

1-1-2022

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Recommended Citation

Michal Buchhandler-Raphael, *Underprosecution Too*, 56 U. Rich. L. Rev. 409 (2022).
Available at: <https://scholarship.richmond.edu/lawreview/vol56/iss2/4>

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UNDERPROSECUTION TOO

Michal Buchhandler-Raphael *

*“First, they refused to believe me. Then they shamed me. Then they silenced me.”*¹

INTRODUCTION

In 2016, Donna Doe, a nineteen-year-old student at Baylor University in Waco, Texas, attended a party at the school’s fraternity chapter of Phi Delta Theta.² She claimed that after she had drunk some punch and felt woozy, Jacob Anderson, who was at that time the fraternity’s president, raped her multiple times.³ Doe further alleged that after she blacked out, Anderson dumped her face down on the ground and left.⁴

Anderson was arrested, expelled from school, and in June 2018, a grand jury indicted him on four sexual assault charges stemming from these allegations.⁵ Yet, the District Attorney’s office refused

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1. LACY CRAWFORD, NOTES ON A SILENCING, A MEMOIR (2020).

2. See Eli Rosenberg & Kristine Phillips, *Accused of Rape, Former Baylor Fraternity President Gets No Jail Time After Plea Deal*, WASH. POST (Dec. 11, 2018), <https://www.washingtonpost.com/education/2018/12/11/accused-rape-former-frat-president-gets-no-jail-time-after-plea-deal-da/> [<https://perma.cc/2NZP-Q9AP>].

3. See Mitch Mitchell & Kaley Johnson, *Ex-Frat President at Baylor Gets No Jail Time in Rape Case as Judge Accepts Plea Deal*, FORT WORTH STAR-TELEGRAM (Dec. 10, 2018), <https://www.star-telegram.com/news/state/texas/article222888435.html> [<https://perma.cc/23AY-KRDN>].

4. See *id.*; see also *An Ex-Baylor Student Says She Was Raped, but the Suspect Got Probation. Read Her Victim Impact Statement*, CNN (Dec. 11, 2018, 3:11 PM), <https://www.cnn.com/2018/12/11/us/baylor-rape-allegation-victim-impact-statement/index.html> [<https://perma.cc/AAY6-DQM2>].

5. See Rosenberg & Phillips, *supra* note 2.

to try Anderson in court for the sexual assaults.⁶ Instead, the prosecutor accepted a guilty plea that convicted Anderson of unlawful restraint, a crime of a nonsexual nature, which resulted only in a probation sentence.⁷ The prosecutor's reasons for refusing to bring to trial the sexual assault charges were stated in her letter to the complainant,⁸ which included, among others, the following statements:

I've accepted an offer [of a plea agreement] on Jacob Anderson. It's for probation on the charge of Felony Unlawful Restraint not Sexual Assault—therefore, he will not have to register as a sex offender. I realize this is not the outcome we had hoped for or that I had originally offered, but I tried a very similar case to this one last month, and lost. . . . In light of the similarities between the cases, it's my opinion it would be worse to try Anderson and lose and have the entire matter wiped from his criminal history than to accept this plea offer. . . . It's my opinion that our jurors aren't ready to blame rapists and not victims when there isn't concrete proof of more than one victim. . . . Multiple victims put the focus properly on the criminal's conduct. That didn't happen when there was only one victim and one event to talk about. . . . I think this jury . . . was looking for any excuse not to find an innocent looking young defendant guilty. They engaged in a lot of victim blaming—and the behavior of that victim . . . is very similar. . . . Not to mention the emotional damage this victim would have to deal with if she had to testify and then felt the jury thought she was a liar.⁹

The refusal to try this sexual assault due to concerns that a hypothetical jury was unlikely to convict the defendant is illustrative of the prosecutorial treatment of many sexual assault cases, resulting in the underprosecution of these crimes.¹⁰ This prevalent phenomenon occurs when complainants report to police that they have been sexually assaulted, a criminal investigation is conducted, and there is probable cause that the crime had been committed and arguably sufficient evidence to prove it beyond a reasonable doubt.

6. *Id.*

7. *Id.*

8. Throughout the Article, I use the terms "victims" and "complainants," rather than "survivors," although I recognize that many would prefer the latter term. I choose to use the former terms because they are more neutral and are applicable in all crimes, whereas the term "survivors" is unique to sexual assault cases.

9. See Holly Yan, *A Prosecutor Refuses to Try an Ex-Frat Leader's Sex Assault Case. Here Are Her Eye-Opening Reasons Why*, CNN (Dec. 13, 2018), <https://www.cnn.com/2018/12/12/us/baylor-rape-allegation-letter-from-prosecutor/index.html> [<https://perma.cc/T3PQ-LGLN>].

10. See *infra* sections I.A–B.

Yet, prosecutors refuse to try the alleged attacker for the sexual assault.¹¹

Ample studies show that prosecutors pursue criminal charges only in a small fraction of sexual assault cases.¹² These studies further demonstrate that prosecutors decline to bring sexual assault charges in the vast majority of these cases, mostly citing to “insufficient evidence” to justify their decisions.¹³ This Article relies on, among other things, findings of a recent study identifying the main reasons for high attrition rates in sexual assault cases.¹⁴ The study found that prosecutors routinely decide not to pursue charges for reasons unrelated to the legal merits of the case.¹⁵ Instead, prosecutors frequently use the designation “insufficient evidence” as a pretext, when in fact the actual reason underlying the declination decision is their prediction that hypothetical jurors are unlikely to convict because they would likely discredit the complainant’s account.¹⁶ Here, I refer to the practice of declining to prosecute sexual assault cases for this reason as reliance on the convictability standard.¹⁷ The upshot of such deference to potential juries’ unfavorable

11. These cases further vary, as in some, prosecutors decline altogether to pursue any criminal charges, while in others, they refuse to try the defendant in court for the sexual assault, accepting a plea bargain that does not include an offense of a sexual nature but only a conviction of a relatively minor offense. For additional examples illustrating the refusal to prosecute sexual assault cases see, Petition for Appointment of a Prosecutor Pro Tempore, In re Jane Doe 1, Jane Doe 2, Jane Doe 3, and Jane Doe 4 (Utah) (No. 2018-0839), 2018 WL 6015550 at *7–22; First Amended Class Action Complaint, Smith v. City of Austin (W.D. Tex. Austin Div.) (No. 18-cv-505), 2018 WL 8809225.

12. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 160 UNIV. PA. L. REV. 1, 36, 38–41 (2017).

13. See CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES SHERIFF DEPARTMENT AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY’S OFFICE 297 (2012).

14. See MELISSA S. MORABITO, LINDA M. WILLIAMS & APRIL PATTAVINA, NAT’L CRIM. JUST. REFERENCE SERV., DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE UNITED STATES (2019).

15. *Id.* at 4–5.

16. See Michelle Madden Dempsey, *Prosecuting Violence Against Women: Toward a “Merits-Based” Approach to Evidentiary Sufficiency*, 14 UNIV. PALERMO L. REV. 241, 245 (2015). For an English translation, see Michelle Madden Dempsey, *Prosecuting Violence Against Women: Toward a “Merits-Based Approach to Evidentiary Sufficiency”* (Villanova Univ. Charles Widger Sch. L., Pub. L. & Legal Theory, Working Paper No. 2016-1032), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858361 [<https://perma.cc/VM5K-QVLY>].

17. For a general definition of prosecutorial declination and discussion of the phenomenon, see Jessica Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 487–88 (2020).

perception of complainants' credibility is the underprosecution of sexual assault.¹⁸

The claim that sexual assaults are underprosecuted might raise initial skepticism among some readers, given the conventional wisdom that problems of excesses rather than shortages plague the criminal legal system. Overcriminalization and overenforcement, including both overpolicing and overprosecution, are indeed pervasive problems that characterize *most* crimes.¹⁹ Voluminous literature addresses these deficiencies, emphasizing their disparate effects on racial minorities, and calling for comprehensive reforms of the racially unjust legal system.²⁰

Distinct concerns about overenforcement also underlie the legal system's treatment of sexual assault charges brought against defendants of color, given the profound risks of disproportionate effect on them.²¹ Black men have historically often been wrongly prosecuted for crimes allegedly committed against white women, and have excessively endured both legal and extralegal modes of punishment.²²

Yet, the conventional account that exclusively highlights problems of overenforcement is only partially accurate because it reflects prevalent enforcement practices that characterize *most*, but not all, types of crimes. The overenforcement paradigm largely obfuscates a parallel problem of underenforcement that is ubiquitous in specific types of crime, including sex crimes.²³

In recent years, commentators began to identify the phenomena of underpolicing and underprosecution of some categories of crime.²⁴ A common feature underlying these crimes is that their victims are often racial minorities or otherwise marginalized

18. See Tuerkheimer, *supra* note 12, at 36–41.

19. See *infra* section I.A.

20. *Infra* section I.A.

21. See I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. UNIV. L. REV. 1345, 1355 (2010).

22. See AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* 32–40 (2020).

23. See Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1722–33 (2006) (identifying for the first time the underenforcement problem and coining the term to describe it).

24. See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292–1303 (2016). See generally Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205 (2017) [hereinafter Yung, *Rape Law Gatekeeping*]; Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014) [hereinafter Yung, *Rape Statistics*].

individuals. These people have been historically underserved by a legal system that has failed to provide them with equal protection of the law, thus rendering their victimization invisible.²⁵

The failure to adequately prosecute sexual assault poignantly illustrates how the most vulnerable and disempowered members of society, who arguably need the law's protection the most, are ironically the least protected in our criminal legal system.²⁶ The vast majority of sexual assault victims are women, whose unequal treatment by the law, including skepticism and disbelief of their accounts during all stages of the criminal process, continues to render them a marginalized group.²⁷

Moreover, women of color and indigenous women are especially marginalized, because when they report their victimization, the criminal legal system's decisionmakers often view them as less credible.²⁸ The problem of underprosecution of sexual assault is therefore further exacerbated when considered through the lens of intersectionality theories, which stress the cumulative impact that marginalized victims experience as a result of the convergence of several factors.²⁹ Sexual assault victims are especially prone to discriminatory treatment due to the multiple ways in which gender and racial biases intersect.³⁰ A single victim may simultaneously suffer the aggregate effect of these biases and prejudices as a woman of color, a transgender woman, a sex worker, and an undocumented immigrant, which results in multiplying their marginalization.³¹

While the law's biased treatment of socially marginalized individuals disproportionately affects both defendants and victims of sexual assault, the nuanced interrelationship between the over- and underenforcement of these crimes largely remains

25. Tuerkheimer, *supra* note 24, at 1290–91.

26. See Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1146 (2018) (reviewing JAMES FORMAN, JR., *LOCKING UP OUR OWN, CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)).

27. See Tuerkheimer, *supra* note 12, at 20–21. While sexual assault disproportionately affects women, I do not mean to minimize the experiences of men and transgendered individuals who are sexually assaulted. See Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1261–62 (2011).

28. Tuerkheimer, *supra* note 12, at 29–33.

29. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271–82 (1991).

30. See Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 778–80 (2018).

31. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598–99 (1990).

undertheorized.³² Existing literature mostly focuses on underpolicing and institutional deficiencies stemming from inadequate criminal investigation.³³ The other equally troubling facet of the underenforcement phenomenon—the underprosecution of sexual assault—has received only scant scholarly attention.³⁴ In this Article, I choose to focus exclusively on this insufficiently studied area of systemic institutional failure to adequately prosecute sexual assault.

This Article makes two main contributions to existing literature. First, it asserts that in deciding whether to pursue sexual assault charges, prosecutors should *not* rely on the convictability standard. Assessing evidentiary sufficiency in sexual assault cases through the lens of a hypothetical jury is misguided because it incorporates a myriad of jurors' extralegal considerations of victims' behaviors, consisting of racialized, gendered, class, status and other prejudices and biases against victims.³⁵ Declining to prosecute sexual assault based on the convictability standard not only perpetuates unwarranted misconceptions about certain victims, but also reinforces their marginalization by exacerbating the legal system's unequal and discriminatory treatment. Instead, this Article proposes the reasonable prosecutor's evidentiary sufficiency standard under which prosecutors should take into account only legal factors directly relevant to the evidentiary strength of the sexual assault case at issue.³⁶ This proposed standard asks only whether a reasonable jury *could* convict the defendant based on the admissible evidence, rather than predicting whether jurors would likely do so.

To be clear, this Article nowhere suggests that the evidentiary standard necessary for convicting defendants of sexual assault should be anything less demanding than beyond a reasonable doubt. Rather, its modest claim is that prosecutors should objectively evaluate questions of evidentiary sufficiency from the perspective of what reasonable jurors could do. This prescriptive position would ask whether based on the law's substantive definition of sexual assault and the likely admissible evidence, whether the

32. For notable works theorizing the underenforcement of sexual assault, see generally Tuerkheimer, *supra* note 24; Yung, *Rape Law Gatekeeping*, *supra* note 24; Yung, *Rape Statistics*, *supra* note 24; Dempsey, *supra* note 16.

33. See Tuerkheimer, *supra* note 24; Yung, *supra* note 24.

34. See Tuerkheimer, *supra* note 24, at 1288 n.5.

35. See *infra* section II.B.3.

36. Cf. Dempsey, *supra* note 16, at 259.

suspect *could* and *should* be found guilty beyond a reasonable doubt.

Viewed through this normative framework, assessing evidentiary sufficiency through the reasonable prosecutor's lens carries broader implications for other underprosecuted crimes beyond sexual assault. While this Article mostly focuses on advocating for reform in the prosecution of sexual assault, it highlights the potential ramifications on additional crimes. The underprosecution phenomenon is also manifested in other types of crime, most notably unjustified police violence and hate crimes.

Second, this Article uses the underprosecution of sexual assault as a case study for making broader arguments about prosecutorial treatment of other underprosecuted crimes and particularly the roles that progressive prosecutors may play in promoting social justice goals. It argues that a legal system is fundamentally unjust if existing criminal institutions fail to do justice for *all* stakeholders in the criminal process, including not only defendants but also crime victims. When prosecutors refuse to try sexual assault cases, they create a system which perpetuates unjust outcomes for persons whom that the law has traditionally failed to protect.

To ensure that prosecutors make charging decisions in a fair and just manner, this Article develops the Equitable Prosecution Model ("EPM").³⁷ Currently there is no scholarly consensus on a principled theory of the prosecutorial role, as the conventional account of prosecutors' duty to "seek justice" is amorphous and fails to provide direction on how to exercise their discretion in making charging decisions.³⁸

Prosecutors currently lack guidance on how to evaluate contrasting considerations and equitably balance between them. A more rigorous prosecution of sexual assault would arguably create an inevitable tension between two conflicting goals: on one hand, extending the law's equal protection to sexual assault victims who have traditionally suffered from the law's failure to protect them, and have an interest in holding those who wronged them criminally accountable; on the other hand, rectifying the

37. I borrow the term "equitable prosecution" from Fred C. Zacharias, *Justice in Plea Bargaining* 39 WM. & MARY L. REV. 1121, 1160 n.119 (1998).

38. See generally Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 (2020). For further discussion of prosecutor's role, see *infra* section III.A.

disproportionate effects of a racialized criminal legal system on minority defendants, among others in the area of sexual assault.³⁹

This perceived tension between defendants and victims' interests is manifested in the arguably disparate objectives of two social movements that have become prominent in recent years: #MeToo and the Movement for Black Lives ("M4BL" or "BLM"). The former advocates for enhanced accountability for sexual violence while the latter urges for remedying the legal system's longstanding racial injustice, including the harms of mass incarceration, inflicted disproportionately on racial and ethnic minorities and particularly on Black, Indigenous, and People of Color ("BIPOC").⁴⁰

Conceding that both movements' calls for reform are warranted, this Article attempts to reconcile this purported conflict by arguing that the goals of #MeToo and BLM should in fact be viewed as complementary rather than contradictory. It stresses that the law must heed the demands of both movements, as they seek to accomplish important social justice objectives by advocating for an equitable legal system and by amplifying voices that have long been silenced.

Acknowledging that the harms of sexual assault inflicted on Black victims remain undervalued, adopting the EPM will result in doing justice and fairly treating *both* victims and defendants of crimes. Examining in tandem the nuanced interrelationship between problems of over- and underprosecution of sexual assault stresses the interconnectedness between defendants' due process rights and victims' interests in ensuring accountability for criminal wrongdoing, given the criminal legal system's obligation to provide fair and just treatment to both groups.

Furthermore, the EPM incorporates a civil rights approach as underlying the prosecution of sexual assault and other underprosecuted crimes. Drawing on a social justice perspective, this approach recognizes that the law must rigorously protect victims who historically have suffered from the law's unequal protection.⁴¹ This approach aligns with a growing number of district attorneys,

39. See GRUBER, *supra* note 22, at 142, 145.

40. See *infra* section III.D. I use the terms BLM and M4BL interchangeably, as the latter is the larger organization that encompasses several local chapters, BLM among them. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 407–08 (2018). For discussion of the criminal legal system's harms on BIPOC communities, see I. India Thusi, *Reality Porn*, 96 N.Y.U. L. REV. 738, 786 (2021) (observing that the criminal legal system marginalizes BIPOC).

41. See Tuerkheimer, *supra* note 24, at 1334–35.

commonly referred to as “progressive prosecutors,” who emphasize concerns about the legal system’s injustices and prioritize the prosecution of crimes, including sex offenses, that exemplify historical inequality and racial and gender subordination.⁴² The EPM is compatible with these policies, providing a much needed theoretical framework for understanding the innovative practices advanced by these progressive prosecutors.

This Article proceeds as follows. Part I describes the problem of underprosecution of sexual assault, situating it within the broader context of the underenforcement phenomenon. It then identifies the main reasons that account for the failure to prosecute these crimes. Part II elaborates on the shortcomings of prosecutors’ reliance on the convictability standard for evaluating the sufficiency of the evidence in sexual assault cases. It proposes replacing it with the “reasonable prosecutor’s sufficiency of the evidence standard” under which prosecutors would evaluate, based solely on their professional assessment of the admissible evidence, whether jurors could and should convict the defendant, that is whether there is a reasonable possibility of conviction. Part III develops the EPM to theorize prosecutors’ decision making and their roles in pursuing criminal charges in traditionally underprosecuted crimes. It demonstrates how the model’s civil rights underpinning strikes a proper balance between defendants’ rights and victims’ interests, thus ultimately leading to a more equitable criminal legal system for all its stakeholders.

I. THE UNDERPROSECUTION OF SEXUAL ASSAULT

A near consensus has emerged among criminal justice scholars that the criminal legal system is deeply flawed, mostly due to problems of overcriminalization, overenforcement, and mass incarceration.⁴³ Many refrain from using the term “criminal justice system”

42. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417, 1438–39 (2020); *infra* section III.C (elaborating on the role of reformist prosecutors in prioritizing a civil rights approach to prosecution).

43. Voluminous scholarship has been devoted to the problems of overenforcement and mass incarceration. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 260–61 (2018). See generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSE OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019).

due to its failure to do justice, using instead the more descriptive “criminal legal system” language.⁴⁴

Furthermore, the criminal legal system’s problems have disparate effects on defendants of color, particularly young Black men.⁴⁵ Commentators express profound concerns that existing criminal institutions function to exert punishment as a means to control and manage marginalized populations, especially minority communities, perpetuating deeply unjust outcomes.⁴⁶

Yet, in recent years, commentators also began to critique the criminal legal system’s failure to adequately enforce specific categories of crime, including unjustified police violence, hate crimes, and sexual assault.⁴⁷ Critics further observe that underenforcement has disparate implications for particular groups of victims, as these crimes are mostly perpetrated against marginalized persons, who have historically suffered from the law’s underprotection.⁴⁸ In a seminal work that first identified the underenforcement problem, Professor Alexandra Natapoff stresses that overenforcement and underenforcement are “twin symptoms of a deeper democratic weakness of the criminal legal system: its non-responsiveness to the needs of the poor, racial minorities, and otherwise politically vulnerable.”⁴⁹ Other critics further emphasize the inextricable link between the overenforcement of crimes against marginalized defendants, and the underenforcement of specific crimes, affecting marginalized victims.⁵⁰

44. See Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Towards a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1475 n.7 (2020).

45. See, e.g., PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 7–9, 12, 15–18 (2017); JAMES FORMAN, LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 8–9, 11–13 (2017); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1–2 (2020).

46. See ALEXANDER, *supra* note 45; see also Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice,”* 15 OHIO STATE J. CRIM. L. 619, 620 (2018); Sharon Dolovich & Alexandra Natapoff, *Mapping the New Criminal Justice Thinking*, in THE NEW CRIMINAL JUSTICE THINKING 1, 2–4 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

47. See Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 857 (2018) (noting that underenforced crimes also include white collar and corruption cases); Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 528–29 (2018) (noting the same). These crimes implicate different concerns and their victims are not marginalized but powerful.

48. See Tuerkheimer, *supra* note 26, at 1154–57; Sarah Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 877–78 (2020).

49. See Natapoff, *supra* note 23, at 1719, 1722–39 (discussing the various aspects of the underenforcement problem).

50. See Tuerkheimer, *supra* note 26, at 1150.

While voluminous scholarship addresses the criminal legal system's excesses, parallel problems manifesting its deficits, and particularly the underenforcement of specific crimes, including sexual assault, largely receive only scant scholarly attention.⁵¹ Below, I demonstrate how the underprosecution of sexual assault represents one important component of the broader underenforcement phenomenon.⁵²

A. *Underenforcement of Sexual Assault*

The criminal legal system's treatment of sexual assault does not include any overpunitive practices, such as rigorous pro-arrest, zealous pro-prosecution or harsh pro-incarceration policies that characterize the enforcement of most types of violent crime.⁵³ Instead, the underenforcement of sexual assault offenses is manifested in various stages of the criminal process. First, sexual assault is the most under-reported violent crime, as the vast majority of victims choose not to report their victimization to the police.⁵⁴ Second, the police's neglect to conduct an effective criminal investigation poses a major impediment to enforcement.⁵⁵ Third, prosecutorial refusal to file criminal charges once criminal investigation has been completed results in the underprosecution of sexual assault.⁵⁶

The underenforcement of sexual assault, however, largely remains underdeveloped in the literature, with the exception of a few notable works.⁵⁷ Moreover, the scant scholarship that addresses

51. See *supra* notes 45–48 and accompanying text.

52. See Natapoff, *supra* note 23, at 1717 (defining underenforcement as “a weak state response to lawbreaking as well as to victimization”). Natapoff's work described several areas characterized by underenforcement, yet it was not specifically focused on underenforcement of sexual assault.

53. See *Statistics: Sexual Assault in the United States*, NAT'L SEXUAL VIOLENCE RES. CTR., <https://www.nsvrc.org/statistics> [<https://perma.cc/E33N-CE5S>]; see also Laurie S. Kohn, *#MeToo, Wrongs Against Women and Restorative Justice*, 28 KAN. J.L. & PUB. POL'Y 561, 574 (2019) (observing that sexual assault remains an underprosecuted crime).

54. See Lara Bazelon & Bruce Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO STATE J. CRIM. L. 293, 293 (2020) (observing that sexual assaults remain grossly under-reported and underprosecuted).

55. See Tuerkheimer, *supra* note 24, at 1292–99 (discussing police failure to investigate sexual assaults); Yung, *Rape Law Gatekeeping*, *supra* note 24, at 219–20 (same).

56. Tuerkheimer, *supra* note 24, at 1289 n.6 (noting that arguments about underenforcement apply both to underpolicing and underprosecution); see Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1158 (2019) (observing that even when police substantiate a rape complaint, prosecutors pursue only a fraction of the cases referred).

57. Tuerkheimer, *supra* note 24, at 1289 (observing that underenforcement and over-enforcement are related problems, both manifesting the state's implementation of its police

problems of underenforcement of sexual assault, mostly centers on problems of underpolicing—police failure to adequately investigate sexual assault—rather than underprosecution of these crimes.⁵⁸ This lacuna is unsurprising, for three main reasons.

First, given the near scholarly consensus that the criminal legal system suffers from problems of excesses in all stages of the criminal process, merely invoking the notion of this system's deficits is largely perceived with skepticism. Given ample justified critique of prosecutorial excessive criminal charging in other areas, deficits in prosecutions of sexual assault remain less visible.⁵⁹

Second, one of the distinct features of the American criminal legal system is that prosecutors exercise unregulated discretion during all stages of the criminal process, including among others, in deciding whether or not to file charges.⁶⁰ Prosecutors' authority to decline to prosecute all types of cases is unlimited and they may decline to prosecute a specific case for any reason they deem appropriate.⁶¹ Moreover, prosecutors' decisions not to file charges are unreviewable, and are typically final and not subject to reversal by anyone outside their offices.⁶² Prosecutors' refusal to file sexual assault charges is not perceived differently than their routine declination decisions in other areas.⁶³ Given the inevitable

power in ways that disadvantages the most vulnerable among us, and both undermining equal protection norms).

58. See Yung, *Rape Law Gatekeeping*, *supra* note 24, at 219; Tuerkheimer, *supra* note 24, at 1292–99; Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 14 *GEO. J. GENDER & L.* 43, 46 (2013).

59. Recent advocacy inspired by the #MeToo movement, however, shines some new light on the problem. See Tuerkheimer, *supra* note 24; *see also infra* section III.D (further discussing the #MeToo movement).

60. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *IOWA L. REV.* 393, 409 (2001); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 *UNIV. PA. L. REV.* 959, 960 (2009); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 *WISC. L. REV.* 837, 837–38 (2004); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 *IOWA L. REV.* 1537, 1539–40 (2020); Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 *WAKE FOREST L. REV.* 677, 677 (2016); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 *WASH. & LEE L. REV.* 1413, 1414–15 (2010). See generally Jeffrey Bellin, *The Power of Prosecutors*, 94 *N.Y.U. L. REV.* 171 (2019) for an argument challenging the conventional wisdom regarding prosecutorial power.

61. See Gerald E. Lynch, *Prosecution Prosecutorial Discretion*, in 3 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1248 (Joshua Dressler ed., 2d ed. 2002).

62. See JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION* 115–16 n.6 (4th ed. 2015) (observing that in some states, the state Attorney General has limited authority, which is rarely exercised, to take jurisdiction and overrule a nonprosecution decision).

63. See Roth, *supra* note 17, at 520 (describing prosecutors declining to file charges in crimes other than sexual assault).

discretionary power vested in prosecutors, the practice of declining to bring sexual assault charges is largely viewed as yet another iteration of this power.⁶⁴

Third, in recent decades, rape law reformers have largely focused on the need for amending the substantive definition of the crime, including redefining consent to sexual relationships to include an affirmative consent standard.⁶⁵ These efforts obfuscated the limited impact that statutory reforms have for prosecuting sexual assault.⁶⁶ Since the vast majority of sexual assault cases do not result in an adjudicative process, these reforms largely have no operative effect.⁶⁷

The underprosecution of sexual assault, however, is yet another equally troubling facet of the underenforcement of these crimes. Conflating prosecutorial declination decisions in sexual assault cases with prosecutors' common declination practices in other crimes obscures the unique ramifications of the underprosecution of sexual assault, which this Article highlights. The following sections describe existing empirical evidence on this prevalent practice, including the reasons lurking behind it.

B. *Prosecutorial Declination Decisions in Sexual Assault Cases*

Despite the enormous implications of prosecutorial authority to refuse to bring criminal charges, the question of under what circumstances prosecutors exercise this unlimited power largely remains open. Elaborating on the broader ramifications of prosecutors' declination decisions in all types of crime exceeds the scope of this Article. For the purposes of my argument here, suffice it to stress that the factors underlying the prosecutorial decision-making process are varied and complex, but mostly understudied. Prosecutors have neither a legal duty to publicly disclose their decisions

64. There are ample social science studies describing the underprosecution of sexual assault. See *infra* section I.B for a discussion of these studies. See Tuerkheimer, *supra* note 12, at 1; Dempsey, *supra* note 16, at 245–48, for important legal literature addressing the underprosecution of sexual assault.

65. See Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415 (2016). Similarly, rape law reforms have focused on special evidentiary reforms known as rape shield laws, prohibiting the complainant's sexual past and allowing evidence of defendant's previous sexual assaults in a criminal prosecution for a sexual assault despite the general prohibition against character evidence when used to prove propensity.

66. See Michal Buchhandler-Raphael, *The Failure of Consent: Re-conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 150 (2011).

67. See *id.*; see also Erin Sheley, *A Broken Windows Theory of Sexual Assault Enforcement*, 108 J. CRIM. L. & CRIMINOLOGY 455, 465 (2018).

nor an obligation to publicly state their reasons for declination, resulting in lack of transparency and meaningful oversight.⁶⁸

Moreover, empirical data on the reasons for prosecutors' declination decisions are not only scant, but also inherently limited. It may only cover their *stated* legal reasons, which do not necessarily reveal their actual unstated motives that cannot be quantifiably measured.⁶⁹ Prosecutors' declared *legal* reasons, however, may obscure troubling factors where their decisions are shaped by nonlegal, and mostly pretextual and arbitrary considerations. These include race, gender, class, status, and "other invidious criteria" which may affect prosecutors' "choices, either consciously or unconsciously."⁷⁰ These unstated reasons for refusing to bring criminal charges to trial prove especially disconcerting in sexual assault cases.

Empirical research shows that only a small fraction of sexual assaults are prosecuted in the criminal legal system.⁷¹ Scholars have long observed that the vast majority of sexual assault cases are not brought to trial.⁷² Despite three decades of advocacy calling for legal reforms in the treatment of sexual assault, these cases remain underprosecuted today.⁷³

68. See Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. UNIV. L. REV. 1071, 1082 (2019).

69. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129, 133–35, 135 n.20, 145–46, 148–153 (2008) (analyzing data on declinations in four jurisdictions, revealing that the reasons for declinations in one of the jurisdictions (New Orleans) include those related to criminal procedure, like unlawful searches, the substance of criminal law, evidentiary problems of proof, particularly when victims and offenders have prior relationships, victims' refusal to cooperate, and policy reasons, including chief prosecutors' offices policies and priorities).

70. *Id.* at 154–55 (finding that internal regulations have the potential power to affect prosecutors' choices and cause them to respond positively to race, class, and other types of disparities).

71. See Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 146, 157 (2012) (estimating that for every 100 rapes, only 0.4 to 5.4 are prosecuted); Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48 SOC. PROBS. 206, 213 (2001) (noting that prosecutors refused to bring criminal charges in over forty percent of rape cases); SPOHN & TELLIS, *supra* note 13, at 17–20 (describing high case attrition in both the Los Angeles Police Department ("LAPD") and Los Angeles County Sheriff's Department ("LASD")); MORABITO ET AL., *supra* note 14, at 16–21 (describing the same).

72. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1195 (1997); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1162, 1168 (1986); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 726, 729 (2006).

73. See PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE

Multiple social science studies demonstrate the criminal legal system's high rates of attrition underlying all phases of the criminal process in sexual assault cases.⁷⁴ For example, one study finds that for every hundred forcible rapes, 5%–20% will be reported, 0.4%–5.4% will be prosecuted, 0.2%–5.2% will result in conviction, and 0.2%–2.8% will result in incarceration.⁷⁵

One notable study included quantitative analysis of case attrition from court records, analysis of case files, and interviews with victims as well as with police and prosecutors (“Sphon and Tellis Study”).⁷⁶ It found that the overwhelming majority of reports of sexual assault do not result in the arrest of a suspect and that only “about one in four reports was cleared by arrest, one in six resulted in the filing of charges, and one in seven resulted in a conviction.”⁷⁷ It further found an overuse of the “exceptional clearance” designation in sexual assault cases; namely instances where law enforcement was unable to clear an offense by arrest, despite conducting an investigation and identifying a suspect.⁷⁸

Recent findings from a multijurisdictional study on police officers' and prosecutors' decision-making in sexual assault cases (“Morabito Study”) replicate the above findings, revealing substantial attrition in handling these cases.⁷⁹ The Morabito Study found that the attrition problem in sexual assault cases stems from a

AGAINST WOMEN SURVEY 1, 33 (2006) (“[A]mong all women who were raped since age eighteen, only 7.8 percent said their rapist was criminally prosecuted, 3.3 percent said their rapist was convicted of a crime, and a mere 2.2 percent said their rapist was incarcerated.”).

74. Attrition rates in criminal cases are defined as “the rate at which cases are lost or dropped from the legal process,” beginning with the moment of reporting the offense, continuing with police investigation and then prosecutors' decision whether to file charges, and ending in the trial phase which may culminate in sentencing. See Eric R. Carpenter, *An Empirical Look at the Commander Bias in Sexual Assault Cases*, 22 BERKELEY J. CRIM. L. 45, 49–51, 56 (2017) (“Attrition is generally studied at six points, and researchers use different data sources to measure attrition at these different points.”).

75. See Lonsway & Archambault, *supra* note 71, at 156–57 (documenting the attrition of rape allegations as cases progress through the criminal legal system).

76. See SPOHN & TELLIS, *supra* note 13, at 16–17, 37 (covering sexual assault cases investigated by the LAPD and LASD).

77. *Id.* at 404–05 (summarizing the study's findings, specific to the LASD, on the high rates of attrition in sexual assault cases).

78. See Cassia Spohn & Katharine Tellis, *Justice Denied? The Exceptional Clearance of Rape Cases in Los Angeles*, 74 ALB. L. REV. 1379, 1383, 1394, 1420 (2011) (noting that police departments reported a clearance rate of 45.7% when the rate of clearance by arrest was only 12.2%).

79. MORABITO ET AL., *supra* note 14, at 20–21. The study, which includes interviews with eighteen sexual assault police investigators and twenty-four prosecutors in six jurisdictions across the country, presents results on case attrition for 2,887 female victims who reported sexual assault between 2008 and 2010, was submitted to the Department of Justice in 2019. *Id.* at 14, 16.

combination of police investigation barriers—discouraging reporting and failing to conduct effective investigation—and prosecutors’ frequent refusal to bring criminal charges.⁸⁰ It found that out of the 2,887 reports that complainants filed with police, only 544 (18.8%) were cleared by arrests, charges were filed only in 363 (72%), and declined in 115 (22.8%).⁸¹ In addition, 860 cases (29.8%) were “exceptionally cleared.”⁸²

These findings show considerable attrition in the early stages of case processing, with the vast majority of sexual assault reports not ending in arrest and even fewer going to trial. Only a minority of sexual assault reports, less than one in five, were cleared by arrest, and only 1.5% of all sexual assault complaints to police ended in a trial.⁸³ In addition, only 10–15% of cases brought to prosecution resulted in trial before a judge or jury.⁸⁴ Notably, at least 30% of cases where it was presumed that probable cause for arrest existed, did not result in arrest but instead were cleared by “exceptional means.”⁸⁵

The Morabito Study highlights one major problem in prosecutors’ decision-making regarding whether to bring criminal charges, which is excessive reliance on “exceptional clearance.”⁸⁶ It confirms findings from previous studies showing that the designation “exceptional clearance” is more common in rape cases than in other crimes.⁸⁷ More specifically, “exceptional clearance” was frequently used in cases where probable cause existed to make an arrest, yet one was not made, based on the assessment that prosecutors thought that they could not win the case at trial.⁸⁸ The Morabito study further notes that detectives often believed that they had solid cases with enough evidence to make an arrest, yet prosecutors declined to bring charges.⁸⁹ Researchers also found that police

80. *See generally id.*

81. *Id.* at 16.

82. *Id.* at III.

83. *Id.*

84. *Id.* at 77–78. The Morabito Study consists of both interviews with police detectives and with prosecutors. Section VIII focuses on interviews with Assistant District Attorneys, beginning on page seventy-five of the report.

85. *Id.* at III (observing that the unfounding of cases was relatively rare, with only 212 cases (7.3%)).

86. *Id.* at 33.

87. *See supra* note 73.

88. MORABITO ET AL., *supra* note 14, at IV; *see also* SPOHN & TELLIS, *supra* note 13, at 411–12.

89. MORABITO ET AL., *supra* note 14, at 69–70; *see also* Katharine Webster, *Why Do So Few Rape Cases End in Arrest?*, UMASS LOWELL (Apr. 17, 2019), <https://www.uml.edu/>

detectives made decisions based on their assessments of whether prosecutors would pursue the case.⁹⁰

The Spohn and Tellis Study further confirms previous research findings revealing that “exceptional clearance” is especially prevalent when suspects were not strangers, i.e., in acquaintance rape.⁹¹ The main issue in acquaintance rape is whether consent to sex was obtained.⁹² Prosecutors frequently decline to file charges in these cases because they believe that they are not going to be able to prove guilt beyond a reasonable doubt due to jurors’ reluctance to credit the complainant’s story.⁹³

Additionally, many studies show that underprosecution of sexual assault is especially prevalent when the victims are people of color.⁹⁴ Critical race theorist professor Bennett Capers observes that when crime victims are Black, underenforcement problems undercut the criminal enforcement of their sexual assault.⁹⁵ Other commentators also stress that empirical evidence shows the continued devaluation of Black victims, as notable disparities exist in rape conviction rates according to the race of the victim, confirming a bias against minority victims.⁹⁶ For example, one study demonstrates the impact of both the defendant’s and the victim’s race in prosecuting sexual assault, showing that their racial composition was a significant factor in all stages of the criminal process.⁹⁷

news/stories/2019/sexual_assault_research.aspx [https://perma.cc/D8TY-JXG4]. (“A lot of times, detectives felt like they had really good, solid cases with enough evidence to make an arrest, but prosecutors declined to go forward.”).

90. SPOHN & TELLIS, *supra* note 13, at 94 (noting that prosecutors reviewed all cases in some sites but only the most difficult cases in others).

91. *Id.* at 26, 176–77 (noting that prosecutors are less likely to file charges if the victim knew the offender).

92. *Id.* at 143–44.

93. *Id.* at 130–34 (providing quantitative analysis of case attrition in sexual assault cases from court records).

94. See GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 129–33, 134–43 (1989).

95. See I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1253–54 (2017).

96. See Tania Tetlow, *Discriminatory Acquittals*, 18 WM. & MARY BILL RTS. J. 75, 88–90 (2009).

97. See generally Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault*, 64 AM. J. CMTY. PSYCH. 256 (2019). For an earlier study confirming these findings, see LAFREE, *supra* note 94, at 129–33, finding that even though Black men accused of assaulting Black women accounted for 45% of reported rapes, they only accounted for 17% of defendants who received sentences of six years or more; in contrast, Black men charged with assaulting white women accounted for 50% of men who received sentences of six or more years.

But prior studies found that the influence of race on the criminal legal system's response to sexual assault has been described as "mixed," "inconsistent", and containing "contradictions." A recent systemic review of prior studies, ("Shaw and Lee Study") attempted to explain the disagreement in prior studies about how race influences sexual assault cases progression. It found that prior findings in fact unite to tell a nuanced story of the role of race in the criminal legal system response to sexual assault.

The Shaw and Lee Study examined eighteen studies concerning the decision to file charges initially, the decision to pursue charges rather than dismiss them, or the severity of the charges filed.⁹⁸ Some found that sexual assault cases involving "[w]hite" victims were more likely to have charges filed as compared to "non-[w]hite" and "Black" victims.⁹⁹ "Black" suspects, in general, as well as "Black" suspects with "white" victims were more likely to be charged with more serious crimes and for the charges to be filed as felonies.¹⁰⁰ However, a couple of studies have found that "white" victims, generally, and "white" victims with "Black" suspects, specifically, are more likely to have charges dismissed as compared to "Black" victims, and other racial dyads, respectively.¹⁰¹ The authors explained the purported disparity, suggesting that prosecutors initially issue charges on more cases involving white victims and suspects of color, but later when it becomes clear that there is not a strong enough case for it to proceed to prosecution, the charges are dropped.¹⁰²

Other studies found that in cases of aggravated rape, involving a stranger perpetrator, a gun or knife, or collateral injuries to the victim, race played a more prominent role.¹⁰³ Race continued to have no effect on charging decisions in cases of simple rape.¹⁰⁴ Researchers explained that this suggested that prosecutors believed that the seriousness of the crime was enhanced when the victim was white and that the race of the victim might have been itself an aggravating factor.¹⁰⁵

98. See Shaw & Lee, *supra* note 97, at 272.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 272–73.

103. *Id.* at 260.

104. *Id.*

105. *Id.* at 273.

C. *Reasons for Refusal to Prosecute*

Critically evaluating the underprosecution of sexual assault calls for probing into the reasons underlying prosecutors' declination decisions. To be sure, when prosecutors decide not to file charges because in their professional opinion there is genuinely not enough evidence to allow a reasonable jury to convict a defendant beyond a reasonable doubt, there is no basis for casting doubt on their decisions.¹⁰⁶ This Article thus takes no issue with these cases. Rather, it argues that when prosecutors' declinations are motivated by concerns that juries might not convict the defendant because they might rely on biases and prejudices concerning the victim, namely meritless factors that are not directly related to genuine legal insufficiencies of the evidence, challenging these decisions becomes vital.

The difficulties of unveiling the actual reasons behind prosecutors' declination decisions are not distinct to sexual assault cases, because prosecutors rely on unstated reasons in other types of cases as well.¹⁰⁷ Yet, the problem is exacerbated in the area of sexual assault because unlike other crimes which are overprosecuted, the vast majority of sexual assault cases are declined for prosecution. Assessing the various reasons for the refusal to try sexual assault cases is especially challenging because prosecutors often openly state one reason, most commonly the designation "insufficient evidence," when other unstated, and mostly pretextual reasons, underlie their declination decisions. The main considerations underlying both prosecutors' stated and unstated reasons for refusing to pursue sexual assault charges largely fall under the four categories below.

1. The Convictability Standard

The social science studies discussed earlier confirm that the main reason underlying prosecutors' declinations in sexual assault cases are their subjective assessment of the low likelihood that juries will convict.¹⁰⁸ Under the "convictability standard,"

106. See Miller & Wright, *supra* note 69, at 147–48 (observing that prosecutorial declination decisions largely stem from fundamental legal requirements).

107. See *supra* section I.B.

108. See MORABITO ET AL., *supra* note 14, at 77 (observing that prosecutors take cases forward that present a very high likelihood of a guilty disposition); Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461, 488–89 (2005) (noting that

prosecutors consider not only whether, based on the evidence, jurors could convict, but also whether they would be likely to do so.¹⁰⁹ Put differently, prosecutors decide whether to bring sexual assault charges based on their assessment of the likelihood that jurors would convict; that is, whether they “belie[ve] that the case would *likely* result in a conviction at trial.”¹¹⁰

Likewise, prosecutors’ refusal to file charges is often based on their *predictions* that jurors are unlikely to convict.¹¹¹ In interviews conducted with prosecutors, they emphasized the need to pursue only cases that would most likely reach a guilty verdict.¹¹² They further conceded that they made decisions in anticipation of how they believed a *jury* would respond to the evidence. These studies demonstrate that prosecutors deliberately pursue only a few strong cases in which they are persuaded that there is high probability that jurors would convict, screening out cases where conviction is unlikely.¹¹³ Using this prediction for measuring the perceived strength of the case often leads prosecutors to conclude that there is insufficient evidence to pursue the charges.¹¹⁴

One factor that prosecutors frequently rely on in predicting low likelihood of conviction in sexual assault cases is commonly known as the “CSI effect.”¹¹⁵ The “CSI effect” refers to a perception that jurors are unlikely to convict a defendant without DNA evidence.¹¹⁶ Such evidence, however, is not legally required for conviction in sexual assault cases and is merely a self-imposed constraint.¹¹⁷

a multijurisdictional study shows that prosecutors select cases with high probability of conviction and reject charges in case where conviction is unlikely).

109. See Tuerkheimer, *supra* note 12, at 37–38. The term “convictability” was first coined in Lisa Frohmann, *Convictability and Discordant Locals: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC’Y REV. 531, 535 (1997).

110. Tuerkheimer, *supra* note 12, at 37.

111. See MORABITO ET AL., *supra* note 14, at V, 8.

112. *Id.*

113. See Biechner & Spohn, *supra* note 108, at 488–91.

114. See Dempsey, *supra* note 16, at 245.

115. See First Amended Class Action Complaint, *supra* note 11, para. 56 (describing the District Attorney’s refusal to charge sexual assault cases based on the perception that juries are unlikely to convict without forensic evidence).

116. The CSI effect is defined as the inflated jury expectations regarding evidentiary proof that relies on forensic evidence and the resulting increase in prosecution’s burden of proof. See generally Kimberlianne Podlas, “The CSI Effect”: Exposing the Media Myth, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 433 (2006).

117. See Heather Waltker, Gerald Laporte, Danielle Weiss, Dawn Schwarting, Minh Nguyen & Frances Scott, *Sexual Assault Cases: Exploring the Importance of Non-DNA Evidence in Sexual Assault Cases*, NAT’L INST. OF JUST. (Nov. 9, 2017), <https://nij.ojp.gov/topics/articles/sexual-assault-cases-exploring-importance-non-dna-forensic-evidence> [<https://perma.cc/TG2E-DVYM>].

Moreover, studies document a substantial backlog in testing forensic sexual assault examinations (“rape kits”).¹¹⁸

Sufficient evidence for conviction of sexual assault, however, may largely rely on complainants’ testimonies at trial, provided that jurors find them credible. Victims’ accounts may be buttressed with non-DNA corroborative evidence consisting of witnesses who observed the complainant before and after the assault, electronic communications, and photographs.¹¹⁹

Heavy reliance on DNA evidence in prosecutors’ decision making is especially problematic given the fact that in acquaintance rapes, where the defendant typically defends this charge on the ground that the sexual encounter was consensual, such evidence should not be considered a dispositive factor in deciding whether to prosecute the case.¹²⁰ This Article will return to elaborate on the drawbacks in the convictability standard in the Part II,¹²¹ but before doing that, it will continue to outline additional reasons underlying prosecutors’ declination decisions.

2. The Credibility Discount

Prosecutors’ declination decisions in many sexual assault cases are problematic because in doing so they unjustifiably discredit complainants’ accounts.¹²² Crediting witnesses for telling the truth at trial, sometimes referred to as believability, is a key tenet underpinning discussions of evidentiary issues in all legal proceedings.¹²³ While credibility concerns are not unique to sexual assault

118. See Tuerkheimer, *supra* note 12, at 34–35.

119. *Id.* at 9–10.

120. See Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials*, 41 LOY. U. CHI. L.J. 119, 136–37 (2009) (describing the CSI effect as the jury’s perception of the enormous power of forensic science evidence in rape cases).

121. See *infra* section II.B.

122. See Tuerkheimer, *supra* note 12, at 17–20; MORABITO ET AL., *supra* note 14, at 85. For a recent excellent work on the complexities of sexual assault victims’ credibility, see generally DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 2–3 (2021) (elaborating on how the credibility complex, driven by cultural assumptions and misconceptions about victims and accusers, and legal interpretation and procedures that embed the discounting of credibility, results in distorted decision-making that results in disbelieving accusers).

123. Credibility and truth telling, however, are not mutually exclusive, as witnesses may tell the truth yet not be believed or may tell lies and still be believed. See Julia Simon-Kerr, *Uncovering Credibility*, in THE OXFORD HANDBOOK OF LAW AND THE HUMANITIES 583, 586 (Simon Stern et al. eds., 2020); see also Kimberly Kessler Ferzan, #BelieveWomen and the Presumption of Innocence: Clarifying the Questions for Law and Life 2–3, 20–21 (May 2020)

cases, they are further compounded in this particular area. One of the main obstacles underlying the criminal legal system's treatment of sexual assault is decisionmakers' disbelief and judgment of sexual assault complainants during the various phases of the criminal process, beginning with police officers' suspicion, continuing with prosecutors' hesitancy, and ending with jurors' skepticism.¹²⁴

The problem of disbelieving victims of sexual assault is augmented by the fact that the underlying reasons for this phenomenon often stem from biases and prejudices.¹²⁵ Using the term "credibility discount" to refer to an "unwarranted failure to credit an assertion where this failure stems from prejudice," Professor Deborah Tuerkheimer describes the ways that law enforcement officers downgrade the trustworthiness and plausibility of victims' accounts, which in turn influences prosecutorial declination decisions.¹²⁶

Additionally, the credibility discount is inextricably intertwined with the convictability standard discussed above. Declination decisions encompass not only a prosecutor's own skepticism about the case's strength, but also the anticipated skepticism of a hypothetical jury that will likely downgrade the victim's credibility.¹²⁷ In some cases, prosecutors explicitly tell sexual assault victims that while they believe them, they do not think that a jury is likely to convict.¹²⁸

Furthermore, a host of other extralegal factors, consisting mostly of prejudices and biases, play a prevalent role in prosecutors' declination decisions, explaining the high attrition rates in sexual assault cases. The social studies described earlier demonstrate that prosecutors are more prone to express skepticism of victims' accounts when the latter engaged in what prosecutors perceive as "risk-taking behaviors," including alcohol and drug use prior to the sexual assault.¹²⁹ The studies show that sexual assault

(unpublished manuscript) (on file with the University of Virginia School of Law) (discussing the claims underlying the demand to believe alleged sexual assault victims).

124. See Tuerkheimer, *supra* note 12, at 27–41.

125. *Id.* at 29–30; see also *supra* note 75.

126. See Tuerkheimer, *supra* note 12, at 3.

127. *Id.*

128. See Petition for Appointment of a Prosecutor Pro Tempore, *supra* note 11, at *10 (describing the prosecutor's letter to the complainant notifying her of the decision not to file a charge against the suspect). The prosecutor further explained that he believed the complainant but did not think that a jury was likely to convict the suspect. *Id.*

129. See Biechner & Spohn, *supra* note 108, at 489–90.

cases that were not prosecuted following the “exceptional clearance” designation were often associated with the fact that the victims were drinking alcohol prior to the alleged assault.¹³⁰ These cases were often rejected at the initial stage, namely, screened out pre-arrest, because victims’ “risk-taking behaviors” were considered challenging to the prosecution due to credibility concerns.¹³¹

The dangerous cumulative effect of the convictability standard and the credibility discount is illustrated in the infamous Missouri case involving the sexual assault of Daisy Coleman.¹³² In January 2012, then fourteen-year-old Daisy and a thirteen-year-old friend snuck out of Daisy’s house and were picked up by then seventeen-year-old Matthew Barnett, and some other boys, who took them to Barnett’s house.¹³³ Daisy told investigators that she was given a clear liquid before Barnett raped her while another boy recorded the act on his cellphone.¹³⁴ The suspects then left the unconscious, intoxicated Daisy barefoot on her house’s porch, in freezing temperatures.¹³⁵ Barnett admitted to having sex with Daisy but said it was consensual.¹³⁶ Shockingly, the prosecutor read Daisy her *Miranda* rights before she answered questions about her assault, in an unusual tactic that epitomizes decision-makers’ typical suspicion and disbelief of rape victims.¹³⁷ The prosecutors eventually decided not to pursue the sexual assault charges, citing insufficient evidence, after estimating that a jury would be unlikely to convict the suspect of raping Daisy who accompanied him to his house and voluntarily consumed alcohol.¹³⁸ Instead, the prosecutors agreed to

130. See MORABITO ET AL., *supra* note 14, at 25.

131. *Id.* at 26–27.

132. The details of the alleged sexual assault of Daisy Coleman are described in the Netflix documentary *Audrey and Daisy*, NETFLIX, (2016), <https://www.netflix.com/watch/80097321?trackid=13752289&tctx=0%2C0%2C5c2343> [<https://perma.cc/U76R-EYVL>].

133. *Id.*

134. Dugan Arnett, *Nightmare in Maryville: Teens’ Sexual Encounter Ignites a Firestorm Against Family*, KAN. CITY STAR, <https://www.kansascity.com/news/special-reports/maryville/article329412/Nightmare-in-Maryville-Teens-sexual-encounter-ignites-a-firestorm-against-family.html> [<https://perma.cc/CG8A-6B65>] (June 19, 2018, 2:59 PM).

135. See Allie Jones, *Prosecutor Read Daisy Coleman Her Miranda Rights When She Reported Her Rape*, THE ATLANTIC (Mar. 7, 2014), <https://www.theatlantic.com/politics/archive/2014/03/prosecutor-read-daisy-coleman-her-miranda-rights-when-she-reported-her-rape/358952/> [<https://perma.cc/XMR5-86VN>].

136. Arnett, *supra* note 134.

137. Jones, *supra* note 135.

138. Robert Rice, the Nodaway County prosecutor who declined to file charges against the alleged attackers referred to the case as a “case of ‘incorrigible teenagers’ drinking alcohol and having sex,” saying that “[t]hey were doing what they wanted to do, and there weren’t any consequences. And it’s reprehensible. But is it criminal? No.” See Arnett, *supra* note 134.

a plea agreement under which Barnett pled guilty to a misdemeanor child endangerment charge and was sentenced to two years of probation and a four-month suspended jail term.¹³⁹ In August 2020, when Daisy was twenty-three years old, she committed suicide, after coping with the aftermath of this traumatic experience for eight years.¹⁴⁰

3. Uncooperative Victims

While convictability and credibility are mostly tacit reasons underlying prosecutors' charging decisions, two stated reasons further account for declination decisions in sexual assault cases. The first concerns victims' noncooperation with the prosecution. Interviews with prosecutors reveal that this may involve either active refusal to cooperate, where victims explicitly state that they do not wish to pursue prosecution, or passive noncooperation, where victims do not respond to prosecutors' reaching out to them or fail to appear for interviews.¹⁴¹ Prosecutors further note that noncooperation is especially prevalent where the offender and the victim were acquainted. In many cases where the offender and victim were acquainted, they are in a domestic relationship, which prosecutors estimate account for about fifty percent of sexual assault cases.¹⁴²

Sexual assault victims' unwillingness to engage in the criminal process raises broader issues pertaining to the public's general mistrust of law enforcement. Minority communities, and BIPOC in particular, express ample concerns about racialized policing and the disparate effects of police brutality on Black people.¹⁴³ Further elaborating on these problems exceeds the scope of this Article. For purposes of the discussion here, suffice it to say that many victims are reluctant to partake in the coercive power of the carceral state, when their participation results in the incarceration of their intimate partner or acquaintance.¹⁴⁴ This Article will revisit the implications of victims' refusal to cooperate with prosecutors and the possible tension between victims' and states' interests in Part III,

139. Jones, *supra* note 135.

140. *Daisy Coleman: Assault Survivor in Netflix Film Takes Own Life*, BBC NEWS (Aug. 5, 2020), <https://www.bbc.com/news/world-us-canada-53673192> [<https://perma.cc/VLF6-5CPR>].

141. See MORABITO ET AL., *supra* note 14, at 85.

142. See *id.* at 80–81, 84.

143. See, e.g., BUTLER, *supra* note 45, at 2–7.

144. See, e.g., *id.* at 2.

when proposing an equitable prosecution theory to underpin the prosecutor's role in charging decisions.¹⁴⁵

4. Efficient Allocation of Limited Resources

Prosecutors stress the need to screen out cases due to efficacy concerns and limited resource availability as among their reasons for not bringing sexual assault charges.¹⁴⁶ Carefully managing scarce resources implicates general institutional considerations that are not unique to the prosecution of sexual assault. Insufficient resources and other organizational constraints similarly limit prosecutors' charging decisions in all other areas of criminal prosecution, forcing them to balance the costs and benefits of moving forward with any distinct case.

Arguably, factoring in efficacy and efficiency considerations is a legitimate prosecutorial policy choice, which may appear unproblematic at first sight. Yet these choices become more problematic in sexual assault cases given the unique challenges embedded in trying them. The complexities underlying sexual assault prosecutions might incentivize prosecutors, even unconsciously, to decline close cases, favoring prosecutions of easier and less nuanced cases.

Prosecutorial choices that are conceived as resource driven, however, disguise a host of value-laden priorities which are anything but neutral. The refusal to prosecute controversial sexual assault cases expresses profoundly normative societal messages about which values, and whose interests, matter more than others.

Without minimizing the significance of efficient allocation of scarce public resources, I submit that it is merely one factor that must be balanced against competing normative considerations, which will be further elaborated upon in the next part.

II. REJECTING THE CONVICTABILITY STANDARD

Having identified the convictability standard as the main reason underlying prosecutors' reluctance to try sexual assault cases, this Article now turns to criticize this test for its flaws and unintended consequences, and proposes an alternative evidentiary standard in its stead.

145. See *infra* section III.D.

146. See MORABITO ET AL., *supra* note 14, at 77, 92.

A more robust prosecution of sexual assault, as I propose in this Article, requires rejecting prosecutors' practice of predicting the low likelihood of conviction through the lens of a hypothetical jury. Prosecutors should not use charging criteria that is grounded in predictive assessments of imaginary jurors' perceptions of the case. Instead, prosecutors should make charging decisions in sexual assault cases based solely on their own assessment of the sufficiency of the evidence in any given case, as the following discussion suggests.

A. *The Debate Over the Controlling Evidentiary Standard*

A general problem characterizing prosecutors' decision-making processes in all criminal cases concerns ambiguity in how they ought to evaluate the sufficiency of the evidence in particular cases. In exercising their discretionary power to decide whether to pursue charges once police investigation had been completed, prosecutors must identify the quantum of evidence that is sufficient for prosecution.¹⁴⁷ The controlling standard was established by the Supreme Court of the United States in *Bordenkircher v. Hayes*, which held that the decision whether to file charges rests entirely within the prosecutor's discretion "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute"¹⁴⁸

This standard prohibits prosecutors from filing charges without sufficient evidence to prove guilt beyond a reasonable doubt, and establishes that disregarding this mandate amounts to violation of their professional duty.¹⁴⁹ But other than that, the decision sets a fairly low threshold of "probable cause" for evaluating the sufficiency of the evidence in making charging decisions. Beyond this indeterminate prerequisite, neither *Bordenkircher* nor subsequent decisions offer any concrete guidance to prosecutors on how to assess ex ante evidentiary sufficiency in distinct cases.¹⁵⁰

Likewise, commentators are unable to reach a consensus on how prosecutors ought to assess evidentiary sufficiency. They observe that "[t]he academic literature reflects vigorous disagreement

147. See Bellin, *supra* note 38, at 1221.

148. 434 U.S. 357, 364 (1978).

149. See *id.*; cf. Zacharias, *supra* note 37, at 1149–51 (discussing the prosecutor's duty to do justice in plea bargains).

150. See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 337 (2001).

about how convinced of guilt prosecutors should be before bringing or continuing charges.”¹⁵¹ In general, prosecutors may choose between two alternatives when making charging decisions in most crimes: they may either refer close cases to the jury’s decision or proceed only in cases where they subjectively believe that the suspect is guilty.¹⁵²

The absence of an agreed-upon standard under which prosecutors ought to evaluate evidentiary sufficiency proves especially problematic in the context of sexual assault prosecutions. Commentators observe that in many controversial areas, prosecutors often attempt to be appealing to juries’ perceptions, especially when societal attitudes towards the specific crime are perceived as divisive, which is often the case when prosecutions implicate historically fraught social and political issues.¹⁵³ Similarly, sexual assault prosecutions exemplify one of these areas. Unique concerns arise in this context because unlike most other crimes, prosecutors do not refer close cases to the jury’s decision. Instead, they decline to file charges because they predict that the likelihood that a hypothetical jury will convict the defendant is low.¹⁵⁴ Using an imagined jury’s potential reaction to a case to shape prosecutors’ charging decisions is fraught with difficulties, as I suggest below.

B. *Problems with the Convictability Standard*

The following discussion explains what is wrong with prosecutors’ reliance on the convictability standard, as measured through the perspective of a hypothetical jury. But one preliminary clarification regarding the contours of my argument is necessary before proceeding. The assumption underlying my argument for rejecting the convictability standard is that sufficient evidence to support the defendant’s guilt beyond a reasonable doubt is, and ought to remain, a necessary prerequisite to filing criminal charges. Concededly, any other standard that falls short of this stringent yet fundamental requirement would be unconstitutional.

Yet, the phrase “sufficient evidence,” is hardly self-explanatory. It leaves open the question of *how* prosecutors should determine

151. Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 50 (2009).

152. Bellin, *supra* note 38, at 1221.

153. Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 893 (2014).

154. *See supra* section I.C.1 (discussing the convictability standard).

what types of evidence are considered sufficient in particular cases. Prosecutors' charging decisions implicate not merely a qualitative and quantitative assessment of the evidence. Instead, evaluating evidentiary sufficiency is a value-laden task that incorporates a host of implicit societal assumptions, embedding biases, and prejudices about how the complainant's and the defendant's testimonies would likely be perceived by the jury at trial. Measuring convictability through the jury's lens is inappropriate because prosecutors are applying a higher, more onerous standard than legal sufficiency of the evidence in order to decide whether to proceed with the charges.

The scope of my argument is thus limited to criticizing prosecutors' understanding of how to evaluate what amounts to sufficient evidence. A prosecutor's mere prediction that a hypothetical jury is unlikely to convict does not, and should not, mean that the evidence is in fact insufficient to prove guilt beyond a reasonable doubt. While genuine problems of insufficiency of evidence should result in prosecutors' refusal to file charges, perceived difficulties concerning how hypothetical jurors are likely to react to the case should not. The convictability standard is wrong precisely because it rests on misperceived rather than genuine evaluations of legal sufficiency. The subsections below further elaborate on why prosecutors' reliance on such a standard is misguided.

1. Relinquishing Prosecutors' Discretion to a Hypothetical Jury

Exercising prosecutorial discretion on whether and what charges should be brought in distinct cases is an integral part of prosecutors' professional duty.¹⁵⁵ A critical component of this duty includes assessing the relevant considerations underlying charging decisions according to legal standards. Prosecutors' decisions about whether to file sexual assault charges thus ought to be grounded on the legal merits of the case, including the evaluation of substantive, procedural, and evidentiary questions as a matter of law.¹⁵⁶ Furthermore, prosecutors' charging decisions ought to be based on key fundamental values, including independency, a

155. See Bellin, *supra* note 38, at 1212, 1223.

156. See generally Dempsey, *supra* note 16, at 251 (discussing in further detail the benefits of such a merit-based standard).

principled and consistent decision-making process, and transparency.¹⁵⁷

The refusal to file sexual assault charges due to deference to an imagined jury's perception of the evidentiary strength of the case is improper because by doing that, prosecutors effectively relinquish their autonomous power to exercise professional discretion on whether and what charges should be brought.¹⁵⁸ The problem with this decision-making process is that prosecutors fail to exercise their own professional, legal evaluation of the case's evidentiary strength.

Prosecutors' duty to independently assess *ex ante* evidentiary sufficiency should not be deferred to the jury. Prosecutors cannot abrogate their professional discretion by replacing it with predictive assumptions about hypothetical jurors who have yet to hear the evidence.¹⁵⁹ Unlike the grand jury, whose role is to decide whether probable cause for commission of the crime exists, the trial jury's role is to determine, after all the evidence has been introduced, whether guilt has been proven beyond a reasonable doubt.¹⁶⁰ The trial jury's factual determinations regarding the sufficiency of the evidence and the credibility of the witnesses cannot be presupposed based on prosecutors' mere predictions and ought to be reserved for the final stage of the criminal process.

Moreover, the infrequency of jury trials¹⁶¹ further supports the argument that prosecutors should not substitute hypothetical jurors' perception of sexual assault cases with their own legal assessment of the cases' evidentiary sufficiency. The dominance of plea agreements in the criminal legal system provides a compelling reason why prosecutors' charging decisions should not hinge on measuring convictability through the lens of a hypothetical jury.¹⁶² The fact that the vast majority of sexual assault cases never reaches a jury, and thus a trial jury verdict is unlikely to happen, casts doubt on prosecutors' deference to an imagined jury's perspective.¹⁶³

157. See Green & Zacharias, *supra* note 60, at 843, 846–47, 861–62.

158. See Dempsey, *supra* note 16, at 250.

159. See Offit, *supra* note 68, at 1111–12.

160. See Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2359 (2008).

161. For an excellent critique of the legal system's heavy reliance on plea agreements, see CARISSA BYRNE HESSICK, *PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL* (Abrams Press, New York, 2021).

162. See Offit, *supra* note 68, at 1079 (“[O]nly 2% of defendants with felony convictions were tried by juries.”).

163. See Dempsey, *supra* note 16, at 245–48.

Prosecutorial reliance on a hypothetical jury's evaluation of the evidence, including the likelihood that the jury would believe the complainant's testimony, is misguided because in eventuality, juries rarely play a role in deciding the defendant's guilt.¹⁶⁴

2. Interjecting Non-Legally Mandated Factors

Another problem with the convictability standard is that juries' perceptions of sexual assault cases are not based solely on their legal merits. Instead, juries rely on various factors that are not legally mandated, including corroboration of the complainant's account.¹⁶⁵ Evidence law today poses less legal challenges to prosecuting sexual assault in the absence of corroboration, since the common law's requirement that complainants' testimonies be corroborated by additional evidence has largely been abolished in most jurisdictions.¹⁶⁶ Despite the fact that corroboration is not legally mandated under most sexual assault laws, prosecutors are often reluctant to pursue sexual assault charges in the absence of such evidence, because they predict that jurors are unlikely to convict.¹⁶⁷

Juries' persistent quest for corroboration of the complainant's account proves especially problematic in acquaintance rapes, which hinge on whether the complainant consented to sex and

164. Some argue that prosecutors ought to incorporate jurors' perception of given cases, even if the likelihood of a jury trial is low. Arguably, prosecutors' accounting for hypothetical jurors' perspective on the question of whether to bring charges is important because hypothetical jurors' viewpoints practically shape prosecutors' decisions. *See, e.g.*, Offit, *supra* note 68, at 1079, 1088–89, 1093. Yet, there are good reasons to cast doubt on the desirability of heavily incorporating hypothetical jurors' perceptions of cases from a normative standpoint, as I further elaborate below.

165. *See* Tuerkheimer, *supra* note 12, at 7, 41 (observing that credibility discounting compounds the prosecution of sexual assault, given the assumption that jurors are unlikely to convict based on the complainant's testimony alone); Kimberly Kessler Ferzan, #WeToo, 45 FLA. STATE L. REV. (forthcoming 2022) (observing that even without a legally required corroboration requirement, prosecutors opt not to charge in the absence of corroboration).

166. *See* TUERKHEIMER, CREDIBLE, *supra* note 122, at 92–95 (elaborating on the historical development of rape law's corroboration requirement and noting that some jurisdictions included a so-called cautionary instruction directing the jury to evaluate the complainant's testimony with extra suspicion); Michelle J. Anderson, *Prompt Complaint Requirement, Corroboration Requirements, and Cautionary Instructions in Campus Sexual Assault*, 84 B.U. L. REV. 945, 964 (2004) (discussing the current status of the corroboration, prompt complaint and cautionary instruction requirements); *see also* SPOHN & TELLIS, *supra* note 13, at 174 (noting that rape law reforms focused on removal of the corroboration requirement, though in some jurisdictions, this requirement remains intact).

167. *See* Dempsey, *supra* note 16, at 245; *see also* Ferzan, *supra* note 165 (“[E]ven without a legally required corroboration requirement, prosecutors opt not to charge in the absence of corroborating evidence.”).

whether the suspect knew or should have known about such non-consent.¹⁶⁸ Nonconsensual sex in these cases is mostly accomplished without use of physical force, leaving no physical traces as evidence.¹⁶⁹ Likewise, complainants' resistance often consists of only verbal, rather than physical resistance. Most jurisdictions have long abolished the physical resistance requirement, making verbal resistance, namely, lack of consent, sufficient for conviction.¹⁷⁰

Yet, juries continue to rely on physical evidence to corroborate complainants' testimonies that they did not consent.¹⁷¹ Such reliance, however, is not legally mandated.¹⁷² The fact that the key piece of evidence consists only of the complainant's account does not demonstrate a genuine evidentiary deficiency from a legal standpoint.¹⁷³ That testimony, *if believed by the jury*, is in itself sufficient to establish the defendant's guilt beyond a reasonable doubt.¹⁷⁴ The jury remains free to decide that the complainant's testimony is not credible and acquit the defendant. Juries routinely engage in deciding whose testimony is more credible in all other contexts, and sexual assault cases should not be treated differently.¹⁷⁵ Yet, juries treat complainants' accounts with deep skepticism, dismissing them as "he said, she said," which results in concluding that the evidence is "insufficient."¹⁷⁶

The problem with prosecutors' prediction that juries are likely to view the evidence as "insufficient" is that it is not grounded in legally based assessments that the evidence is indeed legally

168. See Beichner & Spohn, *supra* note 108, at 488–89.

169. See MORABITO ET AL., *supra* note 14, at 86–87 (observing that in many sexual assault cases, corroborating evidence is often lacking).

170. See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 987–89 (2008).

171. See Tuerkheimer, *supra* note 12, at 23–24.

172. See generally, TUEKHEIMER, CREDIBLE, *supra* note 122, at 44–49, 60–69, 92–95 (discussing the way rape law's physical resistance requirement is no longer legally mandated, but juries often find evidence of physical resistance helpful and insist on an unreasonable demand for corroboration).

173. *Id.* at 68 (“[I]n the courtroom, victim testimony about what happened *is* evidence—often, it is the most powerful evidence of all.”).

174. *Id.* at 10–11 (observing that in many cases, additional evidence corroborates the complainant's account, including, among others, electronic evidence like text messages).

175. See generally Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 89–90 (2011) (discussing the various ways that jurors assess credibility and choose whom to believe); Ferzan, *supra* note 165 (describing juries' discrediting sexual victims' accounts).

176. See Yan, *supra* note 9 (referencing the jury's acquittal of the defendant in the Hunter Morgan case).

insufficient due to genuine problems with the believability of the complainant's account. Instead, prosecutors' refusal to pursue sexual assault charges are guised as problems of evidentiary sufficiency when in actuality, they incorporate non-legally mandated factors, namely, extra legal considerations.

This problem is poignantly illustrated in the infamous sexual assault case against former comedian Bill Cosby. The recent decision of the Pennsylvania Supreme Court¹⁷⁷ to acquit Cosby of sexually assaulting Andrea Constand highlights the problem of prosecutorial declination to bring sexual assault charges to trial based on a questionable assessment that the case could not be won at trial as well as the problem of prosecutor's reliance on extra legal considerations in making charging decisions.¹⁷⁸

The refusal to bring sexual assault charges following Andrea Constand's 2005 complaint stems from then District Attorney of Montgomery County, Pennsylvania Bruce Castor examination of the investigation file conducted by police leading to his subsequent conclusion that "there was insufficient credible and admissible evidence upon which any charge against Cosby related to the Constand incident could be proven beyond a reasonable doubt."¹⁷⁹

Then D.A. Castor offered several reasons to support his decision to decline to prosecute the case. First, the chief prosecutor believed that Constand's delay in promptly filing a complaint against Cosby diminished the reliability of her later recollections.¹⁸⁰ Second, and relatedly, the prosecutor believed that such delay undermined the investigators' efforts to collect forensic evidence.¹⁸¹ Third, the prosecutor identified a number of inconsistencies in Constand's various

177. *Commonwealth v. Cosby*, 252 A.3d 1092 (Pa. 2021).

178. Ten years later, the initial declination decision was reversed as another District Attorney decided to bring charges in the case. In 2015, Cosby was arrested on charges that he had drugged and sexually assaulted Andrea Constand at his home in the Philadelphia suburbs 11 years earlier. In April 2018, the jury convicted Mr. Cosby of three counts of aggravated indecent assault against Ms. Constand. The Pennsylvania Supreme Court acquitted Cosby based on D.A. Castor's statement to the press that Cosby would not face charges, which paved the way for Mr. Cosby to testify in a civil trial, meant that he should not have been charged in the case. The Pennsylvania Supreme Court held that Cosby's due process rights were violated when a prosecutor ultimately chose to prosecute him after a former prosecutor made an unconditional promise of nonprosecution, which Cosby relied upon to his detriment by waiving his constitutional right not to testify and providing incriminating deposition in a civil action. The principle of fundamental fairness that undergirds due process law demands that the former prosecutor's promise not to prosecute Cosby be enforced, therefore barring Cosby's subsequent prosecution. *See generally id.*

179. *Id.* at 1099.

180. *Id.* at 1103.

181. *Id.*

statements to investigators which *in his opinion* impaired her credibility.¹⁸² Fourth, the prosecutor believed that Constand's behavior after the alleged sexual assault, namely, continuing to communicate with Cosby, complicated the possibility of securing a conviction.¹⁸³ Based on the totality of the circumstances, the prosecutor decided not to bring sexual assault charges against Cosby.¹⁸⁴

The explanations underlying the prosecutor's declination statement, however, are deeply troubling. The problem with the prosecutor's reasons for declination rests with misguided evaluation of the evidence in the case, which was largely based on extra-legal factors that were not mandated by the applicable state law, including Pennsylvania's rules of evidence. Pennsylvania law does not require that complainants promptly file a police report immediately after an alleged sexual assault.¹⁸⁵ The prompt complaint requirement is a relic of the past and has been abolished and no longer serves as a legal barrier to prosecution.¹⁸⁶ Furthermore, the prosecutor's personal belief that a sexual assault victim would necessarily not continue to communicate with her attacker is similarly based on mere unsupported assumptions and misconceptions about how a sexual assault victim "is supposed" to behave. Moreover, mere inconsistencies in the various statements made by a complainant to police investigators does not necessarily diminish her credibility as such inconsistencies are common in these circumstances.¹⁸⁷ Finally, the prosecutor's reasoning that Constand's delay in filing a prompt complaint hindered investigators' ability to collect forensic evidence is likewise not based on any legal

182. *Id.*

183. *Id.* at 1104.

184. *Id.*

185. 18 PA. CONS. STAT. § 3105 (2021) provides that "[p]rompt reporting to public authority is not required in a prosecution under this chapter: [p]rovided, however, [t]hat nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence."

186. See David P. Bryden & Erica Madore, *Patriarchy, Sexual Freedom, and Gender Equality as Causes of Rape*, 13 OHIO STATE J. CRIM. L. 299, 345 (2016) (observing that "the rule requiring a prompt complaint by the alleged rape victim did not exist until it was included in the Model Penal Code; thereafter it was adopted in only six states, all of which later repealed it").

187. See U.S. DEPT OF JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 46 (2011) (observing that New Orleans Police Department's work on rape cases often emphasized the victim's inconsistent statements, gaps in knowledge or memory, or inability to give a good description of the perpetrator, none of which demonstrate that an allegation is false; such reactions, common for sexual assault victims in crisis or suffering from posttraumatic stress, should not be used to label a report of assault as false).

requirement because often there is no forensic evidence to support a sexual assault complaint.¹⁸⁸

3. Perpetuating Biases, Prejudices, and Marginalization

One of the most troubling illustrations of the extent to which nonlegal factors affect prosecutors' charging decisions concerns the role that biases and prejudices play in assessing evidence in sexual assault cases. Measuring the likelihood of conviction through the lens of hypothetical juries is especially disconcerting because by doing that, prosecutors incorporate into their charging decisions juries' biases and prejudices that underlie their perceptions of sexual assault complainants.¹⁸⁹ By applying the convictability standard to deciding whether to bring sexual assault charges to trial, prosecutors reinforce existing problematic community prejudices about which sexual assault victims are deemed credible and thus worthy of the law's protection.¹⁹⁰

Moreover, deference to the perspective of a hypothetical jury increases the chances that prosecutors' decisions whether to file charges would take into consideration juries' reliance on extra-legal considerations that are shaped by questionable cultural norms that are unfairly prejudicial to female complainants.¹⁹¹ Opening the door to considerations which embed jurors' misconceived beliefs about complainants' behaviors results in charging decisions that are framed by jurors' personal worldviews, rather than by the law.¹⁹² The infiltration of such factors into prosecutorial discretion taints prosecutors' objective assessment of complainants' credibility.¹⁹³ But what's more unsettling is that it contributes to sexual

188. See Gwen Jenkins & Regina A. Schuller, *The Impact of Negative Forensic Evidence on Mock Jurors' Perceptions of a Trial of Drug-Facilitated Sexual Assault*, 31 LAW & HUM. BEHAV. 369, 369–70 (2007) (observing that the absence of forensic evidence had a negative impact on date rape cases even though certain date rape drugs cannot be detected more than twelve hours after the ingestion).

189. See Dempsey, *supra* note 16, at 244–48.

190. See Frohmann, *supra* note 109, at 533.

191. See PAULA DiPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 218 (1984) (expressing concerns about the potential for jury verdicts to be “unpredictable and arbitrary, susceptible to being moved by factors which do not have to do with the evidence”).

192. See Ruthy Lowenstein Lazar, *Epistemic Twilight Zone of Consent*, 30 S. CAL. INTERDISC. L.J. 461, 490–92 (2021) (observing the gap between prosecutors' assessment of the complainant's credibility and what the prosecutor believes will be the jurors' beliefs and view of the case).

193. *Id.* at 496–98.

assault complainants' marginalization, perpetuating the mistreatment of already marginalized victims.¹⁹⁴

Sexual assault complainants often suffer multiple layers of biases, prejudices, and marginalization given the intersection of various factors. To begin with, sexual assault generally wreaks personal, psychological, emotional, and dignitary harm on *all* victims, regardless of their gender.¹⁹⁵ Additionally, sexual assault inflicts various group-based harms, reaching beyond the harms experienced by specific victims.¹⁹⁶ Since the majority of sexual assault victims are women, one type of group harm is gendered. Women are placed at a unique disadvantage because they have long been deprived of the law's protection against gendered-based harms.¹⁹⁷

But the group harms that all female sexual assault ordinarily suffer from qua women are further exacerbated whenever they are also part of social groups that endure additional forms of harm and marginalization due to their race, ethnicity, class and sexual orientation.¹⁹⁸ Prosecutors' decisions about whether to pursue sexual assault charges often hinge on demographic and socioeconomic factors, with the sexual victimization of women from marginalized communities, including low-income women and women of color, frequently being discredited and dismissed.¹⁹⁹

The racial implications underlying the underprosecution of sexual assault are particularly salient given the undervaluation of sexual assaults of BIPOC victims and particularly Black women.²⁰⁰

194. See Tuerkheimer, *supra* note 12, at 49–50.

195. See Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759, 788–91 (2017).

196. Cf. Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 UNIV. PA. L. REV. 1729, 1746 (2010) (conceding that even if specific prostituted people do not feel harm personally, prostitution is mostly harmful to women as a group).

197. See generally Donald A. Dripps, *Why Rape Should Be a Federal Crime*, 60 WM. & MARY L. REV. 1685 (2019).

198. See TUERKHEIMER, CREDIBLE, *supra* note 122, at 6 (“[M]arginalized survivors suffer most from our widespread tendencies to discount the credibility of accusers. Women of color, poor women, women with disabilities, LGBTQ individuals, immigrant women—these are the accusers least likely to be believed, whether by formal officials or by their family and friends.”); see also *id.* at 192–95 (citing psychological research suggesting that women “are treated particularly poorly by the system because of their intersectional identities”).

199. See Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429, 445–56 (2016).

200. See Harris, *supra* note 31, at 598; see also Jeffery J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victims Charging Disparities*, 7 NEV. L.J. 1, 38–43 (2006).

Commentators have long noted that sexual assaults against Black women are under-reported, underinvestigated, and underprosecuted when compared to cases where white victims were sexually assaulted.²⁰¹ Undervaluing the sexual victimization of minority victims exemplifies racial-biased discrimination by police and prosecutors, exacerbating disparities among different groups of victims.²⁰²

Discrediting victims' accounts of their sexual assault is one of the multiple harms that is inflicted on sexual assault victims, as being disbelieved is considered in itself an epistemic harm.²⁰³ Commentators distinguish between credibility and truth-telling, stressing that enjoying credibility is not necessarily a function of truth-telling because credibility attaches to those who comport themselves as though they are truthful.²⁰⁴ Having their accounts believed is thus pertinent for sexual assault victims because the power of victims' narratives lends credibility to their victimization especially after they have been historically discredited by the law.²⁰⁵

The phenomenon of "credibility discounting" is helpful in explaining the reasons underlying the underprosecution of sexual assault.²⁰⁶ Professor Deborah Tuerkheimer argues that prosecutors' use of the convictability standard in deciding which sexual assault cases to pursue demonstrates one example of epistemic injustice.²⁰⁷ The latter concept was coined by philosopher Miranda Fricker to describe situations in which people use heuristics in making judgments about credibility, which in turn reinforce not only social and cultural norms, but also biases about certain groups of people.²⁰⁸ Prejudice involves stereotypes that people use as heuristics in their credibility of judgments, following generalizations about particular social groups.²⁰⁹ Whenever an expected jury's skepticism is the

201. See Pokorak, *supra* note 200, at 7, 42–43.

202. *Id.* at 6.

203. See Tuerkheimer, *supra* note 12, at 41–46; see also Anibal Rosario-Lebron, *Evidence's #MeToo Moment*, 74 MIA. L. REV. 1, 32–49 (2019) (explaining how credibility discounting is reinforced in evidentiary impeachment rules that allow attacks on sexual assault victims' character for truthfulness).

204. See Simon-Kerr, *supra* note 123, at 586.

205. See Tuerkheimer, *supra* note 12, at 36–38.

206. See *id.* at 37–41.

207. See *id.*

208. *Id.* at 41–42.

209. *Id.* at 42–43.

effect of prejudice, prosecutors' deference to a likely trial outcome perpetuates such credibility discounting.

The prosecutorial practice of relying on a system of outcome bias regarding assessments of convictability has distinctly harmful effects on marginalized sexual assault victims.²¹⁰ While the notion of credibility appears at first sight to be gender and race neutral, gendered and racialized norms pervasively shape its content because factfinders' decisions regarding whether an individual receives credibility excess or deficit often turns on the race of this individual.²¹¹

The problem of credibility discounting is especially troubling when the victims of sexual assault are BIPOC, especially Black women.²¹² Group identity factors frequently affect the use of familiar stereotypes of historically powerless groups, such as women and Black people.²¹³ These groups disproportionately suffer from prejudices stemming from the misperception that they lack credibility.²¹⁴ Commentators have long noted that Black women in sexual assault cases are confronted with unique credibility obstacles, as studies confirm that jurors were less likely to believe Black female complainants.²¹⁵ When prosecutors engage in such “down streaming” by considering at the charging stage prejudices and biases that hypothetical juries will likely employ, instead of independently assessing whether a complainant's account is credible, this practice carries especially adverse effects on marginalized victims.²¹⁶ The excessive effect of credibility discounting on minority victims reinforces their marginalization, exacerbating the harms of sexual victimization. Moreover, existing problems of systemic racism and patriarchal structures not only perpetuate social biases and subordination of women but also exacerbate societal inequalities.²¹⁷

Considering the underprosecution of sexual assault through the perspective of intersectionality theory—also known as critical race

210. See Pokorak, *supra* note 200, at 42.

211. See MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* 23–29 (2007).

212. See Simon-Kerr, *supra* note 123, at 589–90.

213. See Tuerkheimer, *supra* note 12, at 43.

214. See Simon-Kerr *supra* note 123, at 589–90.

215. See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *BUFF. L. REV.* 1, 85 (1999).

216. See Pokorak, *supra* note 200, at 42.

217. See Simon-Kerr, *supra* note 123, at 594.

feminism—highlights additional ways in which race and gender are inextricably intertwined with the law.²¹⁸

In recent years, commentators began to identify the multiple layers underlying the intersection between critical race theory and evidence law.²¹⁹ Critical race scholars expose the various racialized and other group-based biases that underscore jurors' evaluation of witnesses, stressing that evidence law might perpetuate racial subordination.²²⁰ Professor Jasmine Gonzales Rose argues that jurors often rely on nonlegal evidence that is not recognized by the rules of evidence, using their own perceptions about the race of a defendant, victim, or other witness to conclude that they are truthful or untruthful.²²¹ Similarly, Professor Bennett Capers demonstrates the various ways in which jurors take into consideration informal "evidence," such as victims' clothes, although it is unchecked and unregulated by formal evidence rules' legal constraints.²²² Capers further argues that jurors, including in sexual assault cases, often use prejudicial evidence that rests on gendered, racial, and other biased factors that disfavor racial minorities and favor white people.²²³

Racial minorities, however, are not the only group of victims that are disproportionately affected by prosecutors' refusal to pursue sexual assault charges. The underprosecution of sexual assault is also prevalent where complainants are viewed by decision-makers as "imperfect victim[s]."²²⁴ As noted earlier, studies confirm that prosecutors often take into account factors such as complainants' criminal records, engagement in risky behaviors like prostitution, and drugs and alcohol consumption, when refusing to pursue sexual assault charges.²²⁵

Most jurisdictions criminalize the acts of both buyers and sellers of commercial sex, resulting in sex workers' dual status as both

218. See Dorothy E. Roberts, *Critical Race Feminism*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 112 (Robin West & Cynthia Grant Bowman eds., 2019).

219. See, e.g., Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 868 (2018); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2244 (2017).

220. Gonzales Rose, *supra* note 219, at 2244.

221. *Id.* at 2262.

222. See Capers, *supra* note 219, at 874–95.

223. *Id.* at 869, 875–76, 891, 896.

224. See Tamara Rice Lave, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 TEX. TECH. L. REV. 219, 222–23 (2016).

225. See *supra* section I.C.2.

perpetrators and victims of crime.²²⁶ When sex workers are raped, however, the law mostly fails to prosecute the crime, refusing to recognize their victimization.²²⁷ To address this problem, some commentators suggest that prosecutors might not have merely the discretion, but an actual *duty* to pursue cases involving certain kinds of crimes or certain groups of underserved victims, including sexual assault perpetrated against people who engage in prostitution.²²⁸

Another category of underprosecuted sexual assault concerns complainants who engaged in excessive consumption of alcohol or drugs before or at the time of the incident. Sexual assaults of voluntarily intoxicated victims exemplify how jurors' prejudices and biases underscore the question of whether they believe complainants' accounts.²²⁹ A prevalent societal misperception is that people who voluntarily become intoxicated are more promiscuous because by excessively drinking, they arguably make themselves sexually available.²³⁰ Societal beliefs about intoxicated complainants affect police officers', prosecutors', jurors', and judges' perceptions of sexual assault cases involving intoxicated victims. Jurors view these victims with deep skepticism and are less prone to accept their claims that they did not consent to sex.²³¹

Prosecutors' reluctance to pursue sexual assault charges when complainants are perceived as immoral rather than innocent are motivated by concerns that complainants' accounts are likely to be discredited by jurors who are unlikely to believe those who engage in risky behaviors.²³² By doing that, prosecutors reinforce gendered

226. See I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185, 193–94, 196–97 (2018). In this Article, I use the terms “sex workers” and people engaged in “prostitution” interchangeably, without expressing a position on whether the law should decriminalize the crime of prostitution.

227. See I. India Thusi, *Sex, Harm, and Consequences*, 2019 UTAH L. REV. 159, 166–67 (2019) (using the intersectionality perspective to critique the continued criminalization of sex work of people of color).

228. See Rice Lave, *supra* note 224, at 227–29 (discussing the duty to prosecute sexual assault of people engaged in sex work); cf. Rebecca Roiphe, *The Duty to Charge in Police Use of Excessive Force Cases*, 65 CLEV. ST. L. REV. 503 (2017) (discussing the duty of charge in police use for excessive force cases).

229. See Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 BROOK. L. REV. 1031, 1033–34 (2017).

230. See *id.* at 1042–43, 1045.

231. *Id.* at 1045.

232. See Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejection*, 38 SOC. PROBS. 213, 224 (1991); see also Rice Lave, *supra* note 224, at 223.

and race-based marginalization of sexual assault victims, perpetuating systemic biases and societal prejudices against them.

Additionally, sexual assault complainants have long suffered from the legal system “blaming” them for engaging in behaviors that “contribute” to their assault.²³³ The upshot of prosecutors taking into account factors such as “immoral” behavior is that jurors and judges continue the infamous practice of victim blaming.²³⁴ Therefore, another unintended consequence of the convictability standard is that it results in perpetuating problematic victim-blaming norms.

4. Overemphasizing the Goal of “Winning”

Another drawback in prosecutors’ reliance on the convictability standard concerns unjustifiably overemphasizing the goal of “winning” cases. In choosing to file charges only if they believe the case is “winnable,” prosecutors engage in instrumental decision-making that is largely conviction oriented rather than embracing a more holistic view of the case, which contemplates other important considerations besides winning.²³⁵

Studies demonstrate that the desire to win their cases is among the factors that motivate prosecutors’ decision-making processes.²³⁶ Prosecutors’ offices typically maintain a “winning” mentality, carrying mindsets of nondefeat and aversions to dismissal of the charges.²³⁷ Studies further show that when sexual assaults are prosecuted, conviction rates are high, which is attributed to aggressive screening out of cases and taking on only those that would likely result in conviction.²³⁸ Operating under this institutional pressure to accomplish high conviction rates, prosecutors are consciously or unconsciously incentivized to refuse to bring sexual assault charges in close cases.²³⁹

233. See, e.g., JODY RAPHAEL, RAPE IS RAPE: HOW DENIAL, DISTORTION, AND VICTIM BLAMING ARE FUELING A HIDDEN ACQUAINTANCE RAPE CRISIS 50–51 (2013) (“[S]ome progressives continue to believe that individuals who pursue sexually liberated lifestyles must accept the risk of rape, an attitude that understandably affects judges and juries as well.”).

234. See Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1605–07 (2009).

235. See Dempsey, *supra* note 16, at 260, 263.

236. See Eisenberg, *supra* note 153, at 887.

237. See Josh Bowers, *Punishing the Innocent*, 156 UNIV. PA. L. REV. 1117, 1128 (2008).

238. See Dripps, *supra* note 197, at 1709.

239. See MORABITO ET AL., *supra* note 14, at 83. See generally Ferzan, *supra* note 165, at 33 (noting that prosecutors “will not prosecute cases if they think they cannot win”).

Likewise, prosecutors that are inculcated in an office culture that prioritizes winning as an independent goal, gravitate towards avoidance in pursuing cases that they perceive as “hard to win,” preferring to take on the relatively easy cases, where conviction is more likely.²⁴⁰

Sexual assault prosecutions are indeed hard cases to get a conviction, especially where the parties are acquaintances.²⁴¹ When the evidence consists mostly of the complainant and the defendant’s diametrically opposing accounts about the presence or absence of consent, persuading the jury of the defendant’s guilt beyond a reasonable doubt is a challenging task. And rightly so. Justice demands that prosecutors’ burden of proof will not be anything less than beyond a reasonable doubt.

Yet, prosecutors’ emphasis on winning cases is not mandated by law, as no court decision holds that winning is an independent goal.²⁴² Additionally, neither prosecutors’ professional nor ethical codes of conduct provide that prosecutors should assess the sufficiency of the evidence using an outcome-driven approach that grounds charging decisions on the likelihood of securing a conviction.²⁴³ Prosecutors’ prediction of the likelihood of winning the case is therefore a self-imposed limit, rather than any substantive, procedural or evidentiary impediment.

A plausible counterargument is that efficiency and budget constraints demand prudent allocation of scarce public resources and justify the refusal to spend resources on cases that are not likely to result in conviction.²⁴⁴ While this is a valid consideration, it should not be dispositive in determining whether to pursue sexual assault charges. Efficiency and efficacy considerations ought to be equitably balanced against competing interests that support bringing charges. I will delve into these important interests in Part III while proposing an equitable prosecution model to remedy the underprosecution of sexual assault problem.²⁴⁵ For now, suffice it to say

240. See Dripps, *supra* note 197, at 1709–10.

241. See Bryden & Lengnick, *supra* note 72, at 1246.

242. *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasizing that the prosecutor’s interest in a criminal prosecution “is not that it shall win a case, but that justice shall be done”).

243. See generally NATIONAL PROSECUTION STANDARDS, NAT’L DIST. ATT’YS ASS’N, <http://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf> [<https://perma.cc/EZJ4-X9SE>].

244. See MORABITO ET AL., *supra* note 14, at 83.

245. See *infra* section III.C.

that tactical considerations, standing alone, such as anticipated difficulties in winning the case, are not sufficiently good reasons for declining to bring sexual assault charges. Criminal prosecution is not a competition, and neither legal nor normative reasons suggest that securing a conviction ought to be the exclusive factor guiding prosecutors' charging decisions.

C. *The Reasonable Prosecutor's Sufficiency of the Evidence Standard*

Rejecting convictability as the controlling standard in deciding whether to pursue sexual assault charges calls for applying in sexual assault cases the same evidentiary that prosecutors rely on in assessing evidence in all other cases, namely, the sufficiency of the evidence standard.

Importantly, the general legal standard for determining whether evidence supports conviction of the defendant beyond a reasonable doubt is sufficiency, rather than the convictability standard.²⁴⁶ Prosecutors' insistence on the more onerous convictability standard in the context of sexual assault is not legally mandated. In all types of crimes, the applicable legal standard requires the prosecutor to consider whether the rational trier of fact could find the evidence sufficient to prove guilt beyond a reasonable doubt. There is no principled reason why the sufficiency standard should not similarly apply in sexual assault prosecutions.

Yet, as noted earlier, courts and commentators do not agree on how to assess evidentiary sufficiency.²⁴⁷ To guide prosecutors' decision-making process in evaluating the sufficiency of the evidence, I propose a standard that draws on the reasonableness of prosecutors' charging decisions, as measured through an objective perspective of professional prosecutors. An evidentiary standard that focuses on assessing whether jurors *could* and *should* convict, as a matter of law, is especially suitable to address the distinct problem of underprosecution of sexual assault. Reasonable prosecutors should consider only whether there is sufficient evidence to support conviction beyond a reasonable doubt. Furthermore, making these sufficiency of evidence determinations should be based only

246. *In re Winship*, 398 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307, 313 (1979) (evidence in support of conviction is sufficient if it leads a rational trier of fact to find guilt beyond a reasonable doubt).

247. *See supra* section II.A.

on the legal merits of the case. This merits-based requirement stems from prosecutors' duty to act independently and impartially and ground their charging decisions in a consistent, principled, and transparent process.²⁴⁸

Professor Michelle Madden Dempsey has long suggested that prosecutors adopt a merits-based approach to evaluating evidentiary sufficiency in deciding whether to bring sexual assault charges.²⁴⁹ Her proposal, however, has not been sufficiently developed and the concept of a merits-based approach as underlying evidentiary sufficiency in sexual assault cases remains undertheorized. Building on this promising concept, the standard I propose below also focuses on evaluating the legal merits of cases but adds another layer, that is considering the case through the lens of a reasonable prosecutor that assesses whether there is a *reasonable possibility* that jurors could convict.

A standard that assesses evidentiary sufficiency through the lens of the reasonable prosecutor emphasizes the importance of an objective assessment of cases by shifting prosecutors' attention from predicting the likely outcome of cases brought before hypothetical juries to objectively assessing the cases' actual strength through their own professional analysis of the evidence. The prediction that juries will be unreceptive to a sexual assault victim's account is not a merits-based reason for declining to prosecute if the prosecutor believes that sufficient evidence exists in the case to allow a reasonable jury to convict.

Evaluating evidentiary sufficiency from a reasonable prosecutor's perspective is superior to the convictability standard because it embodies a prescriptive approach to prosecutors' charging decisions rather than simply adhering to descriptive norms.²⁵⁰ The convictability standard is grounded in a descriptive evaluation of what jurors *would* likely do in a given sexual assault case; namely, whether they *would* convict the defendant. In contrast, a standard that centers on the reasonable prosecutor's assessment of the sufficiency of the evidence in the case encompasses a prescriptive assessment of whether the jury *should*, as a matter of the law and given the admissible evidence, find the defendant guilty beyond a reasonable doubt.²⁵¹ Under this standard, a reasonable prosecutor

248. See Green & Zacharias, *supra* note 60, at 870–71.

249. See Dempsey, *supra* note 16, at 251–52.

250. Bellin, *supra* note 38, at 1223.

251. *Id.* at 1222–23 (articulating an evidentiary charging standard whereby prosecutors

would objectively evaluate what the charging decision *should* be, regardless of whether they believe a hypothetical jury is likely to convict.²⁵² The difference between what a jury *might* do and what it reasonably *could* and *should* do captures a stark normative contrast. The reasonable prosecutor standard is normatively justified, placing legal considerations at the center of charging decisions.

The reasonable prosecutor's sufficiency of the evidence standard is less demanding than the onerous convictability standard in terms of measuring probabilities. The key difference between these standards is best captured by the distinction between the notions of *substantial probability*, namely high likelihood of conviction, which is what the convictability standard demands, and *reasonable possibility* of conviction, which is what the reasonable prosecutor's sufficiency of the evidence standard requires.²⁵³

Importantly, the reasonable possibility standard does not diminish the reasonable prosecutor's obligation to try the case only if in their professional assessment, there is sufficient evidence to allow the jury to convict the defendant beyond a reasonable doubt. But when the reasonable prosecutor believes that the evidence *is* sufficient to support defendant's guilt beyond a reasonable doubt, and that there is a reasonable possibility that the jury will convict, they should take the case to trial.

The legally sufficient evidence that a reasonable prosecutor should assess encompass a host of factors that a professional prosecutor is capable of evaluating. These consist, among others, assessing the credibility of the complainant as compared with the credibility of the suspect, as well as any other pieces of evidence, including nonforensic evidence, such as verbal statements the complainant made immediately after the alleged assault.

Sexual assault victims may tell different people after the incident that they have been assaulted. These statements are likely to meet the requirements of several hearsay exceptions that typically allow admission of statements that are made at the crime scene.²⁵⁴ Such compelling statements may strengthen complainants' credibility while testifying in trial. For example, excited utterances are

bring charges when they expect that the evidence introduced at trial will prove the defendant's guilt beyond a reasonable doubt).

252. See Dempsey, *supra* note 16, at 259.

253. See generally Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293 (2007) (discussing the various probability standards).

254. See, e.g., FED. R. EVID. 803(2) and states evidence rules adopting the same rule.

exceptions to hearsay and include excited responses to a traumatic event made while the victims were still under the stress that the assault caused.²⁵⁵ Excited utterances would include crime victims' statements to 911 operators or to the police officer interviewing them immediately after they report the alleged crime and will likely fall under the excited utterance hearsay exception.²⁵⁶

Likewise, statements that victims make to family members, friends and acquaintances after the alleged assault are likely to qualify as excited utterances.²⁵⁷ These verbal and nonverbal responses to the assault are assertive statements that were made while the victim was still under the emotional impact of the assault. These also include statements made to volunteers at sexual assault support centers and may either be communicated in person or via electronic communication like chats and text messages.²⁵⁸ The excited utterance exception to hearsay is routinely used in violent assault cases to admit statements by the victim after the attack.²⁵⁹ These statements implicate the accused, as they are considered genuine and reliable and have high probative value given their temporal proximity to the traumatic event.²⁶⁰

Moreover, a reasonable prosecutor might also introduce into evidence testimonies from doctors and nurses as well as mental health professionals like psychologists and social workers about a complainant's statements relayed to them at the time of treatment after the assault.²⁶¹ These statements to health care personnel, including those made while conducting a rape kit examination, such as statements made to sexual assault nurse examiners ("SANE") and sexual assault forensic examiners ("SAFE"), are likely to be

255. See Colin Miller, *A Shock to the System: Analyzing the Conflict Among Courts Over Whether and When Excited Utterances May Follow Subsequent Startling Occurrences in Rape and Sexual Assault Cases*, 12 WM. & MARY J. WOMAN & L. 49, 58–59 (2005).

256. Gary M. Bishop, *Testimonial Statements, Excited Utterances and the Confrontation Clause: Formulating a Precise Rule After Crawford and Davis*, 54 CLEV. ST. L. REV. 559, 586 (2006); see also Miller, *supra* note 255, at 98–99.

257. See CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE 880–87 (6th ed. 2018).

258. *National Sexual Assault Hotline Confidential 24/7 Support*, RAINN, <https://www.rainn.org/resources> [<https://perma.cc/Q6JG-AS2C>].

259. See MUELLER ET AL., *supra* note 257, at 880–81 (noting that in cases of violent criminal assault, statements by the victim implicating the accused are routinely admitted, as are statements by nonvictim eyewitnesses).

260. *Id.* at 882–85.

261. See *id.* at 909–13, 915–16.

admissible under the medical treatment or diagnosis hearsay exception as these are typically pertinent to the treatment.²⁶²

Admitting into evidence complainants' statements to various people made after the sexual assault can significantly bolster their credibility while testifying at trial. Acknowledging the role that such statements may play also belies the inaccurate assumption that the evidence in acquaintance rape cases consists only of the parties' conflicting accounts.²⁶³ Prosecutors' reliance on the convictability standard discounts the powerful role that complainants' out-of-court statements may play at trial. Conversely, the sufficiency of the evidence standard, as measured through the lens of a reasonable prosecutor, emphasizes the ways in which complainants' statements strengthen the credibility of their trial testimonies, reinforcing their accounts of the alleged assault.

Likewise, the reasonable prosecutor's sufficiency of the evidence standard diminishes the weight of extra-legal factors that shape prosecutors' decisions under the convictability standard. As the previous section demonstrates, potential jurors' biases and prejudices improperly infiltrate prosecutors' decisions.²⁶⁴ The reasonable prosecutor's emphasis solely on the admissible evidence in the case is likely to ensure that external and inherently subjective factors, including jurors' prejudices and biases, are disregarded.

Another strength of the proposed standard is that it incorporates the notion of objective reasonableness into prosecutors' charging decisions. To date, the term "reasonable prosecutor" has largely been used to assess the reasonableness, or lack thereof, of prosecutors' decisions to file charges *without* probable cause.²⁶⁵ While the reasonableness requirement aims to prohibit overzealous prosecutors from overcharging, commentators have yet to use the term to judge the appropriateness of the parallel problem of undercharging.

Applying the commonly used legal notion of reasonableness to assess prosecutors' decisions *not* to file charges is especially pertinent in the sexual assault context. In this area, prosecutors often

262. See, e.g., *State v. Miller*, 264 P.3d 461, 490 (Kan. 2011); *State v. Dorsey*, No. 11 CA 39, 2012 Ohio App. LEXIS 554, at *8–10 (Feb. 17, 2012); *State v. Stahl*, 855 N.E.2d 834, 839–40, 846 (Ohio 2006).

263. See Tuerkheimer, *supra* note 12, at 10.

264. See *supra* section II.B.3.

265. See Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2199 (2010).

make inherently subjective judgments about these contested cases because of the complexity of the notion of consent to sex.²⁶⁶ Using the reasonable prosecutor perspective is appropriate because the sufficiency of the evidence should be measured against objective factors underlying prosecutors' professional opinion regarding cases' strength.

An additional advantage of adopting the reasonable prosecutor's sufficiency of the evidence standard is that it addresses not only the concern that a hypothetical jury would take into account non-legal considerations but also the possibility that prosecutors might do that as well. Individual prosecutors' perceptions of a sexual assault case may themselves be biased and prejudiced against marginalized victims. A prosecutor's belief about the suspect's guilt is inherently subjective and might unduly incorporate the prosecutor's idiosyncrasies and personal worldviews. Incorporating a reasonable component into prosecutors' charging decisions ameliorates the risks of prosecutors' own reliance on heuristics.²⁶⁷

Having outlined the benefits of an alternative evidentiary standard to replace the convictability standard, I now hypothesize its application by revisiting the case against Jacob Anderson, discussed earlier, where the prosecutor decided not to pursue sexual assault charges due to convictability concerns.²⁶⁸ This is a test case to illustrate that the reasonable prosecutor standard would have likely changed the outcome, resulting in trying the sexual assault charges in court.

A reasonable prosecutor would have considered whether the evidence in the Anderson case was sufficient to prove the defendant's guilt beyond a reasonable doubt, based solely on the case's legal merits. Excerpts from the prosecutor's letter to the victim, discussed earlier, suggest that the prosecutor initially believed that there was sufficient evidence to pursue the sexual assault charge and that the victim's account was credible.²⁶⁹ Under existing laws, neither corroboration nor DNA or other forensic evidence are legally necessary for a sexual assault conviction. A reasonable prosecutor, however, would have taken into account additional

266. See Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402–07 (2016).

267. See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1591–92 (2006).

268. See *supra* notes 2–3 and accompanying text.

269. See Yan, *supra* note 9.

testimonies that would bolster the complainant's credibility. These would have included testimonies of persons with whom she communicated immediately after the sexual assault; for example, people who attended the party where the assault occurred. Likewise, these would also include testimonies from nurses who treated the victim after the assault as well as from therapists who provided the victim with psychological treatment pursuant to the alleged crime.

A reasonable prosecutor, however, would not make their decision whether to pursue the sexual assault charges based on the likelihood that a hypothetical jury would convict. A reasonable prosecutor would also not have taken into account nonlegal considerations, such as the facts that the suspect sexually assaulted only one victim, and that both the suspect and the victim were intoxicated at the time of the incident. Instead, a reasonable prosecutor would have likely taken the case to trial, because based on the prosecutor's professional assessment that a jury *could* and *should*, based on the sufficient admissible evidence in the case, convict the defendant beyond a reasonable doubt.

Some readers might object to substituting the reasonable prosecutor's sufficiency of the evidence standard for the convictability standard by arguing that prosecutors' reliance on predicting the likelihood of conviction is warranted. Critics might raise a concern that bringing charges in cases that would not result in conviction might prove counterintuitive; weakening rather than strengthening societal norms surrounding sexual assault.²⁷⁰ Others would likely stress the benefits of the convictability standard, given budgetary, efficiency, and efficacy constraints limiting prosecutors' offices.²⁷¹ Still others would argue that deference to jurors' perspectives is valuable, because it accurately reflects communities' standards, therefore mirroring the democratic will of the people.²⁷² Additionally, one commentator who conducted an empirical research on federal prosecutors' charging decisions argues that jurors' perspectives help prosecutors shape their own view of the

270. See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 UNIV. CHI. L. REV. 607, 608 (2000) (coining the "sticky norms problem" to refer to lawmakers trying to radically change norms surrounding acquaintance rape).

271. See *supra* section I.C.

272. See Daniel S. McConkie, Jr., *Criminal Justice Citizenship*, 72 FLA. L. REV. 1023, 1046-50 (2020).

case, promoting fairness and collaborative internal discussions within their offices' organizational structure.²⁷³

While these are plausible arguments, the premise underlying the proposal to reject the convictability standard is that the many drawbacks to this standard, as elaborated earlier,²⁷⁴ substantially outweigh its benefits. Concededly, applying the reasonable prosecutor's sufficiency of the evidence standard might result in prosecutors pursuing sexual assault charges even if they believe the jury might acquit based on their disagreement with the law or their personal worldviews.²⁷⁵ This is an inevitable feature of a standard that prioritizes adherence to strict legal considerations rather than deferring to communities' choices and preferences, as embedded in the hypothetical jury inquiry.²⁷⁶

Yet, the concern that rejecting the convictability standard will lead to more acquittals and thus would weaken social norms against sexual violence is merely theoretical. The assertion has never been empirically tested, and it is unclear if it may be empirically proven.²⁷⁷ It is impossible to predict what the effect of bringing more sexual assault charges will be if an alternative standard is adopted.²⁷⁸ This uncertainty leaves open the question of whether filing more sexual assault charges would eventually strengthen or weaken the criminal prohibition against sexual assault.

But even assuming *arguendo* that applying the proposed standard might result in more acquittals, cogent policy-based reasons offset this potential outcome. There are normative benefits to pursuing sexual assault charges in appropriate cases despite low likelihood of conviction. As discussed above, one drawback to prosecutors' reliance on the convictability standard is that deference to jurors' perceptions mirror local communities' values, which might perpetuate racialized, misogynistic or otherwise prejudiced and

273. See Offit, *supra* note 68, at 1107, 1112, 1114.

274. See *supra* sections B.1–4

275. *Id.*; Bellin *supra* note 38, at 1222 (observing that “the prosecutor could pursue a case against an alleged date rapist even if the prosecutor believed the jury would acquit based on their disagreement with the law”).

276. *Id.* (rejecting the prosecutor's belief means that prosecutors should not defer to their own understanding of what justice means or to the result the community prefers).

277. See Dempsey, *supra* note 16, at 258–59.

278. *Id.*; see also Paul H. Robinson, *Criminalization Tensions: Empirical Desert, Changing Norms & Rape Reform*, in *THE STRUCTURE OF CRIMINAL LAW 201* (R.A. Duff et al. eds., Oxford Univ. Press, 2011) (positing that “every case litigated in public would become . . . an opportunity to promote the public's discussion of what should be considered ‘reasonable’ in this context”).

biased norms that should be repudiated.²⁷⁹ Prosecutorial deference to such problematic norms thus hinders the possibility of fostering a meaningful social change and promoting social justice goals.

In sum, the convictability standard proves an impediment to solving the problem of underprosecution of sexual assault. The alternative reasonable prosecutor's sufficiency of the evidence standard promises to promote more equitable prosecution of these crimes. This proposed standard is warranted from a normative perspective in the context of sexual assault cases, which have traditionally been underprosecuted. The next part proposes a broader conceptual framework that calls for invigorating the prosecution of sexual assault to facilitate more just and fair treatment of all stakeholders in the criminal process including marginalized victims.

III. AN EQUITABLE PROSECUTION MODEL

Advocating for the adoption of an alternative evidentiary standard to assess sexual assault cases' strength is the first step necessary for reforming the treatment of these underprosecuted crimes. A more vigorous prosecution of sexual assault, however, must also rest on normative considerations underscoring why reform is warranted from a principled public policy perspective.

The discussion below introduces a novel prosecutorial theory that is designed to provide a more robust prosecution of sexual assault and effectively promote social justice goals. The theory that I develop here, which I refer to as the Equitable Prosecution Model ("EPM"), suggests that prosecutors embrace a civil rights approach to bringing sexual assault charges, because victims of these crimes have traditionally and continuously experienced the law's underprotection.

To date, the concept of equitable prosecution is not only undertheorized but also rarely mentioned in the literature.²⁸⁰ Developing this concept, the EPM asserts that prosecutors owe a duty to the public to exercise their discretion to file charges in manner that is

279. *See supra* section B.3.

280. Searching the term "equitable prosecution" yields only twenty-four hits on WESTLAW (January 2022). The notion of equitable prosecution is one tenet of the nonprofit organization, Fair and Just Prosecution ("FJP"), which aims to promote a criminal legal system that is grounded in fairness, equity, compassion, and fiscal responsibility. For the organization's actions, see generally FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/> [<https://perma.cc/H4G7-RJHY>].

fair and just to *all* members of society, defendants and victims alike. This model is the first scholarly account that uses the concept of equitable prosecution to justify a more vigorous prosecution of crimes like sexual assault that have largely been underprosecuted. While the discussion below largely focuses on applying the EPM in sexual assault cases, it also offers a broader conceptual framework for revisiting other crimes that have been traditionally underprosecuted, including excessive police violence, hate crimes and crimes against sexual minorities.²⁸¹

A. *The Lack of Consensus on the Prosecutor's Role*

A key tenet of the EPM rests with identifying prosecutors' roles and obligations in the criminal legal system. To date, courts and commentators have yet to agree on what prosecutors' obligations encompass, failing to provide useful guidelines that underpin prosecutors' roles in a coherent conceptual framework.

The 1935 Supreme Court's decision in *Berger v. United States* announced a broad legal standard underlying prosecutorial function, holding that a prosecutor's role is to represent "a sovereignty whose obligation to govern impartially . . . and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."²⁸² Despite the eighty-seven years that have passed since *Berger* was handed down, the decision is still widely cited for the proposition that prosecutors have an obligation is to seek justice. Yet, the Court has provided neither more recent iterations nor specific guidance on this general obligation.²⁸³

While the *Berger* decision broadly stands for the proposition that prosecutors must do justice, its language also includes two additional requirements. First, the decision mandates that prosecutors act "impartially," a requirement that commentators interpret to encompass prosecutorial neutrality which requires prosecutors'

281. See sources cited *supra* note 49 and accompanying text for Articles that address the underprosecution of other crimes. Further elaborating on the implications of extending the model to additional underprosecuted crimes, however, exceeds the scope of this Article, and I leave it for consideration in future scholarly works.

282. 295 U.S. 78, 88 (1935).

283. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612, 625–26, 634 (1999) (noting the rationales that explain why prosecutors have a duty to seek justice: gross imbalance of power between the government and individual defendants, and the fact that the prosecutor is a representative of the state and states have an obligation and responsibility to dispense justice in a fair and just manner).

decisions to be principled and consistent.²⁸⁴ Second, the Court uses the obligation language when referring to the prosecutor's role.²⁸⁵

Framing the prosecutorial function in terms of an obligation which is owed to the public has received little scholarly attention.²⁸⁶ But using the duty, rather than discretion language, to describe the prosecutor's role is critically important because it emphasizes that states—and prosecutors as their representatives—have an obligation to dispense justice in a fair and just manner. Similarly, the prosecutor's duty to make equitable decisions stands at the core of the EPM. I will consider the implications of framing the prosecutor's role in a duty to the public, including to crime victims, in subsequent sections, while developing the civil rights approach underpinning the EPM.²⁸⁷

The judicial requirement that prosecutors “do justice” proved not only conceptually amorphous and elusive but also meaningless in practice.²⁸⁸ Concepts such as promoting the public interest or justice are inherently too diffuse and elastic to structure prosecutors' discretion.²⁸⁹ The vague and ambiguous mandate does not offer prosecutors any concrete guidelines on how to exercise their discretionary power in particular cases.²⁹⁰

In the absence of any practical judicial guidance, different prosecutors' offices invoke various conflicting concepts of what “seeking justice” means; for several decades, prosecutors prioritized “tough justice,” that is the need to be “tough on crime” to promote the public's safety.²⁹¹ Others emphasized “popular justice,” aimed at best serving their constituents.²⁹² Still others advanced “social justice” as a way to end mass incarceration.²⁹³ Yet, these policies are

284. *Berger*, 295 U.S. at 88; see Green & Zacharias, *supra* note 60, at 880–82.

285. *Berger*, 295 U.S. at 88.

286. For a notable exception, see Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. UNIV. L. REV. 805, 806–08 (2020).

287. See *infra* sections III.B–C.

288. See, e.g., Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46, 58 (1991); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 637–38 (2006).

289. See Bibas, *supra* note 60, at 959–61.

290. See Bellin, *supra* note 38, at 1211.

291. See *id.*; see also Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, THE ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/> [https://perma.cc/HZL6-LWP9] (discussing the timeline of the “tough on crime” era).

292. See Bellin, *supra* note 38, at 1211.

293. See *supra* section III.C.2 (elaborating on the progressive prosecution phenomenon).

sporadic and often inconsistent and none draws on a unified theory of the prosecutorial role.

In recent years, scholars studying prosecutorial discretion have tried to develop a unified, principled theory that underlies the prosecutor's role in the criminal legal system.²⁹⁴ There is no scholarly consensus on what is the institutional role that prosecutors play when they exercise their public duties.²⁹⁵ Commentators disagree on *how* prosecutors should make their discretionary charging decision, and specifically, how prosecutors should identify the relevant considerations and balance competing public concerns underlying these prosecutorial choices.²⁹⁶

For example, Professor Jeffrey Bellin advances a prosecutorial theory that is grounded on a servant-of-the-law model.²⁹⁷ Under this model, prosecutors would give preference to defendant-protective constitutional provisions over mechanical enforcement of criminal statutes, dismiss minor cases given resource constraints, and default to less severe charges when having the option.²⁹⁸ Others ground the prosecutor's role in constitutional mandates, suggesting that prosecutors should enforce constitutional protections for defendants when the adversarial system fails to do so.²⁹⁹

Existing theories of prosecution largely embrace a defendant-oriented approach which emphasizes the need for placing constraints on prosecutorial excesses in exercising their discretion. Doing so is perceived as a corrective measure to ameliorate problems of overenforcement that prosecutors significantly contributed to during four decades of advancing "tough on crime" policies.³⁰⁰ Advancing prosecutorial policies aimed at restricting prosecutorial discretion is not only justified but also necessary as in *most* areas of criminal enforcement the legal system indeed suffers from overprosecution. The alternative prosecutorial theory that I develop in

294. See generally Green & Zacharias, *supra* note 60, at 840; Bellin, *supra* note 38; Green & Roiphe, *supra* note 286.

295. See Bellin, *supra* note 38, at 1204–05.

296. See Green & Roiphe, *supra* note 286, at 807–09.

297. See Bellin, *supra* note 38, at 1212.

298. *Id.* at 1213–15.

299. See Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 253–54, 305 (2017).

300. See Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 302–05 (2017); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 301 (2014).

subsequent sections takes no issue with these theories as applied in the context of overprosecuted crimes.

These theories, however, are not attentive to the distinctive considerations that underlie the treatment of underprosecuted crimes like sexual assault. Exclusively emphasizing the need to promote defendants' rights obfuscates the fact that the interests of other stakeholders in the criminal legal system, including victims, also warrant protection.

Theories that ground the prosecutor's role in fiduciary duties that the prosecutor owes to the public take an important step in that direction by incorporating additional considerations underlying prosecutors' charging decisions. Professors Bruce Green and Rebecca Roiphe suggest that the prosecutor's obligation to seek justice should focus attention on duties of care and loyalty that prosecutors owe the public at large.³⁰¹ A theory that draws on the notion of fiduciary duties to the public, they argue, incorporates intrinsic considerations to justice, which entail a "constellation of interests" and values, among them, avoiding wrongful convictions, treating people proportionally and equally, using the criminal process to incapacitate dangerous individuals, deterring future offenses, and securing retribution and restitution for victims.³⁰² Among others, they continue, prosecutors have an obligation of care to victims since fiduciary duties to the public's interests presuppose care for interested private parties.³⁰³

Grounding the prosecutor's role in fiduciary duties to the public adds a much-needed perspective that is largely missing from existing theories of prosecution; it recognizes that the prosecutor's obligations regarding bringing criminal charges ought to be examined not only through the lens of defendants' rights but also through a broader framework that accounts for additional considerations that shape the justness and fairness of specific prosecutorial choices.

The notion of prosecutors' fiduciary duties underscores the role that victims' interests should play in the prosecutors' charging decisions by suggesting that they ought to be factored into the calculus while weighing competing considerations.³⁰⁴ Yet, the fiduciary

301. See Green & Roiphe, *supra* note 286, at 809.

302. *Id.* at 809–10.

303. *Id.* at 834.

304. See *id.* at 808–09.

theory of prosecution is a theory of general applicability that is not specifically tailored to address the unique considerations underlying the prosecution of sexual assault and other crimes that are typically underprosecuted.

Scholars have yet to develop a normative theory of prosecution that sufficiently accommodates competing considerations affecting the public at large, including those impacting victims of underprosecuted crimes like sexual assault.

The EPM that this Article develops in subsequent sections does precisely that. It crafts a prosecutorial theory that is attentive to cases that are mostly characterized by a dearth of prosecutions, like sexual assault. Under the EPM, prosecutors also ought to factor in other considerations, including victims' interests, *in addition* to defendants' rights, and properly balance between them. The section below considers the role that victims' interests ought to play under such an alternative theory of prosecution.

B. *Victims' Interests*

In general, interests are mostly framed in positive terms, implicating the government's obligation to act in a particular way, including ensuring people's interests in being safe from crime and in avoiding additional harm.³⁰⁵ When conceived this way, sexual assault victims have an interest in the government bringing criminal charges against those who harmed them. These interests, however, are currently not sufficiently protected in our criminal legal system which fails to adequately prosecute sexual assault.

Crime victims are not independent parties to criminal prosecutions where only the state and the defendant are parties to the proceeding.³⁰⁶ One feature that distinguishes criminal law from tort law is that the former aims to vindicate public harms, whereas the latter focuses on private injuries.³⁰⁷ Existing criminal process

305. See Erwin Chemerinsky, *Constitutional Scholarship in the 1990s*, 45 HASTINGS L.J. 1105, 1114–15 (1994) (reviewing PUBLIC VALUES IN CONSTITUTIONAL LAW (1993) (distinguishing between rights and interests, noting that while rights are negative, interests are positive)).

306. See Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 10–11 (1997).

307. See JEFFRIE G. MURPHY & JULES L. COLEMAN, THE PHILOSOPHY OF LAW: INTRODUCTION TO JURISPRUDENCE 170 (1984) (“The standard way of drawing this distinction is to say that duties imposed by tort law cover *private* harms, and those imposed in the criminal law cover *public* harms.”).

therefore largely does not require prosecutors to accord any weight to the preferences of crime victims.³⁰⁸

Many criminal law theorists, however, emphasize that the interests of crime victims are a central tenet of contemporary criminal law.³⁰⁹ In recent years, commentators recognized that the criminal legal system should take into consideration victims' interests in the criminal process, and that the notion of "public harm" intrinsically encompasses the obligation to redress these interests.³¹⁰ These accounts further point to empirical evidence showing that the effect of victim rights laws is leveling the playing field by empowering otherwise disempowered victims and equalizing outcomes.³¹¹ For example, Stephanos Bibas, then law professor and now Circuit Judge, supported strengthening formal avenues for participation in the criminal process, especially for victims who have traditionally been underserved by the criminal legal system.³¹² Similarly, in advocating for vigorous prosecution of domestic violence, another crime that had been historically underprosecuted, Professor Michelle Madden Dempsey emphasizes that the path to victims' true healing can begin only when they cease to be victims and become in charge of relating the narratives of their victimization.³¹³

Critical race scholars further expose the interrelationship between marginalized defendants and marginalized victims, stressing that the criminal legal system adversely effects both. For example, Professor James Forman provides a nuanced account of the complex interdependence between victims' and offenders' interests.³¹⁴ Forman demonstrates the surprising roles that Black community leaders, as well as Black prosecutors and judges, have played in facilitating overly punitive measures, which

308. See Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 612 (2019) (noting that prosecutors may choose to take account of these preferences, among other considerations).

309. See MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 154–55 (2002); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 863 (2007).

310. See STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 91 (2012) ("While defendants have strong interests in fair trials, victims likewise have strong personal interests in being listened to and taken seriously.").

311. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 138 (2004).

312. See Bibas, *supra* note 60, at 993.

313. See MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 196, 208 (2009).

314. See FORMAN, *supra* note 45, at 10.

disproportionally affected Black defendants.³¹⁵ This was possible, contends Forman, because of the need to heed Black victims' interests and demands for effectively addressing the skyrocketing crime rates in Washington, D.C. in the 1970s and 1980s, when "[B]lack communities were devastated by historically unprecedented levels of crime and violence."³¹⁶

Commentators further stress the important independent values of criminal trials for crime victims.³¹⁷ For example, Professor Mihailis Diamantis argues that victims become "active narrators" and "agents of justice" by testifying at trial.³¹⁸ In failing to prosecute wrongdoers, he continues, the criminal legal system not only becomes complicit in past victimization but also in future victimization, especially of vulnerable populations.³¹⁹ Likewise, Professor Zachary Kaufman argues that sexual assault victims' interests in prosecution ought to be taken into account when considering imposing criminal responsibility for third parties' failure to intervene in preventing sexual assault.³²⁰

Other commentators critique the recent proliferation of victims' rights laws and their expansion under state constitutions, asserting that incorporating participation rights in the criminal process itself poses significant risks to defendants' due process rights.³²¹ Elaborating on these amendments exceeds the scope of this Article because they apply only *after* a criminal proceeding is already underway, thus having no impact on prosecutors' declining to pursue sexual assault charges.³²²

The EPM I develop here stresses that victims' interests should play a prominent role in prosecutors' charging decisions, especially in cases implicating the interests of victims of underprosecuted crimes like sexual assault. Bringing charges against perpetrators of sexual violence provides victims with the opportunity to share their narratives and publicly relay their victimization accounts.

315. *Id.* at 9–11.

316. *Id.* at 10.

317. See Mihailis E. Diamantis, *Invisible Victims*, 2022 WISC. L. REV. (forthcoming).

318. *Id.* at 32.

319. *Id.* at 33–34.

320. See Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1337–38 (2019) (discussing this idea in the context of duty-to-report laws).

321. See Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1462, 1482–87 (2021) (criticizing the proliferation of Marsy's laws).

322. See Brown, *supra* note 47, at 862.

The legal system's refusal to pursue sexual assault charges results in preventing victims from testifying, which is in itself a form of silencing.³²³ Criminal prosecution of sexual assault serves particularly important expressive values for crime victims and society at large precisely because their voices have been traditionally silenced.³²⁴

Incorporating the notion of victims' interests into prosecutors' charging decisions warrants one clarification and one caveat. First, the EPM by no means suggests that defendants' rights and victims' interests carry equal weight. They do not; defendants' liberty interests are at stake in criminal prosecutions and the EPM concedes that prosecutors should prioritize defendants' constitutional protections. Instead, my more modest claim is that an equitable criminal legal system requires exercising fairness and justice to both offenders and victims and that the prosecutor's role is to equitably balance between their conflicting rights and interests. The position I espouse here suggests that prosecutors take into consideration sexual assault victims' interests in holding those who harmed them criminally accountable, as one of many factors in their charging decisions.

Second, the EPM recognizes that in balancing the various considerations underlying their charging decisions, prosecutors should also take into account victims' interests *not* to pursue criminal charges where they are reluctant to partake in the criminal process. Conventional wisdom is that states' and victims' interests are aligned as public prosecution rests on bringing charges against offenders who perpetrate harms against broad societal interests, which inherently encompass victims' interests as wells.³²⁵ But this assumption sometimes proves inaccurate in circumstances where the state's interest in pursuing criminal charges and victims' interests *not* to pursue them directly clash.

Sexual assault victims are not monolithic, but rather are a divergent group, consisting of diverse individuals, from varied racial, ethnic, socioeconomic, and sexual identity backgrounds, which shape their preferences regarding a subsequent criminal

323. See Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 906–07, 910 (2009).

324. *Id.* at 866; Kaufman, *supra* note 320, at 1325–26.

325. See Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 294, 298 (1999).

process.³²⁶ Many victims do not wish to participate in the criminal adjudication process for various reasons. Some find the engagement with the legal system to be a re-victimizing experience, which is unresponsive to their unique needs for healing.³²⁷ Importantly, many victims have lost any trust in the criminal legal system, which they perceive as racist and unjust, especially to people of color.³²⁸

Critical race scholars make a strong case for minority victims' decisions not to partake in what they view as the inherently destructive power of the carceral state.³²⁹ Choosing to disengage the state's coercive legal system altogether, many Black victims, including victims of gender-based violence, have made a conscious decision not to rely on police and prosecutors because of the pervasive adverse impact of these institutions on their communities.³³⁰ Given the profound mistrust of these institutions, states and victims' interests often diverge; while the state might have an interest in criminally pursuing a case, marginalized victims might have a strong interest to not cooperate with a system which they view as disproportionately oppressive to minorities.

Taking seriously victims' interests requires that prosecutors take into account the choices of those victims who wish to avoid pursuing criminal charges.³³¹ The EPM recognizes the need for respecting victims' rights to choose whether they want to pursue criminal prosecution or prefer not to engage with the state's coercive power. Dignity and respect for victims' choices as autonomous persons mandates that the law provides them with the right to decide whether alternative measures to redress their harms may better fit their specific needs.³³²

326. See Bazelon & Green, *supra* note 54, at 295–96.

327. *Id.* at 294–97 (observing that many victims believe that they would have been better served by more beneficial alternatives to remedying their harms).

328. See Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocation*, 75 *FORDHAM L. REV.* 2641, 2643 (2007); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 *N.Y.U. L. REV.* 1449, 1452–53 (2005); *Black Survivors and Sexual Trauma*, *TIME'S UP* (May 20, 2020), <https://timesupfoundation.org/black-survivors-and-sexual-trauma/> [<https://perma.cc/QY6Z-F5FB>].

329. See BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 157 (1996).

330. *Id.* at 33–36, 133–34.

331. See LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 121–22, 136, 138, 140, 143, 145 (2018) (emphasizing domestic violence victims right not to pursue charges).

332. See Alexandra Brodsky, *Against Taking Rape “Seriously”*: *The Case Against Mandatory Referral Laws for Campus Gender Violence*, 53 *HARV. C.R.-C.L. L. REV.* 131, 150

The suggestion that prosecutors take into consideration sexual assault victims' interests in their charging decisions calls for identifying the legal source underlying these interests. The next section explains that such source may be found in a civil rights approach to conceptualizing victims' interests.

C. *A Civil Rights Approach Underpinning the Prosecutor's Role*

A key feature of the EPM is that prosecutors must equitably balance between the competing rights and interests of offenders and victims in making charging decisions. While the requirement that prosecutors act in a fair and just way seems undisputed, fairness and justness are indeterminate concepts, and prosecutors hold vastly different perspectives on what this entails. A principled theory of the prosecutor's role must therefore provide concrete guidelines to inform the prosecutor's understanding of what it means to exercise their discretion in an equitable manner. The EPM does that by suggesting that a civil rights approach may underpin the prosecutor's role in exercising their discretion in a fair and just manner to defendants, victims, and the public at large.

1. States' Duties Under a Civil Rights Approach

Invoking a civil rights approach calls for untangling the inextricable link between prosecutors' obligations to act in an equitable manner and states' duties to protect individuals from all forms of violence, including among others, sexual violence.³³³ States' duty to provide people with personal safety and security and to protect them from harms perpetrated against them by private actors has long been perceived as a feature of the social contract theory.³³⁴ Criminal law scholars observe that in a criminal case, the government has a compelling interest in the protection of individuals from private violence and expropriation of an interest which is constitutionally mandated.³³⁵

(2018).

333. See generally William S. Laufer & Robert Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155 (2021) (discussing the state's omission to respond to crime and state's duty to provide justice to all crime victims).

334. See Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 30–33 (1999) (noting that under Locke's social theory contract, a main function of the state is to protect the physical integrity of individuals).

335. See Kate Stith, *The Government's Interest in Criminal Law: Whose Interest Is It Anyway?*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 137, 139–40 (Stephen E. Gottlieb ed.,

In recent years, several commentators further suggest that states' duty to protect their citizens from private violence should be viewed through the lens of a civil rights approach. For example, African-American studies Professor Naomi Murakawa argues that "the first civil right is the freedom from violence, and the state's fundamental task is to provide safety for all its citizens, particularly those who might be especially vulnerable or might lack the political power to address widespread violence."³³⁶

Professor Robin West grounds a state's duty to protect its citizens from violent harm in a civil rights framework. Rejecting the conventional wisdom that civil rights ought to be understood merely as antidiscrimination rights, West argues that a state's duty to protect people from private violence ought to be understood as an individual's civil right to physical security.³³⁷ Civil rights are those that protect individuals' enjoyment of fundamental human capabilities against unjust impediments, continues West, including individuals' rights of access to protected social goods and systems of law.³³⁸ Emphasizing that civil rights are rights *to* state protection unlike constitutional rights which are rights *from* state interference, West asserts that states have an obligation to actively facilitate, promote and protect people by engaging in positive state action, as only the state can provide civil rights.³³⁹ In turn, she continues, individuals have an interest in the states' provision of these civil rights, so the individuals would be able to enjoy their right to physical security. Therefore, people have a civil right to laws that criminalize private violence as well as a right to an effective and trustworthy police force that protects against private violence in a nondiscriminatory way and without violating rights of privacy and dignity.³⁴⁰ West concludes by stating that "[t]he thoroughly positive right to thoroughly positive, state-provided protection against thoroughly private violence is a—maybe the—quintessential civil right: it is a right that can only be realized through the enactment of positive law and its fair enforcement."³⁴¹

1993).

336. See NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 50 (2014).

337. See Robin West, *Toward a Jurisprudence of the Civil Rights Acts*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY* 73 (Samuel Bagenstos & Ellen Katz eds., 2014).

338. *Id.* at 75, 82–83.

339. *Id.* at 74–75, 96–97.

340. *Id.*

341. *Id.* at 96–97.

The civil rights perspective connects states' duties to protect individuals against all forms of private violence with victims' interests in having an effective, fair, and just public institution whose role is to prosecute those suspected of depriving individuals of their personal security. One derivative interest emanating from people's right to be protected against violence concerns the decision whether the state should use the criminal law in response to sexual assault on their agency and autonomy.³⁴²

The institution of public prosecution is the thread that links states' duties to protect individuals against acts of private violence perpetrated against them with prosecutors' duties to do that. In adopting the public prosecution model, states delegated to prosecutors their duty to protect individuals from all forms of violence, including sexual violence.³⁴³ Although most crimes were privately prosecuted until the late eighteenth century, individuals have since delegated to states the power to initiate private justice.³⁴⁴ Public prosecution is premised on the understanding that it is the state's exclusive role to bring criminal charges against perpetrators and vindicate public harms in the name of victims.³⁴⁵ By holding a monopoly on the operation of the public prosecution model, states created a system that invites citizens to rely on this system for protection against harm.³⁴⁶

The civil rights approach explains why a prosecutor's role should be conceived as a *duty* owed to crime victims. The conventional account that prosecutors merely have discretionary power to bring criminal charges obscures the obligatory nature of the duty that prosecutors owe to the public in general and to victims in particular. The failure to effectively prosecute sexual assault illustrates the significance of casting the prosecutor's role in an obligatory framework. By criminalizing sexual assault, states channeled the treatment of sexual violence into the criminal legal system. The prosecutor's role thus consists of a duty to equitably prosecute

342. See DUBBER, *supra* note 309, at 335–36 (noting that crime victims have a subordinate right to participate in the prosecutor's decision whether to bring criminal charges).

343. See Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 52 (2010).

344. See Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1574–81 (2021); see also Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 UNIV. PA. J. CONST. L. 659, 665, 670–71 (2010).

345. See Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 718–19 (2016).

346. See Brown, *supra* note 47, at 867–70.

sexual assault to protect all people against sexual violence. The refusal to bring sexual assault charges in cases where there is probable cause that a sexual assault has been committed and sufficient evidence to support the charges deprives people of a public good, namely state protection against sexual violence. The result of such deprivation is that public goods are not equally distributed because they are only provided to some victims but not others.³⁴⁷ The underprosecution of sexual assault thus violates states' duties as conceptualized through the civil rights perspective.

Moreover, grounding the prosecution of sexual assault in a civil rights underpinning complements the constitutional-based framework that commentators have proposed to address the underenforcement of sexual assault. Professor Deborah Tuerkheimer advances such a framework by arguing that underenforcing sexual assault crimes violates states' constitutional mandate to equally protect all citizens, thus creating a constitutional violation under the Fourteenth Amendment Equal Protection Clause.³⁴⁸ The underenforcement of sexual assault crimes perpetrated against marginalized victims, she continues, underscores the ways in which prosecutors perpetuate harms on particular communities by failing to provide them with the equal protection of the state.³⁴⁹ Withholding states' protective resources from a group of crime victims, Tuerkheimer concludes, is a hallmark of inequality.³⁵⁰ While the constitutional framework for understanding the underenforcement of sexual assault problem is persuasive, further adding the civil rights underpinning offers yet another theoretical basis to support states' duties to strengthen the prosecution of sexual assault and protect people from private sexual violence.

Moreover, applying a civil rights approach to the underprosecution of sexual assault adds a normative dimension to states' duties to protect against sexual violence, especially when perpetrated

347. See Natapoff, *supra* note 23, at 1717 (“Underenforcement . . . [as] a form of deprivation, tracking familiar categories of race, gender, class, and political powerlessness. Conceived as a form of public policy, underenforcement is a crucial distribution mechanism whereby the social good of lawfulness can be withheld.”).

348. See Tuerkheimer, *supra* note 24, at 1334–35 (describing DOJ findings that law enforcement discriminatory practices that failed to respond to sexual assault cases violated the Equal Protection Clause).

349. *Id.*

350. *Id.* at 1288–89 n.5 (clarifying that the argument focuses on police failures to effectively investigate sexual assault, but that many of the arguments also apply for the underprosecution of these cases).

against marginalized communities.³⁵¹ The underprosecution of sexual assault carries distinct implications for marginalized victims who have traditionally suffered from discriminatory enforcement of the law and systemic biased treatment by the criminal legal system's institutional players. The prosecutor's refusal to bring sexual assault charges exemplifies a deprivation of state protection from those who need it the most, given the intersectional dimensions of gender, race, class, social orientation, and other factors contributing to victims' marginalization.³⁵²

A civil rights approach is normatively warranted because it allows prosecutors to take into account broad social justice goals in their charging decisions, especially when these implicate the interests of marginalized victims who experience gender-, race-, and other class-based biases and prejudices. A civil rights perspective emphasizes policy-driven reform by highlighting the societal implications of prosecutors' charging choices. These choices carry the prospect of shaping social norms by sending expressive messages about what kinds of harm, as well as what types of victims, warrant the law's protection.

2. Progressive Prosecutors and the Civil Rights Approach

The interrelation between the underprosecution of sexual assault and the civil rights approach is not merely theoretical but also has important practical implications. These are manifested in a growing phenomenon among various prosecutors' offices around the nation of vigorously prosecuting crimes that have been traditionally underprosecuted including sexual assault.³⁵³ The phenomenon has mostly taken hold in large cities, but, infrequently, it also emerges in rural areas where elected prosecutors adopt reformist policies.³⁵⁴

351. *Id.* at 1289–90 n.9.

352. *See supra* section II.B.3 (discussing the intersectionality of multiple factors contributing to victims' marginalization).

353. *See Levin, supra* note 42, at 1438–39 (describing various forms of progressive prosecutors who seek to amp up the prosecution of underprosecuted crimes like sexual assault).

354. *See* Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 816 (2020); *cf. Maine Prosecutor Aims to Reform Prosecuting Sexual Assaults*, ASSOCIATED PRESS (Jan. 31, 2020), <https://apnews.com/article/7596a4aec6a71c1d435cda0c93b84173> [<https://perma.cc/2WG4-FNK2>] (describing how Natasha Irving, a District Attorney in Waldo County, Maine, advances prosecutorial practices that promote equitable treatment of communities who have been historically under-protected by the law and how Irving's campaign platform emphasized her commitment to improving the investigation and prosecution of gender-based crimes, domestic violence, and

In recent years, many elected district attorneys implement policies and practices that reimagine a new role for prosecutors, a phenomenon commonly referred to as progressive prosecution.³⁵⁵ While running for office, these prosecutors have campaigned on advancing institutional reforms aimed at changing the profoundly flawed criminal legal system.³⁵⁶ Among their goals has been a commitment to a more balanced approach to criminal enforcement, including reducing mass incarceration and its racial disparities, rectifying its disproportionate effects on defendants of color and other marginalized defendants, and decreasing wrongful convictions.³⁵⁷ To accomplish these objectives, progressive prosecutors mostly focus on ameliorating problems of over prosecution, among others, by refusing to file charges in misdemeanors such as possession of marijuana.³⁵⁸

This conventional account of progressive prosecutors' initiatives, which largely emphasizes problems of overenforcement, obfuscates a less visible feature underlying these progressive prosecutors' practices, one that emphasizes the parallel phenomenon of underenforcement of specific types of crimes. Many progressive prosecutors, however, recognize the interconnectedness of over- and underenforcement of crimes; they stress that meaningful reform of the criminal legal system must also encompass a robust prosecution of crimes that have been traditionally underprosecuted.³⁵⁹

Importantly, progressive prosecutors are by no means monolithic. Commentators observe that the broad concept captures distinct categories of prosecutors' platforms, each reflecting a different vision of what is wrong with the criminal legal system and whether and to what extent prosecutors might help in remedying these wrongs.³⁶⁰ Elaborating on the disparate flavors of progressive prosecutors exceeds the scope of this Article. Instead, I exclusively focus here on one type of progressive prosecutor, which I refer to as a Civil Rights Reformist ("CRR prosecutor").³⁶¹

sexual assault).

355. See David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017).

356. See Levin, *supra* note 42, at 1424.

357. *Id.* at 1437–39 (mapping the different types of progressive prosecutors).

358. See Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 752 (2018).

359. See *supra* notes 339, 345, 354 and accompanying text.

360. See Levin, *supra* note 42, at 1447.

361. *Id.* at 1418 (using the term "the prosecutorial progressive" to refer to this type of prosecutor). For an account that uses the term "reformist prosecutor," see Editorial Board, A

The CRR prosecutor's vision is rooted in concerns about structural inequality, systemic racism, and substantive social justice, and is motivated towards advancing certain political priorities.³⁶² Importantly, the CRR prosecutor draws on ideas that are conceptually similar to the civil rights approach discussed earlier when making charging decisions that are aimed at remedying historical inequalities, discrimination, and biases against marginalized victims.³⁶³ To promote broad policy goals, the CRR prosecutor advances, among others, prosecutorial practices that robustly pursue criminal charges in cases involving underprosecuted crimes.³⁶⁴ These crimes are largely perpetrated against marginalized victims that the law had historically failed to protect, thus these prosecutors' practices aim to rectify systemic social injustices, including racialized and gendered discriminatory enforcement and biases.³⁶⁵ For example, CRR prosecutors seek to counteract an overly punitive and systemically racist criminal legal system by rigorously prosecuting police officers who have violated the law.³⁶⁶ The paradigm example includes filing charges against those who have unjustifiably killed Black victims.³⁶⁷

CRR prosecutors, however, implement practices and policies that draw on the civil rights approach only in a sporadic manner. This is because currently there is no principled theoretical framework underpinning their practical operation. Moreover, CRR prosecutors may be perceived as uncritically heeding to political pressures and succumbing to public demands.³⁶⁸ The civil rights underpinning for the EPM that I develop here conceptually aligns with practices that CRR prosecutors employ in bolstering prosecution of underprosecuted crimes. Yet, the proposed model adds a much needed theoretical support to undergird these prosecutorial reforms, thus, ameliorating concerns that public pressure might disproportionately shape prosecutors' charging decisions.

One important aspect of CRR prosecutors' agendas includes robustly prosecuting sexual assault.³⁶⁹ Bringing more sexual assault

Wiser Generation of Prosecutors, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/opinion/a-wiser-generation-of-prosecutors.html> [<https://perma.cc/T3HQ-WPRD>].

362. Levin, *supra* note 42, at 1438.

363. *See supra* section III.C.1.

364. *See* Bellin, *supra* note 38, at 1222, 1251.

365. *See id.*

366. *See id.* at 1205, 1218, 1222.

367. *See* Note, *supra* note 358, at 749, 754–55.

368. *See* Bellin, *supra* note 38, at 1248–53.

369. *See supra* text accompanying notes 345–64.

charges serves to combat patriarchal biases in the enforcement of crimes that are largely perpetrated against women, amplifying harms that have long been ignored. By recognizing the roles that these prosecutions play in fostering a more equitable criminal legal system, CRR prosecutors highlight the inexorable connection between problems of over- and underprosecution. They further acknowledge their dual-pronged duties to protect defendants from excessive use of the state's penal power on one hand and provide state protection to sexual assault victims on the other. This approach embraces a group oriented civil rights approach, which incorporates victims' interests in holding wrongdoers accountable.

Many prosecutors' offices across the United States now illustrate this reformist approach. San Francisco's District Attorney Chesa Boudin, a former public defender, is believed to be the first prosecutor in the country to promote initiatives that endeavor to integrate meaningful reforms in the prosecution of sexual assault.³⁷⁰ Boudin's election campaign included, among others, a commitment to address problems of selective processing and continuous backlog and to amplify sexual assault victims' voices.³⁷¹ Boudin stated that "[b]eing a progressive prosecutor is about more than just ending mass incarceration and the racial injustice plaguing our criminal justice system It requires treating sex crimes with the seriousness they demand, and treating victims/survivors with the compassion they deserve."³⁷²

To better facilitate the prosecution of sexual assault, Boudin created a six-point plan that draws on a victim-centered approach to prosecuting these crimes.³⁷³ The plan included measures to testing all rape kits, process up-to-date toxicology tests, establish a sex crimes review team, implement mandatory sexual assault trainings, establish a sexual violence task force and give victims a voice

370. See *DA's Office Launches Pilot Program to Expand Toxicology Tests for Sexual Assault Survivors*, SFGATE (Oct. 15, 2020), <https://www.sfgate.com/news/bayarea/article/Da-s-Office-Launches-Pilot-Program-To-Expand-15651937.php> [<https://perma.cc/K2YV-MA6V>].

371. See Marissa Hoechstetter, *Can a Prosecutor be Progressive and Take Sex Crimes Seriously?*, THE APPEAL (Jan. 8, 2020), <https://theappeal.org/progressive-prosecutors-metool/> [<https://perma.cc/GMD5-DYQX>].

372. Seamus Kirst, *These Progressive Prosecutors Want to Reshape Justice in Major American Cities*, TEEN VOGUE (July 29, 2019), <https://www.teenvogue.com/story/meet-progressive-prosecutors-krasner-rollins-boudin-owens-caban> [<https://perma.cc/9PMJ-2ZXL>].

373. Tim Redmond, *DA Candidates Address SF's Failures in Sexual Assault Cases*, 48HILLS (June 25, 2019), <https://48hills.org/2019/06/da-candidates-address-citys-failures-in-sexual-assault-cases/> [<https://perma.cc/8QPX-RV5S>].

in every case.³⁷⁴ Recognizing that sexual assault survivors are among the most vulnerable victims, one feature that particularly stands out in this plan is Boudin's commitment to proactively prosecute sex crimes perpetrated against underserved communities.³⁷⁵ This policy emphasizes the discriminatory implications of the state's failure to prosecute sexual assault crimes whose victims have long been marginalized. This approach brings home the point that the underprosecution of sexual assault crimes and the overprosecution of most crimes ought to be viewed as the flip sides of the same coin.

Other district attorneys have similarly advanced prosecutorial practices that are consistent with the civil rights underpinning to the prosecution of sexual assault. Larry Krasner, Philadelphia's District Attorney, also aims to promote reformist prosecutorial policies that invigorate sexual assault prosecutions.³⁷⁶ For example, Krasner's office charged Carl Holmes, a high-ranking police officer in the Philadelphia Police Department with sexual assault and related offenses of three female police officers during his tenure as Inspector and Chief Inspector.³⁷⁷ The incidents occurred fifteen years earlier, but no criminal charges were previously brought against Holmes.³⁷⁸ Filing charges in this case, despite the passage of time, signals a prosecutorial commitment to eradicate sexual violence, particularly in cases where perpetrators abused their positions of authority to coerce sexual demands from victims in vulnerable positions.³⁷⁹

Brooklyn's District Attorney Eric Gonzales provides yet another notable example of a CRR prosecutor whose policies and practices emphasize the interrelationship between the underprosecution of

374. Chesa Boudin, *Chesa Boudin Pledges Survivor-First Approach to Sex Assault*, OAKLAND NEWS NOW (June 25, 2019), <https://oaklandnewsnow.com/chesa-boudin-pledges-survivor-first-approach-to-sex-assault/> [<https://perma.cc/6WTL-JPVJ>].

375. *Id.*

376. *Larry Will Continue to Attack Mass Incarceration and Work to Prevent Violence*, KRASNER FOR DA, <https://krasnerforda.com/plans-for-the-future> [<https://perma.cc/DDY6-3XKX>].

377. The charges were filed after a Grand Jury heard testimonies from three unrelated complainants who testified that Holmes kissed, groped, and digitally penetrated them, without their consent. *See* Grand Jury Documents at 1, In re: The Thirtieth County Investigating Grand Jury, No. 0008094-2018 (C.P. Phila. 2018).

378. *Id.* at 1–2 (elaborating the three complainant's allegations against Holmes, describing sexual assaults that Holmes allegedly committed as early as 2004, and the Grand Jury's 2019 findings recommending that Holmes be charged with the alleged sexual offenses).

379. *See* Buchhandler-Raphael, *supra* note 66, at 151–54 (advocating a sexual abuse of power model to address such abuses).

sexual assault and a civil rights approach to victims' interests.³⁸⁰ His office's prosecutorial agenda explicitly recognizes the critical role that victims' interests play in the prosecution of sexual assault, promising to take into considerations their views about case dispositions.³⁸¹ Likewise, Gonzales stresses that a progressive prosecutor's office must value transparency and accountability.³⁸²

Like other CRR prosecutors, Gonzales explicitly connects the phenomena of over- and underprosecution. In an elaborate, publicly available document, entitled *Action Plan*, Gonzales provides a thorough, detailed roadmap for actions that capture his reformist vision for an alternative prosecutorial model.³⁸³ The *Action Plan* mostly focuses on ameliorating problems of overincarceration and other punitive measures which disproportionately affect marginalized communities, but also stresses the need to address the underprosecution of sexual assault. More specifically, in a section titled "Enhance prosecution of cases of gender-based violence, including acquaintance rape and sexual assault cases," the *Action Plan* calls for applying enhanced evidence gathering techniques early on in sexual assault cases.³⁸⁴ It also emphasizes the need to ensure that the Special Victims Bureau, handling sexual assault crimes in Brooklyn, is sufficiently resourced.³⁸⁵ Additionally, the plan advocates for adopting innovative strategies for prosecuting drug-facilitated and alcohol-facilitated sexual assault.³⁸⁶

Lastly, a recent iteration of a prosecutorial civil rights approach is exemplified by George Gascón, Los Angeles County District Attorney, yet another CRR prosecutor whose running campaign rested on a reformist platform.³⁸⁷ Improving the enforcement of sexual assault crimes is among Gascón's many proposed reforms of

380. See ERIC GONZALEZ, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN (2020), <https://www.brooklynnda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf> [<https://perma.cc/MY34-2DV3>].

381. *Id.* ("We can only achieve the best outcomes for survivors when prosecutors include them in the handling of their cases. Keeping survivors informed about the status of their cases, regularly consulting them, and taking into account their views about case dispositions can help establish a dynamic that is victim-centered and promotes their recovery.").

382. *Id.* at 29.

383. *Id.* at 3–9.

384. *Id.* at 35.

385. *Id.*

386. *Id.*

387. See James Queally, *On First Day As L.A. County D.A., George Gascón Eliminates Bail, Remakes Sentencing Rules*, L.A. TIMES (Dec. 7, 2020, 6:51 PM), <https://www.latimes.com/california/story/2020-12-07/in-first-day-on-job-gascon-remakes-bail-sentencing-rules> [<https://perma.cc/6UVX-6CC7>].

the criminal legal system's operation in Los Angeles.³⁸⁸ Gascón's plan includes advancing the prosecution of sexual assault in partnership with law enforcement and community members to prevent sexual violence, hold offenders accountable, and ensure that each survivor finds their own path to healing and recovery.³⁸⁹ This plan emphasizes taking steps like testing every rape kit, developing a sexual assault response team, increasing survivors voice and choice, protecting the LGBTQ community and advocating for victims of uncharged cases to have the opportunity to read a victim impact statement at the sentencing of a serial sex offender.³⁹⁰

Importantly, CRR prosecutors' reformist policies and practices offer an internal organizational mechanism for exercising oversight of prosecutors' decisions that decline to bring sexual assault charges to trial. Scholars have long cast doubt on the effectiveness of external oversight mechanisms, such as judicial review, for shaping prosecutors' behavior.³⁹¹ A case-by-case review, they continue, is poorly suited to policing broader systemic concerns such as equality across different prosecutors.³⁹² Instead, these scholars advocate for internal governance measures implemented within prosecutors' offices, which prosecutors could use to regulate themselves.³⁹³ These include, among other things, inculcating professional culture that focuses on exercising fairness in prosecution policies as well as using internal substantive guidelines which could shape offices values and norms and harmonize prosecutors' substantive results.³⁹⁴

Furthermore, embracing a principled civil rights approach to the prosecution of sexual assault fosters more transparent policies which also result in more consistency in individual prosecutors' charging decisions.³⁹⁵ Studies confirm that prosecutors respond to a blend of social norms and values and that internal regulations

388. *See Sexual Assault—Protecting and Holding Abusers Accountable*, GEORGE GASCÓN, <https://www.georgegascon.org/on-the-issues/#assault> [https://perma.cc/V2MF-45WD].

389. *George Gascón's Proposed Policies and Guidelines for Protecting Victims of Domestic Violence, Sex Assault and Human Trafficking, and Holding Abusers Accountable*, GEORGE GASCÓN (Jan. 23, 2020), <https://www.georgegascon.org/campaign-news/gascon-policies-for-protecting-victims-of-dv-sexual-assault-ht-and-holding-abusers-accountable/> [https://perma.cc/2NG9-MXGQ].

390. *Id.*

391. *See Bibas*, *supra* note 60, at 960, 1003.

392. *Id.* at 972–73.

393. *Id.* at 964.

394. *Id.* at 997, 1003.

395. *Id.* at 993.

within prosecutors' offices, initiated and enforced by the offices' leaders, produce predictable and consistent prosecutorial choices.³⁹⁶

In sum, the growing wave of prosecutors who advance reformist agendas that are attentive to social justice goals carries promising potential for regulating prosecutorial discretion, advancing transparency and consistency within the office, and providing much needed internal oversight. This approach is cognizant of the interrelation between the over- and underprosecution phenomena. As such, it offers hope for adopting reforms that implement a prosecutorial model that is fairer and more just to both defendants and victims as stakeholders in the criminal legal system.

D. *#MeToo Meets BLM: Reconciling Tensions Between Conflicting Objectives*

Endeavors to invigorate the prosecution of sexual assault are likely to raise a host of objections; these include a general anticriminalization argument, denouncing the exclusive dependence on the criminal legal system as the quintessential solution to solve all society's problems, as well as a more specific claim, rooted in intersectional feminism, urging feminists to disengage the criminal law in addressing the problem of sexual assault.³⁹⁷

First, those rejecting the use of criminal law as a vehicle for social control are likely to raise a broad argument, under which criminal law is not only unhelpful in reducing harmful behaviors but also has a destructive impact on minority communities, with disproportionately adverse effects on communities of color.³⁹⁸ Since its multiple harms outweigh any potential benefits, the argument continues, progressive criminal law reformers ought to disengage punitive measures that only strengthen the harmful effect of the carceral state.³⁹⁹ Consequently, supporting the goals of the M4BL requires divestment from criminal enforcement.⁴⁰⁰

396. See Miller & Wright, *supra* note 69, at 129, 176.

397. See Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1466 (2012).

398. See BUTLER, *supra* note 45, at 9–10 (analyzing the racially disparate effects of mass incarceration); Jonathan Simon, *A Radical Need for Criminology*, 40 SOC. JUST. 9, 9 (2014).

399. See Simon, *supra* note 398, at 9.

400. See Akbar, *supra* note 40, at 435, 442.

Commentators further reject the proliferation of “progressive punitivism,” which they define as measures that wield punitive weapons for the purpose of promoting social equality, including shaming, stigmatization, harsh punishments and denial of rehabilitation.⁴⁰¹ Progressive punitivism is especially prevalent in the area of sexual assault, the argument continues, given calls to hold accountable individuals who are perceived as belonging to powerful groups.⁴⁰² This account denounces the celebration of “progressive prosecutors” advancing carceral policies, by emphasizing the risks associated with relying on prosecutors to deliver transformative reform.⁴⁰³

Second, intersectional scholars condemn feminists’ continued reliance on the criminal law to remedy the harms of gender-based violence, including both domestic violence and sexual assault.⁴⁰⁴ Professor Aya Gruber’s recent book, *The Feminist War on Crime*, fiercely rejects feminists’ engaging carceral policies as a means to promote gender justice, calling feminists to disengage criminalization measures and adopt instead a neofeminism agenda.⁴⁰⁵ Furthermore, commentators criticize a phenomenon they refer to as “carceral exceptionalism,” where progressive prosecutors create “carve outs” for sexual assault crimes, calling for harsher carceral sanctions *only* for these crimes while simultaneously decrying mass incarceration.⁴⁰⁶

These critiques are concededly justified, but only as they pertain to crimes that are indeed overprosecuted. Yet, as this Article demonstrates, sexual assault crimes are in fact under, rather than overprosecuted. The above objections thus have only limited application in this specific context. Without minimizing these concerns, I argue that they are overstated and largely undervalue the significance of competing considerations underlying the treatment of sexual assault crimes.

401. See Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 201–02 (2020).

402. *Id.* at 205–06.

403. See Note, *supra* note 358, at 750.

404. See GRUBER, *supra* note 22; LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE* 16 (2019).

405. GRUBER, *supra* note 22, at 68.

406. See Levin, *supra* note 42, at 1438–39, 1439 n.102 (arguing that instead of carving out specific exemptions and exceptions to the enforcement of sexual assault, legislatures and other criminal law’s institutional actors should advance reforms that aim to abolish the carceral state in a way that is broadly applicable to all types of criminal enforcement and all types of crimes, including gender-based violence).

To begin with, a remarkable shortcoming of critiques advocating for disengagement with the criminal law as a means to battle gender-based violence is that they fall short of providing any meaningful alternative to criminalization. The undeniable reality is that sexual assault remains a uniquely harmful phenomenon that inflicts enormous injuries on victims. Yet, critics of criminal enforcement of sexual assault fail to offer any viable substitutes to criminalization that would not only work better and more effectively address these crimes but also prevent future crimes.

Moreover, these critiques unnecessarily conflate criminalization decisions with incarceration and other punitive sanctions. My call for robust prosecution of sexual assault does not entail any support for harsh sentencing for those convicted of these crimes because trials have independent values beyond punishment.⁴⁰⁷ I am nowhere attempting to trivialize the concerns underlying the criminal legal system's excessive reliance on punitive measures to address all forms of harmful behaviors or the urgent need to rectify the systemic injustices and racial inequities underlying its operation. Instead, my more modest claim is that vigorous prosecution of sexual assault should not result in contributing to mass incarceration because bringing sexual assault charges has important expressive objectives.

Critics of policies aimed at invigorating the prosecution of sexual assault assume that doing so necessarily means contributing to the problem of mass incarceration.⁴⁰⁸ This perceived connection, however, is by no means inevitable. Admittedly, bringing more sexual assault charges creates inherent tensions between the destructive impact of carceral policies on marginalized communities on one hand and the state's obligation to protect people from sexual violence on the other. Commentators who reject reliance on criminal enforcement resolve these tensions simply by embracing a rule that defendants' interests always substantially outweigh the competing interests of the state and the victims and thus should necessarily prevail.⁴⁰⁹

This categorical position, however, fails to balance the conflicting interests of all stakeholders in the criminal process, defendants and victims alike. Such unqualified approach further neglects to acknowledge that prosecutorial choices regarding whether to bring

407. See Diamantis, *supra* note 317, at 24–28.

408. See GRUBER, *supra* note 22, at 15, 171.

409. *Id.* at 192.

sexual assault charges are not only detrimental to particular sexual assault victims but also undermine normative social values, including gender and racial equity.

Conversely, the position I advance in this Article concedes that these tensions exist but asserts that they may be reconciled in a manner that equitably balances between competing considerations. This could be done by weighing defendants' interests to avoid harsh sentences against victims' interests in holding those who sexually assaulted them criminally accountable.

In general, prosecutors' decisions whether to file charges in all cases always require weighing competing considerations.⁴¹⁰ But the need for balancing between conflicting interests of all stakeholders in the criminal process becomes more salient in the specific area of sexual assault prosecutions because they are largely underprosecuted. Here, prosecutors should evaluate, on a case-by-case basis, whether the potential benefits of bringing charges—given the interests of the general public and the victim—outweigh the potential pitfalls of the criminal process, including the harm to marginalized defendants. Engaging in such a fact-specific balancing process ensures that prosecutors' decisions about whether to pursue sexual assault charges are fair and just to both defendants and crime victims.

Moreover, progressive prosecutors' carving out specific exceptions to their general policy of reducing the overall number of their cases is normatively warranted to address the problem of underprosecution of sexual assault. Similar reasoning applies by analogy to prosecuting police violence, yet another type of underprosecuted crime. Most readers will likely agree that police violence is an exceptional category of crime that warrants prosecution.⁴¹¹ Similarly, principled policy reasons also support carving out exceptions for the prosecution of sexual assault, as both types of crime implicate discriminatory and unjust treatment of marginalized victims.

One overlooked way of reconciling the tensions between defendants and victims' conflicting interests lies with disentangling criminalization decisions from incarceration policies and other punitive sanctions.⁴¹² The conventional wisdom that intuitively links

410. See Eisenberg, *supra* note 153, at 893.

411. For a position that objects to the use of criminal prosecutions to address systemic problem of police violence and racialized police, see Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1008 (2021).

412. Punitive measures also consist of additional measures such as sex offenders'

criminalization with harsh punitive measures is not an inevitable feature of criminal law, although prevalent “tough on crime” policies have made them inexorably linked. The criminal legal system mostly draws on a flawed “punitivism or nothing” binary that exclusively relies on incarceration as the sole form of societal denunciation of criminal wrongdoing.⁴¹³

Yet, there is nothing inherently contradictory in separating criminalization decisions from considering how much punishment is appropriate.⁴¹⁴ In fact, there is a scholarly consensus that the questions of what the criminal law should cover and what sentences are deserved are entirely separate.⁴¹⁵ Professor Mihailis Diamantis, for example, proposes decoupling prosecutions from punishments by arguing that the criminal law ought to permit the prosecution of those who cannot be punished due to reasons such as death or immunity.⁴¹⁶ Here, I argue that the criminal legal system *should* distinguish between strengthening the criminalization of sexual assault, as these crimes have long been subject to underprosecution, while simultaneously decreasing incarceration rates and expanding alternatives to punitive sanctions.

The prosecutorial model that I propose in this Article uses the treatment of sexual assault as a case study to make a broader claim about the criminal legal system’s need to divorce criminalization from incarceration. To counterbalance the effects of vigorous prosecution of sexual assault against defendants’ right to equitable treatment, the criminal legal system must envision innovative ways to disentangle criminalization decisions from overpunitive policies. Calling for increased sexual assault prosecutions should not be equated with support for harsh carceral practices. Furthermore, it is not only entirely plausible but also conceptually consistent to advocate for a more robust prosecution of sexual assault while simultaneously denouncing harsh incarceration of defendants convicted of these crimes.

Importantly, disentangling the criminalization discourse from the notorious incarceration frenzy that dominated the criminal

registries. *See generally* Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO STATE J. CRIM. L. 335, 349 (2020).

413. *See* Levin, *supra* note 43, at 262 (describing the mass incarceration critique).

414. *See* Sandeep Gopalan, *Skilling’s Martyrdom: The Case for Criminalization Without Incarceration*, 44 U. S.F. L. REV. 459, 504 (2010).

415. *See* Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 94 (2012).

416. *See* Diamantis, *supra* note 317, at 4, 42.

legal system brings home the point that, contrary to conventional wisdom, the objectives of the #MeToo and BLM movements in fact complement, rather than contradict each other. Both movements advance social reforms that are aimed at remedying the legal system's longstanding unfair and unjust treatment of marginalized victims and defendants of crime.⁴¹⁷ Similarly, they amplify minority voices that have historically been silenced under legal and social norms, thus contributing to the empowerment of marginalized victims.

The respective goals of #MeToo and M4BL may therefore be reconciled and harmonized rather than pitted against each other. Enhancing the prosecution of sexual assault as the EPM proposes, *should not* lead to subsequent expansions in punitive measures. This may happen only if the criminal legal system acknowledges the necessity of breaking the familiar connection between conviction and harsh incarceration. To ensure that this conceptual shift is indeed translated into practice, the criminal law must focus on developing effective substitutes to incarceration.

Divorcing criminalization from incarceration requires the implementation of a host of alternatives to punitive measures.⁴¹⁸ The “punitivism or nothing” paradigm that dominates the enforcement of sexual assault crimes illustrates the utter lack of imagination concerning the purposes of criminalization. This binary obscures the fact that some important goals of criminalization, including both general and specific deterrence, may be accomplished through a host of alternative measures that reject harsh punitivism and carceral practices.⁴¹⁹

An important alternative measure draws on the expressive function of criminal enforcement. Commentators have long recognized the criminal law's expressive goal, identifying it as a separate justification for punishment, beyond deterrence and retributivism, given the societal message that criminal conviction itself sends through bringing wrongdoers to trial.⁴²⁰ Professor Joshua Kleinfeld

417. See Margo Kaplan, *Reconciling #MeToo and Criminal Justice*, 17 OHIO STATE J. CRIM. L. 361, 382 (2020).

418. See Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO STATE J. CRIM. L. 53, 75 (2011).

419. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 UNIV. CHI. L. REV. 591, 601–04, 631–34 (1996).

420. See Cass R. Sunstein, *On the Expressive Function of the Law*, 144 UNIV. PA. L. REV. 2021, 2022 (1996); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 70 OR. L. REV. 339, 340 (2000); R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 79–80 (2001); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: General*

has recently developed a version of expressivism referred to as reconstructivism, which focuses on the nature of criminal wrongdoing.⁴²¹ It stresses criminal law's function of reconstructing violated normative order, supporting criminalization as a way of reaffirming society's educative message that offenders' devaluation of victims' interests is wrong.⁴²²

Applying an expressivist-reconstructivist approach is especially suitable for sexual assault crimes, as criminalization offers a powerful tool for conveying social messages that denounce sexual wrongdoing.⁴²³ Professor Michelle Madden Dempsey suggests that sexual assault prosecutions serve an important function of denouncing wrongdoers, thus promoting intrinsic and consequential values.⁴²⁴ This expressive function, she continues, may be accomplished merely by the charging decision itself, even where conviction is unlikely.⁴²⁵

Taken together, carceral consequences should not be viewed as an inevitable or necessary outcome of conviction. Holding wrongdoers criminally accountable for inflicting harm embodies societal condemnation of sexual violence, in itself sending a compelling expressive message, and may suffice, without linking criminalization to any additional punitive measures. Emphasizing the symbolic message that criminalization embodies reaffirms the important message that sexual violence will not be tolerated by the law, while at the same time, recognizing that such affirmation could be accomplished without resorting to lengthy prison terms.

Another innovative measure to promote offenders' accountability without reliance on punitive practices lies with restorative and transformative justice alternatives to punishment. These programs establish offenders' accountability rather than merely punishing them.⁴²⁶ In recent years, commentators elaborated on ways that restorative and transformative justice programs may be

Restatement, 148 UNIV. PA. L. REV. 1503, 1504 (2000). Some scholars incorporate expressivism as one of the many strands of retributivism. See, e.g., Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 113 (2006).

421. See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1498 (2016).

422. *Id.* at 1513.

423. See TUERKHEIMER, CREDIBLE, *supra* note 122, at 217–23; Sheley, *supra* note 67, at 474–75.

424. See Dempsey, *supra* note 16, at 253.

425. *Id.*

426. See Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 892 (2019).

integrated into the criminal legal system as alternatives to incarceration.⁴²⁷ These programs, however, have largely not been implemented in the area of sexual assault as they require the mutual consent of adult defendants and victims.⁴²⁸ Further elaborating on applying these programs to address sexual assault exceeds the scope of this Article, but suffice it to say that *some* sexual assault cases might be suited for such alternatives in lieu of punitive measures.

CONCLUSION

In “I May Destroy You,” a British television HBO series, writer and director Michaela Coel offers a nuanced account of a sexual assault victim’s grappling with the aftermath of the crime.⁴²⁹ The series’ narrative centers on the lingering repercussions of sexual victimization, beginning with the assault itself and culminating in the subsequent healing process. Subtly portraying the fifty shades of emotional trauma following the sexual assault, the series delves not only into questions of consent to sex but also the intersection of race, gender, sexuality, and class.

Inspired by her own experience as a sexual assault survivor, as well as the daughter of Ghanaian immigrants, Coel stars as Arabella, a Black, young writer living in London, who becomes heavily intoxicated and blacks out after someone slipped a rape facilitating drug into her drink, while out for a night at the bar with her friends. Bruised and disoriented, Arabella has flashbacks of a man thrusting against her in a bathroom stall, and quickly realizes that she had fallen prey to a drug facilitated sexual assault. After piecing together from the fragmented images what had happened to her, Arabella reports the crime to the police, and investigation ensues. Later, however, police investigators inform Arabella that in the absence of forensic evidence, and any other leads to an identifiable suspect, the file is closed.

427. See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 223, 228–29 (2003).

428. See Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 716 (2017).

429. See Salamishah Tillet, *I May Destroy You Imagines a Path Back from Sexual Assault*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/arts/television/i-may-destroy-you-sexual-assault.html> [<https://perma.cc/V3BM-9UHS>]; see also Carina Chocano, *‘I May Destroy You’ Is Perfect TV for an Anxious World*, N.Y. TIMES MAG. (July 29, 2020), <https://www.nytimes.com/2020/07/29/magazine/i-may-destroy-you-hbo-michaela-coel.html> [<https://perma.cc/W33B-YZL5>].

Now, consider what would have happened had the crime been committed in an American jurisdiction. Even assuming that a suspect had been identified, it is likely that prosecutors would have chosen not to try this case in court. Arabella's behavior preceding the assault did not fit the traditional script of "blameless" sexual assault victim and the societal expectations surrounding it. The series unabashedly portrays Arabella as what many would characterize as an "imperfect victim," who frequently voluntarily consumes alcohol and recreational drugs. Yet, on the night of the crime, she was involuntarily drugged, which deprived her of any agency and control over her body. Had prosecutors contemplated whether to bring sexual assault charges based on predicting whether a hypothetical jury would convict, it is likely that they would have concluded that the evidence was insufficient to take the case to trial. Such refusal to prosecute the case, however, would have been profoundly marred by disconcerting social misconceptions about sexual assault victims who drink excessively and sometimes choose to engage in occasional sex.

Coel's experience, as she relays in the series, is hardly unique to her. Instead, it epitomizes what many sexual assault victims encounter namely, the legal system's failure to prosecute their rapists. Despite continuous efforts by rape law reformers, sexual assaults largely remain underprosecuted. The problem is especially disconcerting when victims are perceived by prosecutors as "problematic," often due to excessive voluntary consumption of drugs and alcohol.

Moreover, considering the underprosecution of sexual assault through an intersectionality lens exemplifies how the problem is further exacerbated when victims are Black, Indigenous, and People of Color, immigrants, members of the LGBTQ community, or sex workers. Prosecutors' discretionary decisions in refusing to bring sexual assault charges not only shape societal norms about permissible and impermissible sexual conduct, but also reinforces and perpetuates prejudices and biases against sexual assault victims.

The EPM that I develop in this Article offers a civil rights underpinning for theorizing the prosecutor's role, which is specifically tailored to address the problem of underprosecution of sexual assault. It advances social justice goals by rectifying harms that the law historically failed to address, mostly involving marginalized victims who have traditionally been underprotected by the criminal legal system, including people of color. An equitable criminal

legal system must be attentive to the close interrelationship between defendants' and victims' interests. It ought to take into account both defendants' due process rights and victims' interests in holding wrongdoers accountable, being equally protected by the law, and having their long-silenced voices amplified.

Yet, this Article simultaneously emphasizes the necessity of disentangling charging decisions from sentencing questions. Developing a comprehensive theory of criminalization that is not tethered to punitive sanctions exceeds the scope of this Article. Here, I sketch in broad strokes some preliminary thoughts on the need to envision how the goals of criminalization might be accomplished without supporting carceral measures, leaving for future work the task of further theorizing alternative frameworks. Criminal enforcement of sexual assault crimes, however, will remain a necessary tool for addressing the harms of sexual victimization and for expressing strong societal condemnation of gender-based violence as wrongful and blameworthy behavior.