

# Who Is Worthy of Redress?: Recognizing Sexual Violence Injustice Against Women of Color as Uniquely Redress- Worthy—Illuminated by a Case Study on Kenya’s Mau Mau Women and Their Unique Harms

Miyoko T. Pettit<sup>†</sup>

*“Look around you, . . . [e]ven if you closed your eyes—how can I explain?—you cannot imagine what we lived through. How can I possibly explain it to you? All you know of this place is what you see today—the shambas [farms] and the vegetation, our homes, and our livestock. I have to take you to places that no longer exist to explain their meaning . . . How can I make you understand what the British and their Home Guards did to us? I cannot begin to tell you what we experienced in those villages.”*

*—Kenyan Mau Mau woman survivor, Muringo Njooro, in an interview with Harvard historian Caroline Elkins, 1999.<sup>1</sup>*

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<sup>†</sup> JD (2015), University of Hawai’i William S. Richardson School of Law, Korematsu Scholar Advocate; BA, Harvard College (2011). This Article reflects my scholar advocate training and hopefully serves as a praxis contribution to ongoing Mau Mau redress efforts. I am especially grateful to Professor Eric Yamamoto for his invaluable guidance, insightful comments, mentorship, and inspiration; to Professor Susan Serrano for her keen observations and generous feedback; to Professor Alfred Brophy for his enthusiasm and encouragement; and to Dean Avi Soifer for his guidance and support. A special thank you to Eliza Duggan and the editorial board of the *Berkeley Journal of Gender, Law & Justice* for their superb editorial assistance. My deepest gratitude goes to my family—Ted, Catherine Mieko, and Sachiko Pettit—for their patience and support throughout my legal studies and to Silas Oliveira de Toledo for believing in me every step of the way. All mistakes are my own.

1. CAROLINE ELKINS, IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN’S GULAG IN

**ABSTRACT**

*Until recently, reconciliation initiatives tended to ignore specialized harms of sexual violence suffered by women. At the urging of gender scholars and advocates, reconciliation initiatives started acknowledging the unique nature of sexual violence harms to women and began tailoring remedies to address these specialized harms. Yet, though a step in the right direction, even those forward-looking gender-sensitive initiatives have not specifically and forthrightly recognized the unique sexual violence harms to women of color.*

*Race and gender place women of color at the bottom of the social hierarchy, making them particularly vulnerable to sexual violence as part of mass injustice and later often rendering their injuries nearly invisible in the redress process. Yet their severe sexual violence harms are unique, ranging from irreparable reproductive damage, broken relationships, and economic hardship to stigma, isolation, and shame. Why do those fashioning redress tend to largely overlook or ignore these unique sexual violence harms to women of color?*

*This Article responds to this pressing question and modestly refines the recently developed intersectional race-gender redress analysis. It clarifies societal constructions of gender by focusing on one aspect as it intersects with race—sexual violence. The Article calls for a particularized intersectional race-gender redress analysis to recognize sexual violence against women of color as uniquely worthy of redress.*

*Through a case study on Kenya’s Mau Mau women and their unique harms, the Article employs this refined redress analysis and encourages scholars, frontline advocates, policymakers, and survivors and their families to strive for more comprehensive and enduring social healing “by doing justice” for both individual women of color and the polity itself. In doing so, it emphasizes that unveiling and making explicit any implicit intersectional race-gender redress bias might significantly begin changing societal notions about who is worthy of redress.*

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KENYA 234 (2005) (quoting Muringo Njooro, a Mau Mau woman survivor).

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**INTRODUCTION**

Summer 2013 marked the British government’s monumental decision to settle and pay over thirty-one million dollars to over five thousand Kenyan Mau

Mau survivors, political protestors comprised mainly of indigenous Kikuyu.<sup>2</sup> Historic 2011 and 2012 British High Court rulings held that Mau Mau tort claims based on torture and abuse by British colonial officials from 1952 to 1959 could proceed to trial.<sup>3</sup> These claims, at risk of dismissal on procedural grounds, moved forward based on sufficient preliminary evidence.<sup>4</sup> This was a significant step toward healing the decades-old wounds of injustice. In many ways, the High Court rulings and the subsequent settlement provided long-delayed justice for some Mau Mau survivors. But not for all—especially not for all Mau Mau women.

Whereas the government-sanctioned systemic torture and severe beatings of Mau Mau men and women and the castration of Mau Mau men appeared at the forefront of the High Court’s rulings, rape and other forms of sexual violence against Mau Mau women were mentioned only in passing. At times they were notably absent, subsumed under the label of “torture.”<sup>5</sup> When fashioning redress, many focused, perhaps unknowingly, on harms common to men and women or

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2. Eric K. Yamamoto & Susan K. Serrano, *Reparations Theory and Practice Then and Now: Mau Mau Redress Litigation and the British High Court*, 18 ASIAN PAC. AM. L.J. 71, 9-10 (2012). See also Joe Ombour, *Mau Mau Veteran Who Quit Job to Fight Colonialists’ Racism*, STANDARD DIGITAL NEWS (Apr. 26, 2014), <http://www.standardmedia.co.ke/lifestyle/article/2000110281/mau-mau-veteran-who-quit-job-to-fight-colonialists-racism> (noting that the British government also agreed to pay for a memorial monument in Nairobi). According to historian David Anderson, the Mau Mau struggle against British colonists and settlers was largely confined to the Kikuyu, one of Kenya’s ethnic groups. DAVID ANDERSON, HISTORIES OF THE HANGED: THE DIRTY WAR IN KENYA AND THE END OF EMPIRE 4 (2005). “With a population of around 1.4 million in 1948, the Kikuyu occupied the rich highlands in the central region of the colony, close to Nairobi and adjacent to the main areas of white settlement.” *Id.* They were therefore the group “most affected by the colonial government’s policies of land alienation, or expropriation, and European settlement.” ELKINS, *supra* note 1, at 12. According to Anderson, after the Lari attack, in which women and children were killed, “the Mau Mau struggle had become a civil war—a struggle in which all Kikuyu feared for their survival.” ANDERSON, *supra*, at 127. But he observed that to whites living in Kenya at the time, the “Mau Mau rebellion was nothing less than an assault upon the racial supremacy that was the foundation of their society.” *Id.* at 86. British officials, then, attempted to recruit official Kikuyu militia to fight Mau Mau and thereby frame the conflict as a “civil war” and not a “race war that pitted African against European.” *Id.* at 240. A note on terminology: throughout this Article, the term Mau Mau refers to those Kenyan Kikuyu who took or were suspected of taking an oath to fight for their land and freedom. Mau Mau, then, refers to a subsection of the Kikuyu population but does not refer to all those of Kikuyu ethnic background. It is notable, however, that nearly all Kikuyu living in central Kenya during this period were suspected of being Mau Mau and treated as such through detention, torture, and abuse. See *infra* notes 105-106 and accompanying text.
  3. See *Mutua v. Foreign & Commonwealth Office (Mutua II)*, [2012] EWHC 2678 (QB) [100], [160] (Eng.) (allowing claims to proceed to trial); *Mutua v. Foreign & Commonwealth Office (Mutua I)*, [2011] EWHC 1913 (QB) [158] (Eng.) (citing claims as “properly arguable” and “fit for trial”).
  4. See *supra* note 3.
  5. See, e.g., *Mutua II*, [2012] EWHC 2678 at [20] (citing the claim that “the UK government was liable to the claimants in negligence for breach of a common law duty of care in failing to put a stop to what it knew was systematic use of torture and violence upon detainees when it had a clear ability to do so”); *Mutua I*, [2011] EWHC 1913 at [143] (referring to “alleged acts of torture”). See also *infra* Part II.B.3-4.

to only men. Recent Mau Mau redress efforts and litigation proceedings—though a step in the right direction—largely overlook Mau Mau women’s sexual violence harms. A targeted inquiry into the unique harms women experienced might be the next step in redress efforts.

In light of the salutary steps already taken and the strong sense that something significant is missing from comprehensive redress for Mau Mau women, this Article responds to the broader and more pressing question: why are sexual violence injustices against women of color largely overlooked or ignored in redress initiatives?<sup>6</sup> Its responses build upon previous inquiries into women’s harms during periods of systemic violence.<sup>7</sup> They add to the existing literature by illuminating why sexual violence during hostilities is often viewed as an incident of war and not worthy of redress.<sup>8</sup> Most important, through a case study on Mau Mau women and their unique harms, this Article calls for recognition of sexual violence harms against women of color as uniquely redress-worthy.<sup>9</sup>

Mau Mau Women’s Unique Harms. The sexual violence that Mau Mau women experienced from 1952 to 1961 is indescribable—indeed, unimaginable—in our present-day world. Significantly, it was neither unusual nor isolated. Rather, it was characteristic of the British colonial suppression of Mau Mau people fighting for land and freedom.<sup>10</sup> Many female survivors, as highlighted in the epigraph, struggle to find the right words to capture the horrific sexual abuses and atrocities that marked their bodies, minds, and spirits. When they do find the courage to speak up, many recount stories that brought individual and communal tragedy to the indigenous Kikuyu people, Kenya’s

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6. This Article builds upon and contributes to the new field of gender-sensitive and intersectional race-gender sensitive redress. *See, e.g.*, Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, in *IMPLICIT BIAS ACROSS THE LAW* 265 (Justin D. Levinson & Robert J. Smith eds., 2012) (calling for intersectional race-gender sensitive redress to account for implicit redress bias); Michele Park Sonen, *Healing Multidimensional Wounds of Injustice Intersectionality and the Korean “Comfort Women”*, 22 *BERKELEY LA RAZA* L.J. 269 (2012) (employing an intersectional race-gender redress analysis for Korean “comfort women”).
  7. *See, e.g.*, Yamamoto & Sonen, *supra* note 6; Sonen, *supra* note 6.
  8. *See generally* Yamamoto & Sonen, *supra* note 6; Sonen, *supra* note 6.
  9. *See infra* Parts III.D, IV.
  10. *See infra* Parts II.A., III.D., IV. *See generally* ELKINS, *supra* note 1 (detailing the crimes perpetrated by colonial forces against the Mau Mau and the subsequent concealment of this history); ANDERSON, *supra* note 2 (chronicling the rise of the Mau Mau and the often violent British suppression that followed). A thorough review of the literature reveals that the books written by Caroline Elkins and David Anderson are the first of their kind to convey the hidden history of the Mau Mau rebellion and its brutal suppression by the British. *Historical Background (Mau Mau Claims)*, LEIGH DAY, <http://www.leighday.co.uk/International-and-group-claims/Kenya/The-Mau-Mau-claims/Historical-background-to-the-Mau-Mau-claims> (last visited Apr. 12, 2015). Elkins and Anderson also served as expert witnesses and reviewed thousands of newly released documents during the reparations litigation before the British High Court. *See Mutua II*, [2012] EWHC 2678 at [48-49] (stating that the parties agreed to consider the expert witness statements of Elkins and Anderson regarding the newly discovered documents as “akin to published academic articles by learned authors”); *Mutua I*, [2011] EWHC 1913 at [32-36] (citing the expert testimony of Drs. Elkins, Anderson, and Bennett).

largest ethnic group.<sup>11</sup> For instance, one survivor recalled, “When the Johnnies and Home Guards came, they would rape you, in full sight of your father-in-law, and he would not say a word of protest. . . . Even your own daughters could be raped in your sight, and you wouldn’t protest or prevent it.”<sup>12</sup> Esther Muchiri remembered, “[S]ome [soldiers] would deliberately be left behind to rape you. If you happened to have a nasty one, he would force a bottle inside your private parts. It was painful . . . .”<sup>13</sup>

Many other survivor stories detail similar acts of sexual violence, including British colonial officials shoving banana leaves, vermin, bottles, hot eggs, knives, and rifles into their vaginas or mutilating their breasts with pliers.<sup>14</sup> Others found themselves helpless as they watched soldiers rape their loved ones in front of them.<sup>15</sup> Or awaited the choice between public rape and death.<sup>16</sup> For many, these emotional memories, along with severe subsequent physical injuries, psychological trauma, and economic damage, are open wounds—festering, re-inflicting pain, and waiting to be healed over sixty years later.<sup>17</sup>

Redress for Sexual Violence as It Intersects with Race. When fashioning redress and litigation strategy, many involved recognized the pervasive racism and systemic ill treatment of Kikuyu Kenyans—most of whom were suspected Mau Mau supporters.<sup>18</sup> But at the intersection of race and sexual violence, rooted in societal constructions of gender,<sup>19</sup> Mau Mau women were characterized as the most inferior and stigmatized group in Kenya.<sup>20</sup> They were thereby susceptible to uniquely horrific and lasting sexual violence harms. Their experiences, however, were largely not part of public consciousness—they were not reflected in public discourse,<sup>21</sup> court documents,<sup>22</sup> the out-of-court settlement,<sup>23</sup> stories,

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11. The Kikuyu were Kenya’s largest ethnic group at the time of the Mau Mau uprising. See ELKINS, *supra* note 1, at xi.
  12. *Id.* at 254 (quoting a Mau Mau woman survivor).
  13. *Id.* (quoting Mau Mau survivor Esther Muchiri).
  14. *Id.* at 66; see also *infra* notes 360–362 and accompanying text.
  15. ELKINS, *supra* note 1, at 254.
  16. See *id.* at 244 (explaining that if women resisted rape then it “could lead to summary execution or further torture before consideration of a life or death judgment,” often in public).
  17. While this Article focuses mainly on sexual violence, Mau Mau women endured other forms of gendered harms. For instance, British colonial officials also forced Mau Mau women to do hard labor with their newborn infants left to die under the scorching sun and demanded that they bury the dead in mass graves, including bundles of six babies at a time. ELKINS, *supra* note 1, at 228, 264.
  18. See *supra* note 2 and accompanying text.
  19. See *infra* notes 179–181 and accompanying text.
  20. See *infra* Part III.D.3.
  21. See *infra* Part II.B.2. Public discourse, before and during the first round of litigation, mainly focused on the “unspeakable acts of brutality,” including strongly emphasizing castration, beatings, and general “systemic torture”—mostly inflicted against men or implicitly characterized as harms common to men and women. See Ian Cobain, *Mau Mau Torture Case: Kenyans Win Ruling Against UK*, GUARDIAN (Oct. 5, 2012), <http://www.theguardian.com/world/2012/oct/05/mau-mau-veterans-win-torture-case> (citing human rights lawyers referring to Mau Mau harms as “unspeakable acts of brutality” as well

official records, or even human rights accounts<sup>24</sup>—because their unique harms have been devalued in the redress-worthiness hierarchy. Mau Mau women’s unique harms were often deemed as less worthy, or even unworthy, of redress. Yet their pain is real and alive. Mau Mau women disproportionately continue to deal with desolation and shame not common to other Kenyans.<sup>25</sup>

Recent redress efforts did not specifically address the myriad ways that the British colonial government, through its detention system, inflicted life-long physical, emotional, economic, and cultural harms on Mau Mau women because of their identities as women of color. This likely reflects “implicit biases even among those seeking to ‘do the right thing.’”<sup>26</sup> Therefore, the time is ripe to

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as one of the judges of the British High Court saying that there was “ample evidence in the few papers . . . suggesting that there may have been systemic torture of detainees during the Emergency” and referring to the specific harm of “castration” to men, but not to the mass “rape” of Mau Mau women); *see also* Kharunya Paramaguru, *Justice for the Mau Mau: Court Case in the U.K. Sheds Light on Grim Colonial Past*, TIME (Oct. 10, 2012), <http://world.time.com/2012/10/10/justice-for-the-mau-mau-court-case-in-the-u-k-sheds-light-on-grim-colonial-past> (noting that the “three claimants offer harrowing details of the sexual violence that took place in the detention camps” but focusing on Nzili’s castration); Corydon Ireland, *Mau Mau at Peace: Kenyan Fighters Reflect on Their Struggles Against a Colonial Ruler*, HARV. GAZETTE (Sept. 22, 2011), <http://news.harvard.edu/gazette/story/2011/09/mau-mau-at-peace> (focusing on the story of three male Mau Mau survivors and the sexual abuses they endured during the 1950s). More recently, however, with another round of reparations litigation underway before British courts, a journalist pointed out that many other victims, besides Mau Mau fighting for freedom, were “civilians, including [Kikuyu] women and children, caught in a dragnet of colonial retribution. Many were murdered, and thousands suffered abuse or sexual assault during interrogation.” Katie Engelhart, *British Government Says It Did Not Operate ‘System’ of Abuse in Colonial Kenya*, VICE NEWS (Dec. 17, 2014), <https://news.vice.com/article/british-government-says-it-did-not-operate-system-of-abuse-in-colonial-kenya>.

22. *See infra* Part II.B.3. Court documents and decisions touched upon rape and sexual violence against Mau Mau women but mostly highlighted abuses against men. *See Mutua II*, [2012] EWHC 2678 [35–46] (citing allegations of sexual abuse to both male and female litigants); *Mutua I*, [2011] EWHC 1913 [1] (describing alleged injuries to all claimants as “physical mistreatment of the most serious kind, including torture, rape, castration, and severe beatings”). As this Article goes to press, Mau Mau claimants with the help of British law firms are pursuing another round of reparations litigation with a more “generalist” strategy in defining “harms” and “damages” and with some 41,000 claimants registered. *See Engelhart, supra* note 21. If the case goes to trial, then the High Court will test twenty-five cases presumably “to devise a formula for attaching price tags to various forms of half century-old pain.” *Id.*
23. *See infra* Part II.B.4. The out-of-court settlement included compensation for about 5,200 Mau Mau survivors “with sufficient evidence of torture”—without distinction as to gender. Lewis Smith, *Kenyan Mau Mau Veterans to Get £14m Torture Settlement from Britain*, INDEPENDENT (June 5, 2013), <http://www.independent.co.uk/news/uk/politics/kenyan-mau-mau-veterans-to-get-14m-torture-settlement-from-britain-8646564.html>.
24. One of the few places where their experiences are documented is in the history written by Harvard Professor Caroline Elkins, who conducted hundreds of interviews with Mau Mau men and women. *See generally* ELKINS, *supra* note 1, at xiv–vi.
25. *See infra* Parts III.D.3., IV.A.
26. *See* Yamamoto & Sonen, *supra* note 6, at 245. “Beyond employment discrimination law and criminal law, however, scholars have been slower to consider deeply the way implicit biases propagate inequality throughout the legal system.” Justin D. Levinson, *Introduction: Racial Disparities, Social Science, and the Legal System*, in IMPLICIT BIAS ACROSS THE LAW,

redress Mau Mau women's persisting harms as well as the unique harms suffered by all women of color.

To address this type of implicit bias,<sup>27</sup> scholars continue to call for new approaches to redress initiatives. In 2006, human rights scholars Colleen Duggan and Adila Abusharaf noted the absence of gender-sensitive redress<sup>28</sup> and "determined that women were twice harmed—once during the underlying atrocity and again during the redress process."<sup>29</sup> Following these initial observations calling for a new field of gender-conscious redress, reparations scholar Ruth Rubio-Marín encouraged "conceptualizing forms of redress tailored to women."<sup>30</sup> She illuminated redress initiatives that did not comprehensively address women's unique harms<sup>31</sup> and later underscored the importance of

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*supra* note 6, at 6.

27. Implicit bias, as a social scientific concept, often has two key parts. First, it is implicit, in the sense that "it is generally outside the awareness and control of a person." IMPLICIT BIAS ACROSS THE LAW, *supra* note 6, at 3. Second, it is biased, such that "it disproportionately affects people in meaningful ways." *Id.* It encompasses both implicit stereotypes and implicit attitudes of others. JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS, NAT'L CTR. FOR STATE COURTS 1–2 (2009), available at <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx>. Implicit bias "reveals how human mental machinery can be skewed by lurking stereotypes, often bending to accommodate hidden biases reinforced by years of social learning." IMPLICIT BIAS ACROSS THE LAW, *supra* note 6, at 2. Social scientists rely on implicit social cognition, the scientific underpinning of implicit bias whereby human minds automatically and categorically sort incoming information, to demonstrate how people potentially "rely on racial and gender stereotypes in almost any law-relevant situation, even without awareness that they are doing so." *Id.* Implicit social cognition helps guide human thinking about social categories and derives from experiences with other people, either directly through real-world encounters or vicariously through stories, books, movies, media, and culture. KANG, *supra*, at 1.

Implicit bias, then, at times also helps "explain not only the continued subordination of historically subordinated groups but also the legal system's complicity in that subordination." IMPLICIT BIAS ACROSS THE LAW, *supra* note 6, at 2. For an in-depth treatment of implicit bias in the law, see Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Justin D. Levinson, Huajian Cai & Danielle Young, *Guilt by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

This Article acknowledges both explicit and implicit racial and gender bias. It attempts to make intersectional implicit redress bias explicit by calling for recognition of sexual violence against women of color as uniquely redress-worthy. Other explanations for racist or sexist tendencies in redress are beyond the scope of this Article.

28. See Colleen Duggan & Adila Abusharaf, *Reparations of Sexual Violence in Democratic Transitions: The Search for Gender Justice*, in THE HANDBOOK OF REPARATIONS 623, 626 (Pablo de Greiff ed., 2006).
29. Yamamoto & Sonen, *supra* note 6, at 249 (citing Duggan and Abusharaf's role in developing gender-sensitive redress theory). "UN Women, the United Nations organization dedicated to gender equality and the empowerment of women, implores policymakers to acknowledge that 'women bear the brunt of modern conflicts.'" *Id.* at 246.
30. Ruth Rubio-Marín, *Introduction* to WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS 20, 27 (Ruth Rubio-Marín ed., 2006) [hereinafter WHAT HAPPENED TO THE WOMEN?].
31. See generally WHAT HAPPENED TO THE WOMEN?, *supra* note 30.

gender-sensitive redress.<sup>32</sup> Gender-conscious redress then emerged as a new field and continues to “gain[] traction globally.”<sup>33</sup>

Most recently, redress scholars Professor Eric Yamamoto and Michele Park Sonen advanced the idea that an intersectional race-gender analysis is essential to ascertaining real world redress.<sup>34</sup> They noted that while gender-sensitive redress is a major advancement by bringing women to the forefront, redress for harms specific to women of color is still missing.<sup>35</sup> Drawing on intersectionality theory,<sup>36</sup> illuminated through the work of Professors Kimberlé Crenshaw, Mari Matsuda, and Angela Harris, Yamamoto and Sonen proposed “reframing redress”<sup>37</sup> to focus on unique harms “suffered by those at the bottom of a social hierarchy determined by race and gender.”<sup>38</sup> Sonen later elaborated on this approach to eliminating redress bias through a case study on harms particular to Korean World War II military sex slaves, sometimes referred to as “comfort women.”<sup>39</sup>

Recognizing Sexual Violence Injustice Against Women of Color. Building upon the work of these scholars, this Article modestly refines the intersectional race-gender analysis.<sup>40</sup> More specifically, it clarifies societal constructions of

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32. See Ruth Rubio-Marín, *Gender and Collective Reparations in the Aftermath of Conflict and Political Repression*, in *THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES* 192, 195 (Will Kymlicka & Bashir Bashir eds., 2008).

33. Yamamoto & Sonen, *supra* note 6, at 249. For instance:

In October 2010 the United Nations called for financial assistance, health care, and education for victims of systemic sexual violence in the conflict-ridden Democratic Republic of Congo—a country labeled the ‘rape capital of the world.’ Amnesty International recently called for repairing the damage of gender violence committed during the recent Bosnian and Herzegovinian wars.

*Id.*

34. See generally *id.*

35. See *id.* at 254–57.

36. Intersectionality theory refers to the conceptual underpinnings whereby scholars challenge the dominant ways of thinking about discrimination. These mainly feminist scholars propose that multiple perspectives better account for the complex experiences of subordinated groups, especially women of color. Intersectionality theory then is a response to the “single-axis” conceptual limitations that treat “race and gender as mutually exclusive categories of experience and analysis.” Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139, 149 (1989). See also Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 8 (1989) (urging advocates to embrace “consciousness of the experience of life under patriarchy and racial hierarchy”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that white feminist scholars sometimes adopt gender essentialist views that ignore the unique experiences of women of color).

37. See Eric K. Yamamoto & Ashley Kaiyo Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5 (2009) (highlighting the need to “reframe” redress initiatives). See generally Yamamoto & Sonen, *supra* note 6; Sonen, *supra* note 6.

38. Yamamoto & Sonen, *supra* note 6, at 256.

39. See Sonen, *supra* note 6.

40. See *infra* Part III.C.

gender<sup>41</sup> by focusing on one aspect as it intersects with race—that is, sexual violence. Sexual violence is unique because in many ways it is both horrific at the time it occurs and in its aftermath. Yet sexual violence against *women of color* seems to receive the lowest consideration in the redress-worthiness hierarchy.

This tightening of the gender analysis partly explains why sexual violence as it intersects with race is often overlooked in redress initiatives, such as those slighting African American slave women,<sup>42</sup> Guatemalan indigenous women,<sup>43</sup> Korean military sex slaves,<sup>44</sup> and Jeju women.<sup>45</sup> In light of the new field of gender-sensitive redress and the emerging intersectional race-gender redress analysis, and because extensive sexual violence during hostilities is now a crime against humanity or a war crime warranting redress,<sup>46</sup> this Article particularizes intersectional race-gender redress analyses to recognize sexual violence against women of color as uniquely worthy of redress. This Article thus attempts to unveil and make explicit any implicit intersectional redress bias.

To do so, Part I discusses the theoretical underpinnings of redress and social healing. Part II uses a case study on Mau Mau women's unique harms to reveal how present-day discourse and recent redress efforts are limited and insufficient because they largely overlook Mau Mau women's past and persisting wounds. Part III highlights how an intersectional race-gender redress analysis explains the lack of recognition of sexual violence harms against women of color. That section begins by describing generally gender-conscious redress and intersectional race-gender redress theories. Then, through various case studies, Part III illuminates how implicit intersectional redress bias often renders nearly invisible the unique sexual harms to women of color. Part IV justifies a refined intersectional race-gender redress analysis that recognizes sexual violence against women of color as uniquely redress-worthy. To do so, it employs a *recognition* inquiry—the first R of Yamamoto's *social healing through justice* framework—to examine the different harms resulting from sexual violence injustice against Mau Mau women. Finally, Part IV applies the refined intersectional race-gender redress analysis set forth in this Article. In doing so, Part IV emphasizes that making explicit any implicit intersectional redress bias might significantly begin changing societal notions about who is worthy of redress. An overview of redress for historic injustices, then, is a good starting point.

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41. See discussion *infra* Part III.A.

42. See Yamamoto & Sonen, *supra* note 6, at 25–29.

43. See *id.* at 255–56. See also *infra* Part III.C.1.

44. See generally Sonen, *supra* note 6. See also *infra* Part III.C.2.

45. See *infra* Part III.C.3. See also Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 ASIAN-PAC. L. & POL'Y J. 1, 5–5 (2014).

46. See *infra* notes 215–224 and accompanying text.

### I. REDRESS FOR HISTORIC INJUSTICE

Redress generally encompasses a government's response, through words or actions, to remedy historic injustice.<sup>47</sup> According to Professor Eric Yamamoto, redress is integral "to the future of civil society, both for long-standing democracies committed to human rights and for countries transitioning from repressive regimes to democratic governance."<sup>48</sup> Yet comprehensive and enduring healing for those injured and society itself is often illusive because of the shifting discourse of redress.

The language of redress evolved over time from *reparations* to *reconciliation* and *social healing*.<sup>49</sup> These terms all at some point signified redress in the broadest sense of healing wounds and repairing the damage wrought by injustice.<sup>50</sup> Over time, confusion surrounding some of these terms constrained their meanings.<sup>51</sup> Reparations served as the catchphrase of redress.<sup>52</sup> Initially, the term reparations represented government actions that genuinely seek to repair the damage and heal wounds, such as public apologies and educational campaigns.<sup>53</sup> Reparations now singularly connote monetary compensation to individuals.<sup>54</sup> Because of this narrow casting of reparations, the

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47. See generally Yamamoto & Obrey, *supra* note 37 (broadly discussing redress and reparative justice).

48. *Id.* at 7. In particular, Yamamoto and Obrey point out that when a government participates in redressing wrongs committed, that redress action not only begins to foster reparative justice, but it also bolsters that government's legitimacy as a democracy actually committed to civil and human rights. See *id.*

Whether a country heals persisting wounds is increasingly viewed as integral (1) domestically, to enable its communities to deal with pain, guilt, and division linked to its past in order to live peaceably and work productively in the future, and (2) globally, to claim legitimacy in the eyes of the world as a democracy truly committed to civil and human rights (which affects a country's standing to participate in matters of international security and responsible economic development).

*Id.*

49. *Id.* at 20.

50. See *id.* For a very thorough and insightful discussion of reparations, including "possibilities for the future," see ALFRED L. BROPHY, REPARATIONS PRO & CON 16–79 (2006).

51. Yamamoto & Obrey, *supra* note 37, at 20 ("[R]eparations supporters have expressed concern about the public narrowing of the very idea of reparations—that the concept now tends to mean individual money payments and exclude apologies, institutional restructuring, or community restoration. . . . For these reasons, the language of redress is shifting away from reparations and towards social healing, or what is often broadly termed reconciliation."). See also *id.* at 2–1, 2–7 (describing how reparations theory and practice "stand at a crossroads" and explaining the "mid-life crisis of reconciliation").

52. *Id.* at 18 (noting that "reparations discourse and advocacy have been the refrain of the redress realm").

53. *Id.* at 2–1.

54. *Id.* at 8. See also Rubio-Marín, *supra* note 30, at 24 (discussing how reparations were initially a "principle of interstate responsibility linked to the commission of an internationally wrongful act"). According to reparations scholar Ruth Rubio-Marín, reparations may now be the "most tangible manifestation of the efforts of the state to remedy the harms victims have suffered." *Id.* at 23 (quoting Pablo de Greiff, *Introduction* to THE HANDBOOK OF REPARATIONS 1, 1–2 (Pablo de Greiff ed., 2006)).

redress discourse shifted toward social healing, or more broadly reconciliation.<sup>55</sup> “[W]ith an emphasis on the individual and societal benefits of storytelling, apologies, symbolic payments, [institutional restructuring] and public education,” reconciliation emerged as a “high [priority] on many established democracies’ political agendas.”<sup>56</sup>

Reconciliation is an exploding global phenomenon. The United States has issued congressionally-approved and presidentially-delivered apologies to Japanese Americans for race-based internment during World War II<sup>57</sup> and to Native Hawaiians for their loss of nationhood in 1893.<sup>58</sup> Globally, many countries have attempted to redress historic injustices through formal reconciliation initiatives, including Canada,<sup>59</sup> Chile,<sup>60</sup> Peru,<sup>61</sup> Colombia,<sup>62</sup> Guatemala,<sup>63</sup> South Africa,<sup>64</sup> Morocco,<sup>65</sup> Sierra Leone,<sup>66</sup> Kenya,<sup>67</sup> Timor-Leste,<sup>68</sup> Indonesia,<sup>69</sup> Cambodia,<sup>70</sup> and South Korea.<sup>71</sup> Other countries have

55. Yamamoto & Obrey, *supra* note 37, at 20.

56. *Id.* at 2–1.

57. See generally ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2d ed. 2013).

58. See Yamamoto & Obrey, *supra* note 37, at 2–4.

59. See *id.* at 23.

60. See, e.g., *Reparations*, INT’L CENTER FOR TRANSITIONAL JUST., <http://www.ictj.org/our-work/transitional-justice-issues/reparations> (last visited Apr. 22, 2015) (detailing that “[f]rom 1996 to 2008, the Chilean government paid more than \$1.6 billion in pensions to certain victims of the Pinochet regime, and established a specialized health care program for survivors of violations” as well as issuing a presidentially-delivered formal apology).

61. See, e.g., CRISTIÁN CORREA, INT’L CTR. FOR TRANSITIONAL JUSTICE, REPARATIONS IN PERU: FROM RECOMMENDATIONS TO IMPLEMENTATION (2013), available at [http://www.ictj.org/sites/default/files/ICTJ\\_Report\\_Peru\\_Reparations\\_2013.pdf](http://www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf) (describing Peruvian efforts and shortcomings in implementing reconciliation recommendations).

62. See, e.g., *Colombia*, INT’L CENTER FOR TRANSITIONAL JUST., <http://www.ictj.org/our-work/regions-and-countries/Colombia> (last visited Apr. 22, 2015) (describing recent reconciliation efforts for Colombia).

63. Yamamoto & Sonen, *supra* note 6, at 255–56 (examining Guatemalan redress efforts).

64. See generally Eric K. Yamamoto & Brian MacKintosh, *Redress and the Salience of Economic Justice*, 4 OXFORD F. PUB. POL’Y 1 (2010) (assessing South Africa’s redress efforts).

65. See, e.g., *Reparations*, *supra* note 60 (explaining that the “Moroccan government is currently implementing both individual and community-based reparations for over 50 years of widespread abuse,” including “funding for projects proposed by communities that were previously deliberately excluded from development programs for political reasons”).

66. See, e.g., *id.* (describing the 2010 presidential apology to women victims of Sierra Leone’s ten-year armed conflict along with “ongoing efforts to distribute modest compensation, rehabilitation, and other benefits to eligible victims”).

67. See, e.g., *Kenya*, INT’L CENTER FOR TRANSITIONAL JUST., <https://www.ictj.org/our-work/regions-and-countries/Kenya> (last visited Apr. 22, 2015) (describing reconciliation efforts in Kenya).

68. Yamamoto & Obrey, *supra* note 37, at 26 (highlighting the government’s gender-sensitive approach to redress efforts).

69. See, e.g., *Indonesia*, INT’L CENTER FOR TRANSITIONAL JUST., <http://www.ictj.org/our-work/regions-and-countries/indonesia> (last visited Apr. 22, 2015) (describing reconciliation efforts in Indonesia).

70. See, e.g., *Reparations*, *supra* note 60 (“The Extraordinary Chambers in the Courts of Cambodia ordered symbolic and collective reparations in the court’s first conviction for

informally endeavored to repair damage and heal wounds.<sup>72</sup> Now, Kenya and Great Britain are taking steps toward redressing the historic and persisting wounds of Mau Mau survivors.<sup>73</sup> Mau Mau redress, then, is situated among these global reconciliation initiatives.

Reconciliation “can be of considerable social value as a sometimes promising though difficult pathway to redress.”<sup>74</sup> On the other hand, it is at times “amorphous and often leaves policymakers and advocates working in the dark, without guidance or accountability.”<sup>75</sup> As a vague term, reconciliation “can serve as an insincere cover for indifference or continuing hostilities and power grabs.”<sup>76</sup> According to Yamamoto, reconciliation efforts are experiencing a “mid-life crisis,” so advocates are looking to new analytical concepts and language for continuing the redress discourse.<sup>77</sup> *Social healing through justice*, Yamamoto’s evolving framework grounded in theory and workable in practice, now provides the conceptual and analytical tools to shape, assess, implement, and revitalize reconciliation initiatives.<sup>78</sup>

Social healing “by doing justice” draws on social psychology, theology, law, economic justice, political theory, and indigenous practices, as well as emerging international human rights principles of reparative justice.<sup>79</sup> That is, social healing embraces mutual engagement by all with some responsibility of repairing the damage wrought by injustice.<sup>80</sup> For Yamamoto, these disciplines “address[] specific processes for healing the wounds of injustice, illuminating both salutary prospects and limitations.”<sup>81</sup>

The disciplines coalesce into six working principles,<sup>82</sup> which provide a “conceptual foundation for approaches to repairing the damage of collective trauma linked to group-based injustice.”<sup>83</sup> These principles ground social

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crimes against humanity . . . [and] ordered that the names of victims of a notorious prison be listed in the Court’s website, as well as the apologies issued by the convicted person.”).

71. See Tae-Ung Baik, *Fairness in Transitional Justice Initiatives: The Case of South Korea*, 19 BUFF. HUM. RTS. L. REV. 169, 178–79 (2012) (describing transitional justice initiatives in South Korea).

72. See, e.g., Yamamoto & Obrey, *supra* note 37, at 22 (describing less formal reconciliation efforts in New Zealand and Australia).

73. See generally discussion *infra* Part III.

74. Yamamoto & Obrey, *supra* note 37, at 27.

75. *Id.* at 8.

76. *Id.*

77. *Id.*

78. See *id.*

79. See *id.* at 31–32; see generally ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (2000). “Social healing” is now the preferred term to describe the ultimate goals and concepts of redress initiatives. See Yamamoto & Obrey, *supra* note 37, at 20 (“[T]he language of redress is shifting away from reparations and towards social healing, or what is often broadly termed reconciliation.”).

80. See *id.* at 31–32; see generally YAMAMOTO, *supra* note 79.

81. See Yamamoto, Pettit & Lee, *supra* note 45, at 8.

82. See *id.* at 18–19.

83. See *id.* The six working principles are:

healing's four points of inquiry, or 4Rs—*recognition, responsibility, reconstruction, and reparation*.<sup>84</sup> The 4Rs at the heart of Yamamoto's *social healing through justice* framework “assist groups and governments first in shaping a particular redress initiative and then in assessing whether the effort is on the path toward genuine social healing.”<sup>85</sup> Additionally, they guide reconciliation leaders and governments “to make appropriate implementation adjustments in light of changing conditions.”<sup>86</sup>

*Recognition*, the first point of inquiry in *social healing through justice*, serves as an appropriate tool in examining what is missing in present-day redress efforts for Mau Mau women survivors.<sup>87</sup> As elaborated in Part IV, the *recognition* inquiry into Mau Mau redress also suggests that genuine social healing requires a refined intersectional race-gender analysis—recognizing that sexual violence as it intersects with race is especially worthy of redress.<sup>88</sup> That is, comprehensive redress calls for *recognition* of unique sexual violence harms against women of color as a crucial component of the *responsibility, reconstruction, and reparation* dimensions.<sup>89</sup>

## II. WHAT'S MISSING?: MAU MAU WOMEN'S UNIQUE HARMS IN REDRESS

An understanding of current Mau Mau redress initiatives and their incomplete recognition of Mau Mau women's unique sexual violence harms grounds this Article. In particular, through a case study on Mau Mau redress initiatives, this section seeks to illuminate “what's missing” for Mau Mau women. More broadly, it attempts to highlight that the unique harms of women of color are often missing, or rendered nearly invisible, at all stages of redress. To better set the stage for an examination of current Mau Mau redress efforts, this section begins with a brief historical account of the Mau Mau rebellion.

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(1) [M]utual engagement by those responsible in some fashion and a convergence of their interests in social healing; (2) equality and fair treatment and at least a partial leveling of one group's power over the other; (3) reparative measures addressing both the individual and the communal (or societal); (4) economic capacity-building and financial assistance for those harmed in ways that foster autonomy and self-determination; (5) a blend of words and actions that encompass acknowledgments of harms and causes, acceptance of responsibility, and reconstruction of relationships in order to fully repair the damage; and (6) anticipation and handling of the risks of backlash and incompleteness.

*Id.* at 18–19.

84. *Id.* at 20. For an elaboration of the 4Rs, with detailed examples and descriptions, see YAMAMOTO, *supra* note 79; *see also* Yamamoto, Pettit & Lee, *supra* note 45, at 20–21; Yamamoto & Obrey, *supra* note 37, at 3–6.

85. Yamamoto & Obrey, *supra* note 37, at 33.

86. Yamamoto, Pettit & Lee, *supra* note 45, at 20.

87. *See infra* Part IV.

88. *See infra* Part IV.

89. *See infra* Part IV.

### A. A Brief Historical Background of Mau Mau Women's Experiences

From 1952 to 1961, some indigenous Kikuyu inhabitants of central Kenya<sup>90</sup> launched the Mau Mau rebellion, an anti-colonial mass peasant uprising against British settlers, officials, and supporters.<sup>91</sup> Mau Mau supporters, mainly comprised of Kikuyu men, women, and children of all ages, responded to British colonial displacement of indigenous peoples and dispossession of nearly sixty thousand acres of arable lands.<sup>92</sup> After sixty years under British colonial rule, they fought for “*ithaka na wiyathi*,” or “land and freedom.”<sup>93</sup> Most Mau Mau sought to address social inequality, economic limitations on work and housing opportunities, and deterioration of indigenous culture.<sup>94</sup> More specifically, many sought to restore their identities as Kikuyu because “[t]o be a man or a woman—to move from childhood to adulthood—a Kikuyu had to have access to land.”<sup>95</sup> For these reasons, almost all Mau Mau, known as “freedom fighters,” supported Kenyan independence from British colonial rule.<sup>96</sup>

The British colonial government, it appears, did not take any specific steps to respond to the legitimate grievances and concerns of individual Mau Mau, or to directly address a few apparently violent Mau Mau-related killings of a relatively small number of British colonists, settlers, and Kikuyu loyalists.<sup>97</sup> Instead, the British colonial government attempted to suppress the rebellion.<sup>98</sup> Instituting an “Emergency Operation,” British colonial officials and police detained nearly all Kikuyu people, among whom were many Mau Mau

90. See *supra* note 11 and accompanying text.

91. See ELKINS, *supra* note 1, at xi-xii; see also ANDERSON, *supra* note 2, at 4–5.

92. See ELKINS, *supra* note 1, at 12; see also ANDERSON, *supra* note 2, at 22 (noting that Kikuyu wanted the land that had been taken from them, amounting to some 60,000 acres).

93. ELKINS, *supra* note 1, at xi. See also *id.* at 28 (explaining that the ambiguity and specificity of the fight for “land and freedom” appealed to all and thus made it very difficult for the British to suppress).

94. *Id.* at 23–25.

95. *Id.* at 14. The British dispossession of Kikuyu from their ancestral lands had far-reaching social impacts. According to Caroline Elkins, land was central to Kikuyu culture:

A man needed land to accumulate the resources necessary to pay bridewealth for a wife, or wives, who would in turn bear him children. Land and family entitled him to certain privileges within the Kikuyu patriarchy; without land a man would remain socially a boy. A woman needed land to grow crops to nurture and sustain her family; without it in the eyes of the Kikuyu she was not an adult. A Kikuyu could not be a Kikuyu without land.

*Id.*; see also ANDERSON, *supra* note 2, at 151 (“The slaughter of women and children had its reason: it signified the denial of inheritance, a determination that those who had rejected their obligations toward dependents and subverted custom to claim land as property for themselves should not be allowed to benefit.”).

96. See ELKINS, *supra* note 1, at 25–30.

97. For many government officials, according to David Anderson, “[t]here were no grievances or justifiable claims to be aired by the Kikuyu; only an illness, a mental disease” and “their own inability to grapple with the challenges of modernity.” ANDERSON, *supra* note 2, at 280.

98. “Viewed from the perspective of white Kenyans, the Mau Mau rebellion was nothing less than an assault upon the racial supremacy that was the foundation of their society.” *Id.* at 86; see ELKINS, *supra* note 1, at 31–61.

supporters, and burned entire villages.<sup>99</sup> Through their “villagization,”<sup>100</sup> “screening,”<sup>101</sup> “rehabilitation,”<sup>102</sup> and “dilution”<sup>103</sup> processes, white British officials and Kikuyu loyalists<sup>104</sup> tortured, severely beat, and killed many suspected Mau Mau.<sup>105</sup> Some colonial officials, it appears, adopted the approach that “only by detaining nearly the entire Kikuyu population of 1.5 million people and physically and psychologically atomizing its men, women, and children could colonial authority be restored and the civilizing mission reinstated.”<sup>106</sup>

According to Harvard journalist Corydon Ireland, “[a]t least 11,000—and perhaps as many as 50,000—black Kenyans died, half of them children. About 80,000 were imprisoned [and summarily detained] . . .”<sup>107</sup> The British colonial government first detained thousands of men and a few so-called “hardcore” women in the “Pipeline,”<sup>108</sup> its comprehensive “gulag” system at the heart of the suppression operation.<sup>109</sup> Government-sanctioned broadscale violence and terror marked the widespread detention system.<sup>110</sup> The British colonial government’s violent suppression of the Mau Mau rebellion devastated individuals and families and tore apart communities.<sup>111</sup>

99. See ELKINS, *supra* note 1, at 43. The “Emergency” allowed the British colonial government to derogate the European Convention of Human Rights and sanction government-sponsored torture, brutality, detention without trial, and other violations in the name of protecting the “life of the nation.” See *id.* at 314. It provided a loophole to justify the British colonial government’s often violent actions and policies. See *id.*

100. See *id.* at 233–74.

101. See *id.* at 62–90.

102. See *id.* at 91–120.

103. See *id.* at 311–53.

104. According to Elkins, loyalist was a specific “term for any Kikuyu who would actively fight on the side of the British government against the Mau Mau movement and who in return would be granted privileges that would far outweigh anything that previously had been granted to the chiefly community during the years leading up to the war.” *Id.* at 29.

105. See *generally id.* (detailing that the gulag system was marked by torture, assault, and severe treatment of Mau Mau detainees).

106. *Id.* at xv.

107. Corydon Ireland, *Putting History on Trial: In Case Involving Kenyan Abuse, Scholarship Must Fit Legal Rubric*, HARV. GAZETTE (Feb. 7, 2012), <http://www.news.harvard.edu/gazette/story/2012/02/putting-history-on-trial>. Blood was on the hands of nearly all involved in the conflict. *Id.* Yet only thirty-two white civilians were killed compared to thousands of Mau Mau who were killed by the British or died during detention. *Id.*

108. See ELKINS, *supra* note 1, at 109 (noting that Askwith coined the term “Pipeline” to denote the progression from “initial detention through ever more benevolent rehabilitation activities to ultimate release”).

109. See ANDERSON, *supra* note 2, at 200–12 (describing “Operation Anvil” or the screening process of nearly all Kikuyu for detention without trial).

110. Guards beat and castrated males, raped women, and tortured many. See ELKINS, *supra* note 1, at 73. Other documented abuses included “forced sodomies with broken bottles and vermin and snakes” and dragging Mau Mau people behind trucks “until they were left in bits.” *Id.*; Interview by Michael Martin with Caroline Elkins, *Mau Mau Settlement: How Much Cash Fixes the Past?*, NAT’L PUB. RADIO (June 13, 2013), available at <http://www.npr.org/templates/story/story.php?storyId=191316147>.

111. ANDERSON, *supra* note 2, at 7 (“British justice in 1950s Kenya was a blunt, brutal and unsophisticated instrument of oppression.”).

This overarching narrative has thus far dominated public consciousness about the Mau Mau rebellion and its violent suppression.<sup>112</sup> It served as the focal point of the recent reparations litigation and settlement discussed below.<sup>113</sup> Beyond the realm of the Pipeline, however, Mau Mau women's unique harms have largely remained invisible, with the exception of Harvard historian Caroline Elkins's groundbreaking revisionist history published in 2005.<sup>114</sup> The horrific harms Mau Mau women endured, detailed in Elkins's book and described in Part IV,<sup>115</sup> are only now beginning to enter public discourse.<sup>116</sup> Many today still fail to acknowledge the British colonial government's unique detention of suspected Mau Mau wives, mothers, daughters, and sisters in guarded villages—and the unspeakable harms perpetrated within those villages.<sup>117</sup>

### B. Mau Mau Women's Devalued Sexual Violence Harms

What is clear from the prevailing historical narrative, described above, and from present-day redress efforts is this: sexual violence harms to Mau Mau women are hardly acknowledged at all phases of redress, and thereby are not considered uniquely worthy of redress. Immediately following the end of detention and British colonial rule and with the emergence of an independent Kenya, many survivors found themselves banned from speaking about their harms until the early 2000s. At that juncture, the reparations litigation before the British High Court brought global attention to the historic injustices Mau Mau experienced—but not necessarily those of Mau Mau women. Moreover, the subsequent out-of-court reparations settlement largely failed to acknowledge and account for many Mau Mau women's persisting harms.

The following sections detail how even salutary redress efforts (perhaps unintentionally) relegated Mau Mau women's unique harms to the bottom of the redress-worthiness hierarchy. Their harms, then, remain largely unaddressed. Over sixty years later, Mau Mau women still suffer from deep, persisting physical, emotional, and psychological wounds as well as economic injustice.<sup>118</sup>

#### 1. Post-Colonial Silencing

In post-colonial Kenya, Mau Mau women were silenced. The British colonial government dismantled the Pipeline system, and Kenya declared

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112. See ANDERSON, *supra* note 2; ELKINS, *supra* note 1.

113. See *infra* Part II.B.3–4.

114. See generally ELKINS, *supra* note 1.

115. See *infra* Part IV. Historian David Anderson references in a few places the treatment of Mau Mau women, but their specific harms are largely missing from his historical account. See generally ANDERSON, *supra* note 2.

116. See *infra* Part IV.

117. See ELKINS, *supra* note 1, at xiv (acknowledging the lack of attention to Mau Mau women in historical accounts).

118. For a general explanation of how women are “doubly” and “triple” marginalized, see *infra* note 195 and accompanying text.

independence in 1963.<sup>119</sup> The Kenyan government, however, banned any mention of the atrocities and branded Mau Mau as terrorists (not “freedom fighters”).<sup>120</sup> According to Professors Eric Yamamoto and Susan Serrano, Mau Mau were not able to tell their story or seek reparative justice:

[T]heir characterization as terrorists legally shielded the British government from reparation claims because under the Geneva Convention governments were not liable for the harsh treatment of prisoners engaged in terrorism. Post-independence Kenyan leadership maintained the ban and buried the memory of Mau Mau ostensibly to promote national unity . . . . Later Kenyan leadership also suppressed the memory of Mau Mau in history books and independence celebrations.<sup>121</sup>

Prevailing racist and sexist views deployed during the conflict might account for this initial silencing.<sup>122</sup> Post-colonial leadership, it appears, sought to normalize relations with Great Britain, eliminate any potential claims, and maintain the systems of oppression that controlled the majority of Kenyans during the colonial period.<sup>123</sup>

While this labeling and silencing applied to both Mau Mau men and women, it was the women who were additionally branded among their community as undesirable. Mau Mau men frequently abandoned their wives for raising illegitimate children resulting from sexual assaults by white British or Kikuyu loyalists.<sup>124</sup> They also often rejected them for being incapable of reproducing more children.<sup>125</sup> Silence then served as a coping mechanism for many Mau Mau women who were too ashamed, fearful, or bitter to tell the truth of the horrors they experienced.<sup>126</sup> But for numerous Mau Mau women, their inability to openly discuss their festering wounds publicly or privately with their families further marginalized them.<sup>127</sup>

A shift came for the Mau Mau people in 2002 when Kenyans elected Mwai Kibaki, a Kikuyu from Nyeri, who uprooted previous corrupt leadership and ended the fifty-six-year-old Mau Mau ban.<sup>128</sup> Soon thereafter, Mau Mau

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119. See ELKINS, *supra* note 1, at 353–67 (describing the end of British colonial rule and the emergence of an independent Kenya).

120. Yamamoto & Serrano, *supra* note 2, at 81.

121. *Id.* at 91 (citations omitted); see also ANDERSON, *supra* note 2, at 336 (quoting President Jomo Kenyatta’s written statement that “Mau Mau was a disease which has been eradicated and must never be remembered” and describing how “public memories of detention camps, of massacres, of punishments, and of dispossession were suppressed”).

122. See *infra* Part III.D.

123. See ELKINS, *supra* note 1, at 353–67 (describing post-colonial life in Kenya).

124. See *infra* notes 336–337 and accompanying text.

125. See *infra* notes 367–369, 375 and accompanying text.

126. See *infra* notes 370–372 and accompanying text.

127. See *infra* note 185 and accompanying text (explaining that, even when women are subject to the same harms as men, women often experience these harms in unique ways).

128. See Yamamoto & Serrano, *supra* note 2, at 91.

survivors and families began to openly discuss their experiences and created the Mau Mau War Veterans' Association.<sup>129</sup> With Kenyan government support, the Veterans' Association sought an accurate written history of the rebellion, particularly for elderly Kenyan survivors.<sup>130</sup> The town of Nyeri and the Kenya National Archives in Nairobi also attempted to memorialize the Mau Mau struggle.<sup>131</sup> This seemed to be a step in the right direction as the first stage of Mau Mau redress.

## 2. Public Discourse

In 2003, when a few veterans appealed for redress from the British government, public discourse spotlighted Mau Mau survivors' experiences.<sup>132</sup> Around the same time, the Republic of Kenya created the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission to determine if Kenya needed a formal truth commission.<sup>133</sup> The Task Force heard accounts of suffering during Kenya's colonial era, but it ultimately decided to focus only on the post-colonial period after the Mau Mau conflict.<sup>134</sup> Although the Task Force "went out of its way to encourage and recognize women speakers," only a few women participated.<sup>135</sup> Despite directly recognizing gendered harms to other Kenyan women, including rape, discrimination, and economic injustice, the Task Force's report did not specifically mention the unique harms Mau Mau women experienced.<sup>136</sup> The report vaguely referred to "colonial atrocities" against Mau Mau freedom fighters.<sup>137</sup> Mau Mau women's unique harms thus remained in the shadows of these initial redress efforts.

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129. *See id.*

130. *See id.*

131. *See* ANDERSON, *supra* note 2, at 337–38 (describing the creation of a museum and public access to photographs and film shows in the national archives).

132. *See* Yamamoto & Serrano, *supra* note 2, at 91–92.

133. *See* Makau Mutua, *Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15, 15 (2004).

134. *See* Yamamoto & Serrano, *supra* note 2, at 91–92; *see also* Mutua, *supra* note 133, at 18, 46–47 (citing the impractical circumstances surrounding an investigation into colonial human rights violations).

135. *See* Mutua, *supra* note 133, at 20.

136. *See id.* at 20–21 (citing deep concern for the low numbers of women at the Task Force hearings and acknowledging Kenya's "deeply embedded prejudices, policies, and traditions that have historically marginalized women and made them invisible in the public square"). The Task Force's report also recognized that "[h]uman rights violations and the economic crimes committed by the state have a special gendered effect on women, [which] is why violations against women have disproportionately multiplied adverse effects and are rarely addressed." *Id.* at 2–1. The Task Force further acknowledged that a truth commission must heed special attention to the "participation of women and the abuses perpetrated against them" or face being of little "beneficial value in addressing the plight of women." *Id.* at 21. Yet, despite these cognizant claims, the Task Force declined to recognize the sexual abuses perpetrated by both Kenyan loyalists and British colonists during the Mau Mau uprising. *See id.* at 4–7.

137. *See* Mutua, *supra* note 133, at 46 (describing why colonial atrocities against Mau Mau freedom fighters were not a viable option for inclusion in the truth commission).

The Mau Mau War Veterans' Association appealed to the Kenya Human Rights Commission for more than this limited investigation.<sup>138</sup> Based partly on the work of historians delving into colonial-era abuses, the Commission initiated a Mau Mau Reparations Campaign.<sup>139</sup> At the same time, the Commission hired a British law firm to form a Mau Mau reparations legal team.<sup>140</sup> This legal team then interviewed forty-two potential claimants for a justice suit, amongst whom two women and three men were chosen.<sup>141</sup>

Before filing suit, the Commission requested an official apology from the United Kingdom's Foreign and Commonwealth Office in 2007.<sup>142</sup> When these efforts were deemed futile, partly because the British government refused to engage, the Mau Mau reparations legal team filed an appeal for trial with the Royal Courts of Justice in the United Kingdom.<sup>143</sup> This appeal seemed like a valuable opportunity to directly recognize and begin healing Mau Mau women's wounds—especially with two female litigants alleging sexual violence harms.

Yet at this point, public discourse revolved around “unspeakable harms,” which alluded to the torture that both Mau Mau men and women endured.<sup>144</sup> It did not focus on Mau Mau women's specific sexual violence injustices that continued to plague many elderly female survivors. Nor did it suggest that redress efforts should focus on these open, lingering wounds. It did not acknowledge the multiple and continuing ways that sexual violence deeply injured many Mau Mau women physically, psychologically, emotionally, and economically, or the ways sexual violence stigmatized the women socially.<sup>145</sup>

Persistent implicit biases against women of color provide one compelling explanation for how this public discourse rendered Mau Mau women's unique harms nearly invisible.<sup>146</sup> The reparations team and other advocates leading redress efforts—nearly all men with their own explicit or implicit intersectional race-gender biases—may be another.<sup>147</sup> Because policymakers, advocates, and members of the public likely viewed sexual violence as another type of physical

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138. See Yamamoto & Serrano, *supra* note 2, at 92.

139. See *id.* at 91.

140. See *id.*

141. The veterans selected were between the ages of seventy-five and eighty-four. See Corydon Ireland, *Justice for Kenya's Mau Mau*, HARV. GAZETTE (Sept. 1, 2011), <http://news.harvard.edu/gazette/story/2011/09/justice-for-kenya's-mau-mau>. “The five were chosen because they represented some of the abuses that occurred in the Mau Mau era.” *Id.* Two of the claimants, including Susan Ciong'ombe Ngondi, died during the litigation. *Id.*

142. *Id.*

143. See Ireland, *supra* note 21.

144. See *supra* note 21 and accompanying text.

145. See *infra* Parts III.D., IV.

146. See generally discussion *infra* Part III.A–C. (exploring the underpinnings and recent developments of intersectional race-gender redress theory and why unique sexual violence harms against women of color tend to be ignored or overlooked in redress); see also *supra* note 27.

147. See generally discussion *infra* Part III.D. (illuminating implicit intersectional race-gender bias through the Mau Mau reparations litigation case study).

harm common to Mau Mau men and women, they treated Mau Mau women's harms the same as those of Mau Mau men.<sup>148</sup> Despite the inclusion of two Mau Mau female litigants, these biases erected further roadblocks to redressing Mau Mau women's unique injuries.

### 3. Court Documents

The next phase of Mau Mau redress, a reparations lawsuit, appeared at the time to remedy the public discourse's lack of attention and blurred understandings of Mau Mau women's unique harms. In 2009, the plaintiffs, Ndiku Mutwiwa Mutua, Paulo Nzili, Wambugu Wa Nyingi, Susan Ngondi, and Jane Muthoni Mara, with support from their community, initiated litigation before the British High Court and sought redress from the British government for its historic colonial injustices from 1952 to 1961.<sup>149</sup> In particular, they sought economic justice (including symbolic payments) and a formal public apology.<sup>150</sup> They also asked the British government to acknowledge its human rights violations and accept responsibility for healing the lingering harms of many Mau Mau survivors, including those harms arising out of mass rape and sexual abuses of women.<sup>151</sup>

The lawsuit stalled for many months until the British Foreign and Commonwealth Office publicly released thousands of British administration files in 2011.<sup>152</sup> The "smoking gun" documents, approximately 8,800 files in over 300 boxes containing more than 20,000 pages of notes, letters, and reports from thirty-seven colonies, shifted the case in favor of the Mau Mau litigants.<sup>153</sup> The documents revealed that some British colonial officials in Kenya directly authorized the violent suppression and detention of presumed Mau Mau and that several British officials and ministers in London were aware of these abuses

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148. See *infra* Parts III.A–B., IV.

149. *Mau Mau Case: UK Government Cannot Be Held Liable*, BBC NEWS (Apr. 7, 2011), <http://www.bbc.co.uk/news/uk-12994190>.

150. *Id.* At the same time of the litigation, the Kenya Human Rights Commission sought an apology directly from then-Prime Minister Gordon Brown and his foreign secretary, David Miliband. See Ireland, *supra* note 141. The group initially sought "an official apology, a welfare fund for surviving Mau Mau, community reparations such as schools or hospitals, and small monthly stipends for the veterans." *Id.*

151. See *Mau Mau to Sue UK for Compensation*, DAILY NATION (May 10, 2009), <http://www.nation.co.ke/News/-/1056/595996/-/u67str/-/index.html>.

152. See Paramaguru, *supra* note 21.

153. See *Mutua II*, [2012] EWHC 2678 (QB) [48]–[49] (Eng.) (citing the discovery of the Hanslope park documents); *Mutua I*, [2011] EWHC 1913 (QB) [32]–[36] (noting the review of recently discovered factual evidence by historian expert witnesses). See also Alvin Powell, *Justice by Committee: Elkins' Team Scoured Documents to Aid Kenyans in Mau Mau Case*, HARV. GAZETTE (Dec. 12, 2012), <http://www.news.harvard.edu/gazette/story/2012/12/justice-by-committee> (detailing the extent of the "document dump"); Paramaguru, *supra* note 21 (noting that the discovery of the hidden documents occurred in "Hanslope Park, the government communications centre located north-west of London").

abroad.<sup>154</sup> The British High Court ruled that this was sufficient evidence to take the case to trial and solidified a legal claim for reparations.<sup>155</sup>

But by this point in the litigation, one of the female claimants, Susan Ngondi, alleging that she was subjected to “regular rapes perpetrated by soldiers and white settlers,” had died, and her claims could no longer proceed.<sup>156</sup> The other female litigant, Jane Muthoni Mara, claimed sexual assault.<sup>157</sup> Her claim, however, had more or less been subsumed under the label of “torture.”<sup>158</sup> In this way, the High Court and attorneys seemingly adopted a gender-blind approach, failing to treat these sexual harms as distinctly horrific and lasting.<sup>159</sup> Many Mau Mau women’s unique harms were thus slowly pushed out of the litigation and more broadly, once again, out of public consciousness.

Moreover, most claims drawing the Court’s attention did not specifically address the unique harms that Mau Mau women suffered at the intersection of race and sexual violence. The High Court often framed the claims as a “system of torture of detainees in the camps in Kenya during the Emergency” or “misconduct in the treatment of detainees.”<sup>160</sup> In a few instances, the Court referred to “rape” and “humiliating (and partly sexual) torture.”<sup>161</sup> The Court notably described that one of the female claimants was “sexually assaulted by vaginal penetration with a glass bottle in an attempt to extract a confession” and that the other claimant suffered similar harms.<sup>162</sup> Yet in the Court’s fifty-five-page opinion, the specific descriptions of these unique sexual harms received seven written lines of attention.<sup>163</sup> By contrast, the Court spent more than a full page describing harms to the male claimants and other acts of “torture.”<sup>164</sup>

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154. *See Thousands of Kenyans May Receive Reparations from Britain for Mau Mau Atrocities*, AFRICAN GLOBE (May 7, 2013), <http://www.africanglobe.net/Africa/thousands-kenyans-receive-reparations-britain-mau-mau-atrocities> (“In the case of the Mau Mau conflict, the secret papers showed that senior colonial officials authorized appalling abuses of inmates held at the prison camps established during the bloody conflict, and that ministers and officials in London were aware of a brutal detention regime in which men and women were tortured and killed.”).

155. *See supra* note 4 and accompanying text.

156. *Mutua I*, [2011] EWHC 1913 at [42]. *See also Mutua II*, [2012] EWHC 2678 at [161]–[162] (dismissing Ngondi’s claims after her death). For more details about Mrs. Ngondi’s death and the end of her claims, *see supra* note 141 and accompanying text.

157. *See Mutua II*, [2012] EWHC 2678 at [45] (describing how Mara was “sexually assaulted by vaginal penetration with a glass bottle in an attempt to extract a confession from her admitting to taking the Mau Mau oath”).

158. *See id.* at [35] (describing the “seriously humiliating (and partly) sexual torture and other ill-treatment” to which the claimants were subjected).

159. *See discussion infra* Part IV. *See also infra* note 196 and accompanying text.

160. *Mutua I*, [2011] EWHC 1913 at [134], [148].

161. *Mutua II*, [2012] EWHC 2678 at [35].

162. *See id.* at [45]–[46].

163. *See id.*

164. *See id.* at [37]–[44]. Generally, the Court used the legal terms of “assault,” “battery,” “negligence,” and “torture” to characterize harms to Mau Mau survivors. *See id.*; *Mutua I*, [2011] EWHC 1913 at [113]. An analysis of why the Court limited itself to those terms is beyond the scope of this Article but would be an interesting point for further research.

Though another step in the right direction, the reparations litigation efforts, led by two British male attorneys,<sup>165</sup> reflected well-known implicit biases stemming from the intersection of racism and sexism.<sup>166</sup> The Court, apparently with its own implicit biases,<sup>167</sup> generally failed to accord effective remedies to Mau Mau women, revealing gender bias and the privileging of black men over black women.<sup>168</sup> Most Mau Mau women therefore experienced double marginalization at this stage, and their specific sexual harms remained largely unaddressed.

#### 4. An Out-of-Court Settlement

An out-of-court settlement, as one of the more recent phases of Mau Mau redress, resurrected some hope of redress for harms Mau Mau women suffered. By summer 2013, the British government abruptly ended litigation proceedings and agreed to an out-of-court settlement, which included paying about 21.5 million pounds to some 5,200 torture survivors.<sup>169</sup> To many, the monumental settlement was the first step in reconciliation between the British government and Kenyan Mau Mau.<sup>170</sup> Expressions of “deep regret” coupled with recognition of the abuses and sufferings at the hands of British officials and police were enough for many survivors.<sup>171</sup>

But to an extent, the settlement left out many Mau Mau women. Elderly victims “who were found to have been tortured” each received around 4,100 pounds.<sup>172</sup> The broad category of “torture,” however, seemingly obscured Mau Mau women’s unique sexual harms. At this settlement stage, Mau Mau women were at least triply marginalized.<sup>173</sup>

Once again, policymakers, advocates, and members of the public apparently did not consider sexual violence perpetrated against women of color during hostilities to be a unique human rights transgression meriting an effective remedy. Collective understandings of race and gender, infused with explicit or

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165. See *The Mau Mau Claims*, LEIGH DAY, <http://www.leighday.co.uk/International-and-group-claims/Kenya/The-Mau-Mau-claims> (last visited Feb. 28, 2014) (noting that Daniel Leader and Martyn Day were lead counsel on the reparations litigation).

166. See *infra* Part IV.

167. See *infra* note 202 and accompanying text; see also *supra* note 27 and accompanying text (describing implicit bias in general).

168. See *infra* note 202 and accompanying text.

169. See Gregory Katz & Jason Straziuso, *British to Pay Kenyans Tortured During Colonial Rule*, GRIO (June 6, 2013, 2:33 PM), <http://www.thegrio.com/2013/06/06/british-to-pay-kenyans-tortured-during-colonial-rule/#s:elderly-mau-mau-16x9>.

170. *Id.*

171. See *id.*

172. *Id.*

173. Mau Mau women were first marginalized during the initial sexual injustice. They were doubly marginalized during the court proceedings when public discourse focused attention on the historic wounds. At the settlement stage, they became triply marginalized because the British government neither acknowledged their unique sexual harms nor provided any redress for those harms.

implicit biases against women suffering from sexual violence injustice, help to explain this reality.<sup>174</sup> Perhaps those leading the efforts blamed Mau Mau women for their sexual violence harms or viewed sexual violence injustice as collateral damage, a secondary effect of war or even the spoils of war.<sup>175</sup> It is also possible that they took a gender-blind approach, assuming that Mau Mau men and women experienced violence in the same way.<sup>176</sup>

To date, the absence of an effective remedy for Mau Mau women's uniquely horrific and lasting sexual harms has apparently bolstered public patriarchal attitudes about gender and racial inequality.<sup>177</sup> More broadly, these implicit biases in redress, at the intersection of racism and sexism (elaborated in Part IV), affirm that there is little recognition of sexual violence harms against women of color.<sup>178</sup>

### III. WHY ARE THEY MISSING?: THE UNDERPINNINGS AND RECENT DEVELOPMENTS OF INTERSECTIONAL RACE-GENDER REDRESS THEORY

As suggested above, even progressive policymakers tend to overlook sexual violence against women of color as a significant harm worthy of redress. This is partly because sexual violence against women is often subsumed under the broad category of gender, and therefore it is sometimes deemed not uniquely worthy of repair. In many ways, this raises the question anew: what is gender?

Gender is an all-encompassing, ill-defined, socially-constructed category with many societal understandings and overlapping pieces. Accordingly, there exist differing approaches to the social construction of gender. From one approach, gender is a social construction like race. According to Professors Michael Omi and Howard Winant, race is a socially-constructed phenomenon determined by social, economic, and political forces on two levels of social relations: the micro- and macro-level.<sup>179</sup> Gender is similarly a dynamic and fluid social construct established both by the ways people understand themselves and interact with others (micro-level) and by social structures and common ideologies of society, including cultural and stereotypical beliefs of gender (macro-level).<sup>180</sup> Appearance, the physical body and its reproductive functions, interpersonal relations, professional and cultural roles, and sexual matters contribute to both the micro- and macro-levels of gender. Sexual violence

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174. See *infra* Part IV. See also *supra* note 27 and accompanying text (generally describing implicit bias).

175. See *infra* notes 206–210 and accompanying text.

176. See *infra* note 196 and accompanying text.

177. See *infra* Parts III.D., IV.

178. See discussion *infra* Part III.D., IV.

179. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2014) (articulating various paradigms of race and setting forth a theory of racial formation).

180. See generally *id.* at 10–16 (describing the theory of racial formation and its micro- and macro-levels).

against women is deeply implicated in all of these socially constructed aspects of gender. Significantly, sexual violence underscores the pervasiveness and severity of gender-based violence.<sup>181</sup>

From another perspective, sexual violence is an expression of the social construct of gender that submerges women as second-class citizens.<sup>182</sup> According to human rights scholar Rhonda Copelon, “At the core of the construction of gender are hierarchy and hetero-normativity. The hierarchy favors males and dis-empowers females, [often] channeling them into less visible or less valued roles . . . .”<sup>183</sup> Under this construction of gender,<sup>184</sup> women experience unique injuries at the bottom of this hierarchy (or patriarchy). Consequently, sexual violence against women is rendered nearly invisible and thereby devalued as a significant harm warranting redress. Yet sexual violence against women is unique and especially deserving of recognition because in many ways it is as horrific in its consequences as it is at the time of the injustice.

Gender-sensitive redress, described below, emerged as an initial response to healing harms specific to women, including sexual violence. Yet, despite this major practical and theoretical advancement, sexual violence against women is often unaddressed, and harms to women of color are almost entirely absent from many ongoing redress initiatives. Intersectional race-gender redress theories, also described below, fill this theoretical gap and provide a better understanding of why harms to women of color have been largely rendered invisible in redress discourse and action. A careful look at these recent theoretical developments, however, reveals that they miss something crucial—that is, recognition of sexual violence injustice against women of color is especially redress-worthy. This section points out that implicit intersectional redress bias—which places women of color’s sexual violence harms at the bottom of the redress-worthiness hierarchy—largely accounts for the lack of recognition to sexual violence as it intersects with race.

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181. The International Center for Transitional Justice (ICTJ) defines “gender-based violence” as “violence that targets individuals or groups of individuals on the basis of their gender [and] includes ‘acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.’” INT’L CTR. FOR TRANSITIONAL JUSTICE, THE ACCOUNTABILITY GAP ON SEXUAL VIOLENCE IN KENYA: REFORMS AND INITIATIVES SINCE THE POST-ELECTION CRISIS 2 (2014) [hereinafter THE ACCOUNTABILITY GAP], available at <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-SGBVAccountability-2014.pdf> (basing this definition on the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (1992), [www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19](http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19)).

182. See Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. CITY L. REV. 229, 234 (2008).

183. *Id.*

184. The social construction of gender is constantly shifting and evolving. Some consider these social constructions of gender as distinct from one another while others consider that they work together and overlap in many respects. This interpretation is based on the author’s own understanding of gender.

## A. Gender-Sensitive Redress Theory

### 1. The Emergence of Gender-Sensitive Redress Theory

Gender-sensitive redress theory is a developing field that initially emerged as a response to redress initiatives' failure to comprehensively heal women's wounds.<sup>185</sup> In 2002, the government of Timor-Leste, with support from women's groups who demanded redress mostly for pervasive sexual abuse, launched a groundbreaking redress initiative that specifically integrated a gender perspective.<sup>186</sup> Women in Timor-Leste experienced unspeakable harms—mainly mass starvation, murder, torture, rape, and sexual slavery—for over twenty years under Indonesian military occupation.<sup>187</sup> By the time Timor-Leste gained independence in 1999, and after repeated failures to prosecute offenders in court, women mobilized and demanded redress.<sup>188</sup>

For the first time ever, Timor-Leste's Commission for Reception, Truth, and Reconciliation detailed gender-specific harms and devoted the final chapter of its report to sexual violence.<sup>189</sup> The report called for a specific focus on reparative justice for women.<sup>190</sup> For example, it stated that at least fifty percent of resources and compensation should be allocated to women and called for "group therapy sessions and practical skill-building workshops."<sup>191</sup> Some now view this redress initiative as especially significant "[b]ecause later political upheaval stall[ed] final reparations for all."<sup>192</sup>

Following this path-breaking example of a gender-sensitive redress initiative, scholars began to underscore the need for global gender-conscious redress.<sup>193</sup> In 2006, human rights scholars Colleen Duggan and Adila Abusharaf noted the absence of gender-sensitive redress,<sup>194</sup> and "determined that women were twice harmed—once during the underlying atrocity and again during the

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185. For gender-sensitive redress scholars and others, gender is "one of several important social categories, which is also cross-cut by other axes of difference, including age/life-cycle position, marital status, ethnicity, race, religion, class, and caste." Colleen Duggan, *Foreword* to *WHAT HAPPENED TO THE WOMEN?*, *supra* note 30, at 15. It is also "shaped by political, economic, social, and cultural relations and contexts." *Id.* For an example of a redress initiative that failed to adequately heal women's wounds and a discussion of how South Africa's Truth and Reconciliation Commission marginalized women's suffering, see Yamamoto & Sonen, *supra* note 6, at 247–48.

186. *Id.* at 247–48.

187. *Id.*

188. *Id.*

189. See Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste (CAVR), *Reconciliation*, CAVR-TIMORLESTE.ORG, <http://www.cavr-timorleste.org/en/reconciliation.htm> (last visited May 5, 2015) [hereinafter *Reconciliation*] (presenting the official site and findings of the Timor-Leste Truth and Reconciliation Commission); see also Yamamoto & Sonen, *supra* note 6, at 248.

190. See *Reconciliation*, *supra* note 189; see also Yamamoto & Sonen, *supra* note 6, at 248.

191. See *Reconciliation*, *supra* note 189; see also Yamamoto & Sonen, *supra* note 6, at 248–49.

192. Yamamoto & Sonen, *supra* note 6, at 249.

193. See *id.*

194. See Duggan & Abusharaf, *supra* note 28, at 626.

redress process.”<sup>195</sup> Duggan and Abusharaf explained that “[w]hile policymakers are coming to understand that men and women experience political violence differently, the vast array of public policies being designed to redress the consequences of violence and facilitate democratic transition continue to be largely gender-blind.”<sup>196</sup>

Building upon these initial observations calling for a new field of gender-sensitive redress, reparations scholar Ruth Rubio-Marín encouraged “conceptualizing forms of redress tailored to women.”<sup>197</sup> Rubio-Marín’s book *What Happened to the Women?* is one of the first examples of incorporating gender into transitional justice initiatives.<sup>198</sup> She illuminated that genuine justice for women is incomplete because “reparations programs to help victims of gross violations of human rights have not focused on the forms of victimization that women are more commonly subject to, nor are they designed with an explicit gender dimension in mind.”<sup>199</sup>

Through case studies on redress initiatives that did not comprehensively address women’s unique harms, Rubio-Marín underscored that gender plays a critical role in redress.<sup>200</sup> More specifically, gender is important in defining harms, crimes, violations, benefits and beneficiaries of reparations, and implementation policies and programs.<sup>201</sup> She warned, however, that “the challenge of avoiding gender bias is just as present when reparations are decided in courts or compensation tribunals.”<sup>202</sup> The need for gender-sensitive redress,

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195. Yamamoto & Sonen, *supra* note 6, at 249 (citing Duggan and Abusharaf’s role in developing gender-sensitive redress theory). Ruth Rubio-Marín describes the quest of her cutting-edge book on gender-sensitive redress as the “need to redress a history of double marginalization: the marginalization of victims within the framework of the larger debates that take place in transitional and post-conflict societies, and within it, the marginalization of women.” Rubio-Marín, *supra* note 30, at 22. Colleen Duggan also observed, “[W]omen are often doubly or even triply marginalized when it comes to post-conflict reparations schemes.” Duggan, *supra* note 185, at 17.

196. Duggan & Abusharaf, *supra* note 28, at 624.

197. Rubio-Marín, *supra* note 30, at 27.

198. See Duggan, *supra* note 185, at 16.

199. Rubio-Marín, *supra* note 30, at 23. Ruth Rubio-Marín observed that initiatives in South Africa, Germany, Chile, Brazil, and Argentina are stalled because gender-sensitivity has been absent. See *id.* Most recently, however, Brazil’s National Truth Commission (*Comissão Nacional de Verdade*) presented its final report on human rights violations by the military dictatorship (1964–1985), which included a chapter entitled “Sexual Violence, Gender Violence and Violence Against Women and Children.” See Danica Jorden, *Brazil Truth Commission Details Extent of Rape During Military Dictatorship*, UPSIDE DOWN WORLD (Jan. 16, 2015, 9:10 AM), <http://upside-downworld.org/main/brazil-archives-63/5187-brazil-truth-commission-details-extent-of-rape-during-military-dictatorship>. The truth commission detailed the “use of rape and sexual violence as a weapon” against those who opposed the dictatorship, especially political and social activists, and described “how women, including nuns, were raped, how rapes were carried out in the presence of partners and children, and how sexual violence was also committed against victims who were ultimately killed.” *Id.*

200. See generally *WHAT HAPPENED TO THE WOMEN?*, *supra* note 30.

201. See Rubio-Marín, *supra* note 30, at 26.

202. *Id.* at 28.

then, is an evolving endeavor.

These scholars and others attempt to understand and answer the “misunderstood and underresearched questions: Can governments in new or reforming democracies hope to repair the particular forms of gendered harm suffered by their populations during periods of political violence and repression? Can this be achieved through the integration of gender concerns into the conceptualization of [government]-sponsored massive reparations schemes?”<sup>203</sup> In particular, they continue to underscore that women suffer unique harms even if they experience the same violations as men during times of violence.<sup>204</sup> More broadly these scholars highlight how new approaches to gender sensitivity in redress initiatives might lead to more genuine social healing.<sup>205</sup>

## 2. Sexual Violence Against Women in Redress Initiatives

Despite these advancements in gender-sensitive redress, sexual violence, especially against women of color, tends to be ignored as uniquely worthy of redress. Insufficient recognition of sexual violence against women is not a new phenomenon but has historical roots. In particular, patriarchy and women’s traditional societal roles have rendered women uniquely vulnerable to sexual violence.

For thousands of years until recently, mass sexual violence against women was often seen as collateral damage or a necessary secondary effect of war—the “spoils of war” to which soldiers of the winning side were entitled.<sup>206</sup> Sexual violence was a strategic tool of political and military oppression.<sup>207</sup> In many ways, “women [had] become an indirect tool of political violence, a means to achieve a political end.”<sup>208</sup> This was especially true when pain was inflicted on individuals as a means of destroying culture and tearing apart the social fabric.<sup>209</sup>

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203. Duggan, *supra* note 185, at 15.

204. *See id.* More importantly, the accounts of women’s experiences in conflict show that, even when women are subject to the same violations as men, their pre-existing socioeconomic and legal status, as well as the cultural meanings around the construction of the male and the female in patriarchal societies, may imply that the ensuing harms for men and women are not the same. Rubio-Marín, *supra* note 30, at 22.

205. *See* Duggan, *supra* note 185, at 16.

206. *See* Duggan & Abusharaf, *supra* note 28, at 626. Underlying this view are questions of power and control structured by notions of patriarchal privilege or entitlement. *Id.* Class and ethnic inequalities reinforce this “entitlement approach” as justification for violence against women. *Id.*; *see also* Copelon, *supra* note 183, at 235 (“Internationally, although the laws of war called for protection against rape and implicitly embraced it within its prohibitions, rape was generally treated as the reward of soldiers, an inevitable, collateral, even if not felicitous consequence of war, and was rarely prosecuted until the mid-1990s.”); Laura C. Turano, Note, *The Gender Dimension of Transitional Justice Mechanisms*, 43 N.Y.U. J. INT’L L. & POL. 1045, 1047 (2011) (noting that rape is viewed as a “natural by-product of war” and that “images of ‘rape and pillage’ can be found in popular mythology, religious writings, art, and novels”).

207. *See* Duggan & Abusharaf, *supra* note 28, at 626.

208. *Id.*

209. *See id.*

Women often had no chance of escaping sexual violence even after the initial injustice occurred.<sup>210</sup> In many cases, women were “revictimized” once the conflict ended.<sup>211</sup> The injuries of sexual violence were, and continue to be, pervasive and appalling for both individual women and the larger community.

Until recently, many governments, human rights institutions, leaders, and advocates did not consider sexual violence during hostilities to be a human rights transgression.<sup>212</sup> Instead, they often justified and legitimized sexual violence injustice.<sup>213</sup> Relatively new treaties and developments in international law, however, have marked a shift away from this view.<sup>214</sup>

International humanitarian and human rights law as well as international criminal law now recognize extensive sexual violence harms during hostilities.<sup>215</sup> For instance, sexual violence is a crime “against family honor and

210. *See id.* at 627–28.

In the aftermath of political violence, women often find themselves faced with increasing responsibilities while living in extremely precarious conditions. . . . It has also been noted that in the aftermath of violence, women often lose what few material assets they have when widows return to villages to find that they have lost established property rights or that their land has been given by a local chief to a demobilized combatant. In addition to general health and mental health problems, the precarious nature of women’s living conditions, especially victims of sexual violence and those who are heads of family, can lead them into prostitution and other dangerous practices which put their health and lives at great risk.

*Id.* at 628.

211. According to Duggan and Abusharaf, “a large part of the problem hinges upon the fact that citizenship formation, even in countries undergoing democratic transition, is a highly gendered enterprise; that is, women are not treated as equal citizens.” *Id.* at 627.

212. Human rights scholar Rhonda Copelon noted that discussion among an “all-male conference of experts” at the Inter-American Commission of Human Rights at first opposed recognizing rape as a grave human rights violation in 1994 when “asked by a coalition of women’s groups and advocates in Haiti and the United States to declare that official and tolerated unofficial rape under the illegal Cedras regime was torture.” Copelon, *supra* note 182, at 236. Copelon noted some exchanges of the discussion of all-male participants:

One of the commissioners proposed that rape be recognized as torture. Another member objected in words to the effect: ‘You put it in, you take it out. I don’t see what the big deal is.’ The first then reminded the Commissioners that it couldn’t write rape out of torture when it had consistently treated the picana (electric prod) on the penis as torture.

*Id.* at 236–37.

213. *See id.* Even today, according to Copelon, “[r]ape remains one of the most common but least prosecuted or punished offenses in both domestic and international contexts.” *Id.* at 235.

214. Men predominantly led many governments and human rights institutions that did not recognize sexual violence injustice as a violation or crime. *See supra* note 212 and accompanying text. Shifts in global equality between men and women, allowing more women to assume leadership positions, may also account for a shift away from former views on sexual violence injustice. There may also be other reasons as well, but such an inquiry is beyond the scope of this Article.

215. This is a relatively recent development. Many treaties and “documents purporting to regulate armed conflicts commonly fail to recognize the effect of sexual violence on the victim or acknowledge other forms of harm targeted at women during armed conflicts.” Turano, *supra* note 206, at 1048. According to Duggan and Abusharaf, “sexual violence perpetrated by either State or non-State actors undermines not only the physical security of women—and therefore, their fundamental civil rights—but also violates a series of their substantive economic, social, and cultural human rights.” Duggan & Abusharaf, *supra* note 28, at 625.

rights” that is an “outrage[] against personal dignity” under the Fourth Geneva Convention.<sup>216</sup> The International Covenant on Civil and Political Rights (ICCPR),<sup>217</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>218</sup> and the Convention Against Torture and Other Forms of Cruel, Inhumane, and Degrading Treatment or Punishment (CAT)<sup>219</sup> also broadly address gender and sexual violence and discrimination.<sup>220</sup> Rape and other forms of sexual violence, defined as “[a]ny violence, physical or psychological, carried out through sexual means or by targeting sexuality,”<sup>221</sup> are war crimes and crimes against humanity under the Statutes of the International Criminal Court,<sup>222</sup> International Criminal Tribunal for the former Yugoslavia,<sup>223</sup>

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216. Hague Convention Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277 (“Family honor and rights, the lives of persons, and private property, as well as religious conviction and practice must be respected.”); The Geneva Convention Relative to the Treatment of Prisoners of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 972 (“[W]omen shall be especially protected against any attack on their honor, in particular against rape.”). *See also* Duggan & Abusharaf, *supra* note 28, at 625.
217. Articles 2 and 3 prohibit sex discrimination. Article 9 protects the individual right to liberty and security of person. Article 7 protects the fundamental human right to mental and physical integrity. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/RES/2200(XXI) A, at 16 (Dec. 16, 1966).
218. Article 1 prohibits “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, U.N. GAOR 34th Sess., Supp. No. 46, U.N. Doc. A/RES/34/180, at 193 (Dec. 18, 1979). Although Article 1 does not mention violence, the CEDAW treaty monitoring body interpreted it to encompass gender-based violence because “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on basis of equality with men.” Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, P 1, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003). According to the CEDAW committee, gender violence is “violence that is directed against a woman because she is a woman or that affects women disproportionately . . . includ[ing] acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty.” *Id.* at 6.
219. Article 1 prohibits “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing him for an act.” G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984). This treaty article recognizes that rape and other forms of abuse “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” constitute torture. *Id.*
220. Other treaties and regional human rights laws also provide broad human rights protection for women. *See* Turano, *supra* note 206, at 1049–51.
221. *See* Duggan & Abusharaf, *supra* note 28, at 625.
222. The ICC defined rape in its own terms. It acknowledged that sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence were war crimes and grave breaches of the Geneva Convention. *See* International Criminal Court, Elements of Crimes art. 8(2)(e)(vi), ICC–ASP/1/3 (Sept. 9, 2002); Rome Statute of the International Criminal Court art. 8(2)(b)(xxii), July 17, 1998 2187 U.N.T.S. 90 (grave breaches of the Geneva Convention).
223. Under the Statute of the International Criminal Tribunal for the Former Yugoslavia, the U.N. ad hoc tribunal has jurisdiction over genocide, or “acts committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group,” and over crimes against

and International Criminal Tribunal for Rwanda.<sup>224</sup>

These international laws regulating and recognizing sexual violence as a form of injustice are major steps in the right direction. But many forward-looking redress initiatives aimed at reparative justice are lagging. Despite suggestions that sexual violence against women is increasingly entering the public consciousness and noted as worthy of repair,<sup>225</sup> redress for sexual violence injustice is still too frequently absent.<sup>226</sup>

Rubio-Marín presented one reason why sexual violence against women might be missing. She highlighted that societal stigmas attached to incidents of sexual violence might account for redress initiatives that overlook sexual violence injustice:

The fact that sexual violence has traditionally been considered ‘private’ encourages seizing the opportunity of reparations to restore victims of sexual violence to their status as citizens whose rights have been violated. On the other hand, given that part of what harms sexually assaulted women has to do with the system of collective meanings attached to the experience of having been subject to sexual abuse, the particular forms of recognition and redress that are specifically called for in an instance like this are far from clear.<sup>227</sup>

Rubio-Marín thus pointed out that sexual violence injustice continues even after the initial harms because of collective societal understandings of sexual violence,

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humanity, or “crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population,” including mass rape. Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 4 & 5, S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993). *See also* Duggan & Abusharaf, *supra* note 28, at 625; Turano, *supra* note 206, at 1052–53.

224. Under the International Criminal Tribunal for Rwanda Statute, the U.N. ad hoc tribunal has jurisdiction over genocide, or “acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group,” and over crimes against humanity, or rather “crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds,” including mass rape. Statute of the International Tribunal for Rwanda, arts. 2 & 3, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/RES/955 (1994). *See also* Duggan & Abusharaf, *supra* note 28, at 625; Turano, *supra* note 206, at 1052–53.

225. *See* Rubio-Marín, *supra* note 30, at 23.

226. *See Ending Violence Against Women: Why Security Institutions Matter*, INT’L CENTER FOR TRANSITIONAL JUST. (Nov. 25, 2014), <http://www.ictj.org/news/ending-violence-against-women> (“For women who have been victims of sexual or other forms of violence during armed conflict or repressive rule, peace treaties and regime change doesn’t necessarily bring an end to their suffering, or guarantee justice for crimes committed against them.”). *See also* THE ACCOUNTABILITY GAP, *supra* note 181. *See generally* Sonen, *supra* note 6 (addressing this point in a case study on Korean comfort women’s multidimensional harms).

227. Rubio-Marín, *supra* note 30, at 32–33. Rubio-Marín also suggests that it is difficult to assess the harm or lost opportunity for the purpose of material compensation and whether gender biases influence such assessments. *Id.* at 34. She points out, for example, that “employment disability insurance schemes that are sometimes relied upon to assess loss of income generation potential may be ill suited to assess the material destitution of victims of sexual abuse who are abandoned by their partners, ostracized by their communities, or rendered unmarriedable.” *Id.*

and more broadly, of gender.<sup>228</sup> Duggan and Abusharaf echoed this observation: “In contrast to other types of harm, the gendered impacts of sexual violence often result in continued suffering for the victims even in the aftermath of mass violence.”<sup>229</sup>

So Duggan and Abusharaf argued that sexual violence against women deserves unique attention in redress because (1) sexual violence affects women disproportionately in both frequency and effects at every stage such that the chances of recovery are dismal; (2) domestic laws are “weak, discriminatory or nonexistent,” limiting possibilities for redress through courts; (3) the absence of effective domestic remedies for sexual violence tends to reinforce patriarchal public attitudes about women and gender inequality; and (4) sexual violence is often not recognized and instead is blamed on the victim.<sup>230</sup>

Yet even as gender-sensitive and intersectional race-gender redress (described below) emerge as legitimate approaches, and though some justice advocates and redress scholars argue for recognition of mass sexual violence as uniquely worthy of redress, many policymakers tend to consider sexual violence as just another type of physical harm.<sup>231</sup> These policymakers often treat sexual violence in the same way as physical harms to men and women, such as those from torture, prolonged detention, or starvation.<sup>232</sup> Occasionally during times of political unrest, some policymakers and law enforcement do not consider sexual violence “to be as important as other violent crimes, such as murder, robbery, or carjacking.”<sup>233</sup>

But mass sexual violence against women is a distinctly gruesome and enduring harm. Certain forms of sexual violence against women—such as sexual slavery, forced pregnancy and abortion, rape and harms to sexual and

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228. *See id.* at 32-33.

229. Duggan & Abusharaf, *supra* note 28, 643.

230. *See id.* Attention to sexual violence in redress initiatives, however, should not detract from other types of specific harms targeted at women—for instance, domestic violence, destruction of parental rights or national identity, loss of land or inheritance, and other forms of gendered discrimination—that might fall under other societal understandings of gender. For other examples of “gendered” harms against women, see generally the Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 218. Recognizing sexual violence against women does not delineate a constrained, limited conception of gendered harms to women. *Cf.* Turano, *supra* note 206, at 1060–61 (arguing that “a limited conception of [sexual violence] harm is fundamentally flawed” and that overwhelming attention to sexual violence “carries the concurrent risk of erroneously confining the definition of crimes committed against women to sexual violence, and embedding an overly constrained ‘elements of the crime’ type analysis of violence”). It also does not “demonstrate a patriarchal prejudice that reduces women to mere sexual beings.” *Id.* at 1067. Rather, recognizing sexual violence harms against women contributes to societal understandings about who is worthy of redress. *See* discussion *infra* Part IV. “Gender” and “sex” might also encompass understandings of sexual orientation and other LGBT issues, but an analysis of how those understandings fit in with “sexual violence” is beyond the scope of this Article.

231. *See supra* note 204 and accompanying text.

232. *See supra* note 204 and accompanying text.

233. THE ACCOUNTABILITY GAP, *supra* note 181, at 2.

reproductive organs—are distinguishable from physical harms to men and other kinds of gendered harms to women.<sup>234</sup> Because sexual violence is rooted in collective societally constructed aspects of gender, women experience sexual harms on multiple levels, including through the physical body, interpersonal relations, cultural and professional roles, and reproductive functions.<sup>235</sup> Moreover, women experience these multi-faceted harms at the bottom of the patriarchal hierarchy, rendering these unique injuries nearly invisible.<sup>236</sup> Overall, incomplete recognition of sexual violence injustice in redress initiatives reflects society's devaluation of women, especially women of color.

## B. Cutting-Edge Intersectional Race-Gender Redress Approaches

Gender-sensitive redress continues to gain momentum worldwide. Yet something significant is lacking: a particularized analysis of harms to women of color at the intersection of racism and sexism. Drawing on intersectionality theory, described below, redress scholars now propose a new cutting-edge framework: intersectional race-gender redress.<sup>237</sup>

### 1. Intersectionality Theory

Professor Kimberlé Crenshaw first introduced intersectionality theory<sup>238</sup> as a challenge to the “uncritical and disturbing acceptance of dominant ways of thinking about discrimination.”<sup>239</sup> Crenshaw argued that “[b]lack women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender.”<sup>240</sup> According to Crenshaw,

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234. See Duggan & Abusharaf, *supra* note 28, at 624–25.

235. See *supra* notes 180–181 and accompanying text.

236. See *supra* notes 182–184 and accompanying text.

237. See *infra* Part III.B.2.

238. See generally *supra* note 36 and accompanying text. See also Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 U. MO. KAN. CITY L. REV. 485, 485 (2002) (explaining that “race and gender do not operate independently but are woven together”); Linda Burnham, *The Wellspring of Black Feminist Theory*, 28 S.U. L. REV. 265, 265 (2001) (describing how “race, class and gender are interrelated dynamics of power and oppression”); Mary Jo Wiggins, *Foreword: The Future of Intersectionality and Critical Race Feminism*, 11 J. CONTEMP. LEGAL ISSUES 677, 678 (2001) (noting “how race, gender, and class interact for women of color within a system of white male patriarchy and racist oppression”).

239. See Crenshaw, *supra* note 36, at 149. More specifically, Crenshaw examined how courts often require discrimination claims that arise out of either race or sex, but not both. See *id.* at 139 (demonstrating that antidiscrimination law does not directly address intersectional discrimination, particularly when it involves race-gender claims). See also Kimberlé Crenshaw, *Mapping the Margin's: Intersectionality, Identity Politics, and Violence Against Women*, 43 STAN. L. REV. 1241, 1244 (1991) (explaining that black women's experiences are at the intersection of racism and sexism).

240. Crenshaw, *supra* note 36, at 140. Crenshaw noted that black women, then, often experience “double-discrimination—the combined effects of practices” that discriminate based on race and gender. *Id.* at 149. She also recognized that black women sometimes experience

intersectionality “account[s] for multiple grounds of identity when considering how the social world is constructed”<sup>241</sup>—that is, it expands inquiries beyond the more privileged group members, specifically black men and white women, to challenge the marginalization of “those who are multiply-burdened.”<sup>242</sup>

Drawing on the experiences of women of color, Professor Mari Matsuda also illuminated a similar idea of “multiple consciousness,” or multiple identities.<sup>243</sup> She suggested that multiple consciousness has benefits for both those marginalized and those challenging systems of oppression because it can assist in the “search for the pathway to a just world.”<sup>244</sup> From another perspective, Professor Angela Harris looked to “multiple consciousness” as a rejection of “gender essentialism—the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”<sup>245</sup> Harris therefore called upon feminists to “challenge not only law’s content but its tendency to privilege the abstract and unitary voice.”<sup>246</sup> She urged that without a paradigm shift “black women will never be anything more than a crossroads between two kinds of domination, or at the bottom of a hierarchy of oppressions.”<sup>247</sup>

Other intellectuals are now extending intersectionality theory to new conceptual spheres beyond racism and sexism. For instance, Professor Darren Lenard Hutchinson set forth the idea of “multidimensionality,” which pushes

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discrimination as black women—not the sum of race and sex discrimination, but as Black women.” *Id.*

241. Crenshaw, *supra* note 239, at 1245.

242. Crenshaw, *supra* note 36, at 140.

243. See Matsuda, *supra* note 36, at 289–99, 298 (remarking that a shifting, multiple consciousness “produces sometimes madness, sometimes genius, sometimes both”).

244. *Id.* at 299. Matsuda therefore urged lawyers to make “a deliberate choice to see the world from the standpoint of the oppressed” and, in doing so, to acquire “a broader consciousness of oppression.” *Id.*

245. Harris, *supra* note 36, at 585. She recognized that the “voices that are silenced turn out to be the same voices silenced by the mainstream legal voice,” including those of black women. *Id.*

246. *Id.*

247. *Id.* at 589. Since the emergence of intersectionality theory, many scholars have cited to Audre Lorde, whose experience resonates with many. *Id.* at 586 (citing Audre Lorde); see also Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN’S L.J. 181, 191 (1990–1991) (citing Lorde); Sonen, *supra* note 6, at 278 (citing Wing and Lorde). Lorde’s self-reflection is at the heart of challenges to dominant views, singular perspectives, and essentialism:

As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self.

Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER* 114, 120 (2007). In many ways Lorde’s observations underscore how systems of oppression create multiple unique harms and further marginalize those already at the bottom of the social hierarchy. It asks that, as intersectionality scholar Trina Grillo puts it, “we define complex experiences as closely to their full complexity as possible and that we not ignore voices at the margin.” Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 22 (1995).

theorists and advocates to “recognize the multiple and complex ways in which [all] individuals experience oppression and construct categories of identity . . . and to begin reshaping theory and policy to account for the diversity of harms within oppressed social groups.”<sup>248</sup>

Intersectionality theory, evolving ideas of multidimensionality, and post-intersectionality therefore serve to more accurately reflect the complex experiences and harms that individuals with multi-faceted identities face under different systems of oppression. They also serve as the theoretical underpinnings for intersectional race-gender redress.<sup>249</sup>

## 2. Intersectional Race-Gender Redress

Gender-sensitive redress theory, as described in Part III.A, is a major step towards comprehensive redress for women. Yet many now observe that a more nuanced analysis accounting for the unique multidimensional harms of women of color is crucial to genuine social healing.<sup>250</sup> Redress scholars Professor Eric Yamamoto and Michele Park Sonen therefore propose an intersectional race-gender redress analysis.

Yamamoto first applauded gender-sensitive redress scholars for underscoring the importance of gender and mentioning that gender is “cross-cut by other axes of difference, including age/life-cycle position, marital status, ethnicity, race, religion, class, and caste.”<sup>251</sup> But he astutely observed that these scholars did not “examine the deep complexities of the harm women endure when gender is coupled with other forms of discrimination; most commonly race.”<sup>252</sup>

In a cutting-edge development to redress theory, Yamamoto proposed that “intersectionality, or cross-axes discrimination” is a “powerful concept because it explains how the simultaneous crossing of gender and racial discrimination creates unique kinds of harms to women of color.”<sup>253</sup> In particular, he observed that “[w]omen are ‘targetted [sic] in gender-specific ways, such as rape and

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248. Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *BUFF. L. REV.* 1, 17 (1999). See also generally Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 *MICH. J. RACE & L.* 285 (2001); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *CONN. L. REV.* 561 (1997).

249. See generally Yamamoto & Sonen, *supra* note 6 (suggesting that intersectionality provides the foundation for intersectional race-gender redress analyses); Sonen, *supra* note 6 (discussing the work of intersectionality and post-intersectionality scholars and its impact on race-gender redress efforts).

250. See generally Yamamoto & Sonen, *supra* note 6 (presenting an intersectional race-gender redress analysis to account for implicit biases against women of color); Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 *CAL. W. L. REV.* 1, 78 (2007) (suggesting that gender reparations are crucial to more complete social healing).

251. Yamamoto et al., *supra* note 250, at 78 (citation omitted).

252. *Id.*

253. *Id.* at 78-79.

sexual torture.”<sup>254</sup> He urged scholars to examine women of color’s “unique kind of oppression—submerged at the bottom of gender and race hierarchies of human unworthiness.”<sup>255</sup> With the goal of comprehensive reparative justice in mind, Yamamoto and Sonen later recognized that “[s]ome justice advocates, political leaders, and members of the public likely tend to implicitly characterize women’s and [especially] women of color’s harms as less significant and therefore less worthy of repair.”<sup>256</sup>

Drawing from psychological and sociological observations of in-group favoritism, internalized sexism, social cognition, and category dominance—social science concepts at the core of implicit bias studies<sup>257</sup>—Yamamoto and Sonen proposed employing an intersectionality analysis to examine the unique harms that arise at the intersection of racism and sexism.<sup>258</sup> They suggested that an intersectional race-gender redress analysis might “reframe redress” to account for women of color’s current position at the bottom of the hierarchy of social worthiness, bringing to the forefront women of color’s often invisible harms and therefore providing more comprehensive social healing.<sup>259</sup>

### **C. What Happened to the Women of Color?: Implicit Intersectional Redress Bias Rendering Nearly Invisible Sexual Violence Injustice Against Women of Color**

Building upon the work of intersectionality and redress scholars, discussed above in Part III.A and Part III.B, this section highlights a theoretical gap and modestly refines intersectional race-gender redress analyses to account for implicit intersectional redress bias that renders nearly invisible the sexual violence harms of women of color within the redress-worthiness hierarchy. In addition, as discussed further in Part IV, it calls for policymakers, those injured, and society at large to recognize that sexual violence as it intersects with race is especially worthy of redress.<sup>260</sup>

More specifically, this section presents case studies that provide a rough overview of a few specific redress initiatives and “the extent to which implicit

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254. *Id.* at 79 (citation omitted).

255. *Id.*

256. Yamamoto & Sonen, *supra* note 6, at 262.

257. *See supra* note 27 and accompanying text.

258. *See* Yamamoto & Sonen, *supra* note 6, at 255–56.

259. *See id.* As previously mentioned, Yamamoto’s *social healing through justice* framework coalesces many disciplines (law, economics, indigenous healing practices, theology, human rights, psychology, etc.) and offers a four-dimensional framework to guide, assess, implement, and revitalize reparative justice initiatives. His framework “emphasizes a kind of justice that aims to heal psychological wounds and repair the material damage of historical justice” and focuses on “ways to ‘repair’ the deep harms to society (divisions, guilt, shame, lack of moral standing) by healing the continuing [economic and psychological] wounds of [people suffering group-based] injustice.” *See* Yamamoto & Serrano, *supra* note 2, at 8–7. *See also* Yamamoto, Pettit & Lee, *supra* note 45 (offering the most updated theory of the *social healing through justice* framework).

260. *See infra* Part IV.

bias influences the assessment of harms and the fashioning of redress.”<sup>261</sup> Scholars have previously examined in depth the first two studies on Guatemalan and Korean comfort women redress. The third study on Jeju women is the first of its kind. Because intersectional redress analysis is brand new, this Article is the first to inquire into the intersectional race-gender harms of Jeju women and to emphasize the sexual violence they endured. These three studies highlight why intersectional race-gender redress is now emerging as a much-needed lens to ascertain women of color’s unique harms and ways to tailor redress towards those harms. The studies also point out what this Article sets forth: intersectional race-gender redress would benefit from more particularized attention to sexual violence injustice against women of color.<sup>262</sup>

### 1. Mayan Women and Guatemalan Redress Efforts

Guatemala’s redress initiative for harms resulting from its civil war from the 1960s to 1996 widely failed to address Maya women’s intersecting race-gender harms.<sup>263</sup> Eighty-three percent of the 250,000 people killed or “disappeared” were indigenous Maya.<sup>264</sup> At the intersection of racism and sexism, Maya women were at the bottom of the redress-worthiness hierarchy.<sup>265</sup> As the “most inferior and stigmatized group,” they “faced abject poverty and isolation not common to Landino women or Maya men.”<sup>266</sup>

Those fashioning redress addressed race and gender harms. The report of the Commission for Historical Clarification recognized the severe racism and sexual violence against Maya people, yet considered those harms separately.<sup>267</sup> It did “not address or recommend tailored redress for the unique ways that the war brutalized Maya women physically, economically, and culturally because of their place at the bottom of the social hierarchy.”<sup>268</sup> Maya women’s unique harms were largely invisible to policymakers and members of the public and hence remain unredressed even today.

261. See Yamamoto & Sonen, *supra* note 6, at 262.

262. In the same way that Duggan and Abusharaf call for sexual violence against women to “figure as a special category” under reparations programs, this Article calls for sexual violence harms against *women of color* to be deemed uniquely redress-worthy. See Duggan & Abusharaf, *supra* note 28, at 625.

263. Yamamoto & Sonen, *supra* note 6, at 255.

264. *Id.* at 256. See also Claudia Paz y Paz Bailey, *Guatemala: Gender and Reparations for Human Rights Violations*, in *WHAT HAPPENED TO THE WOMEN?*, *supra* note 30, at 92 (providing additional information and analysis about the Guatemalan civil war’s effect on women in particular).

265. Yamamoto & Sonen, *supra* note 6, at 256.

266. *Id.*

267. CHRISTIAN TOMUSCHAT ET AL., *COMM’N FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE* 3–3 (1999), available at [http://www.aaas.org/sites/default/files/migrate/uploads/mos\\_en.pdf](http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf) (discussing racism); *id.* at 91 (discussing rape).

268. Yamamoto & Sonen, *supra* note 6, at 256; see TOMUSCHAT ET AL., *supra* note 267, at 29, 3–3 (discussing injustices done to women and to Maya people as separate categories).

## 2. Korean Comfort Women and Current Redress Efforts

Similarly, the present-day redress movement for Korean comfort women, or World War II military sex slaves, obscures “intersection[al race-gender] harms and impedes genuine social healing.”<sup>269</sup> At the intersection of “racism and patriarchy—informed by colonialism and nationalism,” Korean women found themselves at the “bottom of Imperial Japan’s hierarchy of human worthiness.”<sup>270</sup> Compared to their Japanese counterparts, Korean women were forced to serve at Japanese military “comfort stations” during World War II.<sup>271</sup>

Policymakers fashioning redress largely failed to consider intersectional race-gender harms that “availed the Korean comfort women to the most severe treatment.”<sup>272</sup> According to redress scholar Michele Park Sonen, “[t]he Korean women’s racialized and sexualized identity as dispensable sexual commodities inflicted long-standing intersecting harms manifested in deep physical and psychological wounds throughout their lives.”<sup>273</sup> Sonen observed that the model victim narrative and the nationalist patriarchal frame, to which many policymakers look, precluded genuine social healing “by excluding the Korean comfort women’s racialized experiences and obscuring the multidimensional nature of their harms.”<sup>274</sup> Korean comfort women survivors therefore still seek redress for their intersectional race-gender harms, despite ongoing redress efforts.<sup>275</sup>

## 3. Jeju Women and Jeju 4.3 Reconciliation

Known as the Jeju 4.3 Incident/Tragedy (“Jeju 4.3”), the mass killing and destruction by South Korean military, paramilitary, and police under United States supervision lies at the heart of a leading South Korean redress initiative.<sup>276</sup> Yet that initiative, like those described above, also largely marginalized Jeju women’s unique multidimensional harms.<sup>277</sup> In its 2003 report (translated into English in 2013), the South Korean government’s 4.3 National Committee—tasked with investigating and providing recommendations for Jeju 4.3

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269. Sonen, *supra* note 6, at 273.

270. *Id.* at 272.

271. *Id.*

272. *Id.* at 273.

273. *Id.* at 287.

274. *Id.* at 298.

275. See Choe Sang-Hun, *South Korea Assails Japan on Wartime Brothels*, N.Y. TIMES (Mar. 1, 2014), [http://www.nytimes.com/2014/03/02/world/asia/south-korea.html?\\_r=0](http://www.nytimes.com/2014/03/02/world/asia/south-korea.html?_r=0) (describing how South Korea President Park Geun-Hye urged Japan’s Prime Minister Shinzo Abe to face his “country’s history of aggression in the early 20<sup>th</sup> century, especially its enslavement of Asian women in Imperial Army brothels”).

276. See generally NAT’L COMM. FOR INVESTIGATION OF THE TRUTH ABOUT THE JEJU APR. 3 INCIDENT, THE JEJU APRIL 3 INCIDENT INVESTIGATION REPORT (Jeju Apr. 3 Peace Found. trans., 2013), available at [http://www.jeju43peace.or.kr/report\\_eng.pdf](http://www.jeju43peace.or.kr/report_eng.pdf) [hereinafter TRANSLATED REPORT].

277. See Yamamoto, Pettit & Lee, *supra* note 45, at 5–5.

reconciliation—generally ignored Jeju women’s intersectional race-gender harms.<sup>278</sup>

From 1947 until after the Korean War, South Korean security forces under U.S. supervision detained, summarily tried, raped, tortured, and executed thousands of Jeju residents for protesting police brutality and food policies.<sup>279</sup> In response to perceived threats of communism and some violence by outside “rebel” instigators, the South Korean and US anti-communist policy involved a great deal of violence.<sup>280</sup> According to the 2013 publication of the English translation of the National Committee’s 2003 Investigative Report on the Jeju 4.3 Tragedy (“Translated Report”), an estimated 30,000 islanders died (the government’s official figure is 14,028).<sup>281</sup> Many others were tortured and summarily detained.<sup>282</sup> At least 300 villages, 20,000 households, and 40,000 homes were destroyed.<sup>283</sup>

The Translated Report, however, broadly disregarded the sexual violence that Jeju women experienced during the hostilities.<sup>284</sup> It did not directly specify Jeju women’s unique physical, emotional, psychological, economic, and cultural harms.<sup>285</sup> Additionally, it failed to recognize how the perceived inferiority of Jeju women subjected them to the most severe sexual treatment.<sup>286</sup>

While the Jeju 4.3 museum, created and funded by the South Korean government as part of 4.3 reconciliation,<sup>287</sup> chronicles some of the extensive sexual violence against Jeju women, members of the public are largely unaware of the unique harms Jeju women endured. According to research for the museum, “[w]omen suffered severe sexual abuse. In December 1948, soldiers stormed into Tosan-ri, taking away its young women. They never returned home alive.”<sup>288</sup> Another situation described how “[p]olice stripped a pregnant woman naked and bayoneted her after hanging her from a tree.”<sup>289</sup> In still another instance, “[f]ollowing the attempted rape of a village girl, police shouted in front of residents, ‘As she’s female, a female member of the Great Korean Youth Association come out, and spear her!’”<sup>290</sup> Overall, out of 14,028 reported deaths, “[thirty-three] percent were the elderly, women and children.”<sup>291</sup>

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278. See generally TRANSLATED REPORT, *supra* note 276.

279. See Yamamoto, Pettit & Lee, *supra* note 45, at 3, 26.

280. See *id.* at 2–8.

281. TRANSLATED REPORT, *supra* note 276, at 651.

282. *Id.* at 58–89.

283. *Id.* at 466.

284. See *id.* at 586.

285. See generally *id.* (lacking a comprehensive report on sexual violence to Jeju women).

286. See generally *id.*

287. JEJU APRIL 3 PEACE FOUNDATION, WIND OF PEACE: JEJU APRIL 3 PEACE PARK 3 (2008) (museum brochure on file with author).

288. *Destruction and Massacre*, Jeju April 3 Peace Park (March 28, 2008) (last visited Oct. 19, 2013) (notes on file with author).

289. *Id.*

290. *Id.*

291. *Id.* Research for the museum also detailed that “[p]olice dragged people from a cave where

Most outsiders consider Jeju women as part of the dominant race in South Korea, and therefore, at first glance, racial bias against Jeju women seems nonexistent.<sup>292</sup> Jeju women appear to have similar physical features, cultural roots, and socioeconomic positions as other women from the Korean peninsula. Like Okinawan women in Japan,<sup>293</sup> however, Jeju women assume inferior positions within the larger South Korean polity. In practical reality, the South Korean national government treats Jeju women as ethnically and culturally distinct.<sup>294</sup> Many would agree that those from the Korean peninsula view Jeju islanders as slightly different in appearance, language, and cultural practices.<sup>295</sup> Many view Jeju women, as Japanese generally view Okinawan women, as similar to an indigenous people and therefore inferior to the dominant group.<sup>296</sup>

At the intersection of race/ethnicity and gender, Jeju women occupy the lowest positions in the redress-worthiness hierarchy. While the South Korean government continues to lobby extensively for Korean comfort women redress,<sup>297</sup> or redress for non-Jeju women, the question emerges: Why is the South Korean government seemingly ignoring the sexual violence injustice against Jeju women? Intersectional race-gender redress theory is brand-new, and that question remains to be answered.<sup>298</sup>

As evident from the case studies described above, few redress initiatives explicitly and comprehensively address the intersecting race-gender harms of women of color.<sup>299</sup> These case studies thus provide much needed insight into

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they were hiding and killed them, including children. A woman and her daughter who escaped further into the cave lost their way, and starved to death.” *Destruction and Massacre*, *supra* note 288.

292. See generally OMI & WINANT, *supra* note 179 (describing the underpinnings of how race is socially constructed).
293. See generally STEVE RABSON, *THE OKINAWAN DIASPORA IN JAPAN: CROSSING THE BORDERS WITHIN* (2012).
294. See generally *id.* See also Darren Southcott, *Jeju Language Must Be Saved, Says Linguist*, JEJU WEEKLY (Nov. 11, 2013), <http://www.jejuweekly.com/news/articleView.html?idxno=3659> (stating that Jeju people have been “othered” such that Jeju Island has been a “place of exile and punishment”).
295. Based on experiences on Jeju Island and in Seoul, Korea in October 2013 (notes on file with author). See also Southcott, *supra* note 294 (describing the efforts to revitalize Jejeuo—the native language of Jeju Islanders—because it is linked to Jeju culture and practices and Jeju people’s identity); *Concerted Efforts for the Revitalization of Jeju Language*, UNESCO (Feb. 21, 2012), [http://www.unesco.org/new/en/culture/themes/endangered-languages/dynamic-content-single-view-meeting/news/concerted\\_efforts\\_for\\_the\\_revitalization\\_of\\_jeju\\_language](http://www.unesco.org/new/en/culture/themes/endangered-languages/dynamic-content-single-view-meeting/news/concerted_efforts_for_the_revitalization_of_jeju_language) (noting that Jejeuo, the indigenous language of Jeju Island, risks extinction if not saved).
296. See generally RABSON, *supra* note 293.
297. See Choe, *supra* note 275 (describing recent redress efforts for Korean comfort women survivors); Steve Rabson, *Being Okinawa in Japan: The Diaspora Experience*, ASIA-PAC. J. (Mar. 19, 2012), <http://www.japanfocus.org/-Steve-Rabson/3720>.
298. Yamamoto and Sonen call for future studies to inquire into how implicit biases hinder comprehensive healing for women of color. Yamamoto & Sonen, *supra* note 6, at 262. A deeper inquiry into Jeju women’s sexual violence harms is still needed beyond this rough sketch.
299. For instance, South Africa’s reparations program did not explicitly mention sexual violence,

how redress initiatives continue to neglect women of color's unique sexual harms. In particular, the Jeju study analyzes for the first time Jeju 4.3 redress in terms of sexual violence harms against Jeju women. Significantly, it underscores that sexual violence against women of color is uniquely redress-worthy.

#### **D. What Happened to Mau Mau Women?: An Intersectional Race-Gender Redress Case Study to Illuminate Implicit Redress Bias**

Current Mau Mau redress initiatives underscore what this section suggests: even many progressive policymakers, advocates, and courts tend to overlook sexual violence against women of color as a significant harm worthy of redress. The question then arises: What explains this and why? Intersectional race-gender redress theory, described above, highlights this form of implicit bias where Mau Mau women find themselves at the bottom of both the social and redress hierarchies of human worthiness.<sup>300</sup>

This section, then, calls for a particularized intersectional race-gender analysis of Mau Mau women's sexual violence harms to help explain and remedy implicit intersectional redress bias—that is, a careful examination of the unique kinds of oppression that submerged Mau Mau women as less than human. Understanding how those in power deployed, explicitly or implicitly, racism and sexism in British colonial Kenya and in present-day redress initiatives helps ascertain Mau Mau women's unique harms. Additionally, it demonstrates that these harms are significant and especially worthy of redress.

##### **1. Where is the Racism?**

As black Africans, Mau Mau women faced extreme forms of racism by their white counterparts in British colonial Kenya. White British settlers and colonial officials, and even black Kikuyu loyalists, characterized themselves as superior.<sup>301</sup> They racialized and dehumanized Mau Mau as “bestial,” “extremely vile and violent,” “bloodthirsty,” “barbarians,” “cannibals,” “scum,” “filthy pigs,” and “savage animals.”<sup>302</sup> According to historian Caroline Elkins, “[w]hite

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though sexual abuse was included under “torture” and “severe ill treatment.” See Rubio-Marín, *supra* note 30, at 45–46 n.38. In comparison, reparations initiatives in Peru and Guatemala explicitly address sexual violence on the list of violations. *Id.* And programs in Sierra Leone and Timor-Leste also included victims of sexual violence. *Id.* It is important to note, however, that these programs considered sexual violence against women, but not necessarily the unique harms against women of color—which this Article attempts to address more specifically.

300. Implicit bias is only one possible explanation. Other explanations are beyond the scope of this Article. For an explanation of implicit bias, see *supra* note 27 and accompanying text.

301. See generally ELKINS, *supra* note 1. “Kenya’s politicians remained as they had always been, locked within the limits of a racial hierarchy that placed Europeans on top of Asians, and relegated the African majority very firmly to the bottom of the pile.” ANDERSON, *supra* note 2, at 9.

302. See ELKINS, *supra* note 1, at 48–49, 97, 146, 246 (quoting British colonists, officials and settlers). Anderson notes, however, that before the Mau Mau, Europeans in Africa racially

racial supremacy in Kenya had long manifested itself in various kinds of primitive settler justice, including public floggings, beatings, and summary executions. The majority of Africans were at the very bottom of the European settlers' human hierarchy."<sup>303</sup> After the initial arrival of settlers, attitudes toward Mau Mau insurgents shifted "from simple white supremacy to one that was overtly eliminationist."<sup>304</sup> According to Elkins, "Mau Mau adherents were scarcely part of humanity's continuum; they were indistinguishable in local thought and expression from the animals that roamed the colony."<sup>305</sup>

Such pernicious racism reflected a profound righteousness of white moral, cultural, physical, and psychological superiority over presumed Mau Mau supporters, and thereby over nearly all Kikuyu.<sup>306</sup> Most British colonists believed that Africans, including Mau Mau, were not civilized and not entitled to international human rights, obligations, or duties of the post-World War II world.<sup>307</sup> Elkins explains, "Hardly a European in the colony believed Mau Mau to be human beings."<sup>308</sup> With these extreme changes in an already racist view of Mau Mau supporters, she observed:

Mau Mau became for many whites in Kenya, and for many Kikuyu loyalists as well, what the Armenians had been to the Turks, the Hutu to the Tutsi, the Bengalis to the Pakistanis, and the Jews to the Nazis. . . . Mau Mau adherents did not belong to the human race; they were diseased, filthy animals who could infest the rest of the colony, and whose very presence threatened to destroy Kenya's civilization. They had to be eliminated.<sup>309</sup>

With this mindset, most British colonists and their Kikuyu loyalist supporters justified any atrocities perpetrated against any Mau Mau supporters, including sexual violence to Mau Mau women.<sup>310</sup> For instance, one British

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stereotyped and characterized Kikuyu as "industrious and progressive, the kind of Africans who seized upon the benefits of European civilization and made the best of it; they embraced education; they took to Christianity; they were happy to accept wages for their labour; and they were entrepreneurial." ANDERSON, *supra* note 2, at 279.

303. ELKINS, *supra* note 1, at 47. From the perspective of a Mau Mau veteran, Mau Mau were "ranked fourth-class citizens in our own country, with Somalis ranked higher because of their woolly hair that put them closer to second-ranked Indians." Ombour, *supra* note 2.

304. ELKINS, *supra* note 1, at 48.

305. *Id.* "The Kikuyu had come to be seen as a kind of sub-species, a group that could only make claims to an inferior kind of humanity." ANDERSON, *supra* note 2, at 205.

306. According to Elkins, "[v]irulent racism was certainly endemic to the colony, as was a profound righteousness—a sense that the British were morally superior not only to black Africans but to all other races as well." ELKINS, *supra* note 1, at 88.

307. *Id.* at 97.

308. *Id.* at 113.

309. *Id.* at 49.

310. See ANDERSON, *supra* note 2, at 177 (describing how British propaganda painted Mau Mau as "pitiless souls who had lost any vestige of human dignity" and how "[t]hey would now be hunted like animals, and this was no more than they deserved"). An analysis of other motivations or explanations for committing sexual violence is beyond the scope of this Article.

official charged with “civilizing the hearts and minds” of Mau Mau supporters referred to the Pipeline detention system as “a form of quarantine where those afflicted with the Mau Mau infection could be diagnosed and treated.”<sup>311</sup>

Such explicit racist views against Mau Mau people were pervasive—extending beyond British colonial Kenya to all corners of the British Empire, including its seat of government in London.<sup>312</sup> When faced with criticism for the severe circumstances that Mau Mau detainees experienced, many British colonists and government officials often cast themselves as “hapless victims, rather than perpetrators of crimes,” which evoked sympathy rather than condemnation in public discourse.<sup>313</sup> The broader public, including members of Parliament, for the most part openly accepted such views and even believed that Mau Mau needed to be “Christianized and civilized.”<sup>314</sup>

That openly virulent racism from the 1950s would become implicit in the minds of many policymakers then and now, particularly with memories of the extensive media coverage portraying Mau Mau adherents as “barbaric, anti-European, anti-Christian savages bent on terrorizing British colonists.”<sup>315</sup> The eliminationist attitudes of many, coupled with prevalent views of all Mau Mau as criminals, largely explain why many prominent British Parliament leaders refused to prosecute British colonial officials responsible for the atrocities.<sup>316</sup> They also partly illuminate why only over sixty years later some Mau Mau survivors are receiving attention and some redress for their deep, lingering harms. But for many Mau Mau women survivors, this deep-rooted racism cuts even deeper when combined with widespread patriarchal sexism.

## 2. Where is the Sexism?

Many Mau Mau women experienced harms unique to their gender. Whereas most British officials and settlers often assumed Mau Mau men were criminals or gangsters, they viewed Mau Mau women as needing protection and support from their husbands or male counterparts.<sup>317</sup> Many Kikuyu men similarly regarded Mau Mau women as subservient and often restricted them to the homestead in male-dominated communities.<sup>318</sup> Mau Mau women, then, were

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311. ELKINS, *supra* note 1, at 106 (quoting Thomas Askwith). *See also* ANDERSON, *supra* note 2, at 279 (quoting British official Michael Blundell describing Mau Mau as a “mind destroying disease”).

312. *See* ANDERSON, *supra* note 2, at 178 (noting that British propaganda depicting Mau Mau “barbarity” was used to convince public opinion in Britain to condone “stern measures” and “appropriate reprisals”).

313. ELKINS, *supra* note 1, at 89.

314. *Id.*

315. *Id.* at xi. For an overview of the social cognitive processes behind implicit bias, see generally *supra* note 27 and accompanying text.

316. *See generally* ELKINS, *supra* note 1.

317. *Id.* at 179, 204. They deployed this characterization in the interrogation of Mau Mau men because Mau Mau women symbolized, to an extent, Kikuyu manhood. *Id.* at 208.

318. *See* ANDERSON, *supra* note 2, at 122 (describing Kikuyu patriarchy and noting that the “most

relegated to the bottom of the patriarchal hierarchy.<sup>319</sup>

According to Elkins, most British colonial officials relied on the stereotype of African women, who were purportedly “intellectually weak and easily manipulated.”<sup>320</sup> They were confident that women joined the Mau Mau movement because “their husbands, fathers, and sons had coerced them into taking the oath.”<sup>321</sup> They believed that “[h]ope for a peaceful future hinged on the reconstruction of African motherhood in the British image.”<sup>322</sup> Based on these understandings, the creator of the Pipeline “rehabilitation” system,<sup>323</sup> Thomas Askwith, emphasized, “It will be necessary to cleanse the women in the same way as the men before they are permitted to rejoin them, as there is evidence that wives have in many cases persuaded their husbands to take the oath and are often very militant.”<sup>324</sup> By doing so, he hoped that women would confess to taking the Mau Mau oath, which would thereby “purge the women of their Mau Mau indoctrination and ready them for home-craft, child-care, and agricultural classes.”<sup>325</sup>

To achieve this goal, in line with British patriarchal views, British colonial officials detained mainly adult male Mau Mau suspects in the Pipeline system.<sup>326</sup> A few Mau Mau women considered too “hard core” were sent to the only female detention camp<sup>327</sup> and remained separated from their husbands for the rest of their lives in prison.<sup>328</sup> Most British officials believed that Mau Mau women, unlike the men, had been “manipulated” to take the Mau Mau oath and were thus “redeemable” in the detention’s “rehabilitation” system.<sup>329</sup> The majority of Mau Mau women, however, faced the “punitive [villagization] strategy to contain, control, and discipline Mau Mau women” for their refusal to cooperate with British authorities.<sup>330</sup> They found themselves in heavily guarded villages in the Kikuyu countryside.<sup>331</sup>

Regardless of where they were detained, almost all Mau Mau women were

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senior elders and the largest landowners [in Lari] were all polygamous and the wealthiest men had three or more wives”).

319. *See generally id.*

320. ELKINS, *supra* note 1, at 221-22.

321. *Id.* at 222.

322. *Id.* at 109.

323. *Id.* at 104-105.

324. *Id.* at 109 (quoting Thomas Askwith).

325. *Id.* at 110 (quoting Askwith).

326. *Id.* at 151.

327. *Id.* at 221-22.

328. *Id.* at 194.

329. *Id.* at 222. Yet when faced with forced repatriation to land reserves, Kikuyu women from Nairobi “loudly sang protest songs, snarled abuse, or sat in silent, sullen resentment.” ANDERSON, *supra* note 2, at 204. “The Kikuyu women displayed their own brand of defiance, and retained their dignity; they would not be patronized by the white [women] highlanders or their Asian [female] allies.” *Id.*

330. ELKINS, *supra* note 1, at 240.

331. *Id.* at 234-35.

sexual beings in the eyes of the British. They were dehumanized as animals or even less, which often made them especially vulnerable to cruel sexual violence, including mass rape.

### 3. Where are the Multidimensional Harms?

At the intersection of racism and sexism, Mau Mau women were characterized and treated as Kenya's most inferior and stigmatized group. Compared to privileged black Kikuyu loyalist wives—those who supported British colonial forces and were rewarded with positions of power—Mau Mau women were relegated to the absolute bottom. Whereas many Mau Mau women were forced to do backbreaking work digging trenches around the villages and later laboring as personal servants, most loyalist wives lived in “sites of comparative luxury.”<sup>332</sup> Many loyalist wives “enjoyed ample living space and food, largely provided by confiscated [Mau Mau] livestock and food stores, and the free labor of the thousands of imprisoned [Mau Mau women] villagers living nearby.”<sup>333</sup>

In addition, numerous “[l]oyalist women were not required to work on the forced communal projects or even on the basic domestic upkeep of their own homes.”<sup>334</sup> They received “special status”<sup>335</sup> in the social hierarchy—above Mau Mau women and just short of white British women's status. They were thus rarely subjected to horrific acts of sexual violence or public rape. Instead, it was Mau Mau women who faced the most severe sexual abuse as targets of both white British and black Kikuyu loyalists.

Viewing themselves of higher social status than Mau Mau women, many Mau Mau men rejected their wives for raising “half-breeds”<sup>336</sup> or becoming infertile from sexual abuse to their reproductive organs.<sup>337</sup> Most Mau Mau women thus faced poverty and isolation not common to other Kenyan women or Mau Mau men.<sup>338</sup> A number of survivors continue to experience collective shame and silencing from the widespread mass rape and sexual abuse they endured over sixty years ago.<sup>339</sup>

In sum, as black Africans, Mau Mau women were often dismissed as non-human. As women, they were of the lowest ranking in the patriarchal system. As Mau Mau women, they found themselves at the very bottom of the social

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332. *Id.* at 241.

333. *Id.* at 242.

334. *Id.*

335. *Id.* According to Elkins, Kikuyu loyalist women's “special status earned them the derisive label of *thata*, or barren.” *Id.* She explained that “[i]n a society where reproduction defined womanhood, such a label was the ultimate insult.” *Id.*

336. *Id.* at 269. “Half-breeds” refer to the illegitimate children born from white British or pro-colonists raping Mau Mau women. *Id.*

337. *Id.* at 247.

338. *See infra* Part IV.A.2.

339. *See infra* Part IV.A.2.

hierarchy—and later, at the bottom of the redress-worthiness hierarchy. In other words, most British in colonial Kenya degraded and punished Mau Mau women because they were Mau Mau women.

Many present-day policymakers, advocates, and judges have essentially, though perhaps unknowingly, committed similar harms by failing to recognize Mau Mau women's deep, lingering sexual violence harms. In doing so, these policymakers and others have implicitly characterized Mau Mau women's unique sexual harms as less significant and therefore less worthy of repair because of their perceived combined racial and gender inferiority.

This is a form of implicit intersectional redress bias.<sup>340</sup> A targeted inquiry, through *recognition* of women of color's multidimensional harms arising out of sexual violence injustice, is needed to reveal the extent to which such biases have hindered comprehensive redress and to ameliorate current redress efforts.

#### **IV. WHAT'S NEXT?: REFINING INTERSECTIONAL RACE-GENDER REDRESS THEORY TO RECOGNIZE SEXUAL VIOLENCE AGAINST WOMEN OF COLOR AS ESPECIALLY WORTHY OF REDRESS**

Because of their position at the bottom of the social hierarchy, women of color are often subject to horrific sexual violence injustice during armed conflict. Yet, as discussed above, their unique harms tend to be doubly and triply marginalized—missing, or nearly invisible, at almost all stages of redress. What is now needed to ameliorate current redress efforts (and implicit biases therein) is this: a refined intersectional race-gender redress analysis that recognizes sexual violence, rooted in socially-constructed aspects of gender and its intersection with race, as especially worthy of redress.

This section seeks to explain why this refined intersectional race-gender redress theory is crucial and warranted. More specifically, it employs a *recognition* inquiry—the first R of Yamamoto's *social healing through justice* framework—to examine what is missing in current Mau Mau redress initiatives.<sup>341</sup> It breaks down the different kinds of harms to Mau Mau women as women of color at the bottom of the redress-worthiness hierarchy. It concludes that Mau Mau women's harms resulting from sexual violence injustice are significant yet largely invisible. And in doing so, it highlights that without this modest theoretical expansion, unique sexual harms to women of color remain in the shadows, as they are for Mau Mau women—devalued and unknown to the world.

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340. There are many possible explanations for this implicit intersectional bias against Mau Mau women in current redress initiatives. See Yamamoto & Sonen, *supra* note 6, at 257-61. See also *supra* note 27 and accompanying text.

341. *Recognition* is essential to the other points of inquiry—*responsibility, reconstruction, and reparation*. And therefore, more generally, it is important to achieving comprehensive, systemic, and enduring *social healing through justice*. This “reframing” of redress through a *recognition* inquiry is not comprehensive but a starting point.

*Recognition*, as the first point of inquiry, acknowledges the full range of harms and underlying causes.<sup>342</sup> It “addresses the social psychological by examining the historical, cultural and structural context of past and continuing suffering.”<sup>343</sup> It also examines “the history of the grievance,” “the stock stories embodying cultural stereotypes that seemingly legitimize the injustice” and “the ways organizational structures can embody” oppressive policies.<sup>344</sup>

According to Yamamoto, empathy is at the heart of *recognition* as “members of each group work to understand the wounds of the other groups’ members” and “gain an appreciation for [their] hopes and struggles.”<sup>345</sup> *Recognition* thus means examining the historical, cultural, and structural context of widespread violence— aspects that many policymakers, advocates, and members of the public tend to overlook.

#### A. Recognition of Sexual Violence Injustice Against Women of Color— Empathizing with Those Suffering

*Recognition*, with its focus on empathy, aims to identify “immediate harm,” including “anger, hurt and material loss,” “the pain buried in collective memories,” and “exclusion and subjugation.”<sup>346</sup> Mutual storytelling and listening are means to achieving empathy.<sup>347</sup> *Recognition* of lingering harms as characteristic of collective trauma, emerging from a torn socioeconomic fabric, is also another important step toward genuine empathy.<sup>348</sup>

Limited recognition of the historic sexual violence injustice to Mau Mau women through the British High Court proceedings and subsequent settlement was a valuable step towards social healing.<sup>349</sup> But all participants, and even the world, have yet to fully appreciate the suffering and understand the collective memories of Mau Mau women despite these recent redress efforts.<sup>350</sup> More is needed in recognizing Mau Mau women’s harms beyond the immediate historic sexual violence injustice in ways that achieve genuine empathy.

#### 1. Recognition of Historic Sexual Violence Harms

Mutual engagement in *recognition* therefore is an important starting point.<sup>351</sup> For Mau Mau women, recognition includes all participants first

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342. See YAMAMOTO, *supra* note 79, at 175–84.

343. Yamamoto, Pettit & Lee, *supra* note 45, at 20. See also *infra* Part IV.

344. YAMAMOTO, *supra* note 79, at 175–84; Yamamoto & Obrey, *supra* note 37, at 33.

345. YAMAMOTO, *supra* note 79, at 176.

346. *Id.* at 176–77.

347. *Id.* at 177.

348. See *id.* at 175–76.

349. See *supra* Part II.B.3–4.

350. See *supra* Part II (describing how Mau Mau women’s harms are nearly invisible in current redress efforts).

351. See YAMAMOTO, *supra* note 79, at 176–77.

acknowledging that mass rape was a common experience under British colonial rule but is largely not addressed in current redress initiatives.<sup>352</sup> As previously mentioned, old and young alike were targets of rape and sexual assault, and “[m]others and daughters were sometimes raped together in the same hut by white and black members of the security forces.”<sup>353</sup> Recognition also encompasses realizing that Mau Mau women endured other horrific forms of sexual violence, which often left more lasting and appalling wounds.<sup>354</sup> Those shocking forms of sexual violence, described in the Introduction and Part II.A, were aimed specifically at Mau Mau women, but not other white or African women.<sup>355</sup>

To date, Harvard Professor Caroline Elkins’s *Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya* is one of the few sources recognizing Mau Mau women’s voices.<sup>356</sup> For example, Mau Mau survivor Margaret Nyaruai explained why many endured the horrors of rape and recalled the horrific abuse she and others experienced during the “screening” process:

I was badly whipped, while naked. They didn’t care that I had just given birth. In fact, I think my baby was lucky it was not killed like the rest . . . . Apart from the beatings, women used to have banana leaves and flowers inserted into their vaginas and rectums, as well as have their breasts squeezed with a pair of pliers; after which, a woman would say everything because of the pain.<sup>357</sup>

She survived the torture but noted that even today she continues to suffer a lot of physical pain in her body.<sup>358</sup> Her confession, however, did not earn her release at the time. Those in power continued “to interrogate her, often thrusting hot eggs into her vagina to force her to talk.”<sup>359</sup> They apparently did so because they believed she was a Mau Mau woman.

Another Mau Mau survivor, Salome Maina, recalled that “a bottle full of a mixture of pepper and water was inserted into my birth canal and the contents emptied inside.”<sup>360</sup> She felt the burning everywhere, including in her eyes, ears, nose, and mouth.<sup>361</sup> She remembered that this same event happened to another

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352. According to Harvard historian Caroline Elkins, the Home Guards in the villages “could have chosen not to rape, beat, and torture, but if they had, it could have meant running the risk of being labeled Mau Mau, and thus on the receiving end of British colonial injustice.” ELKINS, *supra* note 1, at 245. Rape was thus pervasive among the “villagization” scheme. *See id.*

353. *Id.* at 247. According to Elkins, during raids, “[y]oung women, pregnant women, and old women were raped, often repeatedly” by the “Johnnies” and Home Guards. *Id.* at 254.

354. *See id.* at 247.

355. *See supra* Introduction and Part II.A.

356. *See generally* ELKINS, *supra* note 1.

357. *Id.* at 68 (quoting Nyaruai).

358. *Id.*

359. *Id.*

360. *Id.* at 258 (quoting Mau Mau survivor Salome Maina).

361. *Id.* (citing Elkins’s interview with Maina).

Mau Mau woman the day before, but the contents of the bottle were pepper and petrol, which left her vomiting and eventually to die.<sup>362</sup>

As a researcher and scholar, Elkins empathized with Mau Mau women survivors and uncovered for some the pain buried in collective memories, exclusion, and subjugation. She allowed Nyaruai and Maina, along with many others, the opportunity for storytelling. Elkins's efforts represent the first step in *recognition*. These efforts, however, are limited because recognition involves *mutual* engagement from *all* participants, including the British and Kenyan governments and populaces, international human rights supporters, researchers and scholars, and others who benefitted from the suppression of the Mau Mau rebellion.

Recognizing and preserving the voices of Mau Mau women survivors, like Nyaruai and Maina, is essential to promoting more complete understandings of the breadth and depth of Mau Mau women's historic sexual violence harms. The British and Kenyan governments might endeavor to document personalized stories of loss and later rejuvenation through widely publicized collective records. They might also devote resources for public education and curriculum development about the struggles and hopes of Mau Mau women survivors. Further, these governments might support popular and scholarly research and publications and public presentations (art, documentaries, conferences) about Mau Mau women's sexual violence harms and current healing efforts. International human rights supporters, researchers, and scholars might contribute to the realization of these government-initiated efforts.

In these ways, the British and Kenyan governments and their populaces might begin to acknowledge that those in power, both white British and black Kikuyu loyalists, apparently targeted Mau Mau women because of their perceived racial and gender inferiority.<sup>363</sup> Sexual violence was rarely, if at all, perpetrated against white British settlers, black Kikuyu loyalist wives, or other Kenyan women. At the intersection of their ethnic/racial and gender identities, Mau Mau women were the most susceptible to sexual violence under British colonial rule.

As mentioned, recognition of the widespread, broadscale historic sexual violence injustice against Mau Mau women is largely absent from ongoing redress efforts.<sup>364</sup> Recognition by all involved, then, would ameliorate the shortcomings of recent redress efforts.<sup>365</sup> Mutual storytelling and listening, in particular, would be a critical aspect moving forward.

But that is not the end of the *recognition* inquiry for Mau Mau women. Without full disclosure of the truth and extent of the harms, including those

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362. *Id.*

363. *See supra* Part III.D.

364. *See supra* Part II.B.

365. *See* Ombour, *supra* note 2 (observing that without the Kenyan government's participation in reconciliation initiatives, healing is largely deemed incomplete and stalled).

extending into the present day, the history of their sexual harms is incomplete. A close look into Mau Mau women survivors' unique persisting harms from sexual violence injustice is crucial.

## 2. Recognition of Persisting Harms

*Recognition* of lingering harms requires understanding that widespread, horrific violence has severe lasting consequences.<sup>366</sup> Elkins's 2005 historical monograph first discussed some of Mau Mau women's persisting wounds. Many aspects of their continuing harms, however, remain unrecognized in current redress efforts.

For the majority of Mau Mau women, the initial violence often caused intense physical, psychological, emotional, and economic damage that has yet to be acknowledged. Many became "amenorrheic, or incapable of reproducing because of their emaciated and exhausted condition" arising out of their experiences in detention.<sup>367</sup> Most were infertile for the rest of their lives.<sup>368</sup> The sexual violence injustice, including contraction of venereal disease, also often caused irreparable harm to their reproductive organs.<sup>369</sup>

Most Mau Mau women endured intense individual and collective psychological trauma years later. For many, silence prevailed as a coping mechanism.<sup>370</sup> Many chose to move on and not talk about the horrific violence they suffered, not even with their husbands.<sup>371</sup> Almost all attempted to rebuild their lives but lived with humiliation and bitterness over the years.<sup>372</sup> These Mau Mau women suffered many layers of pain, fear, shame, and anger. Their communities still bear the marks of these lasting tears in the social fabric.

Beyond the physical and emotional harms, the resulting economic injustice lingers even today. Many Mau Mau women's relationships with their husbands often deteriorated because of the sexual harms they endured.<sup>373</sup> A few men committed suicide after finding that their wives were "rearing children that bore a striking resemblance to their Home Guard neighbors."<sup>374</sup> Some also rejected

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366. YAMAMOTO, *supra* note 79, at 176-77.

367. ELKINS, *supra* note 1, at 269-70.

368. *Id.* at 270. Elkins inferred that lower fertility rates "would have been caused by such factors as malnourishment, disease, miscarriage, the absence of regular male partners, and the psychological stress resulting from war trauma." *Id.* at 366.

369. *Id.* at 270.

370. *Id.*

371. *Id.* See also *Mutua II*, [2012] EWHC 2678 (QB) [35] (explaining that the harms "had a psychologically debilitating effect upon [the claimants'] ability to speak openly, or in some cases even privately, about what had happened to them" such that "Mrs. Mara has still not felt able to discuss these matters with her husband").

372. See ELKINS, *supra* note 1, at 271.

373. It was not uncommon for a man who had been detained to return home to find that his wife had been raped by Home Guards and given birth to a child. See ANDERSON, *supra* note 2, at 332 (describing the difficult coming home experience of Karari Njama).

374. ELKINS, *supra* note 1, at 269.

their wives out of shame that “[t]hey had failed in their roles as Kikuyu men, as guardians of production and reproduction.”<sup>375</sup> Following detention and rejection by their husbands, other Mau Mau women left seeking work in Nairobi where, according to Elkins, “they became part of an expanding class of entrepreneurial women.”<sup>376</sup> While becoming an entrepreneur in a bustling city may not appear to be a significant lingering harm, leaving the countryside for Nairobi further tore apart the social fabric—dividing families, abandoning communal structures, and altering indigenous cultural and social norms—and had economic impacts on the Mau Mau communities left behind.

Most Mau Mau women thus found themselves alone without a male partner—just as they found themselves during their prolonged detention. They often became refugees or sole breadwinners because of rejection from their husbands and communities.<sup>377</sup> With numerous Mau Mau women sexually assaulted and many of their husbands dead, the core working population was destroyed, leaving those remaining barely able to survive.

Many Mau Mau women survivors still suffer from these largely invisible economic harms. For many, the economic damage directly impacted their children, who were left with single parents and heavy responsibility for tending to younger siblings.<sup>378</sup> Other children became “war orphans.”<sup>379</sup> According to historian David Anderson, the “Mau Mau war marked the real beginnings of Nairobi’s ‘street-children’ phenomenon.”<sup>380</sup> Almost all children suffered from post-traumatic distress.<sup>381</sup> Under these circumstances, many Mau Mau women and their descendants continue living in poverty and isolation without any immediate remedies to repair the economic damage and to rebuild their lives.<sup>382</sup>

Complete recognition of the collective trauma and persisting long-term damage to Mau Mau women’s communities and descendants would be significant to next steps in the reconciliation process. In particular, the lingering economic damage is a key yet largely unidentified injury in addition to the more evident, continuing psychological, emotional, and physical harms. The British and Kenyan governments, along with international human rights supporters, researchers, and scholars, might redefine the scope and pervasiveness of Mau

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375. *Id.* at 271.

376. *Id.*

377. See VASUKI NESIAH ET AL., INT’L CTR. FOR TRANSITIONAL JUSTICE, TRUTH COMMISSIONS AND GENDER: PRINCIPLES, POLICIES, AND PROCEDURES 7, 9 (2006), available at [http://ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English\\_0.pdf](http://ictj.org/sites/default/files/ICTJ-Global-Commissions-Gender-2006-English_0.pdf) (describing how social and structural inequalities tend to adversely affect women disproportionately).

378. *Id.* (noting that “children [are] left behind” during widespread violence).

379. ANDERSON, *supra* note 2, at 204.

380. *Id.*

381. VASUKI NESIAH ET AL., *supra* note 377 (noting that children suffer tremendously during widespread violence).

382. See ANDERSON, *supra* note 2, at 204–205 (noting that there was a “massive scale of social dislocation among the Kikuyu communities caused by the war”). See also *supra* notes 338–339 and accompanying text.

Mau women's continuing sexual violence harms. They might explicitly acknowledge that many Mau Mau women experienced, and continue to endure, the historic sexual violence injustice in unique ways and on multiple levels. In doing so, all participants involved in the initial injustice might considerably advance the prospects for more comprehensive and lasting social healing.

### **B. Recognition of Sexual Violence Injustice Against Women of Color— Critical Interrogation of the Discursive and Structural Aspects of Suppression**

Another task of *recognition* is “critical sociolegal inquiry” that “interrogate[s] critically” the “structural/discursive aspects” of widespread historic injustice.<sup>383</sup> This inquiry involves examination of the “stock stories that groups . . . tell to explain the conflict and justify the groups’ responses.”<sup>384</sup> It also involves examining the “agendas and reactions of those in power” and the mechanisms that maintain power structures.<sup>385</sup>

#### **1. Discursive Strategy: Stock Stories Legitimizing the Injustice**

Stock stories “shape how groups comprehend their and others’ justice grievances, inform perpetrator-victim identities, and legitimate” actions and policies.<sup>386</sup> As previously discussed, Mau Mau were branded as terrorists, not “freedom fighters,” and therefore could not receive any redress immediately following the end of British colonial rule and the rebellion.<sup>387</sup> What is missing but clear now through the refined intersectional race-gender redress analysis is this: white British officials and settlers as well as Kikuyu loyalists deployed cultural racial and gender stereotypes to legitimize mass rape and sexual violence against Mau Mau women.<sup>388</sup> The detention system empowered even the weakest British official or Kikuyu loyalist, making it possible to perpetrate such widespread sexual violence against mainly Mau Mau women.<sup>389</sup>

Great Britain, Kenya, and even the world have not yet fully recognized the inaccuracy of the portrayals of Mau Mau women as “bloody savages” or purely sexual beings in popular culture.<sup>390</sup> Rather, only through the recently discovered

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383. YAMAMOTO, *supra* note 79, at 179.

384. *Id.* at 180.

385. *Id.* at 179.

386. *Id.* at 181.

387. *See supra* Part II.B.1.

388. *See supra* Part III.D.

389. *See supra* note 310 and accompanying text.

390. Anderson notes that “stereotypes shape the plots of each movie” about the Mau Mau, which serve as one means of depicting Mau Mau to the public. ANDERSON, *supra* note 2, at 338-39 (citing the three most popular movies made about Mau Mau while the war was still going on, including *Simba*, *Safari*, and *Something of Value*). *See also* ELKINS, *supra* note 1, at xii (describing how magazines at the time characterized Mau Mau as savages through photographic spreads).

British administrative documents have historians begun to unearth a counter-narrative of unjustified torture, unspeakable sexual violence, and overall socioeconomic damage to Mau Mau women.<sup>391</sup> The litigation before the British High Court and subsequent settlement also contributed to reframing the seemingly legitimate abuse and violence as severe human rights violations.<sup>392</sup>

Yet because of minimal coverage of Mau Mau women's harms, limited public access to information about the sexual violence injustice, and continuing inaccurate characterizations of Mau Mau women, British colonial actions remain seemingly legitimate and justified. This at times perpetuates implicit race-gender biases among policymakers and those fashioning redress, thereby hindering comprehensive redress for Mau Mau women survivors.<sup>393</sup> Despite recent efforts to examine the history of the harms from the Mau Mau rebellion, without a formal apology acknowledging the depth and extent of the sexual harms to Mau Mau women, recognition is incomplete.<sup>394</sup>

## **2. Structural Aspects: Organizational Structures Embodying Oppressive Practices and Policies Contributing to Sexual Violence Against Women of Color**

Interrogation of organizational structures illuminates practices and policies, particularly those in the realms of politics, economics, law, and media.<sup>395</sup> It also exposes contextual factors that contributed to the harms and the "agenda and reactions of those in power."<sup>396</sup> Most important, it brings to light the structures that maintain power dynamics.<sup>397</sup>

Great Britain has yet to formally apologize and acknowledge its complicity and oversight in colonial rule and its apparent failure to prevent or remedy the violent oppression of Kenyan Kikuyu.<sup>398</sup> The independent, post-colonial Kenyan government, it appears, also maintained power structures instituted by British colonists—leaving most Mau Mau women survivors destitute with few effective remedies.<sup>399</sup> Both governments also seemingly generated policies advanced and implemented by British colonial officials and Kikuyu loyalists.<sup>400</sup> This ultimately led to the further suppression of Mau Mau women survivors and victims' families and the continued silencing of their historic sexual violence

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391. *See supra* Part II.B.3.

392. *See supra* Parts II.B.3-4.

393. *See supra* Part III.C-D.

394. *See supra* note 171 and accompanying text.

395. YAMAMOTO, *supra* note 79, at 179.

396. *Id.*

397. *Id.* at 181.

398. *See supra* note 171 and accompanying text.

399. *See supra* Part II.B.1.

400. *See* ANDERSON, *supra* note 2, at 328-33 (revealing that mostly everything was dominated and controlled by Kikuyu loyalists and citing policies that prohibited Mau Mau from participating in politics).

injustice.

Few historians have fully interrogated or acknowledged the organizational structures that enabled the British colonial government and subsequent independent Kenyan government to oppress Mau Mau women.<sup>401</sup> No one to date has fully critically examined either the organizational structures involved in the sexual violence and resulting socioeconomic damage to Mau Mau women or the limited structures of remedial bodies in order to heal the wounds and repair the damage.<sup>402</sup> Without these examinations, the British and Kenyan governments and other participants who benefitted have yet to fully recognize the underlying causes of sexual violence against Mau Mau women—including explicit or implicit intersectional race-gender biases.<sup>403</sup>

Great Britain and Kenya therefore have not yet acknowledged the full history of Mau Mau women's sexual violence injustice. Nor have they fully examined the organizational structures and oppressive policies contributing to that violence. Limited acknowledgements of the inaccurate stock stories and stereotypes of Mau Mau women have eroded and weakened with recent redress efforts that narrowly cast their unique sexual harms as "torture."<sup>404</sup> Without aspiring to empathy through an understanding of their history and persisting harms and the critical examination of organizational structures, recognition of Mau Mau women's harms is incomplete. And genuine social healing remains stalled.

The *recognition* inquiry of both Mau Mau women's historic sexual violence harms and their lingering impact, as detailed above, underscores that these unique harms to women of color are especially worthy of redress. In theory, it brings to the forefront the power of an intersectional race-gender redress analysis and justifies refining the analysis to include recognizing sexual violence injustice against women of color as uniquely redress-worthy. In practice, it serves as the starting point for according *responsibility* and justifying *reparation* and *reconstruction*—the other dimensions of Yamamoto's *social healing through justice* framework. More broadly, it also aids in ameliorating implicit biases among the public and those fashioning current redress initiatives by making explicit any biases.

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401. Historians David Anderson and Caroline Elkins lightly touch upon the organizational structures, but they do not specifically address the structures that enabled the suppression of Mau Mau women. *See generally supra* note 10 and accompanying text.

402. *See supra* notes 10, 401 and accompanying text.

403. *See Ombour, supra* note 2 (detailing the limited British settlement but highlighting that the Kenya government has thus far not undertaken genuine reparative actions for Mau Mau survivors). A Mau Mau veteran acknowledged that Kenyans, non-Mau Mau supporters, benefitted from their prolonged detention. He explained:

You see, the home guards and apologists, including colonial chiefs who arrested us and mercilessly beat us up in detention camps, were the ones awarded with tracts of land and lucrative jobs for their children who were well disposed to receive a good education. Their children were the future DOs, DCs, PCs and permanent secretaries.

*Id.*

404. *See supra* Part II.B.2-4.

### CONCLUSION: LOOKING FORWARD TO MORE COMPREHENSIVE REDRESS

In conclusion, where race and gender already place women of color at the bottom of the social hierarchy, thereby fostering especially severe sexual violence harms, implicit intersectional redress bias renders these unique harms nearly invisible. In undertaking a case study on Mau Mau women and their unique harms, this Article employs a refined analysis of the intersection of race and sexual violence, which is rooted in socially constructed aspects of gender. It recognizes sexual violence injustice against women of color as especially worthy of redress, and it thus proposes a new path to more comprehensive social healing “by doing justice”<sup>405</sup> for both individual women of color and the polity itself.

Through a careful case study analysis on post-colonial redress efforts, public discourse, British High Court rulings, and the 2013 British government’s reparations settlement for some Mau Mau survivors, this Article encourages scholars, frontline advocates, policymakers, and survivors to strive for more comprehensive redress of multilayered, intersectional harms, especially for women of color. It underscores that the intersection of race and sexual violence is important in defining harms, crimes, violations, benefits, beneficiaries of reparative actions, and the implementation of policies and programs.

Through *recognition* of how women of color are uniquely situated at the bottom of the redress-worthiness hierarchy, this Article calls for more comprehensive and enduring redress for their sexual violence harms. By doing so, it emphasizes that exposing any implicit redress bias might significantly bring changing societal notions about who is worthy of redress.

Many women of color survivors, including the Mau Mau women discussed above, are aging. Indeed, many are dying without seeing any form of reparative justice.<sup>406</sup> We might all begin to “do justice” for women of color still suffering from sexual violence injustice by first recognizing that their unique harms are especially worthy of repair. The time is *now*.

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405. See discussion *supra* Part I. See generally Yamamoto, Pettit & Lee, *supra* note 45 (providing the most up-to-date version of the theoretical framework, particularly focusing on refining the interdisciplinary underpinnings, commonalities, and working principles that provide the foundation for Yamamoto’s 4Rs). See also YAMAMOTO, *supra* note 79.

406. See Engelhart, *supra* note 21 (describing that hundreds of elderly Kenyan claimants have passed away in the last year or so and that many others are dying).