup> See Alison Gash & Ryan Harding, *#MeToo? Legal Discourse and Everyday Responses to Sexual Violence*, LAWS, 2018, at 2; Zahara Hill, *A Black Woman Created the “Me Too” Campaign Against Sexual Assault 10 Years Ago*, EBONY (Oct. 18, 2017), <https://www.ebony.com/news/black-woman-me-too-movement-tarana-burke-alyssa-milano/>. Milano’s tweet was in part a reaction to emerging reports of Hollywood producer Harvey Weinstein’s widespread sexual predation. See Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1147–49 (2019); Sophie Gilbert, *The Movement of #MeToo*, THE ATLANTIC (OCT. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>.

<sup>2</sup> See Gilbert, *supra* note 1; Hill, *supra* note 1.

Union, and Evan Rachel Wood.<sup>3</sup> #MeToo jumped mediums to Facebook and expanded to include male survivors, as celebrities like Terry Crews and Brandon Fraser shared their experiences of sexual abuse by powerful men in their industry.<sup>4</sup> The tweet's initial impact was in part attributable to its adept use of social media. Unlike other campaigns that sought specific changes outside their medium, #MeToo illustrated the prevalence of sexual violence simply by having survivors use its hashtag.<sup>5</sup>

Milano's tweet was not the first use of the words "Me Too" to advocate for victims of sexual violence. Tarana Burke established the Me Too movement in 2006 to unify survivors of sexual violence in underprivileged communities, particularly women of color.<sup>6</sup> Burke initially provided healing circles in which she shared her story and encouraged others to join.<sup>7</sup> Me Too continues to support these communities. In particular, it works to change the dialogue surrounding sexual

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<sup>3</sup> See Gilbert, *supra* note 1.

<sup>4</sup> See Gilbert, *supra* note 1; Hill, *supra* note 1; Laura Bradley, "I was terrified, and I was humiliated": #MeToo's Male Accusers, One Year Later, VANITY FAIR (Oct. 4, 2018), <https://www.vanityfair.com/hollywood/2018/10/metoo-male-accusers-terry-crews-alex-winter-michael-gaston-interview>.

<sup>5</sup> See Gash & Harding, *supra* note 1, at 2, 11; Catharine A. MacKinnon, *Where #MeToo Came From and Where It's Going*, THE ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>; Gilbert, *supra* note 1; Hill, *supra* note 1.

<sup>6</sup> See Gash & Harding, *supra* note 1, at 1; MacKinnon, *supra* note 5; Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>; Hill, *supra* note 1.

"Rape" and "sexual assault" are legal terms, referring to criminal offenses defined in statutes. Jurisdictions use and define these terms differently, and these terms often require some sort of penetration. Compare N.Y. PENAL Law § 130.35 (McKinney 2014) (using the term "rape"), with N.J. STAT. ANN. § 2C:14-2 (West 2018) (using the term "sexual assault"). "Sexual violence" is a broader term that encompasses when an individual is forced or manipulated into any non-consensual sexual activity. NAT'L SEXUAL VIOLENCE RESOURCE CTR., WHAT IS SEXUAL VIOLENCE? 1 (2010), [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Factsheet\\_What-is-sexual-violence\\_1.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Factsheet_What-is-sexual-violence_1.pdf). Sexual violence includes not only rape, but also any unwanted sexual contact or touching, as well as sexual harassment, sexual exploitation, and showing one's genitals or naked body to someone without their consent. See *id.* These terms may also be used to refer to something broader than what the law prohibits—a normative conception of what is unacceptable conduct.

I use all three terms in both the descriptive and normative sense. I discuss the criminal justice system's failure to meet the needs of those who have survived what is prohibited under rape, sexual assault, and sexual violence laws. I also use the normative meaning of these terms to analyze the gap between what the law prohibits and what survivors (in particular women) experience as a sexual violation and to acknowledge that these actions occur within a larger context of issues related to sex, aggression, and consent that may be more expansive and complex than existing legal definitions.

<sup>7</sup> See Liz Rowley, *The Architect of #MeToo Says the Movement Has Lost Its Way*, N.Y. MAG. (Oct. 23, 2018), <https://www.thecut.com/2018/10/tarana-burke-me-too-founder-movement-has-lost-its-way.html>. Me Too continues to focus on survivors.

violence to better reflect the experiences and needs of Black women and girls, along with queer, trans, and disabled individuals.<sup>8</sup>

The #MeToo movement (“#MeToo”)<sup>9</sup> that followed Milano’s tweet differs from Burke’s work in many ways—perhaps most notably in how it pivoted from a survivor-focused movement to a widespread reckoning of powerful men’s sexual misconduct. In a matter of weeks over eighty women publicly identified themselves as victims of producer Harvey Weinstein’s harassment and assault, including celebrities such as Ashley Judd and Salma Hayek.<sup>10</sup> Survivors’ reports and media investigations brought to light how prominent men across the private and public sectors engaged in sexual harassment and assault. These men included television journalists Charlie Rose and Matt Lauer, directors Bryan Singer and Bret Rattner, playwright Israel Horowitz, Senate candidate Judge Roy Moore and Senator Al Franken, Ninth Circuit Judge Alex Kozinski, actors Louis C.K. and Kevin Spacey, chef Mario Batalli, and opera singer and conductor Placido Domingo.<sup>11</sup> The movement is credited with the convictions of gymnastics coach Larry Nassar, and actor Bill Cosby, as well as the arrests of Weinstein and financier Jeffrey Epstein.<sup>12</sup>

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<sup>8</sup> *History and Vision*, METOOMVMT.ORG, <https://metoomvmt.org/about/#history> (last visited Aug. 31, 2019).

<sup>9</sup> I use the terms “#MeToo” and “the #MeToo movement” to discuss not merely the #MeToo tweet, but also the broader dialogue and actions that followed. See *#MeToo: A Timeline of Events*, CHICAGO TRIB. (last visited Apr. 19, 2020), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmstory.html>. This includes the allegations against over 200 well-known and influential men, the public reaction to and media coverage of these allegations, the consequences of these allegations (professional, legal, and otherwise), the increased attention to sexual violence in the media and in both the public and private sectors, and the various other campaigns that followed, such as #WhyIDidntReport and #TimesUp.

<sup>10</sup> See MacKinnon, *supra* note 5; Salma Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html>; Janice Williams, *Harvey Weinstein Accusers: Over Eighty Women Now Claim Weinstein Sexually Assaulted or Harassed Them*, NEWSWEEK (Oct. 30, 2017), <https://www.newsweek.com/harvey-weinstein-accusers-sexual-assault-harassment-696485>; Ronan Farrow, *Weighing the Costs of Speaking Out Against Harvey Weinstein*, THE NEW YORKER.COM (Oct. 27, 2017), <https://www.newyorker.com/news/news-desk/weighing-the-costs-of-speaking-out-about-harvey-weinstein>; Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein Accusers Tell Their Stories*, THE NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>; Jodi Kantor and Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

<sup>11</sup> See Audrey Carlson et al., *#MeToo Brought Down 201 Powerful Men. Half Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>.

<sup>12</sup> See Carlson, *supra* note 11; see also MacKinnon, *supra* note 5. MeToo founder Tarana Burke asserted that the charging of Harvey Weinstein has been cathartic for sexual violence survivors. See Ricardo Lopez, *Me Too Founder Says Looming Weinstein Arrest Is “Cathartic” For Survivors of Sexual Assault*, VARIETY (May 24, 2018, 2:21PM), <https://variety.com/2018/film/news/tarana-burke-harvey-weinstein-1202821447/>. At the time of writing, the case is awaiting trial.

This response stands in stark contrast to how police or prosecutors previously disregarded victims' allegations against Weinstein, Nassar, and Cosby or, in Epstein's case, allowed a plea deal that led to only three and half months in prison for assaulting multiple girls.<sup>13</sup>

In this article I argue that #MeToo ultimately demonstrates the criminal justice system's substantial limitations as a tool to respond to and prevent sexual violence by calling attention to the criminal justice system's failures. While #MeToo was not exclusively—or even primarily—about criminal justice, it brought into sharp relief the myriad ways this system fails to meaningfully and effectively address sexual violence. Yet #MeToo has at best ignored, and at worst perpetuated, many of these shortcomings. It largely excludes women of color and other subordinated groups. Its focus on perpetrators also furthers a narrative that ignores many survivors' experiences and impedes accountability.

While we should not resign ourselves to the criminal justice system's many limitations, reforms that expand the carceral state will likely aggravate rather than resolve these limitations. It is laudable for #MeToo to address law enforcement's dismissive response to rape accusations. Expanding the criminal justice system's mandate to punish, however, will likely increase the disproportionate incarceration of men of color while providing little benefit to women of color.<sup>14</sup> Such reforms fail to address survivors' needs and the underlying myths and attitudes that perpetuate sexual violence. They also disproportionately harm communities of color, which include those at most risk of experiencing sexual violence.

I argue that #MeToo demonstrates the need to transform rather than enhance the criminal justice system's response to sexual violence. While #MeToo highlighted the inadequacy of the criminal justice system's response, it ultimately demonstrates the need for a *less* carceral approach. Reforms should provide survivors and their communities more power in the reporting, investigation, and consequences of sexual violence. I discuss two such approaches: confidential reporting methods that provide survivors with control over the consequences of

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<sup>13</sup> See Julie K. Brown, *Even From Jail, Sex Abuser Manipulated the System. His Victims Were Kept in the Dark*, THE MIAMI HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article219494920.html>; Kerry Howley, *Everyone Believed Larry Nassar*, N.Y. MAG. (Nov. 12, 2018), <https://www.thecut.com/2018/11/how-did-larry-nassar-deceive-so-many-for-so-long.html>; Lena Wilson, *Five Additional Accusers Will Testify Against Bill Cosby at His Sexual Assault Retrial*, SLATE (Mar. 16, 2018, 3:36 PM), <https://slate.com/culture/2018/03/bill-cosby-prosecutors-introduce-five-more-women-to-his-sexual-assault-retrial.html>; Tracy Connor, *NYPD, Prosecutors Point Fingers Over Harvey Weinstein Probe*, NBC NEWS (Oct. 11, 2017, 11:31 AM), <https://www.nbcnews.com/storyline/sexual-misconduct/nypd-prosecutors-point-fingers-over-harvey-weinstein-probe-n809756>; Nicky Woolf, *The Bill Cosby Sexual Abuse Claims: Accusation by Accusation*, THE GUARDIAN (Dec. 16, 2014, 11:48 AM), <https://www.theguardian.com/world/2014/nov/24/the-bill-cosby-sexual-abuse-claims-accusation-by-accusation> (Epstein died in federal custody before trial); Gregory Wallace, *Jeffrey Epstein's World of Wealth and Powerful Friends*, CNN (Aug. 10, 2019, 9:47 AM), <https://www.cnn.com/2019/07/08/politics/jeffrey-epstein-bio/index.html>.

<sup>14</sup> See I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1362—63 (2010).

reporting; and restorative justice processes within the criminal justice system. These approaches better address many of the unmet needs of survivors, communities, and defendants—particularly those of subordinated groups that the criminal justice system has systematically neglected or abused and which #MeToo has largely excluded. Alternatives that meet these needs can increase accountability and provide more just outcomes.

My argument proceeds in three parts. Parts II and III argue that #MeToo's most salient lessons should be drawn from the ways that it both highlighted the criminal justice system's failures while paradoxically perpetuating them. Part II draws lessons from the successes of #MeToo—in particular the way it demonstrated the magnitude of sexual violence, the broader social, economic, and cultural context in which it flourishes, and the criminal justice system's inadequate and often damaging response. Part III argues that #MeToo has reflected, ignored, or internalized many of these problems. As with both the criminal justice system and many efforts to reform its approach to sexual violence, #MeToo has largely excluded women of color and other marginalized communities and failed to adequately consider issues of systemic racism. Its focus on powerful men's misconduct furthers a problematic "monster narrative" about who can be considered a survivor and a perpetrator of sexual violence.

Part IV argues that applying these lessons requires us to transform the criminal justice system's response to sexual assault. While it is tempting to equate broader criminal laws with greater accountability and more victim satisfaction, reforms that expand the carceral state are poorly suited to the problems I describe in Parts II and III. Such reforms are unlikely to meet survivors' needs—particularly those in subordinated communities that both #MeToo and the criminal justice system have neglected—and will likely unjustly target men of color and exacerbate their disproportionate incarceration.<sup>15</sup> A more just state is not necessarily a more carceral one.

Part IV concludes by considering reforms that would reduce the criminal justice system's carceral response rather than increase it. I discuss the merits and weaknesses of two such approaches: alternative reporting processes and restorative justice. While #MeToo provided a "reckoning" of holding men accountable for sexual violence, criminal justice responses should focus on survivors' needs rather than fixate on perpetrators. Meeting these needs can help bring survivors back into the criminal justice system from which they have been erased and strengthen its legitimacy.

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<sup>15</sup> See *infra* Part IV. A and IV. B.

## II. #METOO'S ACHIEVEMENTS

A. *Exposing the Criminal Justice System's Failures*

#MeToo brought unprecedented attention to the criminal justice system's deficiencies. The criminal justice system methodically discounts or burdens the majority of survivors because they do not fit a specific narrative—a white, straight woman who did not know her attacker, clearly resisted, and can demonstrate resulting injuries.<sup>16</sup> It consequently excludes, among others, those who knew the perpetrator (particularly if they had a sexual relationship), women of color, LGBT individuals, those who were intoxicated, sexually active, flirtatious, or failed to cut ties with the perpetrator and report immediately, low-income individuals, sex workers, and individuals addicted to drugs.<sup>17</sup> While these problems have long been evident to those who practice or study rape law, #MeToo raised substantial public awareness of these failures through media coverage and hashtags like #WhyIDidntReport.<sup>18</sup>

Victims' rights and feminist advocates have spent decades attempting to improve rape law.<sup>19</sup> These reforms focused on rejecting myths about sexual assault and expanding the state's responsibility to protect against sexual violence, thereby

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<sup>16</sup> See STEPHEN J. SCHULHOFER, *UNWANTED SEX*, 1–2 (1998); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 14–41 (2017); Janice DuMont et al., *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466, 467–70 (2003); cf. Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 222 (1989).

<sup>17</sup> See SCHULHOFER, *supra* note 16, at 1–2; Tuerkheimer, *supra* note 16, at 14–41; DuMont et al., *supra* note 16, at 466, 467–70.

<sup>18</sup> See, e.g., Brown, *supra* note 13 (reporting how Jeffrey Epstein manipulated the criminal justice system to avoid punishment); Howley, *supra* note 13 (describing how Larry Nassar continued to abuse girls despite reports to the police); see also MacKinnon, *supra* note 5 (describing #MeToo's effect); Gash & Harding, *supra* note 1 (describing #MeToo's consciousness raising effect). After Christine Blasey Ford testified at Supreme Court Justice Brett Kavanaugh's confirmation hearing that Justice Kavanaugh previously assaulted her, President Trump posted a tweet arguing that "if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local law enforcement authorities by either her or her loving parents" and demanding proof that she filed charges. See Allie Malloy, *Trump Unleashes on Kavanaugh Accuser*, CNN (Sept. 22, 2018, 8:47 AM), <https://www.cnn.com/2018/09/21/politics/donald-trump-brett-kavanaugh-accuser-tweets/index.html>. Survivors of sexual violence responded with #WhyIDidntReport to challenge the assumption that women promptly report assaults to the police. See Jacey Fortin, *#WhyIDidntReport: Survivors of Sexual Assault Share Their Stories After Trump Tweet*, N.Y. TIMES (Sept. 23, 2018), <https://www.nytimes.com/2018/09/23/us/why-i-didnt-report-assault-stories.html>. Like the hashtag #MeToo, #WhyIDidntReport illustrated the magnitude of sexual violence, but it also shed light on how few survivors report their experiences and the myriad reasons they do not. See *id.*

<sup>19</sup> See Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045, 1054–58 (2017) (discussing rape law reform); see also Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 228–32 (2015); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 582–85, 591–92 (2009) (discussing feminists' rape law reform efforts); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1133–84 (1986).

increasing the likelihood that sexual violence would be adequately punished and deterred.<sup>20</sup> The force and resistance requirements were reduced or eliminated to demonstrate that sexual assault can occur without physical struggle.<sup>21</sup> States repealed corroboration and fresh-complaint requirements, ostensibly rejecting the myths that a woman's testimony is insufficient evidence to convict and women who do not report quickly are fabricating their experience.<sup>22</sup> States have slowly begun to eliminate spousal rape exceptions to affirm that rape can be committed by spouses, other sexual partners, or acquaintances.<sup>23</sup> Rape shield laws have attempted to shift the focus from the victim's sexuality to the defendant's actions.<sup>24</sup>

The criminal justice system continues to fail survivors despite these reforms.<sup>25</sup> This failure is in part attributable to the enduring influence of rape myths at every level of the criminal justice system.<sup>26</sup> While sexual assault most commonly occurs when the defendant knows the victim, police are less likely to investigate such cases

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<sup>20</sup> See Kaplan, *supra* note 19, at 1054–58 (discussing rape law reform); Baker, *supra* note 19, at 228–32; William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 56 (1995); Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQUALITY 352 *passim* (2017).

<sup>21</sup> See Schulhofer, *supra* note 20, at 338–48; Kaplan, *supra* note 19, at 1054–57; Michelle Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1404 (2005); Pineau, *supra* note 16, at 218 (“[T]he criteria for consent continues to be the central concern of discourse on sexual assault.”); Vivian Berger, *Rape Law Reform at the Millennium: Remarks on Professor Bryden’s Non-Millennial Approach*, 3 BUFF. CRIM. L. REV. 513, 514–15, 519–25 (2000).

<sup>22</sup> See Gash & Harding, *supra* note 1, at 4–5; Estrich, *supra* note 19, at 1133, 1137–43.

<sup>23</sup> See Lalenya Weintraub Siegel, *The Marital Rape Exception: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 364–69 (1995) (discussing the decline of the marital rape exemption).

<sup>24</sup> See Gash & Harding, *supra* note 1, at 4–5; Estrich, *supra* note 19, at 1133.

<sup>25</sup> See Gash & Harding, *supra* note 1, at 8–9 (discussing how rape myths continue to stymie the criminal justice system's ability to address rape); Kaplan, *supra* note 19, at 1061–72; Stephen J. Schulhofer, *Rape in the Twilight Zone: When Sex is Unwanted But Not Illegal*, 38 SUFFOLK U. L. REV. 413, 415 (2005); see also NAT'L VICTIM CTR., RAPE IN AMERICA: A REPORT TO THE NATION 5 (1992); Katharine K. Baker, *What Rape Is and What it Ought Not to Be*, 39 JURIMETRICS J. 233, 234–36 (1999); Estrich, *supra* note 19, at 1093 (“[T]he problem has never been the words of the statutes as much as our interpretation of them.”); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 318 (2000); Gruber, *supra* note 19, at 585, 627, 630–33; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence*, 8 SIGNS 635, 651 (1983); see also Lili Loofbourow, *Why Society Goes Easy on Rapists*, SLATE (May 30, 2019, 5:45 AM), <https://slate.com/news-and-politics/2019/05/sexual-assault-rape-sympathy-no-prison.html>; Brandon Stahl et al., *When Rape Is Reported*, STAR TRIB. (July 22, 2018), <http://www.startribune.com/when-rape-is-reported-in-minnesota-and-nothing-happens-denied-justice-special-report-part-one/487130861/>.

<sup>26</sup> See SUSAN CARIGELLA, ADDRESSING RAPE REFORM IN LEGAL PRACTICE 2 (2009) (prevailing rape myths and little improvement in reporting and conviction rates demonstrate that “reforms have largely served a symbolic and educative function.”); Gash & Harding, *supra* note 1, at 8–9 (reporting and conviction rates have improved little because “reform activists did little to alter how rape is conceptualized and concretized.”); Tuerkheimer, *supra* note 16, at 112–13 (analyzing evidence that prosecutorial charging practices demonstrate rampant societal biases surrounding sexual assault); Kaplan, *supra* note 19, at 1062–72 (discussing how cultural beliefs and rape myths affect the likelihood of a conviction for sexual assault); Loofbourow, *supra* note 25.

and much more likely to find allegations of stranger rape credible.<sup>27</sup> Prosecutors are also less likely to pursue cases where the victim knows the perpetrator; when they do, juries are less likely to convict the defendant.<sup>28</sup> Police and prosecutors remain reluctant to take on cases that rely primarily or solely on the victim's testimony. Yet the expectation of corroboration is unrealistic for an offense that usually occurs in a private setting with no witnesses beside the perpetrator and victim, and which often lacks expected indicators of force and struggle (such as bruises and lacerations).<sup>29</sup>

Survivors have little reason to report if they cannot trust the legal system to take their allegations seriously.<sup>30</sup> Women perceive that police officers harbor specific views about who is a real rape victim and fear they will be met with disbelief if they do not fit that mold.<sup>31</sup> As discussed more thoroughly below, women of color are

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<sup>27</sup> See SUSAN BROWNMILLER, *AGAINST OUR WILL* 351–52 (1975); Kaplan, *supra* note 19, at 1059–60, 1061 (discussing the prevalence of “acquaintance rape”); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1243 (1997); Estrich, *supra* note 19, at 1170–72.

<sup>28</sup> See Baker, *supra* note 19, at 235–36; Bryden & Lengnick, *supra* note 27, at 1251–52; David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 682 (2001); Brandon Stahl et al., *Five Factors That Can Determine the Fate of a Sexual Assault*, STAR TRIB. (Dec. 18, 2018), <http://www.startribune.com/five-factors-that-can-determine-the-fate-of-a-sexual-assault-case/501637071/>; see also Loofbourow, *supra* note 25.

<sup>29</sup> See Gash & Harding, *supra* note 1, at 6, 9; Stephanie Mundhenk Harrelson, *I Was Sexually Assaulted. And I Believe Incarcerating Rapists Doesn't Help Victims Like Me*, THE APPEAL (July 18, 2019), <https://theappeal.org/i-was-sexually-assaulted-and-i-believe-incarcerating-rapists-doesnt-help-victims-like-me/> (describing how police told her “no sane DA” would prosecute her rapist because she lacked corroboration such as eyewitnesses); see also Gash & Harding, *supra* note 1, at 2, 6; Estrich, *supra* note 19, at 1159. First Lady Melania Trump recently reinforced these beliefs by arguing that survivors of sexual assault should not come forward unless they have “really hard evidence” to support their allegations. See *Being Melania—The First Lady* (ABC television broadcast Oct. 12, 2018), available at <https://abc.go.com/shows/2020/episode-guide/2018-10/12-being-melania-the-first-lady>; see also Marissa G. Muller, *Melania Trump Says #MeToo Accusers of Sexual Assault Need “Really Hard Evidence.”* W MAG. (Oct. 10, 2018), <https://www.wmagazine.com/story/melania-trump-me-too-women-sexual-assault-evidence-comment>.

Similarly, when Christine Blasey Ford testified that Justice Brett Kavanaugh assaulted her in high school, Senators Ron Johnson and Lindsey Graham admitted she might be credible, but dismissed her “emotional testimony” for lack of corroboration. Erica Werner, *Some GOP Senators Concede Ford's Credibility, But Point to Lack of Corroboration*, WASH. POST (Sept. 27, 2018), [https://www.washingtonpost.com/business/economy/some-gop-senators-concede-fords-credibility-but-point-to-lack-of-corroboration/2018/09/27/6d97c484-c287-11e8-b338-a3289f6cb742\\_story.html](https://www.washingtonpost.com/business/economy/some-gop-senators-concede-fords-credibility-but-point-to-lack-of-corroboration/2018/09/27/6d97c484-c287-11e8-b338-a3289f6cb742_story.html).

<sup>30</sup> See Tuerkheimer, *supra* note 1, at 1108–13; Gash & Harding, *supra* note 1, at 5–6; Tuerkheimer, *supra* note 16, at 11–12. The Justice Department estimates that women in the age group most at risk for sexual assault, those ages eighteen to twenty-four, report to police at a rate of twenty percent for college students and thirty-two percent for non-college students. See Tuerkheimer, *supra* note 1, at 1108 (citing SOFI SINOZICH & LYNN LANDGTON, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., *RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE AGED FEMALES, 1995–2013* 1, 5 (DEC. 2014)).

<sup>31</sup> See DuMont et al., *supra* note 16, at 468–69.



both more likely to experience sexual assault and less likely to report it compared to white women.<sup>32</sup> Survivors are also less likely to report if they have been assaulted by someone they know, or lack physical injury or other evidence of a struggle.<sup>33</sup>

Survivors are further deterred by the significant obstacles that follow reporting. Those who report endure a process that intrudes into their privacy, debases their character, and exposes them to additional trauma.<sup>34</sup> Conviction relies upon their ability to conform to distorted jury expectations about rape and rape victims.<sup>35</sup> Few prevail in court.<sup>36</sup> Most forego reporting rather than face judgments about their morality, alcohol use, sexual partners, or credibility; the price of reporting simply outweighs the low probability of success.<sup>37</sup>

#MeToo also demonstrated and intensified the extent to which these problems precipitate reporting through informal channels. Women who see no benefit in reporting to the police, or those who report and are met with incredulity, have long relied on “whisper networks” to warn others of perpetrators.<sup>38</sup> On occasion, such women anonymously share their accounts more publicly through what Deborah Tuerkheimer terms the “Shadow Court of Public Opinion.”<sup>39</sup> #MeToo changed the landscape of these informal networks by empowering an unprecedented number of survivors to identify themselves publicly in what Tuerkheimer describes as the “New Court of Public Opinion.”<sup>40</sup>

These informal channels, however, often fail to provide full or even partial accountability.<sup>41</sup> While some individuals have flatly denied wrongdoing in #MeToo’s New Court of Public Opinion, very few have taken full responsibility or

<sup>32</sup> See *infra* Part III. A.

<sup>33</sup> See *The Nat’l Intimate Partner and Sexual Violence Survey*, NAT’L CTR. FOR INJURY PREVENTION AND CONTROL CTRS. FOR DISEASE CONTROL AND PREVENTION, 1–2, 22–23 (2010), [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf); Gash & Harding, *supra* note 1, at 5–6; DuMont et al., *supra* note 16, at 470, 478–79.

<sup>34</sup> See Gash & Harding, *supra* note 1, at 6, 8–9; Andrea Parrot, *Recommendations for College Policies and Procedures to Deal with Acquaintance Rape*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 368, 369 (Andrea Parrot & Larie Bechhofer eds., 1991) (discussing how reporting to police often compounds a survivor’s trauma).

<sup>35</sup> See Gash & Harding, *supra* note 1, at 9.

<sup>36</sup> See *id.* at 6.

<sup>37</sup> See Tuerkheimer, *supra* note 16, at 11–12; Gash & Harding, *supra* note 1, at 8–9; DuMont et al., *supra* note 16, at 468–70; see also Michelle Alexander, *My Rapist Apologized: I Still Needed an Abortion*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/opinion/abortion-legislation-rape.html> (“I never once imagined that calling the police could help my situation. It could only make things worse. I envisioned prosecutors, courtrooms and interrogations . . . I know many women who’ve been raped; not one has called the cops.”).

<sup>38</sup> See Tuerkheimer, *supra* note 1, at 1168–69.

<sup>39</sup> See *id.* at 1171–72.

<sup>40</sup> See *id.* at 1172–73; see also Chris Reinders-Folmer, *Sorry, Not Sorry: Apologies and Denials in the #MeToo Movement*, THE INQUISITIVE MIND (Jan. 2019), <https://www.in-mind.org/article/sorry-not-sorry-apologies-and-denials-in-the-metoo-movement>.

<sup>41</sup> See Tuerkheimer, *supra* note 1, at 1138–40.

faced substantial consequences. More common is the “strangled, vague, blanket apology” that expresses concern and remorse while subtly minimizing culpability.<sup>42</sup> Among the several high profile individuals who have been accused of sexual violence, few have faced criminal charges for various reasons: survivors never sought help from the criminal justice system, police or prosecutors declined to pursue the cases, or the statute of limitations precluded prosecution.<sup>43</sup> Several men, such as screenwriter Max Landis (who was accused of sexual assault), journalists James Rosen and Glenn Thrush (both of whom were accused of non-consensual sexual touching), comedian Louis C.K. (who admitted he exposed his genitals and masturbated in front of non-consenting women), and political pundit Mark Halperin (who was accused of non-consensual sexual touching) skirted charges and successfully resumed prestigious careers.<sup>44</sup> C.K. used his actions as stand up material in which he unapologetically acknowledged his conduct and lamented the consequences he endured when it became public knowledge.<sup>45</sup>

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<sup>42</sup> Caitlin Flanagan, *To Hell with the Witch-Hunt Debate*, THE ATLANTIC (Nov. 22, 2017), <https://www.theatlantic.com/entertainment/archive/2017/11/to-hell-with-the-witch-hunt-debate/546713/>; see also Reinders-Folmer, *supra* note 40.

<sup>43</sup> See Carlson, *supra* note 11.

<sup>44</sup> See Tracy Clark-Flory, *The Lie of #MeToo Going Too Far*, JEZEBEL (Aug. 19, 2019, 3:30 PM), <https://jezebel.com/the-lie-of-metoo-going-too-far-1837370047>; Jenny Singer, *Here Are All the Famous Men Who Have Tried to Come Back From #MeToo*, THE SCHMOOZE (Apr. 25, 2019), <https://forward.com/schmooze/420038/here-are-all-the-famous-men-who-have-tried-to-come-back-from-metoo/>; Megan Garber, *The Phantom Reckoning*, THE ATLANTIC (Sep. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2018/09/the-phantom-reckoning/570217/> (describing how many men who admitted sexual misconduct failed to make amends and were never held accountable); Madeleine Aggeler, *What Happened to the Careers of the Women Louis C.K. Harassed?* N.Y. MAG. (Aug. 30, 2018), <https://www.thecut.com/2018/08/what-about-the-careers-of-louis-ck-victims.html>; Laura McGann, *Exclusive: NYT White House Correspondent Glenn Thrush's History of Bad Judgment Around Young Women Journalists*, VOX (Nov. 20, 2017), <https://www.vox.com/policy-and-politics/2017/11/20/16678094/glenn-thrush-new-york-times> (detailing allegations against Glenn Thrush); Marlow Stern, *"Bright" Screenwriter Max Landis Accused of Sexual Assault*, THE DAILY BEAST (Dec. 24, 2017), <https://www.thedailybeast.com/bright-screenwriter-max-landis-accused-of-sexual-assault>; Melena Ryzik et al., *Louis C.K. Is Accused by Five Women of Sexual Misconduct*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html>; Oliver Darcy, *Five Women Accuse Journalist and "Game Change" Co-Author Mark Halperin of Sexual Harassment*, CNN (Oct. 26, 2017, 3:27 PM), <https://money.cnn.com/2017/10/25/media/mark-halperin-sexual-harassment-allegations/index.html>.

<sup>45</sup> See Joanna Robinson, *Louis C.K. is Doubling Down on Jokes That Will Enrage His Critics*, VANITY FAIR (Jan. 18, 2019), <https://www.vanityfair.com/hollywood/2019/01/louis-ck-stand-up-9-11-masturbation-jokes>; Sarah Nechamkin, *Louis C.K. Jokes About His "Weird Year": "I Lost \$35 Billion in an Hour,"* N.Y. MAG. (Oct. 17, 2018), <https://www.thecut.com/2018/10/louis-c-k-makes-masturbation-jokes-at-stand-up-performance.html>.

### B. Contextualizing Sexual Violence

Sexual violence is part of a much larger system of intimidation, subordination, and harassment that women and girls must regularly navigate.<sup>46</sup> #MeToo placed sexual violence within this larger context—at least for white women.<sup>47</sup> It called attention to the additional labor many women assume to contend with sexual violence, the culture that promotes this violence, and the way criminal law ignores women’s “lived experiences of sexual violations.”<sup>48</sup> Criminal law does not and ought not punish every harm. It is increasingly clear, however, that criminal law magnifies heterosexual male perceptions of what is harmful and insufficiently values women’s experiences.

By demonstrating the widespread nature of sexual violence, #MeToo inspired a larger discussion about the steps women take to avoid and respond to sexual violence.<sup>49</sup> As one writer commented, women expend significant “energy and preparation ‘being careful’ . . . ‘Practicing caution’ can be frightening. ‘Watching your back’ can be expensive. ‘Staying safe’ can be exhausting.”<sup>50</sup> These myriad informal restrictions proscribe women’s daily activities, spaces they occupy, and create unofficial curfews. Women walk with their keys out as a potential weapon or to be ready to enter their homes quickly; they walk past their homes if someone has been behind them; they avoid parking garages, rest areas, areas that are not well lit, and wooded areas; they frequently change running routes and run without earphones; and they avoid living on the ground floor.<sup>51</sup> In public, they avoid eye contact with men trying to engage them and pretend to listen to music.<sup>52</sup> They are careful of how much alcohol they drink, that they see their drink poured, and that

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<sup>46</sup> See Gash & Harding, *supra* note 1, at 11; Sarah L. Maurer, *#MeToo Isn’t About Women’s Frailty. It’s About Women’s Labor*, CHRON. HIGHER ED. (Jan. 7, 2018), <https://www.chronicle.com/article/The-MeToo-Movement-Isn-t/242179>; Hill, *supra* note 1.

<sup>47</sup> See *infra* Part III. A.

<sup>48</sup> See Gash & Harding, *supra* note 1, at 15–16; see also Kaplan, *supra* note 19, at 1056.

<sup>49</sup> A Saturday Night Live musical skit satirized how #MeToo welcomed men to this reality: “Turns out all these cool powerful men are turning out to be . . . habitual predators? And it’s like, dang, is this the world now? But here’s a little secret that every girl knows. Oh, this been the damn world . . . [t]his is our home town; we’ll show you around. Welcome to hell. Now we’re all in here. Look around, isn’t it nice? It’s a full nightmare.” *Saturday Night Live: Season 43, Episode 9* (NBC television broadcast Dec. 2, 2017), available at <https://www.nbc.com/saturday-night-live/video/welcome-to-hell/3629589>.

<sup>50</sup> Amanda Duberman, *34 Things Women Do to Stay Safe Show the Burden of “Being Careful,”* HUFFPOST (Dec. 6, 2017), [https://www.huffpost.com/entry/what-women-have-to-do-to-be-careful\\_n\\_7072080](https://www.huffpost.com/entry/what-women-have-to-do-to-be-careful_n_7072080).

<sup>51</sup> See JACKSON KATZ, *THE MACHO PARADOX* 3–4 (2006); Duberman, *supra* note 50.

<sup>52</sup> See Duberman, *supra* note 50.

they do not leave their drink unattended.<sup>53</sup> Women avoid situations that include men who have made them uncomfortable in the past, limiting their ability to socialize.<sup>54</sup>

That women must consider their safety in ways straight and cisgender men need not is a widely accepted inequity. A simple Google search for “women’s safety tips” reveals several pages of articles, blogs, and studies asking women if they are “neglecting . . . safety tips” and urging them not to “let their guard down.”<sup>55</sup> These articles and websites advise women to: “pay attention to [their] surroundings,” “scan areas that may look deserted but could be harboring predators, such as parking lots,” to keep their “eyes and ears open, [and] hands free,” “have a plan” to respond to an attack, and in the event of an attack “fight to escape.”<sup>56</sup> They advise women how to protect themselves from violence in multiple roles and circumstances: as a mother<sup>57</sup> or student,<sup>58</sup> while traveling,<sup>59</sup> using the Internet,<sup>60</sup> walking alone at night,<sup>61</sup> driving alone or with children,<sup>62</sup> and exercising.<sup>63</sup>

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<sup>53</sup> See KATZ, *supra* note 51, at 3.

<sup>54</sup> See Duberman, *supra* note 50.

<sup>55</sup> See Linda Thrasybule, *4 Ways Women Can Protect Themselves From Predators*, LIVESCIENCE (May 30, 2013), <https://www.livescience.com/36929-safety-self-defense-tips-women.html>; *Ten Basic Safety Tips for Women*, MOM WITH A PREP, <https://momwithaprep.com/10-self-defense-tips-for-women/>.

<sup>56</sup> See Thrasybule, *supra* note 55; Jamie Cohen, *Personal Safety Tips for Women*, ABC NEWS (Jan. 6, 2006), <https://abcnews.go.com/GMA/HealthyWoman/story?id=125859&page=1>.

<sup>57</sup> See, e.g., *Ten Basic Safety Tips for Women*, *supra* note 55.

<sup>58</sup> See, e.g., Elspeth Bishop, *Safety Tips for Women on College Campuses*, U. MINN. WOMEN’S CTR. (Aug. 23, 2012), <https://mnwomenscenter.wordpress.com/2012/08/23/safety-tips-for-women%E2%80%AC-on-college-campuses/>.

<sup>59</sup> See, e.g., Alex Temblador, *Travel Safety Expert Shares Her Best Safety Tips for Women Travelers*, TRAVEL PULSE (Mar. 5, 2019), <https://www.travelpulse.com/news/features/travel-safety-expert-shares-her-best-safety-tips-for-women-travelers.html>.

<sup>60</sup> See, e.g., Ashley Thurston, *Tips for Women (By Women) On How to Stay Safe On and Offline*, DASHLANE (Mar. 8, 2017), <https://blog.dashlane.com/tips-for-women-on-how-to-stay-safe-on-and-offline/>.

<sup>61</sup> See, e.g., *Basic Street Safety for Women*, <https://www.instructables.com/id/Basic-Street-Safety-for-Women/>.

<sup>62</sup> See, e.g., *Safety Tips for Women: How to Stay Safe on the Road*, JACARANDAFM (Aug. 16, 2019), <https://www.jacarandafm.com/lifestyle/family/safety-tips-for-women-how-to-stay-safe-on-the-road/>.

<sup>63</sup> See, e.g., Nicole Spector, *Scared to Run Alone? Women Runners Share Their Best Safety Tips*, NBC NEWS (Nov. 12, 2018, 5:19 PM), <https://www.nbcnews.com/better/health/scared-run-alone-female-runners-share-how-they-stay-safe-ncna935186>.

In contrast, a search for “men’s safety tips” reveals primarily health advice.<sup>64</sup> Several sites address avoiding injury in the workplace,<sup>65</sup> while exercising,<sup>66</sup> and while shaving.<sup>67</sup> The few sites that provide advice about avoiding sexual violence address gay, bi, or transgender men,<sup>68</sup> or provide help for men who want to change their own abusive behavior.<sup>69</sup>

Women’s social, political, and economic inequality both contribute to and are reinforced by sexual violence.<sup>70</sup> Their social and economic inequality increases vulnerability to rape and limits their ability to leave abusive relationships.<sup>71</sup> At the same time, the threat of sexual violence maintains women’s economic inequality by limiting their access to the workplace and to places of power. Women “show up at work and redirect the conversation away from their bra size, tactfully pull hands off their body, or repeatedly find new ways to avoid the male supervisor who wants to

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<sup>64</sup> See, e.g., Men’s Health: Lifestyle Tips for Men Over 50, CLEV. CLINIC, <https://my.clevelandclinic.org/health/articles/16422-mens-health-lifestyle-tips-for-men-over-age-50> (last updated Jan. 4, 2017); *National Men’s Health Week*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/features/healthymen/index.html> (last updated June 10, 2019); Christopher W. Bunt, *Nine Tips for Men’s Health*, HEALTH.MIL (Jun. 12, 2019), <https://health.mil/News/Articles/2019/06/12/Nine-tips-for-Mens-Health>; Taylor Kabuta, *Nine Tips for Safer Sex*, MEN’S J., <https://www.mensjournal.com/health-fitness/9-tips-for-safer-sex-20150507/>.

<sup>65</sup> See, e.g., *Workplace Safety Tips: A Comprehensive Resource*, ATL. TRAINING, <https://www.atlanticttraining.com/safety-tips/workplace-safety-tips.php> (last visited Apr. 20, 2020).

<sup>66</sup> See, e.g., Philip Ellis, *Three Things Everyone Should Know Before Working Out in a Heatwave*, MEN’S HEALTH (July 6, 2019), <https://www.menshealth.com/fitness/a28307164/safety-tips-working-out-heatwave/>.

<sup>67</sup> See, e.g., Naomi Torres, *Do You Have Any Tips for Men Shaving Their Genitals?*, LIVE ABOUT (July 14, 2017), <https://www.liveabout.com/do-you-have-any-tips-for-men-shaving-genitals-1716911>.

<sup>68</sup> See, e.g., Zachary Zane, *Eight Ways to Make Your Grindr Hookups Safer*, MEN’S HEALTH (Aug. 14, 2019), <https://www.menshealth.com/sex-women/a28689066/grindr-hookup-safety/>; *Men’s Room/Restroom Tips for Pre-Op FTM’s*, THE TRANSITIONAL MALE (Jun. 18, 2003), <http://www.thetransitionalmale.com/menroom>.

<sup>69</sup> See *Safety Tips*, MEN’S SAFETY PROJECT (Mar. 27, 2016), <https://www.menssafetyproject.com/safety-tips/the-stories-of-four-men-who-decided-to-change>.

<sup>70</sup> See Ruth D. Peterson & William C. Bailey, *Rape and Dimensions of Gender Socioeconomic Inequality in U.S. Metropolitan Areas*, 29 J. RES. IN CRIME & DELINQ. 162, 162–67 (1992); Rachel Jewkes, *Intimate Partner Violence: Causes and Prevention*, THE LANCET 1423, 1424–29 (2002) (discussing rape in the context of intimate partner violence); Denise A. Hines, *Predictors of Sexual Coercion Against Women and Men: A Multilevel, Multinational Study of University Students*, 36 ARCHIVES OF SEXUAL BEHAVIOR 403, 405–20 (2007); see also MacKinnon, *supra* note 5 (discussing how power dynamics and inequality license sexual violence).

<sup>71</sup> See, Jewkes, *supra* note 70, at 1424–29; Robin L. West, *Legitimizing the Illegitimate: A Comment on ‘Beyond Rape,’* 93 COLUM. L. REV. 1442, 1452–59 (1993) (discussing consent to sex in exchange for economic security); Naomi R. Cahn, *Loosening the Legal Language: The Reasonable Women Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1429 n.136 (1992) (discussing the case of a woman who was repeatedly raped over ten years by her intimate partner, and who would often return because he promised not to rape her again and she could not earn enough to support herself and their children).

discuss his sexual problems.”<sup>72</sup> Managing the risks and consequences of sexual violence is unpaid and unwanted labor that women must disproportionately undertake or else forego jobs, networking, and mentorship.<sup>73</sup> As Sara Maurer writes, “Did male comedians have to sit in a room and watch Louis C.K. jerk off in order to network? If they didn’t, why should female comedians have to do that work?”<sup>74</sup>

#MeToo also generated more widespread discussion of the culture that supports sexual violence. Cultural norms characterize sex as something men negotiate or win from women.<sup>75</sup> The idea that sex with a woman is something that an aggressive, sexual male achieves is deeply embedded in our understanding of sex, rape, femininity, and masculinity.<sup>76</sup> These social norms promote male entitlement to sex

<sup>72</sup> See Maurer, *supra* note 46; see also Gash & Harding, *supra* note 1, at 11.

<sup>73</sup> See Jill Filipovic, *The Poorly Reported Aziz Ansari Exposé Was a Missed Opportunity*, THE GUARDIAN (Jan. 16, 2018), <https://www.theguardian.com/commentisfree/2018/jan/16/aziz-ansari-story-missed-opportunity> (“[W]e increasingly understand that it’s not just about sex, but about power, and that harassment in the workplace isn’t about sexual desire, but about women’s rights to participate in the workforce.”); Maurer, *supra* note 46; Rebecca Traister, *This Moment Isn’t (Just) About Sex. It’s Really About Work*, N.Y. MAG. (Dec. 10, 2017), <https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html?fbclid=IwAR3wWWhtG6cWuS8ihWTGTnEAHx1-rkL-oNbWu9JHXf8-uSoVf2TvEGFhAdI>; Joan Walsh, *What Would Women Be Doing if We Weren’t Constantly Dealing with Male Abuse?*, THE NATION (Oct. 16, 2017), <https://www.thenation.com/article/what-would-women-be-doing-if-we-weren-constantly-dealing-with-male-abuse/>; Jia Tolentino, *How Men Like Harvey Weinstein Implicate Their Victims in Their Acts*, NEW YORKER (Oct. 11, 2017), <https://www.newyorker.com/culture/jia-tolentino/how-men-like-harvey-weinstein-implicate-their-victims-in-their-acts>. When harassment and assault is reported, women may be unable to find mentors because men who are concerned that their actions will be misconstrued often avoid mentoring women. See Jena McGregor, *#MeToo Backlash: More Male Managers Avoid Mentoring Women or Meeting Alone With Them*, WASH. POST (May 17, 2019), <https://www.washingtonpost.com/business/2019/05/17/metoo-backlash-more-male-managers-avoid-mentoring-women-or-meeting-alone-with-them/>; Katrin Bennhold, *Another Side of #MeToo: Male Managers Fearful of Mentoring Women*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/world/europe/metoo-backlash-gender-equality-davos-men.html?module=inline>.

<sup>74</sup> See Maurer, *supra* note 46; see also Walsh, *supra* note 73; Tolentino, *supra* note 73.

<sup>75</sup> See Jill N. Filipovic, *Offensive Feminism: The Conservative Gender Norms That Perpetuate Rape Culture, and How Feminists Can Fight Back*, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 13, 17–19 (Jaclyn Friedman & Jessica Valenti eds., 2008); Am. Coll. Health Ass’n, *Position Statement on Preventing Sexual Violence on College and University Campuses* (Dec. 2011), [https://www.acha.org/documents/resources/guidelines/ACHA\\_Statement\\_Preventing\\_Sexual\\_Violence\\_Dec2011.pdf](https://www.acha.org/documents/resources/guidelines/ACHA_Statement_Preventing_Sexual_Violence_Dec2011.pdf); Am. Coll. Health Ass’n, *Shifting the Paradigm: Primary Prevention of Sexual Violence* 8 (Aug. 2008), [https://www.acha.org/documents/resources/ACHA\\_PSV\\_toolkit.pdf](https://www.acha.org/documents/resources/ACHA_PSV_toolkit.pdf) (hereinafter *Shifting the Paradigm*); Tracy N. Hipp et al., *Justifying Sexual Assault: Anonymous Perpetrators Speak Out Online*, 7 PSYCH. VIOLENCE, 82, 85 (2017); Baker, *supra* note 19, at 246; Gruber, *supra* note 19, at 631; Traister, *supra* note 73.

<sup>76</sup> See SCHULHOFER, *supra* note 16, at 60–61; Estrich, *supra* note 19, at 1092–93; see also KATE HARDING, *ASKING FOR IT 1* (2015); Filipovic, *supra* note 75, at 18–19; Brad Perry, *Hooking Up with Healthy Sexuality, and Why a Sex-Positive Rape Prevention Paradigm Can Benefit Everyone Involved*, in YES MEANS YES, *supra* note 75, at 193, 200–01; Hipp et al., *supra* note 75, at 85 (describing rape perpetrators’ citing of sexual scripts, in particular that men desire sex and are supposed to initiate it, that women have weaker sex drives or resist male advances); Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1640–42 (2012); Katharine K. Baker, *Sex, Rape and Shame*, 79 B.U. L. REV.

from women and male aggression to obtain it.<sup>77</sup> They reinforce the myth that a woman who does not want sex will continuously resist unless threatened with serious harm.<sup>78</sup> Men therefore commonly overestimate a woman's interest in sex, dismiss or ignore signs of non-consent, and interpret neutral or negative cues as indicators of consent or a challenge to persuade.<sup>79</sup>

Criminal laws requiring force or clear expressions of non-consent ignore how these norms shape sexual interactions.<sup>80</sup> Force and consent standards explicitly or implicitly require women to unequivocally resist or express non-consent because they assume that, as Joshua Dressler argues, "sexual contact ordinarily is a pleasurable event that humans generally seek rather than avoid."<sup>81</sup> Yet the same social norms that characterize sex as a game or contest of wills in which the man acts and a woman reacts also condition women to be pleasant and avoid

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663, 670–77 (1999); Pineau, *supra* note 16, at 222–23; MacKinnon, *supra* note 25, at 650; Traister, *supra* note 73.

<sup>77</sup> See Hipp et al., *supra* note 75, at 86–87 (describing attitudes that lead to rape, including the view of women as objects that exist for sexual gratification); Filipovic, *supra* note 75, at 18–19; Elizabeth Lopatto, *Rape Culture is a Public Health Issue*, FORBES (May 24, 2014), <http://www.forbes.com/sites/elizabethlopatto/2014/05/24/rape-culture-is-a-public-health-issue/#13cc0c2ac7c1>. For a discussion of "rape culture" see HARDING, *supra* note 76 *passim*; TRANSFORMING A RAPE CULTURE iv (Emilie Buchwald, et al., eds., 2005); Joyce E. Williams, *Rape Culture*, in THE BLACKWELL ENCYCLOPEDIA OF SOC. 3783, 3783–87 (George Ritzer ed., 2007); NICOLA GAVEY, JUST SEX?: THE CULTURAL SCAFFOLDING OF RAPE 35 (Jane Ussher ed., 2005); see also Emily Suran, *Title IX and Social Media: Going Beyond the Law*, 21 MICH. J. GENDER & L. 273, 277–78 (2014) (discussing history of the term "rape culture"); Dan Subotnik, "Hands Off": Sex, Feminism, Affirmative Consent, and the Law of Foreplay, 16 S. CAL. REV. L. & SOC. JUST. 249, 252 (2007) (discussing concept of "rape culture"); David S. Lee et al., *Sexual Violence Prevention*, in *Shifting the Paradigm*, *supra* note 75, at 7; Lydia Guy, *Re-visioning the Sexual Violence Continuum*, in *Shifting the Paradigm*, *supra* note 75, at 10.

<sup>78</sup> See Hipp et al., *supra* note 75, at 4 (describing perpetrators' belief that women need to resist more if they truly do not want sex).

<sup>79</sup> See Filipovic, *supra* note 75, at 19–20; Gruber, *supra* note 19, at 631–32; Baker, *supra* note 75, at 230–31, 246; Martie G. Haselton, *The Sexual Overperception Bias: Evidence of a Systematic Bias in Men From a Survey of Naturally Occurring Events*, 37 J. RES. PERSONALITY 34, 39–43, 45 (2003); Douglas N. Husak & George C. Thomas III, *Rapes Without Rapists: Consent and Reasonable Mistake*, 11 PHIL. ISSUES 86, 94–96, 98–100 (2001); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1804 (1992); MacKinnon, *supra* note 25, at 652–54; Jeanna Bryner, *Clueless Guys Can't Read Women*, LIVESCIENCE (Mar. 20, 2008), <http://www.livescience.com/4876-clueless-guys-read-women.html>.

<sup>80</sup> See ANDREA DWORKIN, INTERCOURSE 154–82 (20th anniversary ed. 2007); Cheryl Hanna, *Rethinking Consent in a Big Love Way*, 17 MICH. J. GENDER & L. 111, 136–39 (2010); MacKinnon, *supra* note 25, at 646–47, 650, 652; Carole Pateman, *Women and Consent*, 8 POL. THEORY 149, 158–64 (1980); see also Rebecca Traister, *Why Sex That's Consensual Can Still Be Bad. And Why We're Not Talking About It*, N.Y. MAG. (Oct. 20, 2015), <http://nymag.com/thecut/2015/10/why-consensual-sex-can-still-be-bad.html> (discussing problems with consensual sex).

<sup>81</sup> See Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, *The Sixty-Eighth Cleveland-Marshall Fund Lecture*, 46 CLEV. ST. L. REV. 409, 429 (1998).

awkwardness.<sup>82</sup> A woman who does not want a sexual interaction must therefore reject a man gently enough not to hurt his feelings or incur his wrath but also assertively enough to ensure she is not blamed for sending mixed signals. “No,” one writer states, “is, in theory, available to anyone, at any time; in practice, however, it is a word of last resort . . . [e]veryone should be able to say it, but no one really wants to.”<sup>83</sup> Rejecting a man’s advances also comes with a risk of violence.<sup>84</sup> Many women freeze, disassociate, or acquiesce when they feel that refusing sex may be dangerous or simply useless.<sup>85</sup> Abusive relationships and other power imbalances can limit an individual’s ability to refuse sex or attune those who have endured abuse to unspoken threats.<sup>86</sup> In practice, if a man wants sex with a woman, criminal law generally presumes his access to her body and is agnostic to the woman’s lack of desire unless she adequately expresses it.

Prioritizing male sexual pleasure also shapes how police and prosecutors interpret women’s reports, and how judges and juries determine the defendant’s culpability. A defendant’s actions are inherently more reasonable when viewed through the lens of his desires.<sup>87</sup> Compared to stranger rape, cases in which a survivor knew the perpetrator are easier to understand as a well-meaning man simply getting carried away by his desires. As a result, police and prosecutors are much less likely to credit these reports, juries and judges are less likely to convict based on them, and where conviction occurs, judges commonly reduce sentences.<sup>88</sup> Even affirmative consent standards have little impact on jury’s expectations. Dan Kahan’s study on jury determinations provided mock juries with a fact pattern in which the

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<sup>82</sup> See Megan Garber, *Aziz Ansari and the Paradox of “No,”* THE ATLANTIC (Jan. 16, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/aziz-ansari-and-the-paradox-of-no/550556/>.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*; Mary Adkins, *The Misguided Definition of Rape as “Force,”* THE ATLANTIC (May 21, 2014), <https://www.theatlantic.com/health/archive/2014/05/the-misguided-definition-of-rape-as-force/370954/>.

<sup>85</sup> See Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 443 (2016); Ann J. Cahill, *Unjust Sex vs. Rape*, 31 HYPATIA 746, 753–54 (2016) (stating that women have, “often felt that the situation they were in did not allow for them to do anything *but* consent”); Anderson, *supra* note 21, at 1414–17; Grace Galliano et al., *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates*, 8 J. INTERPERSONAL VIOLENCE 1108, 109–10 (1993); Estrich, *supra* note 19, at 1114–18; see also Lynn Hecht Schafran, *Rape Is a Major Public Health Issue*, 86 AM. J. PUB. HEALTH 15, 16 (1996) (discussing “frozen fright”).

<sup>86</sup> See, e.g., *State v. Alston*, 312 S.E.2d 470 (N.C. 1984); *State v. Lester*, 321 S.E.2d 166 (N.C. Ct. App. 1984); see also Estrich, *supra* note 19, at 1111–12; MacKinnon, *supra* note 85, at 469.

<sup>87</sup> The exception to this is where a Black man is accused of raping a white woman, in which case police, prosecutors, and judges are far more likely to interpret a Black man’s actions as threatening and expect a Black man to know that a white woman would not desire sex with him. See *infra* Part IV. A.

<sup>88</sup> See *supra* notes 28–29 and accompanying text; see also Lili Loofbourow, *Why Society Goes Easy on Rapists*, SLATE (May 30, 2019, 5:45 AM), <https://slate.com/news-and-politics/2019/05/sexual-assault-rape-sympathy-no-prison.html>.



victim repeatedly said “no” and was passive during the interaction; the jurors acquitted at nearly the same rate despite whether affirmative consent or force was required.<sup>89</sup>

A recent and infamous Canadian case demonstrates how these assumptions can affect a trial’s outcome, whether explicitly or implicitly. Judge Robin Camp acquitted a man accused of raping a woman over a bathroom sink during a party, explaining “[y]oung wom[e]n want to have sex, particularly if they’re drunk,” and that “sex and pain sometimes go together . . . that’s not necessarily a bad thing.”<sup>90</sup> He questioned the victim’s morality and her efforts to fight off the attack, asking her why she did not “just keep [her] knees together.”<sup>91</sup>

While Judge Camp faced consequences and subsequently resigned, the defendant’s retrial with a new judge demonstrated a similar but more implicit prioritizing of male sexual desire. The defendant testified that he never tried to determine whether the victim wanted to have sex, that she had no role in directing the sexual activity, and that he made all decisions regarding the sexual interaction.<sup>92</sup> He persisted, he testified, because she did not resist or tell him to stop.<sup>93</sup> His own testimony presented him as a person with desires and the victim as a vector for those desires; he did not think about overpowering the victim’s resistance because he gave her little thought at all. The judge acquitted the defendant based on this testimony.<sup>94</sup>

### III. #METOO’S FAILURES

#### A. *The Continuing Erasure of Women of Color*

#MeToo illustrated the extent to which women of color and other subordinated groups are removed from the discussion of sexual assault in favor of white and more privileged survivors. Women of color experience sexual violence at higher rates

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<sup>89</sup> See Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why*, in *Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 781–99 (2010); see also Kaplan, *supra* note 19, at 1069–72.

<sup>90</sup> See Ian Austen, *Judge Camp, Canadian Judge, Resigns Over Handling of Rape Case*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/world/canada/canada-judge-robin-camp-resigns.html>; Bill Graveland, “*She Never Said Yes Directly*,” *Says Accused in Calgary Sex Assault Trial*, TORONTO STAR (Nov. 19, 2016), <https://www.thestar.com/news/canada/2016/11/09/accused-in-calgary-knees-together-retrial-says-he-really-liked-woman-who-accused-him-of-rape.html>.

<sup>91</sup> See Austen, *supra* note 90.

<sup>92</sup> See Bill Graveland, “*She Never Said Yes Directly*,” *Says Accused in Calgary Sex Assault Trial*, TORONTO STAR (Nov. 19, 2016), <https://www.thestar.com/news/canada/2016/11/09/accused-in-calgary-knees-together-retrial-says-he-really-liked-woman-who-accused-him-of-rape.html>.

<sup>93</sup> See Graveland, *supra* note 92.

<sup>94</sup> See Bill Graveland, *Alexander Wagar, Accused in “Knees Together,” Trial Found Not Guilty of Sexual Assault*, HUFFINGTON POST (last updated Jan. 31, 2017, 8:01 PM), [https://www.huffingtonpost.ca/2017/01/31/alexander-wagar-knees-together-trial\\_n\\_14527502.html](https://www.huffingtonpost.ca/2017/01/31/alexander-wagar-knees-together-trial_n_14527502.html).

than white women, yet are less likely to report this to the police.<sup>95</sup> Other subordinated groups, such as poor women, sex workers, and members of the LGBT community, are also more vulnerable to sexual violence and, as discussed above, are distrustful of involving police.<sup>96</sup> Their communities have endured a long history of police violence and intimidation.<sup>97</sup> They justifiably do not trust the criminal justice system to take their claims seriously and may even fear additional sexual violence from police.<sup>98</sup> As a result, sexual violence against these groups is largely invisible in the criminal justice system.

The #MeToo movement compounded this erasure. Alyssa Milano's original tweet failed to credit Tarana Burke for founding the "Me Too" movement and did not credit her until over a day after the hashtag exploded.<sup>99</sup> That Milano's slight was likely unintentional only underscores her privilege; she does not belong to the communities with which Burke works—women of color and survivors in underprivileged areas overlooked by rape crisis centers and sexual assault workers. Nor did Milano, in Burke's words, "take a moment to see if there was work already being done."<sup>100</sup>

#MeToo has since largely excluded the communities Burke originally sought to reach from its dialogue. Stories of wealthy, white, cisgender women dominate the movement.<sup>101</sup> While referring to "women" does not necessarily exclude women of color, a qualitative study of #MeToo and #TimesUp tweets concluded that the tweets

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<sup>95</sup> See *The Nat'l Intimate Partner and Sexual Violence Survey*, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL CTRS. FOR DISEASE CONTROL AND PREVENTION, 1–2, 22–23 (2010), [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf); Tuerkheimer, *supra* note 1, at 1102 & n.2.

<sup>96</sup> See DuMont et al., *supra* note 16, at 468–70 (analyzing reasons that women of color, lesbians, sex workers, and low-income women do not report to the police); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 776–77 (2007); Hannah Giorgis, *Many Women of Color Don't Go to the Police After Sexual Assault for a Reason*, THE GUARDIAN, (Mar. 25, 2015) (describing how she did not report her rape because police consider Black women "undeserving of protection").

<sup>97</sup> See Hill, *supra* note 1 (describing how police violence against African Americans and the racism of the criminal justice system deters women of color from reporting); see also Keli Goff, *The Complexity of #MeToo for Black Women*, HOLLYWOOD REP., (Feb. 14, 2019), <https://www.hollywoodreporter.com/news/tv-writer-keli-goff-complexity-metoo-black-women-guest-column-1186005>.

<sup>98</sup> See Giorgis, *supra* note 96.

<sup>99</sup> See Hill, *supra* note 1.

<sup>100</sup> See Hill, *supra* note 1.

<sup>101</sup> See Melissa Chan, "Our Pain is Never Prioritized": #MeToo Founder Tarana Burke Says We Must Listen to "Untold" Stories of Minority Women, TIME (Apr. 23, 2019), <https://time.com/5574163/tarana-burke-metoo-time-100-summit/>; Rochelle Riley, #MeToo Founder Tarana Burke Blasts the Movement for Ignoring Poor Women, DETROIT FREE PRESS (Nov. 16, 2018), <https://www.freep.com/story/news/nation/2018/11/16/tarana-burke-metoo-movement/2023593002/>; Tarana Burke, #MeToo Was Started for Black and Brown Women and Girls: They're Still Being Ignored, WASH. POST (NOV. 9, 2017, 8:04 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/>.

lack meaningful description, portrayal, representation, and inclusion of women of color and fail to address the specific risks and challenges women of color face.<sup>102</sup>

#MeToo's exclusive nature is no secret.<sup>103</sup> Burke in particular has argued that #MeToo fails to reflect the voices and needs of indigenous women, trans women, and women of color, noting, "our stories get pushed aside and our pain is never prioritized."<sup>104</sup> Speaking to a conference on race, Burke urged women of color not to abandon #MeToo, but instead to "take back the narrative."<sup>105</sup> Her words underscore how #MeToo burdens women of color with "actively reminding the dominant audience that they exist."<sup>106</sup>

The recall of Judge Aaron Persky—widely hailed as a #MeToo victory—illustrates these problems.<sup>107</sup> Judge Persky had sentenced Brock Turner, a white Stanford student, to two years of probation and six months in county jail after a jury found Turner guilty of sexual penetration of an intoxicated person with a foreign object, sexual penetration of an unconscious person with a foreign object, and intent to commit rape.<sup>108</sup> Judge Persky was widely criticized for focusing on prison's potential impact on Turner while disregarding the magnitude of Turner's offenses and his failure to take responsibility for them.<sup>109</sup> This criticism was certainly merited, particularly when the victim's impact statement detailing her trauma was contrasted with Turner's statement, which largely spoke of his actions in passive voice, focused on his own pain, and blamed his actions on a culture of alcohol and promiscuity.<sup>110</sup>

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<sup>102</sup> See Daniela Ceron, *How Women of Color Are Discussed in Hashtag Feminist Movements*, 9 ELON J. UNDERGRADUATE RES. IN COMM'C'N 76, 82, 85 (2018). The #Time'sUp movement is an outgrowth of #MeToo that specifically focuses on women's unequal treatment in the work force. See TIME'S UP, <https://www.timesupnow.com/> (last visited Aug. 25, 2019).

<sup>103</sup> See Chan, *supra* note 101; Riley, *supra* note 101; Allyson Hobbs, *One Year After #MeToo: The Legacy of Black Women's Testimonies*, NEW YORKER (Oct. 10, 2018), <https://www.newyorker.com/culture/personal-history/one-year-of-metoo-the-legacy-of-black-womens-testimonies>; Jessica Prois & Carolina Moreno, *The #MeToo Movement Looks Different for Women of Color. Here Are Ten Stories*, HUFFPOST (Jan. 2, 2018), [https://www.huffpost.com/entry/women-of-color-me-too\\_n\\_5a442d73e4b0b0e5a7a4992c](https://www.huffpost.com/entry/women-of-color-me-too_n_5a442d73e4b0b0e5a7a4992c); Burke, *supra* note 101.

<sup>104</sup> See Chan, *supra* note 101.

<sup>105</sup> See Riley, *supra* note 101.

<sup>106</sup> See Ceron, *supra* note 102, at 85.

<sup>107</sup> See MacKinnon, *supra* note 5; Paul Elias, *Judge Responsible for Brock Turner's Sentence Taken Down By #MeToo*, BUS. INSIDER (Jun. 6, 2018, 6:39 AM), <https://www.businessinsider.com/judge-responsible-for-brock-turners-sentence-taken-down-by-metoo-2018-6>.

<sup>108</sup> See Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave Brock Turner a Six Month Sentence*, N.Y. TIMES (Jun. 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>; Elias, *supra* note 107.

<sup>109</sup> See Astor, *supra* note 108.

<sup>110</sup> See Katie J.M. Baker, *Here's the Powerful Letter the Stanford Rape Victim Read to Her Attacker*, BUZZFEED (June 3, 2016, 4:17 PM), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra#.btBa2A66lm>; John Bacon, *Stanford Rapist: "I've Been Shattered by the Party Culture,"* USA TODAY (Jun. 8, 2016, updated 2:31 PM),

The movement to recall Judge Persky, which self-identified as an embodiment of #MeToo, ignored important issues of race.<sup>111</sup> It took care, as did several media outlets, to describe how Judge Persky's bias and privilege contributed to leniency for another white, privileged man.<sup>112</sup> Yet this nod to racial bias did not translate into a challenge to the sentencing system's systemic racial bias.<sup>113</sup> Challenging only Judge Persky—and focusing this challenge on the sentence's insufficiency—isolated the problem as one of a bad judge and a failure to punish. Voters recalled Persky and sent a message to judges about the dangers of leniency, which the California legislature subsequently reinforced by expanding the definition of rape and limiting the ability of judges to use probation in sentencing.<sup>114</sup>

The #MeToo response sidestepped the larger problem of inequality within the criminal justice system, of which Judge Persky's actions were but one example. Judge Persky rejected the prosecutor's recommendation of six years, but Turner's sentence was within the probation report recommendation, which the judge routinely followed.<sup>115</sup> Yet if Judge Persky believed his actions were color blind—and some defended them as such—it was only because he ignored the underlying disparities that afforded a white Stanford student a lenient probation report recommendation in a state where the ratio of Black to white prison inmates is over eight to one.<sup>116</sup>

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<https://www.usatoday.com/story/news/nation/2016/06/08/stanford-rapist-ve-been-shattered-party-culture/85602738/>; Astor, *supra* note 108.

<sup>111</sup> See Elias, *supra* note 107.

<sup>112</sup> As Michelle Dauber, a Stanford professor who led the campaign, noted, “[Persky] saw a young man with a bright future . . . He didn't see what was before him. He saw, instead, an image that was untrue and refracted through the lens of bias and privilege.” Bridget Read, *Rape Culture Is on the Ballot in California*, VOGUE (May 23, 2018), <https://www.vogue.com/projects/13543901/brock-turner-judge-aaron-persky-recall-election-california/>; See also Molly Roberts, *Why Did We Want Brock Turner Locked Up So Long in the First Place?*, WASH. POST (Jun. 7, 2018, 4:14PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2018/06/07/why-did-we-want-brock-turner-locked-up-so-long-in-the-first-place/>; see also Shaun King, *Brock Turner and Corey Batey, Two College Athletes Who Raped Unconscious Women, Show How Race and Privilege Affects Sentences*, N.Y. DAILY NEWS (Jun. 7, 2016, 5:42 PM), <https://www.nydailynews.com/news/national/king-brock-turner-cory-batey-show-race-affects-sentencing-article-1.2664945>.

<sup>113</sup> See Roberts, *supra* note 112; Matt Ford, *How Brock Turner Changed California's Rape Laws*, THE ATLANTIC (Oct. 1, 2016), <https://www.theatlantic.com/news/archive/2016/10/california-law-brock-turner/502562/>.

<sup>114</sup> See Jeannie Suk Gerson, *The Unintended Consequences of the Brock Turner Case*, NEW YORKER (Jun. 17, 2016), <https://www.newyorker.com/news/news-desk/the-unintended-consequences-of-the-stanford-rape-case-recall>; Ford, *supra* note 113; Joseph Margulies, *Racism, Classism, Feminism . . . and Brock Turner*, JUSTIA (Sept. 6, 2016), <https://verdict.justia.com/2016/09/06/racism-classism-feminism-brock-turner>.

<sup>115</sup> See Read, *supra* note 112; Mark J. Stern, *This Is How Mass Incarceration Happens*, SLATE (Jan. 16, 2018, 6:01 PM), <https://slate.com/news-and-politics/2018/01/the-dangerous-misguided-campaign-to-recall-the-judge-who-sentenced-brock-turner.html>.

<sup>116</sup> State-By-State Imprisonment Rates Data, THE SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> (select desired state on map; navigate between “Detailed State Data” tab and “State Rankings” tab to view data); see also Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L. J. 2218, 2227–33, 2251–62 (2019) (describing the sources and effects

#MeToo also ignored these disparities, focusing instead on recalling Judge Persky and enhancing state sentencing laws.

Not only did the #MeToo response fail to challenge these fundamental inequalities, but it also ignored how its efforts might exacerbate them. Judge Persky's recall made clear that judges should not be lenient on those convicted of sex offenses; the state legislature cemented this through sentencing restrictions. As Paul Butler argued, "[t]he people who would suffer most from this punitiveness would not be white boys at frat parties," but rather, nonwhite men.<sup>117</sup> Police, prosecutors, witnesses, juries, and judges are all more likely to perceive nonwhite men as violent and predatory, and their sexual interactions are more likely to be perceived as non-consensual, particularly when the victim is white. As a result, Black men are disproportionately reported, convicted, and sentenced for the rape of white women. Black women find their experiences disproportionately dismissed compared to white women.<sup>118</sup>

#MeToo reflects a larger failure of feminist rape reform to consider the needs and voices of victims who are subordinated in other ways. Feminist theorists' focus on "women" too often means "white women," marginalizing the voices of women of color.<sup>119</sup> Rape reform efforts commonly focus on the needs of privileged white women to the exclusion of the needs of poor women or women of color.<sup>120</sup> As Aya Gruber argues, "the victims who are mistreated by the system, generally members of other subordinated groups that have been unfairly excluded from access to government resources (e.g., minorities, drug users, ex-cons, poor women), are precisely not the victims publicized and represented."<sup>121</sup> #MeToo could challenge

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of racial bias in risk prediction methods used by the criminal justice system); Anna Roberts, *Arrests As Guilt*, 70 AL. L. REV. 987, 997–1012, 1022–24 (2019) (exploring the consequences of arrest and detention); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237 (2015); Sonja P. Starr, *Evidence-Based Sentencing and the Rationalization of Discrimination*, 66 STANFORD L. REV. 803, 838 (2014) (describing racial bias in "evidence-based" sentencing processes); Stern, *supra* note 115 (arguing that, because it was based on the probation report, Persky's sentencing decision was not the product of racial bias).

<sup>117</sup> See Paul Butler, *Judicial Recall Will Inevitably Lead to Harsher Sentences*, N.Y. TIMES (updated July 11, 2016, 3:50 PM), <https://www.nytimes.com/roomfordebate/2016/06/08/should-an-unpopular-sentence-in-the-stanford-rape-case-cost-a-judge-his-job/judicial-recall-will-inevitably-lead-to-harsher-sentences>.

<sup>118</sup> See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241, 1277–78, 1281–82 (1991).

<sup>119</sup> See Audre Lorde, *The Master's Tools Will Never Dismember the Master's House*, in *SISTER OUTSIDER* 110 (rev. ed. 2007); Crenshaw, *supra* note 118, at 1242–45, 1258–71; Angela P. Harris, *Race and Essentialism in Feminist Justice Theory*, 42 STANFORD L. REV. 581, 585–92 (1990); Laura Smith, *When Feminism Ignored the Needs of Black Women, A Mighty Force Was Born*, TIMELINE (Feb. 21, 2018), <https://timeline.com/feminism-ignored-black-women-44ce502a3c6>; Rachel Elizabeth Cargle, *When Feminism Is White Supremacy in Heels*, HARPER'S BAZAAR (Aug. 16, 2018, 4:20 PM), <https://www.harpersbazaar.com/culture/politics/a22717725/what-is-toxic-white-feminism/>.

<sup>120</sup> See Gruber, *supra* note 96, at 776–77; Crenshaw, *supra* note 118, at 1250–51, 1265–71.

<sup>121</sup> See Gruber, *supra* note 96, at 776–77.

the structural causes of this vulnerability, including poverty and discrimination, as important drivers of sexual violence. It could forge stronger bonds with the Black Lives Matter movement to address police discrimination and violence, including sexual violence, against Black women and men. As yet, it has not risen to this challenge.

### B. *The Monster Narrative*

#MeToo's pivot from a survivor-focused movement to a reckoning of powerful men limits its ability to meet survivors' needs; it also, paradoxically, limits its effectiveness in promoting accountability. Burke created Me Too to empower survivors and Milano used social media to give voice to survivors. Survivors' stories inspired calls for accountability. #MeToo's focus on punishing the most predatory and powerful men, however, promotes a hyperbolic "monster narrative" that distinguishes sexual violence as the conduct of malicious predators and therefore fails to recognize many survivors and perpetrators.

#MeToo demonstrated this narrative's strength when it tested its boundaries. When #MeToo's ambit expanded to include men who could not easily be labeled monsters, it faced substantial backlash.<sup>122</sup> Critics have since argued that #MeToo had become a witch hunt, punishing decent men for minor transgressions rather than truly predatory behavior.<sup>123</sup> Being apathetic toward consent or inappropriate and insistent, they argued, is not worthy of censure because it was not hostile toward its

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<sup>122</sup> See, e.g., Emily Yoffe, 'I'm Radioactive', REASON (Oct. 2019), <https://reason.com/2019/08/23/im-radioactive/>; Charles Trepany, *The View Hosts Debate Al Franken #MeToo Allegations: A "Political Hit" With "Some Holes,"* USA TODAY (last updated July 23, 2019, 5:24 PM), <https://www.usatoday.com/story/entertainment/celebrities/2019/07/23/the-view-hosts-debate-due-process-al-frankens-metoo-accusations/1806158001/>; Caitlin Flanagan, *The Conversation #MeToo Needs to Have*, THE ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-right-conversation-for-metoo/551732/>; Daphne Merkin, *Publicly, We Say #MeToo. Privately, We Have Misgivings*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html>; Valeriya Safronova, *Catherine Deneuve and Others Denounce the #MeToo Movement*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/movies/catherine-deneuve-and-others-denounce-the-metoo-movement.html>.

<sup>123</sup> See e.g., Yoffe, *supra* note 122; Trepany, *supra* note 122; Anna Livsney, *Liam Neeson Says Harassment Allegations Are Now a "Witch Hunt,"* THE GUARDIAN (Jan. 13, 2018, 5:34 AM), <https://www.theguardian.com/film/2018/jan/13/liam-neeson-says-harassment-allegations-have-become-a-witch-hunt>; Andrew Sullivan, *It's Time to Resist the Excesses of #MeToo*, INTELLIGENCER (Jan. 12, 2018), <http://nymag.com/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html>; Merkin, *supra* note 122; Gwilym Mumford, *Michael Haneke: #MeToo Has Led to a Witch Hunt "Coloured by Hatred of Men,"* THE GUARDIAN (Feb. 12, 2018, 6:28 AM), <https://www.theguardian.com/film/2018/feb/12/michael-haneke-metoo-witch-hunt-coloured-hatred-men>; Safronova, *supra* note 122. See also James Hamblin, *This Is Not a Sex Panic*, THE ATLANTIC (Jan. 17, 2018) <https://www.theatlantic.com/entertainment/archive/2018/01/this-is-not-a-sex-panic/550547/> (describing backlash against #MeToo).

victims.<sup>124</sup> Restricting men this way would “strip[] sex of eros.”<sup>125</sup> Daphne Merkin wrote in the *New York Times*:

It goes without saying that no one is coming to the defense of heinous sorts, like Kevin Spacey and Matt Lauer. But the trickle-down effect to cases like those of Garrison Keillor, Jonathan Schwartz, Ryan Lizza and Al Franken, in which the accusations are scattered, anonymous or, as far as the public knows, very vague and unspecific, has been troubling.<sup>126</sup>

These criticisms demonstrate a considerable bind for survivors. Accusations cannot be “scattered,” yet accusations are far more likely to be taken seriously when multiple women make them. Accusations cannot be “vague and unspecific” to the public; yet workplace complaints are not ordinarily made public, and publicizing explicit details is humiliating. Survivors should not come forward anonymously; yet a woman who comes forward publicly is likely to see her career ruined, her safety threatened, her past laid bare, and her motives questioned.<sup>127</sup>

The criticisms also demonstrate how #MeToo has been unable to challenge—and indeed may have perpetuated—the narrative that only monsters commit sexual violence. While multiple accusers make an allegation more credible, multiple expressions of outrage have the opposite effect.<sup>128</sup> Public outrage elicits sympathy for the responsible individual and concerns that the individual is facing disproportionate consequences.<sup>129</sup> #MeToo has likewise generated concern that

<sup>124</sup> See Yoffe, *supra* note 122; Merkin, *supra* note 122.

<sup>125</sup> See Merkin, *supra* note 122; see also Sullivan, *supra* note 123; Flanagan, *supra* note 122.

<sup>126</sup> See Merkin, *supra* note 122.

<sup>127</sup> See Lulu Garcia-Navarro & Daniella Cheslow, “*It Hurt. And It Was Against My Will*”: *Trump Accuser Stands By Her Story*, NPR (Jun. 22, 2019, 7:00 PM), <https://www.npr.org/2019/06/22/735080909/it-hurt-and-it-was-against-my-will-trump-accuser-stands-by-her-story> (discussing how Trump told reporters that his accusers were being paid and his accusers and those of Brett Kavanaugh were looking for publicity); Amanda Marcotte, *What Drove the New Yorker’s Jane Mayer Into Al Franken Denialism?*, SALON (July 22, 2019), <https://www.salon.com/2019/07/22/what-drove-the-new-yorkers-jane-mayer-into-al-franken-denialism/> (arguing that a *New Yorker* article on Al Franken “relies on hackish tricks” such as burying supporting evidence, focusing on one accuser’s unreliability while largely ignoring other accusers, and “planting the idea that the women were simply overreacting to Franken’s awkwardness”); Tim Mak, *All Things Considered: Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NPR (Nov. 8, 2018, 9:00 AM) <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say> (describing how threats against Christine Blasey Ford required her to move four times, leave her job, and hire private security); *On #MeToo, Americans More Divided By Party Than Gender*, NPR (Oct. 31, 2018, 5:00 AM), <https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender> (discussing skepticism of accusers); Aggeler, *supra* note 44 (describing the backlash against Louie C.K.’s accusers and the negative consequences their careers suffered).

<sup>128</sup> See Takuya Sawoaka & Benoît Monin, *The Paradox of Viral Outrage*, 29 *PSYCHOL. SCI.* 1665, 1665–66 (2018).

<sup>129</sup> See *id.* at 1666–76.

individuals accused of assault or harassment—even those that admit to their behavior—are the victims of disproportionate responses to well-meaning behavior.<sup>130</sup> Thus four in ten individuals polled feel that #MeToo “has gone too far,” and holding accountable men less culpable than Weinstein “violates [the public’s] gut sense of decency and moral proportion.”<sup>131</sup> By both focusing on accountability and publicizing the actions of men who do not fit the monster narrative, #MeToo may have increased sympathy for perpetrators of sexual assault and harassment.

The accusation against Aziz Ansari—and the subsequent backlash—demonstrates this paradox. An anonymous woman known as “Grace” described a date with Ansari in which he repeatedly initiated sex at his apartment.<sup>132</sup> Grace recalled consenting to some sexual activity before asking him to slow down; that he repeatedly placed her hand on his penis, pulling it back to his penis when she removed it several times; that she continuously pulled away from him or moved away from him only to have him follow and continue to kiss her; and that she at one point stopped moving and “turned cold.”<sup>133</sup> She informed him that she did not want to have sex on their first date, to which he suggested they have more wine and consider it their second date.<sup>134</sup> After she returned from the bathroom, where she had tried to collect herself, she expressed concerns about feeling forced; he acknowledged her discomfort and suggested they watch a movie.<sup>135</sup> When they sat down, he motioned for her to perform oral sex and she complied, feeling “pressured.”<sup>136</sup> He led her to a different part of the apartment and asked where she wanted to have intercourse. She again said she was not ready, and he suggested they “chill” with their clothes on.<sup>137</sup> As Grace sat with Ansari, she began to grapple with

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<sup>130</sup> See Nanette Asimov, *#MeToo Movement Spurs #HimToo Backlash: “People Don’t Want to Believe,”* SAN FRANCISCO CHRON. (Oct. 13, 2018, 4:23 PM), <https://www.sfchronicle.com/nation/article/MeToo-movement-spurs-HimToo-backlash-People-13304270.php>.

<sup>131</sup> See *On #MeToo, Americans More Divided By Party Than Gender*, NPR (Oct. 31, 2018, 5:00 AM), <https://www.npr.org/2018/10/31/662178315/on-metoo-americans-more-divided-by-party-than-gender>; Bret Stephens, *When #MeToo Goes Too Far*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/opinion/metoo-damon-too-far.html>; see also Yoffe, *supra* note 122.

<sup>132</sup> See Katie Way, *I Went on a Date With Aziz Ansari. It Turned Into the Worst Night of My Life*, BABE.NET (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355>. See also Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash>; Hamblin, *supra* note 123; Rivu Dasgupta, *Aziz Ansari and What I Wish Caitlin Flanagan Would Have Said*, MEDIUM (Jan. 16, 2018), <https://medium.com/@rivudasgupta/aziz-ansari-and-what-i-wish-caitlin-flanagan-would-have-said-d00e8726fb66>; Garber, *supra* note 82; Caitlin Flanagan, *The Humiliation of Aziz Ansari*, THE ATLANTIC (Jan. 13, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>.

<sup>133</sup> See Way, *supra* note 132.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*



feelings of violation.<sup>138</sup> He began to kiss her again and tried to undo her pants.<sup>139</sup> She left soon after, crying while she rode home and texted friends about the experience.<sup>140</sup>

#MeToo critics and supporters alike argued that Ansari's story demonstrated the movement's overreach. Caitlin Flanagan, who had previously lauded #MeToo as "a long-overdue revolution" wrote that the article was mere revenge pornography designed to humiliate Ansari; #MeToo, she cautioned, was a movement of women who "are angry, temporarily powerful—and very, very dangerous."<sup>141</sup> Many argued that Ansari should not be admonished for ignoring Grace's cues of consent, particularly where those cues were nonverbal.<sup>142</sup> They conceded that Ansari was "aggressive and selfish" and "not honorable."<sup>143</sup> But they maintained that Grace should have expected such behavior and it was her responsibility, and consequent failure, to ward him off.<sup>144</sup> In the end, they dismissed Grace's experience as a "lousy romantic encounter," "bad sex," or a bad date.<sup>145</sup>

Ansari's conduct elicits complicated reactions because he seemed unaware of his date's distress. It demonstrates how those who support consent in theory often demonstrate apathy toward it in practice. Ansari identifies as a feminist and told Grace "it's only fun if we're both having fun."<sup>146</sup> His actions, however, ignored her discomfort when it did not further his own desires.<sup>147</sup> Even after he blithely and continuously disregarded her verbal and non-verbal cues, Ansari expressed surprise

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> See Flanagan, *supra* note 132; Flanagan, *supra* note 42.

<sup>142</sup> See, e.g., Bari Weiss, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>; Flanagan, *supra* note 132; *Banfield Slams Aziz Ansari Accuser in Open Letter*, CNN (Jan. 15, 2018), <https://www.cnn.com/videos/us/2018/01/16/open-letter-to-aziz-ansari-sexual-assault-accuser-banfield.hln>.

<sup>143</sup> See Hamblin, *supra* note 123; Dasgupta, *supra* note 132; Weiss, *supra* note 142; Flanagan, *supra* note 132.

<sup>144</sup> See Weiss, *supra* note 142; Flanagan, *supra* note 132; *Banfield Slams Aziz Ansari Accuser in Open Letter*, *supra* note 142.

<sup>145</sup> See Weiss, *supra* note 142; *Banfield Slams Aziz Ansari Accuser in Open Letter*, *supra* note 142.

<sup>146</sup> See Garber, *supra* note 82 (discussing Ansari's public identification as a feminist); Way, *supra* note 132 (describing how Ansari at first reacted to Grace's discomfort by stating "of course, it's only fun if we're both having fun"); Nosheen Iqbal, *Aziz Ansari: "I've Always Been a Feminist. There Wasn't a Period Where I Was Against Women and Then Started Dating One*, THE GUARDIAN (Jun. 7, 2015) <https://www.theguardian.com/culture/2015/jun/07/aziz-ansari-comedy-politics-women> (quoting Aziz Ansari discussing how he identifies as a feminist).

<sup>147</sup> See Way, *supra* note 132. See also Garber, *supra* note 82 (arguing that Grace's story "presents someone who is conversant with the language of consent, but who is not yet conversant in its practice" and "what can happen when mutuality—*only fun if we're both having fun*—is not bolstered by that far more foundational thing: empathy.").

that she felt violated, insisting “everything did seem okay to me.”<sup>148</sup> Indeed, as feminist writer Jessica Valenti wrote in a tweet, “[a] lot of men will read that post about Aziz Ansari and see an everyday, reasonable sexual interaction. But part of what women are saying right now is that what the culture considers ‘normal’ sexual encounters are not working for us, and oftentimes harmful.”<sup>149</sup>

Supporters of #MeToo also protested the resignation of Senator Al Franken as evidence of the movement’s excessive influence.<sup>150</sup> Franken resigned after several women accused him of unwanted kissing or attempted kissing, and touching them on the breasts or buttocks during photographs.<sup>151</sup> Franken and others later characterized his resignation as mistakenly forced by a regrettable rush to judgment.<sup>152</sup> A magazine investigating the claims questioned a victim’s motives and why she did not report it earlier.<sup>153</sup> It implicitly highlighted the accusers’ sexuality by describing one woman’s history modeling lingerie and posing for *Playboy* and mistakenly identifying another as a “sex therapist.”<sup>154</sup> A crying Franken called an accuser “callous” when she stated that she was not responsible for Franken’s career ending—he was.<sup>155</sup>

In contrast, the article is filled with positive characterizations distinguishing Franken from the type of man who commits sexual harassment or assault. It quotes Franken’s friends describing him “a good man” who talks “sweetly and lovingly

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<sup>148</sup> Meg Swertlow, *Aziz Ansari Releases Statement After Being Accused of Sexual Misconduct*, ENEWS (Jan. 15, 2018), <https://www.eonline.com/news/906326/aziz-ansari-releases-statement-after-being-accused-of-sexual-misconduct>.

<sup>149</sup> Anna Silman, *Aziz Ansari, “Cat Person,” and the #MeToo Backlash*, N.Y. MAG. (Jan. 16, 2018), <https://www.thecut.com/2018/01/aziz-ansari-cat-person-and-the-metoo-backlash.html>; see also Garber, *supra* note 82.

<sup>150</sup> See David Leonhardt, *The Al Franken Case*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/opinion/al-franken-sexual-harassment-mayer.html>; Laura Kipnis, *What Regrets About a Hasty, High-Profile #MeToo Resignation Reveal*, GUARDIAN (July 24, 2019), <https://www.theguardian.com/commentisfree/2019/jul/24/al-franken-resignation-metoo>; Cathy Young, *It’s Official: Al Franken Was the Victim of #MeToo Overreach*, FORWARD (July 23, 2019), <https://forward.com/opinion/428131/its-official-al-franken-was-the-victim-of-metoo-overreach/>.

<sup>151</sup> See Amanda Marcotte, *What Drove the New Yorker’s Jane Mayer Into Al Franken Denialism*, NEW YORKER (July 22, 2019), <https://www.salon.com/2019/07/22/what-drove-the-new-yorkers-jane-mayer-into-al-franken-denialism/>.

<sup>152</sup> See Leonhardt, *supra* note 150; Kipnis, *supra* note 150; Young, *supra* note 150; Rachel Martin, *New Yorker Takes a Closer Look at the Case Against Al Franken*, NPR (July 23, 2019), <https://www.npr.org/2019/07/23/744335616/new-yorker-takes-a-closer-look-at-the-case-against-al-franken>; Jane Mayer, *The Case of Al Franken*, NEW YORKER (July 22, 2019), <https://www.newyorker.com/magazine/2019/07/29/the-case-of-al-franken>.

<sup>153</sup> See Mayer, *supra* note 152.

<sup>154</sup> See *id.*; Anna Merlan, *The New Yorker Seriously Mischaracterized the Story of One of Al Franken’s Accusers*, JEZEBEL (July 26, 2019), <https://jezebel.com/the-new-yorker-seriously-mischaracterized-the-story-of-1836673266>.

<sup>155</sup> See Mayer, *supra* note 152.

about his wife” and “the very last person who would be a sexual harasser.”<sup>156</sup> He was not, they protested “a predatory person” like others accused of misconduct.<sup>157</sup> It contextualized his actions as the non-sexual fumbles of a clumsy, awkward man.<sup>158</sup> The article ignored that he groped and kissed only women and repeatedly described his unwanted kisses as greetings or expressions of gratitude.<sup>159</sup> It presented the fact that Franken had ignored warnings about how he touched and kissed women as further evidence of his hapless nature, even as these incidents provided evidence of his entitlement to touch women and his apathy about their consent.<sup>160</sup> Franken’s resignation prompted outcry because Franken was “not the type of man we want to see as an abuser . . . not someone we can just call a ‘bad guy’ and toss away.”<sup>161</sup>

Yet such men often commit sexual violence. Peggy Orenstein’s interviews with young men who have sex with women found that these men often assume a woman’s pleasure based on their own desires, interpreting their partner’s actions “through the lens of their own wishes.”<sup>162</sup> They believed in consent, but, as one man stated of ignoring his partner’s reluctance, “I was enjoying myself. I was having what in the moment was a positive sexual experience.”<sup>163</sup> Men who identified as “good guys” described pushing women’s heads down to obtain oral sex or taking a Snapchat video of a prom date performing oral sex and distributing it to friends.<sup>164</sup> A different survey of college men reported that one-third agreed that they intended to use force to obtain sex; the majority of these men, however, expressed that they had no intention to “rape a woman.”<sup>165</sup> Another study found that young men who championed enthusiastic consent engaged in actions that conflicted with their stated definition of consent.<sup>166</sup> When faced with this contrast, these men simply expanded

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<sup>156</sup> See *id.*

<sup>157</sup> See *id.* (quoting his former chief of staff as stating “Al Franken is not a predatory person” and friend Sarah Silverman distinguishing Franken from Justice Brett Kavanaugh and Roy Moore).

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*; Merlan, *supra* note 154.

<sup>160</sup> See Mayer, *supra* note 152.

<sup>161</sup> See Ijeoma Oluo, *Al Franken Harassed Women and Should Resign. But It’s Okay to Admit His Loss Hurts*, NBC NEWS (Dec. 7, 2017), <https://www.nbcnews.com/think/opinion/al-franken-abused-women-should-resign-it-s-ok-admit-ncna827556?fbclid=IwAR1Z5BSrSzLdUdG-GhqrhvUZZsvm390Dxf7G7vGI4--qivxC08KfFR5tNU>.

<sup>162</sup> See Peggy Orenstein, *It’s Not That Men Don’t Know What Consent Is*, N.Y. TIMES (Feb. 23, 2019) <https://www.nytimes.com/2019/02/23/opinion/sunday/sexual-consent-college.html>.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> See Sarah R. Edwards et al., *Denying Rape but Endorsing Forceful Intercourse: Exploring Differences Among Responders*, 1 VIOLENCE AND GENDER 188, 190–92 (2014).

<sup>166</sup> See Nicole Bedera, *Moaning and Eye Contact: College Men’s Negotiations of Sexual Consent in Theory and in Practice* 11–13, 15 (2017).

their interpretation of consent to include their actions.<sup>167</sup> They commonly interpreted women's desire in accordance with their own.<sup>168</sup>

The monster narrative makes it harder to hold accountable many perpetrators of sexual violence because it pathologizes sexual violence as the provenance of immoral predators. It excuses from judgment less forcible or explicit acts of coercion and dominance, as well as perpetrators who have admirable characteristics in other parts of their lives.<sup>169</sup> Media coverage of allegations focuses on the resumes of the accused—their past accomplishments or bright futures—because these distinguish the accused from the narrative's perpetrator.<sup>170</sup> Similarly, men defending themselves against allegations often cite their accomplishments as evidence of their innocence or that they do not merit punishment.<sup>171</sup>

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<sup>167</sup> See *id.*

<sup>168</sup> See Bedera, *supra* note 166, at 27–28; see also Orenstein, *supra* note 162.

<sup>169</sup> See C.J. Paskoe & Jocelyn A. Hollander, *Good Guys Don't Rape: Gender, Domination, and Mobilizing Rape*, 30 GENDER & SOC. 67, 74 (2015); Chan, *supra* note 101 (quoting Tarana Burke as stating, “What I realized in the last year is that people are OK when you’re talking about the big, scary bad guy” such as Harvey Weinstein and R. Kelly, but not “the good guy who’s an ally to women, who looks out for everybody, who’s a stand-up person, but maybe behaves in a way that is too permissive.”). Compare Emily Yoffe, *Understanding Harvey*, HUFFPOST (June 26, 2018), <https://highline.huffingtonpost.com/articles/en/harvey-weinstein-psychology-sexual-predators/> (condemning and pathologizing Weinstein, Cosby, and others) with Emily Yoffe, *I'm Radioactive*, REASON (Aug. 23, 2019), <https://reason.com/2019/08/23/im-radioactive/> (describing positively a journalist Yoffe felt was unfairly accused of sexual misconduct and characterizing the source of accusation as “a long-ago, private event that, while regretted, did not involve a sexual assault.”). Racial and class biases about what constitutes an admirable characteristic also make it more likely that individuals will believe that a poor, Black man has committed rape than a white, middle class college student. See Paskoe & Hollander, *supra*, at 74–75.

<sup>170</sup> See Erik Wemple, *CNN Is Getting Hammered for Steubenville Coverage*, WASH. POST (Mar. 18, 2013), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2013/03/18/cnn-is-getting-hammered-for-steubenville-coverage/> (showing a clip and providing a transcript of a CNN reporter describing the guilty verdict after a rape case as “incredibly difficult even for an outsider like me to watch what happened as these two young men that had such promising futures, star football players, very good students, literally watched as they believe their life fell apart.”); E.J. Dickson, *Why Are Judges So Concerned About the Future Potential of Rapists?*, ROLLING STONE (July 9, 2019), <https://www.rollingstone.com/culture/culture-features/judge-james-troiano-brock-turner-sexual-assault-855415/> (describing how judges cite an accused individual's positive attributes such as lack of criminal record, sterling grades, or history of volunteer work within the community when providing more lenient consequences in order to protect the potential of predominately white, young, middle class men).

<sup>171</sup> See MacKinnon, *supra* note 5 (describing how, when questioned about Christine Blasey Ford's testimony, Brett Kavanaugh “repeatedly provided . . . his résumé: *I matter.*”). In his letter to Judge Persky before sentencing, Brock Turner first and foremost focused on how the trial affected him and his accomplishments, writing, “I am no longer a swimmer, a student, a resident of California, or the product of the work that I put in to accomplish the goals I set out in the first nineteen years of my life.” He also noted that he had lost two jobs because of the case, and that “I wish I never was good at swimming or had the opportunity to attend Stanford, so maybe the newspapers wouldn't want to write stories about me.” Letter to Judge Aaron Persky, Brock Turner (June 8, 2016), reprinted in *Brock Turner's Statement*, N.Y. TIMES (Jun. 8, 2016), <https://www.nytimes.com/interactive/2016/06/08/us/document-Defendantstatement.html>.

## IV. LESSONS FOR THE CRIMINAL JUSTICE SYSTEM

A. *Reforming Rape Law and the Carceral State*

Several legal scholars have suggested reforms to better reflect women's experience of sexual violence.<sup>172</sup> One method of changing rape law to better reflect survivors' experiences is to alter how the "reasonable person" standard informs determinations of force, coercion, and non-consent. This standard often requires the prosecution to demonstrate that survivors reacted appropriately when faced with unwanted sex. In New York, for example, rape in the third degree requires that the victim demonstrated what a reasonable person would interpret as non-consent in the circumstances.<sup>173</sup> The reasonable person standard also informs whether a woman's lack of resistance was justified. Under Pennsylvania law a defendant's threat of force to obtain sex does not constitute rape unless the threat would "prevent resistance by a person of reasonable resolution."<sup>174</sup> California law similarly asks juries to determine whether the defendant's threat would cause a reasonable person to acquiesce to unwanted sex.<sup>175</sup> Courts have interpreted force and consent with regard to reasonable resistance even where the requirement is not enshrined in the statute.<sup>176</sup>

The reasonable person standard also shapes interpretations of the defendant's mens rea. Many jurisdictions treat rape as a general intent crime. A defendant lacks the requisite mens rea if he honestly and reasonably believed that he was not engaging in the prohibited conduct—that is, if he were honestly and reasonably

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This may also help clarify why #MeToo has not translated into significant change for the vast majority of women who experience sexual violence. See Amanda Taub, *The #MeToo Paradox: Movement Topples the Powerful, Not the Ordinary*, N.Y. TIMES (Feb. 11, 2019), <https://www.nytimes.com/2019/02/11/world/americas/metoo-ocar-arias.html> ("[T]he #MeToo movement has not shown consensus that abusers in all walks of life ought to be held accountable for misconduct. Instead, it seems to have generated common knowledge only that perpetrators should be kept out of extremely high-status roles, like movie studio chief or United States senator."); Bernice Yeung, *The Unreckoned*, N.Y. MAG. (Sept. 5, 2018) <https://www.thecut.com/2018/09/unreckoned-left-behind-by-metoo.html> (describing how #MeToo has not translated into the ability of ordinary women to report harassment or assault by non-famous men). #MeToo may have affected the consensus about the acts of powerful predators, but it has failed to shift consensus about the acts of ordinary men, and most women lack the celebrity and power to shift the latter narrative. See Taub, *supra*; Young, *supra*.

<sup>172</sup> Such reforms include using a more subjective reasonable person that is specific to women, eliminating the force requirement, refocusing the law on offenders' mens rea as to consent, using a negotiation model for sex, and requiring affirmative consent. See, e.g., Schulhofer, *supra* note 20, at 342–48; Anderson, *supra* note 20, at 1421–37; Cahn, *supra* note 71, at 1432–35; Schulhofer, *supra* note 25, at 417–23.

<sup>173</sup> N.Y. PENAL LAW §§ 130.05(2)(a), 130.25 (McKinney 2018).

<sup>174</sup> 18 PA. STAT. ANN. § 3121(a)(2) (West 2020).

<sup>175</sup> CAL. PENAL CODE §§ 261(a)(2)–(b) (West 2020).

<sup>176</sup> See Estrich, *supra* note 19, at 1107 & n. 49; Cahn, *supra* note 71, at 1401–02, 1406 n. 46.

mistaken about his use of force or the victim's consent.<sup>177</sup> Even jurisdictions that require a defendant obtain affirmative consent may nonetheless ask whether a reasonable person would interpret the victim's actions as affirmative consent.<sup>178</sup>

A "reasonable person" determination reflects the dominant social norms and cultural attitudes.<sup>179</sup> As discussed above, these norms systematically condition men to either not see, underestimate, or ignore signs of non-consent. Women may freeze, disassociate, or simply acquiesce because they fear an unspoken threat of violence or other retribution, do not think their resistance or "no" would affect the outcome, or because it helps them rationalize sexual violence and avoid confronting trauma.<sup>180</sup>

Legal reforms that improve the likelihood of prosecution and conviction, however, may not reflect the needs of many survivors, particularly women of color. Although the criminal justice system provides women of color less protection than white women, it does not follow that women of color seek to strengthen a system that oppresses their community.<sup>181</sup> Women of color bear the weight of both greater vulnerability to rape and a "unique ambivalence" to punishing it because men of color are disproportionately punished for rape compared to white men.<sup>182</sup>

Women of color are far less likely to benefit from expanding rape law than white women. However #MeToo changes social norms, it is unlikely to affect racial biases because it has largely ignored them. Biases that render women of color hypersexual and therefore unable to be raped are likely to persist.<sup>183</sup> If lawmakers reform the reasonable person standard to reflect a "reasonable woman," the new standard will reflect, in truth, a "reasonable white woman," and thus continue to discount the perspectives of women of color, the challenges and threats they face that white women do not, and the unique reasons they may have resisted reporting to the police.<sup>184</sup> A more subjective standard, such as a "reasonable Black woman" may only intensify the effect of racial biases by allowing juries to more easily conclude that the defendant reasonably perceived a Black woman consented because

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<sup>177</sup> See Capers, *supra* note 14, at 1374; see also MacKinnon, *supra* note 85, at 449–50.

<sup>178</sup> See *In re MTS*, 609 A.2d 1266, 1277 (1992).

<sup>179</sup> See Kaplan, *supra* note 19, at 1075–76; Husak & Thomas, *supra* note 79, at 103–08; Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1468–80 (2010).

<sup>180</sup> See *supra* Part XX; Adkins, *supra* note 84; The Nib, *Trigger Warning: Breakfast*, MEDIUM (July 8, 2014), <https://medium.com/the-nib/trigger-warning-breakfast-c6cdeec070e6>.

<sup>181</sup> See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE* 21 (2018); Harris, *supra* note 119, at 593–95, 598–601; Cahn, *supra* note 71, at 1406.

<sup>182</sup> See Harris, *supra* note 119, at 593–95, 598–601; see also Cahn *supra* note 71, at 1406.

<sup>183</sup> See Capers *supra* note 14, at 1367–68; Darci E. Burrell, *Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN'S L. J. 87, 92–94 (1993); see also Crenshaw, *supra* note 118, at 1269–71.

<sup>184</sup> See Cahn *supra* note 71, at 1434; see *supra* Part XX.

of her perceived hypersexuality or that a Black woman has less reason than a white woman to fear a Black man.<sup>185</sup>

Rape reforms that increase rates of prosecution and conviction are likely to harm communities of color by increasing their disproportionate incarceration. As I. Bennett Capers argues:

[A reasonable woman standard] has, at its core, implicit biases. In determining whether a “reasonable woman” would be in fear, decision makers necessarily rely on implicit biases and heuristics that take into consideration the race of the defendant. The standard allows decision-makers to conclude that a reasonable white female might be in fear of a black stranger, while obscuring the fact that a reasonable white female would not be in fear of a stranger under the identical circumstances if the stranger were white. Indeed, it allows decision-makers to engage in the same calculus and reach the same conclusion, even in cases involving black acquaintances. It thus eases the proof necessary in cases involving black men and white women . . . [The reasonable woman standard] is, if not overtly racist, very much racialized.<sup>186</sup>

Domestic violence laws that increase the role of police and rates of incarceration demonstrate how such legal reforms can fare poorly for already subordinated communities.<sup>187</sup> Mass incarceration destabilizes communities and neighborhoods already weakened by poverty and high unemployment rates.<sup>188</sup> Half of all incarcerated men previously served as their families’ primary means of support.<sup>189</sup> When fathers are incarcerated, family income declines to the point that sixty-five percent of families cannot meet their needs.<sup>190</sup> Men returning to the community, particularly African American men, face substantial barriers to employment.<sup>191</sup> Incarceration weakens a community’s social network and deprives it of members who would otherwise raise children and contribute to the local economy.<sup>192</sup> It exposes these community members to violence and increases the risk of mental health problems such as post-traumatic stress disorder.<sup>193</sup> Prison does little to

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<sup>185</sup> See Capers *supra* note 14, at 1367–68; see also Crenshaw, *supra* note 118, at 1277 (describing how intraracial rape of Black women is treated less seriously than intraracial rape of white women).

<sup>186</sup> See Capers *supra* note 14, at 1367.

<sup>187</sup> See GOODMARK, *supra* note 181, at 16–22, 26–32.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See *id.* at 28.

rehabilitate; on the contrary, it discourages empathy and deepens norms that contribute to sexual violence.<sup>194</sup>

### B. *Alternative Reporting Mechanisms*

A more promising reform may involve allowing survivors alternative means of reporting that refocuses on survivors' needs rather than formal investigation and prosecution. As discussed earlier, law enforcement practices deter survivors from seeking help from the criminal justice system. Police are unlikely to report sexual assault allegations as "founded" to prosecutors, especially for non-white women and women who knew their perpetrator. Prosecutors often decline to pursue these cases. Many women fear violence from police.

Numerous investigations into police misconduct demonstrate the importance of increased transparency and accountability. Studies have exposed systematic mishandling of sexual assault allegations in several jurisdictions, including Los Angeles, Baltimore, St. Louis, New Orleans, New York, Salt Lake County, Philadelphia, and Missoula.<sup>195</sup> Police are particularly likely to inappropriately dismiss or fail to adequately investigate claims by women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers.<sup>196</sup>

Deborah Tuerkheimer advocates for a less formal process of confidential complaints within the criminal justice system based on the "You Have Options" program in Oregon.<sup>197</sup> This more flexible system allows confidential complaints that need not precipitate consequences for the perpetrator or which are subject to limited investigation to determine their strength.<sup>198</sup> The program allows most survivors to upgrade or downgrade the investigation at any time.<sup>199</sup> The framework particularly supports survivors who are reluctant to come forward by giving them

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<sup>194</sup> See *id.* at 29.

<sup>195</sup> See Tuerkheimer, *supra* note 1, at 1101–12.

<sup>196</sup> See Tuerkheimer, *supra* note 1, at 1112.

<sup>197</sup> See Tuerkheimer, *supra* note 1, at 1145–48; see also Katie Van Syckle, *The Tiny Police Department in Southern Oregon that Plans to End Campus Rape*, N.Y. MAG (Nov. 9, 2014), <https://www.thecut.com/2014/11/can-this-police-department-help-end-campus-rape.html>; Avery Lill, *Oregon Detective Pioneers New Sexual Assault Reporting Program*, NPR (Sept. 2, 2016), <https://www.npr.org/2016/09/22/491932615/oregon-detective-pioneers-new-sexual-assault-reporting-program>.

<sup>198</sup> See Tuerkheimer, *supra* note 1, at 1145–48; see also *Explore Your Options*, YOU HAVE OPTIONS PROGRAM, <https://www.reportingoptions.org/explore-your-options/> (last visited Apr. 21, 2020).

<sup>199</sup> See Van Syckle, *supra* note 197. Andrea Parrot notes that many sexual assault survivors "do not even attempt to have the assailant arrested; but they would like him to know that what he did was wrong, so that perhaps he will not repeat that type of behavior with others." See also Andrea Parrot, *Recommendations for College Policies and Procedures to Deal with Acquaintance Rape*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 368, 369 (Andrea Parrot & Larie Bechhofer eds., 1991).



more control over the timing and course of their investigation.<sup>200</sup> By encouraging survivors to come forward earlier, it might also preserve evidence and avoid a survivor's credibility being questioned for waiting to report.<sup>201</sup> It may also provide survivors catharsis and allow police officers to identify individuals against which multiple accusations have been confidentially made.<sup>202</sup>

It is unlikely that this process alone will benefit survivors. A law enforcement system that quickly dismisses survivors' claims as unfounded may take even less seriously claims made by women who are unsure whether they want the accused prosecuted.<sup>203</sup> Officers may assume that these survivors are not serious or are fabricating stories because they are not subject to charges for making a false report. It is also not clear that police would be able to maintain victim confidentiality while doing an investigation thorough enough to provide insight, particularly where the victim knows the offender.

Programs are more likely to effect meaningful change when paired with substantial, evidence-based methods of reforming law enforcement conduct. The *You Have Options* program began as a process to rebuild trust in a police department that handled reports poorly.<sup>204</sup> It employs victims' advocates to reach out to survivors and ensure the program reflected their concerns.<sup>205</sup> It also trains police to use "trauma informed" interview techniques focus on experiences and asks sensory questions that can be corroborated later, rather than requiring survivors to provide chronological timelines inconsistent with traumatic experiences.<sup>206</sup> And, it provides survivors support through a team of social workers, advocates, and law enforcement.<sup>207</sup> Reports in the program's jurisdiction have doubled since it was launched.<sup>208</sup>

### C. Restorative Justice

Restorative justice brings together victims, offenders, and other members of the community in the aftermath of an offense and uses collective decision-making to determine how to restore the victim and community, and how to prevent the offense

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<sup>200</sup> See Tuerkheimer, *supra* note 1, at 1145–48; Van Sykle, *supra* note 197.

<sup>201</sup> See Tuerkheimer, *supra* note 1, at 1145–48.

<sup>202</sup> See *id.*

<sup>203</sup> See *id.* at 1109–12 (discussing the propensity of police to label reports of sexual assault “unfounded”).

<sup>204</sup> See Van Syckle, *supra* note 197.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*

<sup>208</sup> See Tuerkheimer, *supra* note 1, at 1148; Van Syckle, *supra* note 197. There is no evidence that increased reporting leads to increased prosecution. See Tuerkheimer, *supra* note 1, at 1148 n. 280. As argued below, however, prosecution may not be the goal of many survivors. See, *infra*, Part XX.

from reoccurring.<sup>209</sup> A restorative justice process is only undertaken when the offender admits fault and is prepared to accept responsibility; it is not an adversarial system that weighs evidence and determines fault.<sup>210</sup> The victim has the opportunity to express how the wrongdoing harmed her and a voice in shaping the consequences the offender faces, as do friends and family of the victim and perpetrator.<sup>211</sup> The offender must engage with the community and consider the full impact of his actions on the many participants.

This process prioritizes the survivor's healing and validation, rather than merely the offender's punishment.<sup>212</sup> It provides survivors with the opportunity to be heard about their experiences, an active role in the consequences, and support from the community.<sup>213</sup> Studies of trauma demonstrate that talking about the harms they have experienced and hearing a public admission of responsibility and remorse can promote a victim's recovery.<sup>214</sup> This is vital for survivors of sexual violence, something which is surrounded by a "norm of silence" that can further trauma.<sup>215</sup> Ordinary criminal justice proceedings—in which a judge determines a defendant's sentence after an adversarial process between the prosecution and defense—deprives survivors of these opportunities.<sup>216</sup>

Although restorative justice's utility is limited to circumstances in which an offender takes responsibility for his actions, its less punitive focus may appeal to offenders. Restorative justice entails consequences, including incarceration.

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<sup>209</sup> See HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 47–52 (2015); Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 *TRAUMA, VIOLENCE & ABUSE* 242, 246–47 (2014); C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 *HARV. J. L. & GENDER* 311, 315 (2012); see also JUSTINE DARLING, *RESTORATIVE JUSTICE IN HIGHER EDUCATION: A COMPILATION OF FORMATS AND BEST PRACTICES* 3 (2011). Restorative justice models often draw on practices of indigenous cultures such as the Maori of New Zealand, various first nations tribes in the United States, and the Mayan people of Guatemala. See Darling, *supra*, at 3; see also ZEHR, *supra*, at 19–20; Hopkins, *supra*, at 333.

<sup>210</sup> See V.C. Geeraets, *Fictions of Restorative Justice*, 10 *CRIM. L. & PHIL.* 265, 268 (2016); Koss et al., *supra* note 209, at 246; Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 *UTAH L. REV.* 303, 312 (2003); Cara Suvall, *Restorative Justice in Schools: Learning from Jena High School*, 44 *HARV. C.R.-C.L. L. REV.* 547, 558 (2009).

<sup>211</sup> See ZEHR, *supra* note 209, at 36–38; JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 12 (2002); Koss et al., *supra* note 209, at 247; Hopkins, *supra* note 209, at 315; Janis F. Bremer, *Essay: Juveniles Who Engage in Sexually Harming Behavior—A Restorative Justice System*, 32 *WM. MITCHELL L. REV.* 1085, 1091 (2006); Heather Strang & Lawrence B. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 *UTAH L. REV.* 15, 27, 35 (2003).

<sup>212</sup> See Riddhi Dastidar, *Cancel Culture vs. Rape Culture, and the Case for Repairing Harm*, *THE WIRE* (Aug. 10, 2019) <https://thewire.in/women/cancel-culture-vs-rape-culture-and-the-case-for-repairing-harm>; Harrelson, *supra* note 29.

<sup>213</sup> See Hopkins, *supra* note 209, at 321–27; Harrelson, *supra* note 29; see also Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 *TEMPLE L. REV.* 701, 718–21 (2017).

<sup>214</sup> See Hopkins, *supra* note 209, at 321–27; see also Harrelson, *supra* note 29.

<sup>215</sup> See Hopkins, *supra* note 209, at 325.

<sup>216</sup> See Harrelson, *supra* note 29; Alexander, *supra* note 27.

Affected parties, however, determine these consequences, rather than a judge who may harbor implicit biases. Restorative justice also creates goals for reintegrating the offender into the community, and involves both the offender and the community in meeting these goals. It provides an alternative to registries and residency restrictions, which are at best ineffective and at worst increase recidivism by isolating offenders from social supports and the ability to obtain employment and housing.<sup>217</sup>

In contrast, the adversarial and punitive nature of ordinary criminal justice proceedings discourages offenders from taking responsibility and understanding the consequences of their action. Offenders desperate to avoid prison and up to a lifetime subject to sex offender registries and restrictions have little incentive to acknowledge the harm they caused, accept responsibility, and commit to rehabilitation.<sup>218</sup> The defendant's denial and subsequent trial—or a guilty plea and sentence approved by a prosecutor and judge without the victim's approval—can further the victim's trauma.<sup>219</sup> As Michelle Alexander notes, prison “lets people off the hook, as they aren't obligated to answer the victim's questions, listen to them, honor their pain, express genuine remorse, or do what they can to repair the harm they've done.”<sup>220</sup> Restorative justice requires an offender to take active responsibility for his conduct by confronting the harmful effects of his conduct, grappling with the decisions that precipitated his conduct, and shaping his consequences and eventual reintegration into the community.<sup>221</sup>

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<sup>217</sup> See KAREN J. TERRY, *SEXUAL OFFENSES AND OFFENDERS* 232–45 (2d ed. 2013); Corey Rayburn Yung, *Banishment by a Thousand Cuts: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 153–58 (2007).

<sup>218</sup> See Kaplan, *supra* note 213, at 721–22; Harrelson, *supra* note 29 (arguing that the criminal legal system's retribution-centered response disincentivizes the accused from admitting or acknowledging the harm they have caused, as they are desperate to avoid the horrors of prison); Alexander, *supra* note 37.

<sup>219</sup> See Harrelson, *supra* note 29 (It is not uncommon for individuals who commit sex offenses to plead to multiple lesser offenses that they did not commit in order to serve a similar sentence but avoid registration and residency restrictions); See also Thea Johnson, *Fictional Pleas*, 94 IND. L. J. 855, 856–58, 888–90 (2019) (describing the common use of such “fictional pleas” in sex offense cases). These plea bargains leverage the prospect of sex offender restrictions while providing few, if any, of restorative justice's benefits.

<sup>220</sup> See Alexander, *supra* note 37; see also Harrelson, *supra* note 29.

<sup>221</sup> BRAITHWAITE, *supra* note 211, at 129; DAVID R. KARP, *THE LITTLE BOOK OF RESTORATIVE JUST. FOR COLLEGES AND UNIV.: REPAIRING THE HARM AND REBUILDING TRUST IN RESPONSE TO STUDENT MISCONDUCT* 10–11 (Skyhorse Publishing 2014); see Kaplan, *supra* note 213, at 721–22. Chanel Miller's Victim Impact Statement demonstrates the priority many survivors place on the offender accepting responsibility and consequences, and how the denial of this acknowledgment and subsequent trial can traumatize survivors again:

“I thought there's no way this is going to trial; there were witnesses, there was dirt in my body, he ran but was caught. He's going to settle, formally apologize, and we will both move on. Instead, I was told he hired a powerful attorney, expert witnesses, private investigators who were going to try and find details about my personal life to use against me, find loopholes in my story to invalidate me and my sister, in order to show that this

Arizona's RESTORE project—which studied a rare use of restorative justice in the context of sex crimes—demonstrates how restorative justice can benefit sexual violence survivors. Survivors who participated in conferencing with the offender placed high value on explaining how the offense affected them, making the offender accountable for his actions, ensuring the defendant did not reoffend, and “tak[ing] back [their] power.”<sup>222</sup> They described high levels of satisfaction with the process, reporting that they felt safe, were listened to, treated with respect, and supported during the conference.<sup>223</sup> All victims who participated in the conference strongly agreed that they would recommend the program and agreed with the statement “I did not feel blamed.”<sup>224</sup> All but one agreed or strongly agreed that it was a success.<sup>225</sup>

Restorative justice also provides an opportunity for the criminal justice system to consider the broader determinants of sexual violence and engage the community in resolving them. As I have argued elsewhere, reform of the black letter law is unlikely to have significant practical effect absent widespread cultural change.<sup>226</sup> Unspoken cultural norms discussed in Parts II and III—that women must, for example, undertake a unique burden of avoiding or responding to sexual violence in every walk of life, that failure to adequately meet this burden demonstrates complicity—perpetuate rape myths and discount women's experiences. Police, prosecutors, judges, juries, and even survivors interpret the law in accordance with these norms. It is far less likely that criminal law will shape these norms than continue to be shaped by them. The traditional U.S. criminal justice system focuses on the offender's individual choices and usually ignores the how systemic failures allowed—or even encouraged—those choices.<sup>227</sup>

Restorative justice requires all parties to view the offense as the product of deeper systemic issues rather than an isolated act of an individual and to consider how to address these systemic issues.<sup>228</sup> Through this process, participants can examine how these factors encourage sexual misconduct and how best to address

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sexual assault was in fact a misunderstanding. That he was going to go to any length to convince the world he had simply been confused.

I was not only told that I was assaulted, I was told that because I couldn't remember, I technically could not prove it was unwanted. And that distorted me, damaged me, almost broke me. It is the saddest type of confusion to be told I was assaulted and nearly raped, blatantly out in the open, but we don't know if it counts as assault yet. I had to fight for an entire year to make it clear that there was something wrong with this situation.”

Baker, *supra* note 110.

<sup>222</sup> See Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1643 Table 3. (2014).

<sup>223</sup> See *id.* at 1645 Table 4, 1646 Table 5.

<sup>224</sup> See *id.* at 1646 Table 5, 1648 Table 6.

<sup>225</sup> See *id.* at 1646 Table 5.

<sup>226</sup> See Kaplan, *supra* note 19, at 1062–72.

<sup>227</sup> See DARLING, *supra* note 209, at 3.

<sup>228</sup> See *id.*; Kaplan, *supra* note 213, at 715.

them. Such community involvement can strengthen norms and attitudes that prevent sexual assault, which may have a more powerful deterrent effect than the threat of sanction.<sup>229</sup>

Restorative justice gives more power to subordinated communities justifiably distrustful of a criminal justice system that subjects them to hyper-incarceration and discrimination. African Americans, for example, are more likely to be targeted by the criminal justice system than those who are white; they are charged with more severe offenses for the same conduct and given more punitive sentences for similar offenses.<sup>230</sup> African American survivors may not want to contribute to the mass incarceration that negatively affects their communities, particularly where the offender is a member of their community.<sup>231</sup> A process that gives voice to several stakeholders and uses consensus to shape consequences can reduce the likelihood of racial bias and increase the criminal justice system's moral legitimacy.<sup>232</sup>

This less carceral approach also allows communities to focus on reintegration, which may be particularly important to communities that suffer the effects of mass incarceration. Restorative justice outcomes integrate into their reparation plans strategies for reintegration, including specific means for the community to support the offender.<sup>233</sup> This process strengthens the offender's social ties to the community rather than disrupting them.<sup>234</sup> An offender's lack of voice in the traditional criminal justice system discourages trust, particularly when that system disproportionately

<sup>229</sup> See Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of "Restorative Justice,"* 2003 UTAH L. REV. 375, 375–77 (2003).

<sup>230</sup> See ACLU Wash. Leg. Off., *Written Testimony of the Am. Civ. Liberties Union on Racial Disparities in Sent'g*, Inter-Am. Comm'n on Human Rights: Hearing on Reports of Racism in the Just. System of the U.S. 1, 8 (Oct. 27, 2014), [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf); Ctr. Health & Just., *Facts on Justice: Minority Populations Incarcerated at Disproportionately High Rates* (Nov. 2010) <http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/FOJ%2011-10.pdf>; NAZGOL GHANDNOOSH, *THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM* 10–12 (2015); *THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 3–8 (2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

<sup>231</sup> See Aya Gruber, *A "Neo-Feminist" Assessment of Rape Law and Domestic Violence Law Reform*, 15 J. GENDER, RACE & JUST. 583, 584–87 (2012) (arguing that rape laws increase the penal state, to the detriment of many women and minority communities); Capers, *supra* note 14, at 1364–81 (discussing how rape law can reflect and exacerbate racial inequality in the criminal justice system); see also Dastidar, *supra* note 212; Harrelson, *supra* note 29 (describing why victims may be distrustful of a system that relies primarily on incarceration).

<sup>232</sup> See Dastidar, *supra* note 212; Harrelson, *supra* note 29.

<sup>233</sup> See Koss, *supra* note 222, at 1624; Robinson, *supra* note 229, at 375; Kathy Elton & Michell M. Roybal, *Restoration, A Component of Justice*, 2003 UTAH L. REV. 43, 52 (2003); Suvall, *supra* note 210, at 567.

<sup>234</sup> See David R. Karp & Casey Sacks, *Student Conduct, Restorative Justice, and Student Development: Findings from the STARR Project: A Student Accountability and Restorative Research Project*, 17 CONTEMP. JUST. REV. 1, 6 (2014).

targets members of his community and demonstrates other systemic bias against him. Requiring an offender actively confront the harm he caused and help determine his consequences increases his investment in the process and strengthens its legitimacy.<sup>235</sup>

Restorative justice processes also have significant limitations, particularly when they are executed within the criminal justice system. Systemic biases may undermine its use. These biases may, for example, give greater access to white or otherwise privileged offenders at the expense of subordinated groups, particularly where (as with RESTORE), prosecutors determine which cases qualify.<sup>236</sup> Communities of color and others affected by hyper-incarceration and discrimination must be given substantial power in creating these restorative justice systems so that their needs are prioritized. Any restorative justice process should keep careful statistics on the offenses and the defendants and survivors who are informed of the process's availability, and of those who ask to participate and are accepted into the program. A task group must periodically review this data for indicators of systemic bias and, with proper protections for parties' identities, make the data available to independent organizations and individuals.

Criminal justice has failed many communities in a way that defies rehabilitation. Building restorative justice processes within this system will not fix it; nor will it address the myriad other sources of oppression.<sup>237</sup> Such processes may, however, be a promising means to incorporate the needs of subordinated groups in the criminal justice system's failing approach to sexual violence.

## V. CONCLUSION

#MeToo's lesson may ultimately be about the limits of criminal law. It is unacceptable to accept these limits with a shrug. However, it would be shortsighted to believe that reforming criminal law will respond to what survivors needs most. Strengthening a carceral state disproportionately harms communities of color, which includes the survivors of sexual violence who are most at risk. #MeToo's ultimate lesson for the criminal justice system may be the need for a less carceral approach shaped and led by those at the margins of both criminal justice and #MeToo's discourse.

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<sup>235</sup> See ZEHR, *supra* note 209, at 23–25; KARP, *supra* note 221, at 20–23; BRAITHWAITE, *supra* note 221, at 81–82; Suvall, *supra* note 210, at 559; Garvey, *supra* note 210, at 314–15.

<sup>236</sup> See Mary P. Koss, et al., *Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable*, 989 ANNALS OF THE N.Y. ACAD. SCI. 384, 389 (2003); Kaplan, *supra* note 213, at 737–41 (noting ways that restorative justice in campus processes may perpetuate the criminal justice system's systemic biases and inequalities).

<sup>237</sup> See Barbara Sherrod, *Restorative Practices Require Power Be Redistributed to Black and Brown Children*, JUV. JUST. INFO. EXCHANGE (Apr. 10, 2019), <https://jjie.org/2019/04/10/restorative-practices-require-power-must-be-redistributed-to-black-brown-children/>.