

1983

## Rape, Racism, and the Law

Jennifer Wriggins

*University of Maine School of Law*, wriggins@maine.edu

Follow this and additional works at: <http://digitalcommons.maine.edu/faculty-publications>

 Part of the [Law Commons](#)

---

### Suggested Bluebook Citation

Jennifer Wriggins, *Rape, Racism, and the Law*, 6 Harv. Women's L.J. 103 (1983).

Available at: <http://digitalcommons.maine.edu/faculty-publications/51>

This Article is brought to you for free and open access by the Faculty Scholarship at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

# RAPE, RACISM, AND THE LAW

JENNIFER WRIGGINS\*

## INTRODUCTION

The history of rape in this country has focused on the rape of white women by Black men. From a feminist perspective, two of the most damaging consequences of this selective blindness are the denials that Black women are raped and that all women are subject to pervasive and harmful sexual coercion of all kinds.

This Note examines the historical legacy of the racist social meaning of rape and its consequences. Part I describes the history of the legal and societal focus on punishing Black men when the rape of white women is claimed. Part II discusses the denial of the rape of Black women. Part III argues that the narrow focus on one racial combination of rape obscures the significance of the sexual coercion

---

\*Student, Harvard Law School.

Acknowledgments. Dozens of people contributed to the making of this Note, and the author is indebted to each of them. Among those who helped in ways the author especially appreciates are: Nia Burnette, Lisa Biow, George Chauncey, Jr., Rhonda Copelon, Christopher Edley, Jr., Karen A. Getman, Geraldine Hines, Muhammed Kenyatta, Mary Ann Kopydlowski, Catharine A. MacKinnon, Judy Miles, Stephanie Y. Moore, Lori J. Nelson, Lynn Paltrow, Jane Schacter, Robin Wiener, and Mary Whisner. Without their support, advice, and criticisms, this Note could not have been written. Special thanks are due to Mary Ellen Roy for her patient editing. Responsibility for the views expressed herein lies with the author.

The word "Black" is capitalized in this Note when used to denote someone's race. The reason for this has been well stated by Catharine MacKinnon:

Black is conventionally (I am told) regarded as a color rather than a racial or national designation, hence is not usually capitalized. I do not regard Black as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions. It is as much socially created as, and at least in the American context no less specifically meaningful or definitive than, any linguistic, tribal, or religious ethnicity, all of which are conventionally recognized by capitalization.

MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982). While a parallel argument could support the capitalization of "white," such a usage would resonate with a long tradition of dominance by whites and is hence rejected.

all women face. Part IV argues that feminists must go beyond traditional rape reform measures to stop sexual coercion.

### PART I: THE NARROW FOCUS ON BLACK OFFENDER/WHITE VICTIM RAPE

There are many different kinds of rape.<sup>1</sup> Its victims<sup>2</sup> are of all races,<sup>3</sup> and its perpetrators are of all races.<sup>4</sup> Yet the kind of rape

<sup>1</sup> By "rape" this Note refers not to the legal definition of rape or sexual assault, but rather to "any attempted or completed sexual act that is forced on an individual against his or her will." Bowker, *Rape and Other Sexual Assaults*, WOMEN AND CRIME IN AMERICA 180, 180 (L. Bowker ed. 1981). The term thus includes a wide range of situations, from a stranger assaulting a woman in a dark alley to a husband forcing sex on his wife, regardless of whether penetration is involved or the act is illegal. The term "illegal rape" refers to situations where the imposition of sex is prohibited by law.

This Note addresses only the rape of women by men. Besides being the most prevalent and widely-studied kind of rape, it is also an important manifestation of, and means of perpetuating, male dominance. This Note argues that the treatment of this kind of rape by the legal system also serves as a weapon of white dominance.

<sup>2</sup> Rape statistics are notoriously unreliable. An initial problem with them is that they report only activity which the law defines as rape. Illegal rape is not necessarily the only or most harmful sex forced on victims. See MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence* 8 SIGNS (forthcoming 1983); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 941 (1973).

A second major problem with rape statistics is that underreporting even of illegal rape renders them inaccurate. It is likely that Black women underreport more than white women, especially if the woman's assailant is white. See *infra* note 122. A recent estimate is that only one in two illegal rapes is reported. Bowker, *Women as Victims: An Examination of the Results of L.E.A.A.'s National Crime Survey Program*, in WOMEN AND CRIME IN AMERICA, *supra* note 1, at 158-64.

A third problem is that police often decide not to pursue rape complaints which may be valid, especially if the complainant is Black, so these complaints may not appear in police "reported rape" figures. Chappell, Geis, Schafer & Siegel, *A Comparative Study of Forcible Rape Offenses Known to the Police in Boston and Los Angeles*, in FORCIBLE RAPE 227, 235 (D. Chappell, R. Geis & G. Geis eds. 1977).

More accurate figures may be derived from victim surveys which involve interviewing a random sample of citizens in a particular area concerning their victimization. It is from such surveys that the estimated ratios of actual to reported rapes are derived. However, this method has in some circumstances been found to underestimate the crime committed against Blacks. Hood & Sparks, *Citizens Attitudes and Police Practice in Reporting Offenses*, in VICTIMOLOGY 167 (I. Drapkin & E. Viano eds. 1974).

<sup>3</sup> This Note focuses on rape between white and Black people in this country. It does not deal with rape involving other people of color for several reasons. First, most of what has been written about race and rape focuses exclusively on Black/white issues. (Exceptions include J. WILLIAMS & K. HOLMES, *THE SECOND ASSAULT* (1981) [hereinafter cited as *THE SECOND ASSAULT*]; AEGIS, March-Apr. 1979 (special issue entitled *Violence Against Women and Race*); CHU & TORRES, *Rape: It Can't Happen to Me!*, BRIDGE: AN ASIAN AMERICAN PERSPECTIVE, Spring 1979.) Second, critics of feminist rape literature have primarily addressed its failure to combat the myth of the Black rapist and to recognize the differences between the vulnerability of white and Black women as rape victims. See *infra* note 183. This Note attempts to begin to correct these failures. A remaining failure is commentators' neglect of rape as it affects other people of color.

<sup>4</sup> See *infra* text accompanying notes 121-232.

that has been treated most seriously throughout this nation's history has been the illegal forcible rape of a white woman by a Black man.<sup>5</sup> The selective acknowledgement of Black accused/white victim rape was especially pronounced during slavery and through the first half of the twentieth century.<sup>6</sup> Today a powerful legacy remains that permeates thought about rape and race.<sup>7</sup>

### *Slavery*

During the slavery period, statutes in many jurisdictions provided the death penalty or castration for rape when the convicted man was Black or mulatto and the victim white.<sup>8</sup> These extremely harsh penalties were frequently imposed.<sup>9</sup> In addition, mobs occasionally broke into jails and courtrooms and lynched slaves alleged to have raped white women,<sup>10</sup> prefiguring Reconstruction mob behavior.<sup>11</sup>

In contrast to the harsh penalties imposed on Black offenders, courts occasionally released a defendant accused of raping a white woman when the evidence was inconclusive as to whether he was

---

<sup>5</sup> See Mann & Selva, *The Sexualization of Racism: The Black as Rapist and White Justice*, 3 W. J. BLACK STUDIES 168 (1979); see also *infra* text accompanying notes 8-80.

<sup>6</sup> See *infra* text accompanying notes 8-63.

<sup>7</sup> See *infra* text accompanying notes 64-80.

<sup>8</sup> See, e.g., Alabama Code of 1852 (death penalty for rape of a white woman by a slave or free Black); Mississippi 1857 Statute (death penalty for attempted carnal connection with or rape of a white female under fourteen by a slave); Tennessee 1858 Law (death by hanging for rape of a free white woman by a slave or free Black); Missouri 1825 Statute (castration for rape or attempted rape by a Black or mulatto); Arkansas Code of 1838 (death penalty for assault with intent to commit rape by a Black or mulatto). Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RIGHTS L. REP. 170, 173 n.14 (1980). Although the last two states appear to provide strong sanctions for the rape of a Black woman by a Black man, the case law demonstrates that the claims of Black women were ignored. See *infra* text accompanying notes 93-96. Although concentrated in the South, statutes distinguishing between the races for sexual crimes were enacted in other states as well. See, e.g., Pennsylvania Code of 1700 (death penalty for rape of a white woman by a Black man); Kansas Compilation of 1855 (castration at his own expense for rape or attempted rape of a white woman by a Black or mulatto). Bienen, *supra*, at 173-n.14; see also Burns, *Race Discrimination—Law and Race in America*, in THE POLITICS OF LAW 89 (D. Kairys ed. 1982).

<sup>9</sup> Dennis, a slave, v. State, 5 Ark. 230 (1843); State v. Joshua, a slave, 15 La. Ann. 118 (1860); State v. Bill, 8 Rob. 527 (La. 1844); Isham v. State, 33 Tenn. (1 Sneed) 111 (1853); Ellick v. State, 31 Tenn. (1 Swan) 325 (1851); Commonwealth v. Watts (4 Leigh) 672 (1833); Thompson v. Commonwealth, 31 Va. (4 Leigh) 652 (1833). 1-3 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (H. Catterall ed. 1926-1932); see M. HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA 1767-1878, at 150-61 (1980); K. STAMPP, THE PECULIAR INSTITUTION 210-11 (1956).

<sup>10</sup> K. STAMPP, *supra* note 9, at 190-91.

<sup>11</sup> See *infra* text accompanying notes 26-40.

Black or mulatto.<sup>12</sup> The rape of Black women by white or Black men, on the other hand, was legal;<sup>13</sup> indictments were sometimes dismissed for failing to allege that the victim was white.<sup>14</sup> In those states where it was illegal for white men to rape white women, statutes provided less severe penalties for the convicted white rapist than for the convicted Black one.<sup>15</sup> In addition, common-law rules both defined rape narrowly<sup>16</sup> and made it a difficult crime to prove.<sup>17</sup>

During slavery, then, the legal system treated seriously only one racial combination of rape—rape involving a Black offender and a white victim. This selective recognition continued long after slavery ended.

### *The Post-Civil War Period*

After the Civil War, state legislatures made their rape statutes race-neutral,<sup>18</sup> but the legal system treated rape in much the same way

<sup>12</sup> Thurman v. State, 18 Ala. 276 (1850); Dick, a slave, v. State, 30 Miss. 631 (1856).

<sup>13</sup> S. BROWNMILLER, AGAINST OUR WILL 176 (1975); Evans, *Rape, Race, and Research*, in BLACKS AND CRIMINAL JUSTICE 75, 79 (C. Owens & J. Bell eds. 1977); see W. BOWERS, EXECUTIONS IN AMERICA 173 (1974); A. L. HIGGINBOTHAM, IN THE MATTER OF COLOR 282 (1978); Blackwell, *Social and Legal Dimensions of Interracial Liaisons*, in THE BLACK MALE IN AMERICA 219, 225 (D. Wilkinson & R. Taylor eds. 1977) [hereinafter cited as THE BLACK MALE]; *infra* notes 89-96 and accompanying text.

<sup>14</sup> State v. Charles, a slave, 1 Fla. 298 (1847); Commonwealth v. Jerry Mann, 4 Va. (Va. Cas.) 210 (1820); George, a slave, v. State, 37 Miss. 316 (1859); see *infra* text accompanying notes 93-96.

<sup>15</sup> See, e.g., Virginia Code of 1819 and 1823 Law (death penalty for rape or attempted rape of a white woman by a slave, Black, or mulatto and term of 10-21 years for rape by a white man); Kentucky 1802 Code (death penalty for rape of a white woman by a slave and term of years for rape by a white man). Bienen, *supra* note 8, at 173 n.14; Georgia Penal Code of 1816 (death penalty for rape or attempted rape of a free white woman by a slave or free person of color and term of not more than 20 years for rape or attempted rape by a white man) No. 380 §§ 33-34; No. 508 and 509, § 2; Georgia Acts of 1816 § 1, COMPILATION OF THE LAWS OF GEORGIA 804 (Lamar ed. 1821), cited in Amicus Brief of Women's Legal Defense Fund and Equal Rights Advocates at 17, Coker v. Georgia, 433 U.S. 584 (1977).

<sup>16</sup> For example, rape by one's husband and rape not involving penetration by the penis were not defined as "rape." See H. FEILD & L. BIENEN, JURORS AND RAPE 154, 163 (1980) [hereinafter cited as JURORS]; MACKINNON, *Violence Against Women: A Perspective*, AEGIS, Jan. 1982 51, 53; MacKinnon, *supra* note 2; Comment, *supra* note 2, at 925-26.

<sup>17</sup> The two most important rules were those allowing admission of evidence of the sexual history of the victim and requiring extensive corroborating evidence of the rape. Berger, *Man's Trial, Woman's Tribulation*, 77 COLUM. L. REV. 1, 15-20 (1977); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 336 (1973); Comment, *supra* note 2, at 919; see *infra* text accompanying notes 140-163. Such rules were relaxed when the defendant was Black. See *infra* text accompanying notes 145-151.

<sup>18</sup> A compilation of all post-Civil War state legislation enacted prior to 1917 that mentioned race contained no rape statutes. F. JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO (1918). Such race-specific legislation included many anti-

as it had before the war. Black women raped by white or Black men had no hope of recourse through the legal system.<sup>19</sup> White women raped by white men faced traditional common-law barriers that protected most rapists from prosecution.<sup>20</sup>

Allegations of rape involving Black offenders and white victims were treated with heightened virulence. This was manifested in two ways. The first response was lynching, which peaked near the end of the nineteenth century.<sup>21</sup> The second, from the early twentieth century on, was the use of the legal system as a functional equivalent of lynching, as illustrated by mob coercion of judicial proceedings,<sup>22</sup> special doctrinal rules,<sup>23</sup> the language of opinions,<sup>24</sup> and the markedly disparate numbers of executions for rape between white and Black defendants.<sup>25</sup>

### *Lynching*

Between 1882 and 1946 at least 4715 persons were lynched, about three-quarters of whom were Black.<sup>26</sup> Although lynching tapered off after the early 1950s, occasional lynch-like killings persist to this day.<sup>27</sup> The influence of lynching extended far beyond the numbers

---

miscegenation statutes. *Id.* at 8-10, 62-207. These statutes, providing criminal penalties for interracial marriage, were declared unconstitutional only quite recently, in *Loving v. Virginia*, 388 U.S. 1 (1967), and *McLaughlin v. Florida*, 379 U.S. 184 (1964).

For thorough general discussions of miscegenation see D. BELL, *RACE, RACISM AND AMERICAN LAW* 53-81 (1980); Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964). For a more specific historical discussion, see J. JOHNSTON, *RACE RELATIONS IN VIRGINIA AND MISCEGENATION IN THE SOUTH 1776-1860* (1970).

<sup>19</sup> See *infra* text accompanying notes 101-112.

<sup>20</sup> See *supra* note 16.

<sup>21</sup> A. RAPER, *THE TRAGEDY OF LYNCHING* 1-2 (1933); C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* 43 (1974); Note, *Constitutionality of Proposed Federal Anti-Lynching Legislation*, 34 VA. L. REV. 944 (1948).

<sup>22</sup> See *infra* text accompanying notes 37-50.

<sup>23</sup> See *infra* text accompanying notes 51-55.

<sup>24</sup> See *infra* text accompanying notes 56-58.

<sup>25</sup> See *infra* text accompanying notes 59-63.

<sup>26</sup> A. ROSE, *THE NEGRO IN AMERICA* 185 (1948) (citing a Tuskegee Institute study). A study by the NAACP found the number of lynchings acknowledged by white officials between 1882 and 1927 to be 4951, with approximately 70% of the victims being Black. White, *A Statement of Fact [on Lynching]*, in *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 1910-1932*, at 610 (H. Aptheker ed. 1973) [hereinafter cited as *DOCUMENTARY HISTORY*].

<sup>27</sup> In March 1981, in Mobile, Alabama, a 19-year-old Black man was beaten, strangled to death, and left hanging from a tree by a rope tied in a noose. *N.Y. Times*, Mar. 23, 1981, at A12, col. 6. There were suggestions by people in the community that he was killed for socializing with white women, or that he was mistaken for a Black co-worker who was married to a white woman. *Id.*, Mar. 26, 1981, at A16, col. 6. Three white men were arrested for the murder but later released when a grand jury failed to return indictments. *Id.*, July 28, 1981, at A12, col. 6.

of Black people<sup>28</sup> murdered because accounts of massive white crowds torturing, burning alive, and dismembering their victims<sup>29</sup> created a widespread sense of terror in the Black community.<sup>30</sup>

The most common justification for lynching was the claim that a Black man had raped a white woman.<sup>31</sup> The thought of this particular crime aroused in many white people an extremely high level of mania and panic. One white woman, the wife of an ex-Congressman, stated in 1898, "If it needs lynching to protect woman's dearest possession from human beasts, then I say lynch a thousand times a week if necessary."<sup>32</sup> The quote resonates with common stereotypes that Black male sexuality is wanton and bestial,<sup>33</sup> and that Black men are wild, criminal<sup>34</sup> rapists of white women.<sup>35</sup>

---

<sup>28</sup> Black women were not spared the violence of lynchings. The NAACP study, discussed in White, *supra* note 26, found that of the 4951 people lynched, 76 were Black women. *Id.* at 610. Vivid first person accounts of the lynchings of Black women document that no gentleness was accorded them on account of their sex. See G. LERNER, *BLACK WOMEN IN WHITE AMERICA* 161-63 (1972); Katz, *The Negro Woman and the Law*, in 2 *FREEDOMWAYS* 289 (1962); *DOCUMENTARY HISTORY*, *supra* note 26, at 142.

<sup>29</sup> See A. RAPER, *supra* note 21, at 141-44, 420-21; I. WELLS, *Lynching Bee*, in *A RED RECORD: LYNCHINGS IN THE UNITED STATES 1892-1893-1894* (1895), reprinted in *JUSTICE DENIED: THE BLACK MAN IN WHITE AMERICA* 196 (W. Chace & P. Collier eds. 1970).

<sup>30</sup> A. ROSE, *supra* note 26, at 186-87; Hall, "The Mind that Burns in Each Body": Women, Rape, and Racial Violence, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* (A. Snitow, C. Stansell & S. Thompson eds. forthcoming 1983); Hernton, *The Negro Male*, in *THE BLACK MALE*, *supra* note 13, at 244-46.

<sup>31</sup> A. ROSE, *supra* note 26, at 185; C. WOODWARD, *supra* note 21, at 43; Hall, *supra* note 30; Reynolds, *The Remedy for Lynch Law*, 7 *YALE L.J.* 20, 20 (1897-98) (quoting an article that refers to the lynching of a Black man for the alleged rape of a white woman as "the usual crime").

<sup>32</sup> Reynolds, *supra* note 31, at 20.

<sup>33</sup> Day, *The Hidden Fear*, in *THE BLACK MALE*, *supra* note 13, at 193, 197-98. The assumption made by whites that Blacks have bestial sexuality has deep historical roots. See W. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812*, at 32-40, 151 (1968). In a culture with a somatophobic heritage such as ours, the association of any group with physicality or sexuality is in itself degrading. For discussions of this phenomenon as it relates to women, see S. DE BEAUVOIR, *THE SECOND SEX* 182-84 (1952); S. GRIFFIN, *WOMEN AND NATURE* (1978); Ortnier, *Is Female to Male as Nature is to Culture?*, in *WOMAN, CULTURE AND SOCIETY* 67 (M. Rosaldo & L. Lamphere eds. 1974); Spelman, *Woman as Body: Ancient and Contemporary Views*, 8 *FEMINIST STUDIES* 109, 119 (1982).

<sup>34</sup> The association of Black men with criminality extends back to at least to the nineteenth century. A. ROSE, *supra* note 26, at 303. White criminals often capitalized on and perpetuated this stereotype by dyeing their faces black before committing crimes. *Id.* at 304; Johnson, *The Negro and Crime*, in *THE SOCIOLOGY OF CRIME AND DELINQUENCY* 419, 422 (M. Wolfgang, L. Santz & N. Johnston eds. 2d ed. 1970). The alleged propensity of Black men to rape white women can be seen partly as a manifestation of the criminality stereotype. In 1933, Arthur Raper made this link in trying to explain lynching: "[A]ccording to the popular estimate, all Negroes are essentially alike and are inclined to commit certain crimes, chief of which is the rape of white women." A. RAPER, *supra* note 21, at 50; see A. ROSE, *supra* note 26, at 305. Note that "all Negroes" refers only to Black men; Black women are left out of this formulation.

<sup>35</sup> In the United States the myth of Black male sexuality includes the characterization of the Black male as rapist of white women. See, e.g., E. GENOVESE, *ROLL JORDAN ROLL: THE*

Many whites accepted lynching as an appropriate punishment for a Black man accused of raping a white woman. The following argument made to the jury by defense counsel in a 1907 Louisiana case illustrates this acceptance:

Gentlemen of the jury, this man, a nigger, is charged with breaking into the house of a white man in the nighttime and assaulting his wife, with the intent to rape her. Now, don't you know that, if this nigger had committed such a crime, he never would have been brought here and tried; that he would have been lynched, and if I were there I would help pull on the rope.<sup>36</sup>

### *The Legal System's Treatment: "Legal Lynching"*

It is doubtful whether the legal system better protected the rights of a Black man accused of raping a white woman than did the mob.<sup>37</sup> Contemporary legal literature used the term "legal lynching"

---

WORLD THE SLAVES MADE 336 (1976); G. LERNER, *supra* note 28, at 193; Mann & Selva, *supra* note 5, at 169-70; Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 3, 444, 454 (1982).

<sup>36</sup> State v. Petit, 119 La. 1013, 1016, 44 So. 848, 849 (1907) (quoting defense counsel). The argument also reveals much about the way the legal system defined the rape of white women. The house where the alleged rape took place belonged not to the victim but to "a white man" and she was "his wife." A Black woman would not have received such protection from the legal system and a white woman did only because she belonged to a white man. These dynamics are discussed *infra* text accompanying notes 143-166. Also, note that the jury here is accurately addressed by the defense counsel as "gentlemen," *i.e.*, it consists entirely of white men, probably landowners. See, e.g., Day v. Commonwealth, 43 Va. (2 Gratt.) 562 (1845); 44 Va. (3 Gratt.) 629 (1846) (new trial for free mulatto defendant convicted of rape of white woman because of evidence that one juror was not a landowner in the county where the trial was held).

<sup>37</sup> The district attorney responded to the defense's claim in the *Petit* case, discussed *supra* note 36, by arguing that a legal system controlled by whites made lynching unnecessary because it had the same result:

During the reconstruction days, when we had negro domination in this state, the Kuklux Klans were organized and the best people of the state shouldered their guns for the protection of our white people. During those days white people were thrown into jail and tried by negro justices of the peace and negro juries. Now we have no more negro domination, but a government by the white people, and hence no necessity for lynching.... [T]he fact that this negro is given a fair trial is no reason why you should believe him innocent.

119 La. at 1016, 44 So. at 849 (quoting the district attorney) (emphasis added). Although the defendant claimed the district attorney's argument was prejudicial, the Supreme Court of Louisiana affirmed the conviction, commenting: "While this discussion of matters outside of the record was highly improper, and should have been, in its inception, repressed by the trial judge, we fail to perceive in the remarks of the district attorney any appeal to racial prejudice for the purpose of influencing the jury." *Id.* at 1017, 44 So. at 849.



to describe the legal system's treatment of Black men.<sup>38</sup> Well past the first third of the twentieth century, courts were often coerced by violent mobs, which threatened to execute the defendant themselves unless the court convicted him.<sup>39</sup> Such mobs often did lynch the defendant if the judicial proceedings were not acceptable to them.<sup>40</sup> A contemporary authority on lynching commented in 1934 that "the local sentiment which would make a lynching possible would insure a conviction in the courts."<sup>41</sup> Even if the mob was not overtly pressuring for execution, a Black defendant accused of raping a white woman faced a hostile, racist legal system.<sup>42</sup> State court submission to mob pressure is well illustrated by the most famous series of cases about interracial rape, the Scottsboro cases of the 1930s.<sup>43</sup> Eight young Black men were convicted of what the Alabama Supreme Court called "a most foul and revolting crime,"<sup>44</sup> which was the rape of "two defenseless white girls."<sup>45</sup> The defendants were summarily sentenced to death based on minimal and dubious evidence, having been denied effective assistance of counsel.<sup>46</sup> The Alabama Supreme Court upheld the convictions in opinions demonstrating relentless determination to hold the defendants guilty regardless of strong evidence that mob pressure had influenced the verdicts and the weak evidence presented against the defendants. In one decision, that court affirmed the trial court's denial of a change of venue on the grounds that the mobs' threats of harm were not imminent enough although the National Guard had been called out to protect the defendants from mob executions.<sup>47</sup> The U.S. Supreme Court later recognized

---

<sup>38</sup> Chadbourn, *infra* note 39, at 332.

<sup>39</sup> A. RAPER, *supra* note 21, at 143; Chadbourn, *Plan for Survey of Lynching and the Judicial Process*, 9 N.C. L. REV. 330, 332-33 (1931); see *Thompson v. State*, 117 Ala. 67, 23 So. 676 (1898) (change of venue granted for Black defendant accused of rape because threats of mob violence threatened defendant's imminent death or would pressure jury into convicting); see also R. WILKINS, *RAPE: A CASE HISTORY OF MURDER, TERROR AND INJUSTICE VISITED UPON A NEGRO COMMUNITY* (1949).

<sup>40</sup> Chadbourn, *supra* note 39, at 331.

<sup>41</sup> Chadbourn, *Lynching and the Law*, 20 A.B.A.J. 71 (1934).

<sup>42</sup> Burns, *Black People and the Tyranny of American Law*, 407 ANNALS, Spring 1973, at 156, 159-60.

<sup>43</sup> *Patterson v. State*, 224 Ala. 531, 141 So. 195 (1932); *Powell v. State*, 224 Ala. 540, 141 So. 201 (1932); *Weems v. State*, 224 Ala. 524, 141 So. 215 (1932).

<sup>44</sup> *Powell v. State*, 224 Ala. 540, 544, 141 So. 201, 204 (1932).

<sup>45</sup> *Id.* at 548, 141 So. at 207.

<sup>46</sup> *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

<sup>47</sup> *Patterson v. State*, 224 Ala. 531, 534, 141 So. 195, 196 (1932); *Powell v. State*, 224 Ala. 540, 545-46, 141 So. 201, 205-06 (1932).

that the proceedings had in fact taken place in an atmosphere of "tense, hostile, and excited public sentiment."<sup>48</sup> After a lengthy appellate process, including three favorable Supreme Court rulings,<sup>49</sup> all of the Scottsboro defendants were released, having spent a total of 104 years in prison.<sup>50</sup>

In addition, courts applied special doctrinal rules to Black defendants accused of the rape or attempted rape of white women.<sup>51</sup> One such rule allowed juries to consider the race of the defendant and victim in drawing factual conclusions as to the defendant's intent in attempted rape cases. If the accused was Black and the victim white, the jury was entitled to draw the inference, based on race alone, that he intended to rape her. One court wrote, "In determining the question of intention, the jury may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man."<sup>52</sup> The "social conditions and customs founded upon racial differences" which the jury was to consider included the assumption that Black men always and only want to rape white women,<sup>53</sup> and that a white woman would never consent to sex with a Black man.<sup>54</sup>

<sup>48</sup> *Powell v. Alabama*, 287 U.S. 45, 51 (1932); see also *C. NORRIS & S. WASHINGTON, THE LAST OF THE SCOTTSBORO BOYS 19-25* (1979).

<sup>49</sup> *Norris v. Alabama*, 294 U.S. 587 (1935) (systematic and arbitrary exclusion of Blacks from jury lists resulting in exclusion of Blacks from juries constitutes denial of Fourteenth Amendment due process rights); *Patterson v. Alabama*, 294 U.S. 600 (1935) (state Supreme Court must consider defendants' claim of systematic exclusion of Blacks from juries despite defendants' failure to file timely bill of exceptions in light of Supreme Court's decision on identical facts in *Norris v. Alabama* that such claims have merit); *Powell v. Alabama*, 287 U.S. 45 (1932) (defendant accused of capital crime has due process right to counsel that includes right to consult with counsel and prepare a defense).

<sup>50</sup> *C. NORRIS & S. WASHINGTON, supra* note 48.

<sup>51</sup> Chastity evidence, for example, was treated differently for Black and white defendants, see *infra* text accompanying notes 145-155.

<sup>52</sup> *McQuirter v. State*, 36 Ala. App. 707, 709, 63 So. 2d 388, 390 (1953) (citations omitted). In this case, the defendant, a Black man who had never before been arrested, was found guilty of an "attempt to commit an assault with intent to rape." *Id.* at 708, 63 So. 2d at 388. He was accused of muttering something unintelligible and walking within six feet of Mrs. Ted Allen, a white woman. *Id.* at 708, 63 So. 2d at 389. See *Pumphrey v. State*, 156 Ala. 103, 107-08, 47 So. 156, 158 (1908); *Kelley v. State*, 1 Ala. App. 133, 135, 56 So. 15, 15-16 (1911).

<sup>53</sup> See *supra* notes 33-35. Many opinions graphically illustrate this assumption, for example: "[T]he accused, a negro, under the excitement of lust and with the intention of gratifying it by force, entered the bedroom of Mrs. Crimm, a white woman. . . . There was nothing in the evidence to indicate that Mrs. Crimm was not virtuous. . . ." *Pumphrey v. State*, 156 Ala. 103, 107, 47 So. 156, 158 (1908). Note the significance to the court, even in this situation, that "Mrs. Crimm" is "virtuous." See *Barnett v. State*, 83 Ala. 40, 3 So. 612 (1878); *Kelley v. State*, 1 Ala. App. 133, 56 So. 15 (1911); *Dorsey v. State*, 108 Ga. 477, 34 S.E. 135 (1899). See *infra* text accompanying notes 140-155.

<sup>54</sup> See, e.g., *Story v. State*, 178 Ala. 98, 5 So. 480 (1912), discussed *infra* text accompanying notes 149-150.

The Georgia Supreme Court of 1899 was even more explicit about the significance of race in the context of attempted rape, and particularly about the motivations of Black men. It held that race may properly be considered "to rebut any presumption that might otherwise arise in favor of the accused that his intention was to obtain the consent of the female, upon failure of which he would abandon his purpose to have sexual intercourse with her."<sup>55</sup> Such a rebuttal denied to Black defendants procedural protection that was accorded white defendants.

Judicial attitudes toward the rape of white women by Black men are also manifested in the factual descriptions of the crime in opinions. Courts sometimes created pornographic images of the events of the rape.<sup>56</sup> One court, for example, wrote, "[The victim,] while clad only in her pajamas was forced to a remote spot some two blocks from her home, where battered, bruised, bleeding and exhausted she was overpowered. . . ."<sup>57</sup> The sense of disgusted fascination that such opinions convey is not paralleled in cases where offender and victim are both white.<sup>58</sup>

The outcome of this disparate treatment of Black men by the legal system was often the same as lynching—death.<sup>59</sup> Between 1930 and 1967, thirty-six percent of the Black men who were convicted of raping a white woman were executed.<sup>60</sup> In stark contrast, only two percent

<sup>55</sup> *Dorsey v. State*, 108 Ga. 477, 480, 34 S.E. 135, 136–37 (1899). This rule was not used where both parties were Black. See *Washington v. State*, 138 Ga. 370, 75 S.E. 253 (1912); see *infra* text accompanying notes 106–108.

<sup>56</sup> That the descriptions were pornographic was pointed out to the author by Karen Getman.

<sup>57</sup> *Maxwell v. State*, 236 Ark. 694, 697, 370 S.W. 2d 113, 115 (1963); see *Vanleeward v. State*, 220 Ga. 135, 136, 137 S.E. 2d 452, 453 (1964).

<sup>58</sup> For example, in *Rice v. State*, 35 Fla. 236, 17 So. 286 (1895), the court drily notes "the plaintiff in error was convicted of the crime of rape upon one Helen Smith, his stepdaughter."

<sup>59</sup> In 1965, 18 American jurisdictions allowed the death penalty for rape. Wolfgang & Reidel, *Race, Judicial Discretion and the Death Penalty* 407 *ANNALS* 120 (1973). Hugo Bedau has written that most criminologists think capital punishment for rape was "introduced in order to *Keep the Nigras in line*" and "had nothing to do with its deterrent effect." Bailey, *Rape and the Death Penalty: A Neglected Area of Deterrence Research*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 336 (H. Bedau & C. Pierce eds. 1975) (citing unpublished letter) (emphasis in the original).

<sup>60</sup> Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in *EXECUTIONS IN AMERICA*, *supra* note 13, at 116. A systematic analysis of 1238 convictions for rape between 1945 and 1965 examined many variables in addition to race, such as presence of a weapon and prior record of the defendant, to attempt to account for the disparate numbers of executions. The study concluded that race was the only factor that accounted for the disparities. *Id.* at 114–20. The Wolfgang study is unique in its methodology and conclusiveness. It supports a larger body of prior research summarized in *id.* at 110–11.

of all defendants convicted of rape involving other racial combinations were executed.<sup>61</sup> As a result of such disparate treatment, eighty-nine percent of the men executed for rape in this country were Black.<sup>62</sup> While execution rates for all crimes were much higher for Black men than for white men, the differential was most dramatic when the crime was the rape of a white woman.<sup>63</sup>

### *The Legacy Today*

The patterns that began in slavery and continued long afterwards have left a powerful legacy that manifests itself today in several ways. Although the death penalty for rape has been declared unconstitutional,<sup>64</sup> the severe statutory penalties for rape<sup>65</sup> continue to be applied in a discriminatory manner. A recent study concluded that Black men convicted of raping white women receive more serious sanctions than all other sexual assault defendants.<sup>66</sup> A recent attitudinal study found that white potential jurors treated Black and white defendants similarly when the victim was Black. However,

<sup>61</sup> *Id.* at 110-13; see Mann & Selva, *supra* note 5.

<sup>62</sup> Wolfgang & Reidel, *supra* note 59.

<sup>63</sup> Wolfgang, *supra* note 60, at 110-13. The NAACP-LDEF challenged the constitutionality of the death penalty partly on the grounds that the execution rate disparities for rape constituted racial discrimination. M. MELTSNER, *CRUEL AND UNUSUAL* 73-105 (1973). This argument was not accepted by the Supreme Court in its decision limiting the circumstances in which the death penalty could constitutionally be imposed. See *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972). A striking example of opposition to this type of argument is the response of the Supreme Court of Arkansas in 1962 to evidence that over a recent 47 year period, 95% of the executions for rape had been of Black men (19 out of 20) and 72.9% of the executions for murder had been of Black men or women (108 out of 148). See *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 113 (1963). The court rejected the idea that such statistics proved discrimination, concluding:

Certainly there was no evidence offered even remotely suggesting that the ratio of violent crimes by Negroes and Whites was different from the ratio of the executions. There was no testimony suggesting that the State's attorneys in the various judicial districts had not been asking for the death penalty in their prosecutions for rape, whether the accused be black or white.

*Id.* at 701. This demonstrates an acceptance of the stereotypes of Black male criminality, see *supra* note 34, and rapaciousness, see *supra* note 35.

<sup>64</sup> *Coker v. Georgia*, 433 U.S. 584 (1977).

<sup>65</sup> In almost half the states today, the maximum punishment for rape is life imprisonment. JURORS, *supra* note 16, at 207-458.

<sup>66</sup> LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AMER. SOC. REV. 842, 852 (1980).

Black defendants received more severe punishment than white defendants when the victim was white.<sup>67</sup>

The rape of white women by Black men is also used to justify harsh rape penalties. One of the few law review articles written before 1970 that takes a firm position in favor of strong rape laws to secure convictions begins with a long quote from a newspaper article describing rapes by three Black men, who at 3 a.m. on Palm Sunday "broke into a West Philadelphia home occupied by an eighty-year-old widow, her forty-four-year-old daughter and fourteen-year-old granddaughter," brutally beat and raped the white women, and left the grandmother unconscious "lying in a pool of blood."<sup>68</sup> This introduction presents rape as a crime committed by violent Black men against helpless white women. It is an image of a highly atypical rape—the defendants are Black and the victims white, the defendants and victims are strangers to each other, extreme violence is used, and it is a group rape. Contemporaneous statistical data on forcible rapes reported to the Philadelphia police department reveals that this rape case was virtually unique.<sup>69</sup> Use of this highly unrepresentative image of rape to justify strict rape laws<sup>70</sup> is consistent with recent research showing that it is a prevalent, although false, belief about rape that the most common racial combination is Black offender and white victim.<sup>71</sup>

---

<sup>67</sup> JURORS, *supra* note 16, at 117–18. This difference is not solely attributable to the type of crime at issue, since many studies show that Black defendants usually receive stricter sentences than white defendants for crimes committed against whites other than rape, *id.* at 117, and that white jurors are generally lenient on Black defendants who commit crimes against Blacks. Note, *The Case for Black Jurors*, 79 YALE L.J. 531, 534 (1970). But the degree of misinformation and sensationalism associated with the accusation of rape is unique. See *infra* note 71.

<sup>68</sup> Schwartz, *The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape*, 59 J. CRIM. L., CRIMINOLOGY, & POLICE BEHAVIOR 509 (1968). The author concludes that the increased penalties for rape did not reduce the incidence of rape.

<sup>69</sup> M. AMIR, *infra* note 116. Out of 343 rapes reported to the Philadelphia police, 3.3% involved Black defendants accused of raping white women, *id.* at 44; 42% involved complaints of stranger rape, *id.* at 250; 20.5% involved brutal beatings, *id.* at 155–56; 43% involved group rapes, *id.* at 200.

<sup>70</sup> In October 1969, *The Thunderbolt*, the newspaper of the National States Rights Party, carried a strikingly similar image. At the bottom of the page was a drawing of the FBI's crime time clock, with a caption proclaiming: "Every thirty minutes, a woman is RAPED somewhere in the U.S.A." Dominating the top of the page was the phrase "THE BLACK PLAGUE," next to a drawing of a large unkempt Black man with a knife, running toward the reader and away from a tangled pile of grass. On close examination, what appeared initially as grass was revealed as the virtually subliminal image of a partly disrobed, prone blonde white woman. This image is reproduced in L. CURTIS, *CRIMINAL VIOLENCE* 22 (1974).

<sup>71</sup> In answer to the question, "Among which racial combination do most rapes occur?" 48% of respondents stated Black males and white females, 3% stated white males and Black females, 16% stated Black males and Black females, 33% stated white males and white females. JURORS,

Charges of rapes committed by Black men against white women are still surrounded by sensationalism<sup>72</sup> and public pressure for prosecution. Black men seem to face a special threat of being unjustly prosecuted or convicted.<sup>73</sup> One example is Willie Sanders.<sup>74</sup> Sanders is a Black Boston man who was arrested and charged with the rapes of four young white women after a sensational media campaign and intense pressure on the police to apprehend the rapist. Although the rapes continued after Sanders was incarcerated, and the evidence against him was extremely weak, the state subjected him to a vigorous twenty-month prosecution. After a lengthy and expensive trial, and an active public defense, he was eventually acquitted.<sup>75</sup> Although Sanders was clearly innocent, he could have been convicted; he and his family suffered incalculable damage despite his acquittal.

Another recent example is the Alabama case of Thomas Lee Hines.<sup>76</sup> Hines is a young mentally retarded Black man who was accused of raping several white women. The trial judge granted a change of venue, noting, "the facts of the race of the defendant and victims have so overpowered the case as to make it appear to the community as a racial incident."<sup>77</sup> Hines' trial was transferred to a nearby county, where he was convicted by an all-white jury in proceedings marked by frequent outbursts from spectators, sensationalist press coverage,

---

*supra* note 16, at 80. Recent victim survey data contradicts this prevalent belief; more than four-fifths of illegal rapes reported to researchers were between members of the same race, and white/Black rapes roughly equaled Black/white rapes. Bowker, *supra* note 2, at 172. In that text, there is a misprint so that the sentence reads: "nearly four-fifths of all rapes were interracial." *Id.* While the context makes clear that "intra-racial" is intended, it is fascinating that this particular typographical error slipped past all proofreaders. For a discussion of rape statistics, see *supra* note 2.

<sup>72</sup> See Abbott & Calónico, *Black Man, White Woman—The Maintenance of a Myth: Rape and the Press in New Orleans*, in *CRIME AND DELINQUENCY: DIMENSIONS OF DEVIANCE* 141 (M. Riedel & T. Thornberry eds. 1974); Evans, *supra* note 13, at 75; Stern, *The Right of the Accused to a Public Defense*, 18 *HARV. C.R.-C.L. L. REV.* (forthcoming 1983).

<sup>73</sup> Several commentators have noted recent rape convictions of Black men accused of raping white women that seem to be based on inadequate evidence. See A. DAVIS, *WOMEN, RACE AND CLASS*, 172-75 (1981); SOCIALIST WOMEN'S CAUCUS OF LOUISVILLE, *THE RACIST USE OF RAPE AND THE RAPE CHARGE* (July 1975) (on file at the HARV. WOMEN'S L.J.); BRADEN, *A Second Open Letter to Southern White Women*, 4 *SOUTHERN EXPOSURE* 50 (Winter 1977); Evans, *supra* note 13, at 80.

<sup>74</sup> Suffolk Superior Court Indictment No. 025027-36, 025077 (1980).

<sup>75</sup> See Stern, *supra* note 72; Sands, *Rape and Racism in Boston: An Open Letter to White Feminists*, *OFF OUR BACKS*, Jan. 1980, at 16-17; *THE WILLIE SANDERS DEFENSE COMMITTEE, FROM SCOTTSBORO 1930 TO BOSTON 1980: THE FRAME-UP CONTINUES* (1980).

<sup>76</sup> *Hines v. State*, 384 So. 1171 (Ala. Crim. App. 1980). This case was brought to the attention of the author by Stephanie Y. Moore.

<sup>77</sup> *Id.* at 1183.

and extensive security to protect the courtroom participants.<sup>78</sup> The appellate court granted a new trial because police behavior coupled with the degree of Hines' retardation called into question the voluntariness of his statements to the police, and stated that the court found that the racially charged trial conditions justified a second change of venue.<sup>79</sup> Hines was eventually declared incompetent for trial and committed to a state institution.<sup>80</sup>

### Conclusion

From slavery to the present day, the legal system has consistently treated the rape of white women by Black men with more harshness than any other kind of rape. The punishment for Black offender/white victim rape has ranged historically from castration, to death by torture and lynching, to executions. Today Black men convicted of raping white women receive longer prison sentences than other rape defendants. Innocent Black men also face the threat of racially motivated prosecutions.

This selective focus is significant in several ways. First, since tolerance of coerced sex has been the rule rather than the exception, it is clear that the rape of white women by Black men has been treated seriously not because it is coerced sex and thus damaging to women, but because it is threatening to white men's power over both "their" women and Black men.<sup>81</sup> Second, in treating Black offender/white

---

<sup>78</sup> *Id.* at 1183.

<sup>79</sup> *Id.* at 1181, 1183.

<sup>80</sup> N.Y. Times, Nov. 22, 1980, at A17, col. 4.

<sup>81</sup> Part of the reason for this social meaning of rape is that laws against rape originate in the conception of women as property. See S. BROWNMILLER, *supra* note 13, at 7-10, 201; L. CLARK & D. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* 115-32 (1977); *THE SECOND ASSAULT*, *supra* note 3, at 24; Comment, *supra* note 2, at 924-25.

In nineteenth century cases and literature, this notion sometimes took the form of discussing women as "goods." For example, in one rape case where a slave was accused of raping a white woman, force was an element of the crime, but since there was no evidence of force, the Alabama Supreme Court wrote:

There was, in this case, at least some evidence tending to show that the act of the prisoner was an attempt to accomplish his object by fraudulent personation of the husband. . . . [W]e depart from our usual course, for the purpose of inviting the attention of the legislature to this subject. Under our penal laws, one who obtains the goods of another under false and fraudulent pretenses, is held guilty. . . as if he had feloniously stolen them. He who contaminates female purity under like fraudulent pretenses, goes unwhipped of justice.

victim illegal rape much more harshly than all coerced sex experienced by Black women and most coerced sex experienced by white women, the legal system has implicitly condoned the latter forms of rape. Third, this treatment has contributed to a paradigmatic but false concept of rape as being primarily a violent crime between strangers where the perpetrator is Black and the victim white. Finally, this pattern is perverse and discriminatory because rape is painful and degrading to both Black and white victims<sup>82</sup> regardless of the attacker's race.<sup>83</sup>

## PART II: THE DENIAL OF THE RAPE OF BLACK WOMEN

*Who knows what the black woman thinks of rape? Who has asked her? Who cares? —ALICE WALKER<sup>84</sup>*

The selective acknowledgement of the existence and seriousness of the rape of white women by Black men has been accompanied by a denial of the rape of Black women that began in slavery and continues today. Because of racism and sexism, very little has been written about this denial. Mainstream American history has ignored the role of Black people to a large extent; systematic research into Black history has been published only recently.<sup>85</sup> The experiences of Black women have yet to be fully recognized in those histories,<sup>86</sup> although this is beginning to change.<sup>87</sup> Indeed, very little has been written about rape from the perspective of the victim, Black or white,

---

Lewis, a slave, v. State, 30 Ala. 54, 56-57 (1857). For explanations of how the conception of women as property links with the creation of myths about the Black male as rapist, see A. DWORKIN, *RIGHT-WING WOMEN* 124 (1983); Mann & Selva, *supra* note 5, at 170.

<sup>82</sup> Powerful poems about the effects of rape on its victims have been published in the last decade, by both Black and white women. See, e.g., Jordan, *Poem About My Rights*, *AEGIS*, March-Apr. 1979, at 31; M. PIERCY, *Rape Poem*, in *LIVING IN THE OPEN* (1976); Shange, *is not so gd to be born a girl*, 10 *THE BLACK SCHOLAR*, May-June 1979, at 8-9. This is not to assert that Black and white women's experiences have been identical. See Part II, *infra* text accompanying notes 84-124.

<sup>83</sup> Evans, *supra* note 13, at 81.

<sup>84</sup> A. WALKER, *Advancing Luna—and Ida B. Wells*, in *YOU CAN'T KEEP A GOOD WOMAN DOWN* 85, 93 (1981).

<sup>85</sup> Beale, *Slave of a Slave No More: Black Women in Struggle*, 12 *THE BLACK SCHOLAR*, Nov.-Dec. 1981, at 16.

<sup>86</sup> *Id.*

<sup>87</sup> G. LERNER, *supra* note 28; *BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES* (G. Hull, P. Scott & B. Smith eds. 1982); *CONDITIONS: FIVE*, Autumn 1979 (The Black Women's Issue); 2 *HERESIES*, Fall 1979 (Third World Women: The Politics of Being Other); 8 *SOJOURNER*,



until quite recently.<sup>88</sup> Research about Black women rape victims encounters all these obstacles.

### *Slavery*

The rape of Black women by white men during slavery was commonplace and was used as a crucial weapon of white supremacy.<sup>89</sup> White men had what one commentator called "institutionalized access" to Black women.<sup>90</sup> The rape of Black women by white men cannot be attributed to unique Southern pathology, however, for numerous accounts exist of northern armies raping Black women while they were "liberating" the South.<sup>91</sup>

The legal system rendered the rape of Black women by any man, white or Black, invisible. The rape of a Black woman was not a crime.<sup>92</sup> In 1859 the Mississippi Supreme Court dismissed the indictment of a male slave for the rape of a female slave less than 10 years old, saying:

[T]his indictment can not be sustained, either at common law or under our statutes. It charges no offense known to either system. [Slavery] was unknown to the common law . . . and hence its provisions are inapplicable. . . . There is no act (of our legislature on this subject) which embraces either the attempted or actual commission of a rape by a slave on a female slave. . . . Masters and slaves can not be governed by the same system or laws; so different are their positions, rights and duties.<sup>93</sup>

---

Jan. 1983 (Special Issue: Women of Color); Jones, *My Mother was Much of a Woman: Black Women, Work and the Family Under Slavery*, 8 FEMINIST STUDIES 235 (1982); 9 THE BLACK SOCIOLOGIST, Spring/Summer 1982 (special issue entitled *New Thoughts on Feminism, Race Relations and Social Change*); Reagon, *My Black Mothers and Sisters or On Beginning a Cultural Autobiography*, 8 FEMINIST STUDIES 81 (1982); Smith, *Racism and Women's Studies*, 5 FRONTIERS, Winter 1980, at 48; Spelman, *The Erasure of Black Women* 5 QUEST 36 (1982).

<sup>88</sup> See *infra* note 212.

<sup>89</sup> S. BROWN MILLER, *supra* note 13, at 165; A. DAVIS, *supra* note 73, at 24-27 (1981); B. HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 24-27 (1981); G. LERNER, *supra* note 28, at 149-50; J. NOBLE, *BEAUTIFUL ALSO ARE THE SOULS OF MY BLACK SISTERS* 35 (1978); see DuBois, *Divine Right*, in DOCUMENTARY HISTORY, *supra* note 26, at 53.

<sup>90</sup> L. CURTIS, *supra* note 70, at 22.

<sup>91</sup> H. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750-1925*, at 386-87 (1978).

<sup>92</sup> See *supra* text accompanying notes 13-14.

<sup>93</sup> *George, a slave, v. State*, 37 Miss. 306 (1859). The following year the state legislature, evidently shocked by the decision, outlawed attempted or actual rape of a Black or mulatto female under 12 by a Black or mulatto male, and made it punishable by death or whipping. 1860 Miss. Laws 62. The legislature refused to recognize the rape of adult Black females and the rape of any Black females by white men.

This decision is illuminating in several respects. First, Black men are held to lesser standards of sexual restraint with Black women than are white men with white women.<sup>94</sup> Second, white men are held to lesser standards of restraint with Black women than are Black men with white women.<sup>95</sup> Neither white nor Black men were expected to show sexual restraint with Black women.<sup>96</sup>

### *The Post-Civil War Period*

After the Civil War, the widespread rape of Black women by white men persisted.<sup>97</sup> Black women were vulnerable to rape in several ways that white women were not. First, the rape of Black women was used as a weapon of group terror by white mobs and by the Ku Klux Klan during Reconstruction.<sup>98</sup> Second, because Black women worked outside the home,<sup>99</sup> they were exposed to employers' sexual aggression as white women who worked inside the home were not.<sup>100</sup>

The legal system's denial that Black women experienced sexual abuse by both white and Black men also persisted,<sup>101</sup> although

<sup>94</sup> "Whites, perhaps originally to perpetuate breeding, encouraged the identity of Black males in terms of uninhibited sexuality. . . . It seems clear that the Black male was given sexual license by the White patriarchy in exchange for his economic and political autonomy." *THE SECOND ASSAULT*, *supra* note 3, at 30-31; see B. HOOKS, *supra* note 89, at 35; G. LERNER, *supra* note 28, at 194. The "sexual license" of course did not extend to white women. *Id.* at 31-33.

The comparison between masters and slaves in *George v. State*, 37 Miss. 306 (1859), implies that real standards of sexual restraint were applied to white men's behavior toward white women, an assumption questioned in Part III of this Note, *infra* text accompanying notes 138-180.

<sup>95</sup> See *supra* text accompanying notes 5-17.

<sup>96</sup> R. STAPLES, *THE BLACK WOMAN IN AMERICA* 40 (1973); B. HOOKS, *supra* note 89, at 32-34.

<sup>97</sup> See H. GUTMAN, *supra* note 91, at 390; B. HOOKS, *supra* note 89, at 52, 56-59; G. LERNER, *supra* note 28, at 173-93.

<sup>98</sup> See G. LERNER, *supra* note 28, at 172-81.

<sup>99</sup> See B. HOOKS, *supra* note 89, at 22, 71-72; G. LERNER, *supra* note 28, at xxiv; J. NOBLE, *supra* note 89, at 46; Beckett, *Working Women: A Historical Review of Racial Differences*, 9 *THE BLACK SOCIOLOGIST* 5 (1982). Analyses of women's situations which assume the "traditional women's role" to be that of housewife, and treat "women's" introduction into the workforce as a relatively recent phenomena, effectively deny the existence of Black women. While this denial has been pointed out in many publications, recent examples of it exist. See, e.g., Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW*, *supra* note 8, at 125-26.

<sup>100</sup> See B. HOOKS, *supra* note 89, at 56-59. The myths concerning Black women's promiscuity probably contributed to the sexual abuse of Black women by white employers.

<sup>101</sup> Bell Hooks discusses newspaper articles urging the public to take action in opposition to the rape of Black women, B. HOOKS, *supra* note 89, at 56-59. The author of this Note has been unable to find any legal literature on the rape of Black women either during or after slavery.

statutes had been made race-neutral.<sup>102</sup> Even if a Black victim's case went to trial—in itself highly unlikely<sup>103</sup>—procedural barriers and prejudice against Black women protected any man accused of rape or attempted rape.<sup>104</sup> The racist rule which facilitated prosecutions of Black offender/white victim attempted rapes by allowing the jury to consider the defendant's race as evidence of his intent,<sup>105</sup> for instance, was not applied where both persons were "of color and there was no evidence of their social standing."<sup>106</sup> That is, the fact that a defendant was Black was considered relevant only to prove intent to rape a white woman; it was not relevant to prove intent to rape a Black woman. By using disparate procedures, the court implicitly makes two assertions. First, Black men do not want to rape Black women with the same intensity or regularity that Black men want to rape white women.<sup>107</sup> Second, Black women do not experience coerced sex in the sense that white women experience it.<sup>108</sup>

These attitudes reflect a set of myths about Black women's supposed promiscuity which were used to excuse white men's sexual abuse

<sup>102</sup> See *supra* note 18.

<sup>103</sup> The process that white rape victims must go through in pursuing a rape complaint has been shown to be arduous and taxing. See L. HOLMSTROM & A. BURGESS, *THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS* 30-62 (1978) [hereinafter cited as *THE VICTIM OF RAPE*]; Note, *supra* note 17, at 347-51; Comment, *supra* note 2, at 937-38; Comment, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36, 43-49 (1974) [hereinafter cited as Comment, *The Rape Victim*]. The treatment by the legal system of a Black rape victim in the first half of this century was incalculably worse. See S. GRIFFIN, *RAPE: THE POWER OF CONSCIOUSNESS* 14 (1979) (description of the treatment Billie Holiday received after having been raped at age 10).

<sup>104</sup> Traditional common-law rules which made rape generally a difficult crime to prove protected the defendant. See *infra* note 159. In addition, Black women's claims were not taken seriously regardless of the offender's race. In a 1971 study on judges' attitudes towards rape victims, a judge was quoted as saying: "with the Negro community, you really have to redefine rape. You never know about them." Bohmer, *Judicial Attitudes Towards Rape Victims*, 57 JUDICATURE 303 (1974). A vivid example of the judicial system's response to Black women's claims of sexual harassment is the account by a nurse published in 1912:

I remember well the first and last work place from which I was dismissed. I lost my place because I refused to let the madam's husband kiss me. . . . I didn't know then what has been a burden to my mind and heart ever since; that a colored woman's virtue in this part of the country has no protection. When my husband went to the man who had insulted me, the man. . . had him arrested! I. . . testified on oath to the insult offered me. The white man, of course, denied the charge. The old judge looked up and said: 'This court will never take the word of a nigger against the word of a white man.'

*More Slavery at the South*, 72 THE INDEPENDENT, Jan. 25, 1912, at 197-200, reprinted in G. LERNER, *supra* note 28, at 155-56.

<sup>105</sup> See *supra* text accompanying notes 52-55.

<sup>106</sup> *Washington v. State*, 38 Ga. 370, 75 S.E. 253 (1912).

<sup>107</sup> See *supra* note 35.

<sup>108</sup> See B. HOOKS, *supra* note 89, at 52.

of Black women.<sup>109</sup> An example of early twentieth century assumptions about Black women's purported promiscuity was provided by the Florida Supreme Court in 1918. In discussing whether the prior chastity of the victim in a statutory rape case should be presumed subject to defendant's rebuttal or should be an element of the crime which the state must prove, the court explained that:

What has been said by some of our courts about an unchaste female being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race, but we would blind ourselves to actual conditions if we adopted this rule where another race that is largely immoral constitutes an appreciable part of the population.<sup>110</sup>

Cloaking itself in the mantle of legal reasoning, the court states that most young white women are virgins, that most young Black women are not, and that unchaste women are immoral. The traditional law of statutory rape at issue in the above-quoted case provides that women who are not "chaste" cannot be raped.<sup>111</sup> Because of the way the legal system considered chastity,<sup>112</sup> the association of Black women with unchastity meant not only that Black women could not be victims of statutory rape, but also that they would not be recognized as victims of forcible rape.

### *The Legacy Today*

The criminal justice system continues to take the rape of Black women less seriously than the rape of white women. Studies show that judges generally impose harsher sentences for rape when the victim is white than when the victim is Black.<sup>113</sup> The behavior of white

<sup>109</sup> *Id.* at 54-85; G. LERNER, *supra* note 28, at 163-71; J. NOBLE, *supra* note 89, at 47.

<sup>110</sup> *Dallas v. State*, 76 Fla. 358, 79 So. 690 (1918), quoted in Note, *Statutory Rape: Previous Chaste Character in Florida*, 13 U. FLA. L. REV. 201, 203-04 (1960).

<sup>111</sup> JURORS, *supra* note 16, at 167; Bienen, *supra* note 8, at 192.

<sup>112</sup> The operation of traditional laws and conceptions of rape that depend on victims' prior chastity is discussed in greater detail at *infra* text accompanying notes 140-155.

<sup>113</sup> LaFree, *supra* note 66, at 847-48. A 1968 study of rape sentencing in Maryland revealed that in all 55 cases where the death penalty was imposed the victim had been white, and that between 1960 and 1967, 47% of all Black men convicted of criminal assaults on Black women were immediately released on probation. The average sentence received by Black men, exclusive of cases involving life imprisonment or death, was 4.2 years if the victim was Black, 16.4 years if the victim was white. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121, 123 (1975).

jurors shows a similar bias. A recent study found that sample white jurors imposed significantly lighter sentences on defendants whose victims were Black than on defendants whose victims were white.<sup>114</sup> Black jurors exhibited no such bias.<sup>115</sup>

Evidence concerning police behavior also documents the fact that the claims of Black rape victims are taken less seriously than those of whites.<sup>116</sup> A 1968 study of Philadelphia police processing decisions concluded that the differential in police decisions to charge for rape "resulted primarily from a lack of confidence in the veracity of Black complainants and a belief in the myth of Black promiscuity."<sup>117</sup>

The thorough denial of Black women's experiences of rape by the legal system is especially shocking in light of the fact that Black women are much more likely to be victims of rape than are white women.<sup>118</sup> Based on data from national surveys of rape victims,<sup>119</sup> "the profile of the most frequent rape victim is a young woman, divorced or separated, Black and poverty stricken."<sup>120</sup>

Recent victim survey data shows that of the roughly one-fifth of illegal rapes that are interracial, Black men were as likely to rape white women as white men were to rape Black women.<sup>121</sup> The statistics concerning Black women's rape by white men, however, may be too low. Black women apparently underreport illegal rape to the police—especially rape by white men<sup>122</sup>—and may do the same with

<sup>114</sup> JURORS, *supra* note 16, at 106.

<sup>115</sup> *Id.* at 119.

<sup>116</sup> See M. AMIR, PATTERNS IN FORCIBLE RAPE 11 (1971); Peters, *The Philadelphia Rape Survey*, in VICTIMOLOGY: A NEW FOCUS, VOL. III, CRIMES, VICTIMS AND JUSTICE 186 (I. Drapkin & E. Viano eds. 1975) [hereinafter cited as VICTIMOLOGY III]; Note, *supra* note 17, at 343. The relatively high credibility accorded white women's accusations of rape against Black men was mitigated if the woman was known to socialize with Blacks.

<sup>117</sup> Comment, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277, 304 (1968).

<sup>118</sup> Recent data from random citizen interviews suggest that Black women are much more likely to be victims of illegal rape than are white women. Bowker, *supra* note 2, at 164; see Karmen, *Women Victims of Crime: Introduction* 185, 188, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN: OFFENDERS, VICTIMS, WORKERS (B. Price & N. Sokoloff eds. 1982).

<sup>119</sup> See *supra* note 2.

<sup>120</sup> Karmen, *supra* note 118, at 188.

<sup>121</sup> Bowker, *supra* note 2, at 172.

<sup>122</sup> There is conflicting commentary as to whether Black women are more or less likely than white women to report rape to the police. Lee Bowker explains that the National L.E.A.A. Survey published in 1976 found that, "[w]hite rape victims were much more likely to report the crime to the police (59%) than were Black rape victims (36%)." Bowker, *supra* note 2, at 173. Allen Johnson, however, claims, "the available evidence suggests that nonwhites are more likely than whites to report their assaults." Johnson, *On the Prevalence of Rape in the*

victim survey interviewers. Even if the victim survey data were accurate, the type of forced sex it studies is only a small fraction of the various kinds of sexual subordination to which women are subjected,<sup>123</sup> some of which are available disproportionately to white men.<sup>124</sup>

### *Conclusion*

From slavery to the present time, the rape of Black women has been denied by the legal system. During slavery, the rape of Black women by Black men was legal. The rape of Black women by white men was frequent, legal, and a crucial weapon of white supremacy. After the Civil War, the legal system's continued denial of the rape of Black women was manifested in discriminatory doctrinal rules and judicial language. Today Black women continue to suffer rape in disproportionate numbers, while the criminal justice system still takes the claims of Black rape victims less seriously than the claims of white victims.

## PART III: THE DENIAL OF THE SIGNIFICANCE OF SEXUAL COERCION

The legal system and American society have acknowledged the existence and seriousness of one racial combination of rape—that

---

*United States*, 6 SIGNS 136, 145 (1980). See *infra* notes 116 and 117, suggesting that police behavior may be an especial deterrent to Black women's reporting. When the race of the assailant is taken into account, there is agreement that Black women tend not to report rapes by white men. In a 1971 study of rape in Oakland, California, few Black women reported being raped by white men. One respondent told the questioners: "No Black woman would report being raped by a white man to the police in Oakland. They might report it to the Panthers, but never the police." Agopian, Chappell & Geis, *Black Offender and White Victim: A Study of Forcible Rape in Oakland, California*, in VICTIMOLOGY III, *supra* note 116, at 101 [hereinafter cited as *Black Offender*]. See L. CURTIS, *supra* note 70; see also THE RACIST USE OF RAPE AND THE RAPE CHARGE, *supra* note 73, at 5-6 (discussion of the rape of Black women by Alabama police during the Civil Rights movement); A. DAVIS, *supra* note 73, at 173 (the rape of Black women by Chicago police in 1974).

<sup>123</sup> See *infra* text accompanying notes 171-178.

<sup>124</sup> The opportunity for sexual harassment of women employees by their employers or supervisors is disproportionately available to white men, who disproportionately hold such positions of power. See A. DAVIS, *supra* note 73, at 197-200. To acknowledge this is not to claim that Black men do not sexually harass women; both Black and white women have complained of sexual harassment by Black men. C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 30-31 (1979).

of white women by Black men.<sup>125</sup> Courts and commentators justified this focus by exaggerating the trauma white women face when raped by Black men.<sup>126</sup> This characterization allowed the crime of rape to be narrowly defined and treated in a way that denied to all women an effective legal shield against rape.<sup>127</sup> Moreover, the myth that rape is only a crime committed by Black men against white women has obscured and deflected attention from the varied nature, pervasiveness, and influence of the sexual subordination to which all women are subjected.<sup>128</sup>

### *Characterizing White Women's Experiences*

Part of the justification given by white men for treating Black offender/white victim rape with special severity was that rape by a Black man felt worse, was worse, than rape by a white man. An 1889 law review note on lynching bid its readers to "consider how profoundly humiliated any woman must feel who has been the victim of an outrage of this character, and how, under existing social conditions, this humiliation must be greatly intensified by the wrong having been committed by a negro."<sup>129</sup>

White men also told white women that death was preferable to rape by a Black man. In one of the Scottsboro opinions<sup>130</sup> the Alabama Supreme Court wrote, "some things may happen to one worse than death by an assassin. One of those things happened to this defenseless woman."<sup>131</sup> Thirty years later, in 1964, the Georgia

<sup>125</sup> See Part I, *supra* text accompanying notes 1-83.

<sup>126</sup> See *infra* text accompanying notes 129-132.

<sup>127</sup> See *infra* text accompanying notes 140-175.

<sup>128</sup> While there has been virtually no recognition that Black women experience any kind of sexual coercion, the illegal rape of white women has been recognized to some extent, albeit within the limits discussed in this Part.

<sup>129</sup> Reynolds, *supra* note 31, at 21. Note that, although the author refers to the humiliation of "any woman," he means only white women. The notion that a Black woman could have been humiliated by a rape would have been virtually inconceivable. See notes 92-112 and accompanying text. To the extent that the definition "woman" was limited by the helpless white woman image, Black women were excluded. The stereotype of the delicate, helpless white woman has never applied and has never been applied to Black women. Part of the reason for this is that Black women have been workers outside their households from slavery to the present. See *supra* note 99. But even with the recent recognition of the introduction of women into the workforce, the notion that Black women are not feminine persists, see B. Hooks, *supra* note 89, at 83.

<sup>130</sup> See *supra* text accompanying notes 43-50.

<sup>131</sup> Powell v. State, 224 Ala. 540, 551, 141 So. 201, 211 (1932).

Supreme Court described the rape of a white woman by a Black man as "a crime more horrible than death[,] . . . the forcible sexual invasion of her body, the temple of her soul," which "soil[ed] for life her purity, the most precious attribute of all mankind."<sup>132</sup> In fostering racism, these characterizations presented a rationalization for the brutal murder of Black men.<sup>133</sup> Yet they also created fear in white women and thus helped maintain their powerlessness<sup>134</sup>—both by encouraging white women's physical dependence on white men, and by robbing women of the power to define their own sexual experiences.<sup>135</sup>

The unstated converse of these characterizations is that for white women, rape by white men is better than death and not nearly as bad as rape by Black men. Indeed, the criminal justice system in practice has virtually denied the seriousness of the rape of white women other than in the rare circumstances where the offender is a violent Black man who is a stranger to the "virtuous" victim.

### *The Legal System's Denial of Rape*

The 1897 law review article on lynching demonstrates great sympathy for the rape complainant<sup>136</sup> and does not explicitly doubt her

<sup>132</sup> *Sims v. Balkcom*, 220 Ga. 7, 136 S.E. 2d 766, 769 (1964).

<sup>133</sup> See Part I *supra* text accompanying notes 1–83.

<sup>134</sup> It is important to acknowledge that to say that something furthers racism is not to deny that it can also be sexist. Likewise, to say that something contributes to sexism is not to deny that it can also be racist. Racism and sexism are complementary, not contradictory. For further discussion, see Part IV, *infra* text accompanying notes 181–233.

<sup>135</sup> These characterizations embody two types of disempowerment. First is the disempowerment involved simply in having one's own experience defined by someone else. Second is the disempowering content of the definitions imposed. Here, the treatment of the rape victim after the rape is that of a stigmatized, ruined woman. An early description of the purported effect of rape on a virgin is *Camp v. State*, 3 Ga. 417, 422 (1847), which stated that after the loss of her virginity, "all is gone: her love of justice, sense of character, and regard for truth." This extreme stigmatization is perhaps decreasing, Sagarin, *Forcible Rape and the Problem of the Rights of the Accused*, *FORCIBLE RAPE*, *supra* note 2, at 142, but it nonetheless persists in powerful forms. The stigma is often internalized, which is also disempowering. See J. BARKAS, *VICTIMS* 126 (1978); Peters, *supra* note 116, at 197.

<sup>136</sup> See *supra* note 129 and accompanying text. Reynolds argues that society's desire to spare the white woman the extreme humiliation she suffers from public cross-examination is the force behind lynching. Reynolds, *supra* note 31, at 21. This characterization of the causes of lynching is obviously incorrect. It uses false stereotypes of white women's extreme delicacy and the false idea that society sincerely aimed to protect white women from rape (this idea is refuted in Part III, *supra* text accompanying notes 125–180) to make lynching seem understandable and even noble.



veracity.<sup>137</sup> These "feminist" attitudes are anomalous in the pre-1970s legal literature.<sup>138</sup> Except for the lynching article, the legal literature on rape shows concern solely for the defendant and invariably implicitly or explicitly favors acquittal.<sup>139</sup>

Until recently various rules and attitudes made rape an extremely difficult crime to prosecute. The issue of chastity, or virginity, was one such barrier. Chastity was legally relevant in rape cases for three reasons. First, in many jurisdictions it was an element of the crime of statutory rape that the victim be chaste.<sup>140</sup> Second, in most jurisdictions the chastity of the rape complainant was considered probative on the issue of consent, the assumption being that a sexually experienced woman was likely to have consented to this particular act of intercourse regardless of her words or actions to the contrary.<sup>141</sup> Third, evidence as to a rape complainant's chastity was thought to bear on the woman's general character, and, hence, on her credibility. A woman's propensity for falsehood was assumed to increase proportionately to her sexual experience.<sup>142</sup>

The concept of chastity was not race-neutral.<sup>143</sup> According to governing stereotypes, chastity could not be possessed by Black women.<sup>144</sup> Thus, Black women's rape charges were automatically

<sup>137</sup> See Reynolds, *supra* note 31, at 20-21.

<sup>138</sup> It should be noted that lynching played a strikingly minor role in legal literature, as did rape, until recently. The INDEX TO LEGAL PERIODICALS lists a total of 39 entries for lynching between 1791 and 1949 (the last year containing an entry on lynching). During the same time period there were 53 entries for rape. By comparison, there were 775 entries under murder and homicide during those years. From 1949 until 1970 there were 51 articles about rape compared to 511 about murder or homicide. Between 1970 and February 1982 there were 187 articles about rape and 362 about murder/homicide.

<sup>139</sup> Rife, *Scientific Evidence in Rape Cases*, 31 J. CRIM. L. & CRIMINOLOGY 232 (1940) is an exception. Recognizing the difficulties in proving rape, Rife details methods of obtaining evidence to corroborate victims' testimony.

<sup>140</sup> JURORS, *supra* note 16, at 168. For a discussion of statutory rape roughly contemporaneous with the *Patterson* decision, see Comment, *Criminal Law: Rape* 19 KY. L.J. 339 (1931). See generally, Note, *Statutory Rape: Previous Chaste Character in Florida*, 13 U. FLA. L. REV. 201 (1960); Note, *Statutory Rape—Previous Chaste Character*, 57 W. VA. L. REV. 199 (1955); Comment, *Recent Decisions—Criminal Law—No Defense To Statutory Rape That Victim Is Married Woman Below The Age Of Consent*, 21 MD. L. REV. 84 (1961).

<sup>141</sup> See, e.g., *Evidence—Specific Acts of Unchastity by Prosecutrix*, 14 GA. B.J. 362 (1953). For a detailed and critical discussion, see Berger, *supra* note 17, at 15-22; see also J. BARKAS, *supra* note 135, at 104; Holmstrom & Burgess, *Rape: The Victim Goes on Trial* in VICTIMOLOGY III, *supra* note 116, at 37-38; Note, *supra* note 17, at 338; Comment, *The Rape Victim*, *supra* note 103, at 41; Comment, *supra* note 2, at 935, 938.

<sup>142</sup> Berger, *supra* note 17, at 16; Note, *supra* note 17, at 335; Comment, *supra* note 2, at 931; Comment, *The Rape Victim*, *supra* note 103, at 39, 40.

<sup>143</sup> See *supra* text accompanying notes 109-112.

<sup>144</sup> See *supra* note 103.

discounted, and the issue of chastity was contested only in cases where the rape complainant was a white woman.

For white women, evidence of unchastity was given less weight when the defendant was Black.<sup>145</sup> A blatant example of the courts' willingness to ignore victims' lack of chastity appeared in the Scottsboro opinions. The Alabama Supreme Court demonstrated its determination to affirm the defendants' convictions by its vigorous protection of the reputation and credibility of the white woman who claimed she was raped. It ruled that evidence pertaining to her marital status,<sup>146</sup> her previous chastity,<sup>147</sup> and her general reputation<sup>148</sup> had been properly excluded as irrelevant.

A less famous but equally vivid case also illustrates this dynamic. In *Story v. State*,<sup>149</sup> where a Black man was charged with the rape of a white prostitute, the Court found that her unchastity with white men was not relevant to her unchastity with Black men, commenting that: "The consensus of public opinion, unrestricted to either race, is that a white woman prostitute is yet, though lost of virtue, above the even greater sacrifice of the voluntary submission of her person to the embraces of the other race."<sup>150</sup>

These rulings shielding the victim's reputation were contrary to the weight of authority at that time.<sup>151</sup> Indeed, the debate in the legal literature prior to the 1970s concerned not whether evidence of the complainant's sexual history should be admissible, but rather the type of evidence that should be admissible—specific sexual acts or only the victim's general reputation.<sup>152</sup>

Many feminists favor excluding evidence of the rape complainant's sexual history because the admission of such evidence reflects and

<sup>145</sup> In the 19th century, evidence of a white woman's lack of chastity sometimes convinced courts to treat Black defendants with relative leniency. See, e.g., *Cato, a slave, v. State*, 9 Fla. 163 (1860) (rape conviction of slave based on partly contradicted testimony of white prostitute set aside and new trial granted). But see *Barnett v. State*, 83 Ala. 40, 3 So. 612 (1888) (rape conviction of Black defendant on uncorroborated testimony of white prostitute upheld).

<sup>146</sup> *Weems v. State*, 224 Ala. 524, 527, 141 So. 215, 217 (1932).

<sup>147</sup> *Patterson v. State*, 224 Ala. 531, 536, 141 So. 195, 197 (1932).

<sup>148</sup> *Powell v. State*, 224 Ala. 540, 550-51, 141 So. 201, 210 (1932).

<sup>149</sup> 178 Ala. 98, 59 So. 480 (1912).

<sup>150</sup> *Id.* at 104, 59 So. at 482.

<sup>151</sup> 1 WIGMORE, EVIDENCE § 200 (2d ed. 1923).

<sup>152</sup> See *Recent cases—Evidence—Admissibility of Prior Acts of Unchastity Upon Issue of Consent of Prosecutrix in a Rape Prosecution*, 9 TEX. L. REV. 98 (1930). The author argued that the better practice was to admit evidence of prior acts rather than general reputation "in view of the gross injustice which might result from placing an innocent man at the mercy of a lewd and unscrupulous woman." See *Cross-examination of Prosecutrix in Rape Prosecution*, 19 GA. B.J. 95 (1956); 14 GA. B.J., *supra* note 141.

reinforces misogynistic views of women<sup>153</sup> and allows defendants to discredit easily the victim's testimony.<sup>154</sup> Yet, in the *Scottsboro* context, other considerations are also important. The complainant was allowed to testify without being cross-examined as to her sexual history only because the defendants were Black. Had they been white, such evidence would have been admitted, the reputation of the witness discredited, and the defendants probably freed.<sup>155</sup>

Another barrier to successful rape prosecutions has been the statutory requirements that the testimony of a rape complainant be corroborated by other evidence.<sup>156</sup> The corroboration requirement was introduced "for the purpose of protecting against false accusations."<sup>157</sup> To justify the stricter standards of proof required in rape cases than for other crimes, commentators claimed women

<sup>153</sup> These include stereotypes that women are especially likely to lie and to be deluded, *see supra* note 142; that sexually experienced women are likely to have actually consented to sex with the man they now are accusing, *see Note, supra* note 17, at 41; Comment, *supra* note 2, at 932; Comment, *The Rape Victim, supra* note 103, at 41; that sexually experienced women are apt to lie, *see Berger, supra* note 17, at 16; Note, *supra* note 17, at 345; and that sexually experienced women cannot be raped, Comment, *supra* note 103, at 44.

<sup>154</sup> *See infra* text accompanying notes 209-210.

<sup>155</sup> Susan Brownmiller notes sexist attitudes manifested in the case, since the white women were threatened with vagrancy and prostitution charges, S. BROWNMILLER, *supra* note 13, at 257-58, and since defense counsel tried to destroy the complainant's credibility by claiming she was a prostitute, *id.* at 254. Brownmiller's discussion of the cases is misleading and disturbing because of its singleminded focus on sexism with its attendant sympathy for the white women, its belittlement of racism, and its lack of sympathy for the Black defendants sentenced to death. Her distortions are well discussed in A. EDWARDS, RAPE, RACISM AND THE WHITE WOMEN'S MOVEMENT: AN ANSWER TO SUSAN BROWNMILLER, 8-15 (2d printing 1979) and A. DAVIS, *supra* note 73, at 198-99. Although Brownmiller is correct that white women were under pressure to cry rape because they were often stigmatized or ostracized if they were discovered in a voluntary relationship with a Black man, A. ROSE, *supra* note 26, at 305, these hardships on women do not justify false rape charges. Susan Griffin claims, without citation, that if a white woman discovered with a Black man did not cry rape, "she herself would be subject to lynching." S. GRIFFIN, *supra* note 103, at 18. This is refuted by the NAACP study cited *supra* at note 28, that found that only 16 out of the 4951 people lynched between 1882 and 1927 were white women. (The reasons for the lynchings were not given.) The number is so small that it is highly unlikely that lynching could have posed a meaningful threat to white women who refused to claim that sexual contact with Black men was rape.

<sup>156</sup> *See, e.g.,* Comment, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967); Comment, *Nebraska's Corroboration Rule*, 54 NEB. L. REV. 93 (1975); Comment, *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. PA. L. REV. 458 (1970); *Criminal Law—Attempted Rape—Merger and Corroboration*, 14 BROOKLYN L. REV. 122 (1948); *Recent Criminal Cases—Rape—Corroboration of Prosecutrix*, 26 J. CRIM. L. & CRIMINOLOGY 463 (1935-36); *Recent cases*, 18 OR. L. REV. 264 (1939).

<sup>157</sup> 26 J. CRIM. L. & CRIMINOLOGY, *supra* note 156, at 463. It was incorrectly thought that the number of reported rapes exceeded the number of actual rapes due to false accusations brought by deluded or malicious women. *See* Comment, *supra* note 2, 919, 931; *infra* note 158. It is now well known that rape is underreported, *see supra* note 2. The justifications for the corroboration requirement became more complex, far-fetched, and misogynist in the late 1960s, apparently through the influence of Freudian psychology, *see* S. BROWNMILLER, *supra*

frequently made malicious rape charges and easily duped juries into awarding convictions.<sup>158</sup>

One result of the chastity and corroboration rules was that rape was often a very difficult crime to prove.<sup>159</sup> Rapes where the woman made her report too soon or not soon enough,<sup>160</sup> rapes where the woman knew her assailant,<sup>161</sup> rapes where the woman did not resist enough,<sup>162</sup> rapes where the woman was sexually experienced,<sup>163</sup> were all difficult to prosecute successfully.

The attitudes manifested in the rape laws and expressed in the legal literature extend to other areas of the criminal justice system. Police have often been extremely insensitive to rape victims.<sup>164</sup> Rape com-

---

note 13, at 415-20; Berger, *supra* note 17, at 28. For example, a 1970 comment claimed that "[w]omen often falsely accuse men of sexual attacks to extort money, to force marriage, to satisfy a childish desire for notoriety, or to attain personal revenge. Their motives include hatred, a sense of shame after consenting to illicit intercourse, especially when pregnancy results, and delusion." Comment, 118 U. PA. L. REV., *supra* note 156, at 460; *see* Comment, 67 COLUM. L. REV., *supra* note 156, at 1138-39.

<sup>158</sup> *See, e.g.,* Note, *Criminal Law—Rape—Evidence—Corroboration of Female—Pregnancy*, 13 NEB. L. BULL. 184, 185 (1934-35) ("Because of the difficulty of refuting the testimony of the prosecutrix, because of the tendency of juries to convict without weighing carefully the evidence, and further, because the crime is one which is often maliciously prosecuted"). A 1967 commentator stressed the "inordinate danger that innocent men will be convicted." Comment, 67 COLUM. L. REV., *supra* note 156, at 1137. For a more thorough discussion of this notion *see* Berger, *supra* note 17, at 22. Feminist writers had responded that the conviction rate for rape was actually extremely low. *See* Note, *supra* note 17, at 338; Comment, *supra* note 2, at 931, 935; *see also infra* note 187.

<sup>159</sup> JURORS, *supra* note 16, at 100-01; Berger, *supra* note 17, at 29-32; Comment, *The Rape Victim*, *supra* note 103, at 38-40.

<sup>160</sup> Holmstrom & Burgess, *supra* note 141, at 41, report that a victim must make a "fresh complaint" but if she does it is assumed by the police that she reported promptly merely in order to get back in her husband's or boyfriend's good graces, not because the claim is real.

<sup>161</sup> *See* Note, *supra* note 17, at 343-45; Comment, *The Rape Victim*, *supra* note 103, at 41. The incidence of illegal rape by acquaintances is high; in victim survey data for 1973-1976, approximately half the sexual assaults were by men their victims knew; Bowker, *supra* note 2, at 166, 169.

<sup>162</sup> The resistance requirements for rape are an excellent example of the ways that the legal system fails to protect women from rape. On the one hand, modern rape statutes require that the victim's resistance be overcome by force or by violence or by threats of imminent bodily harm. *See, e.g.,* N.Y. PENAL LAW § 130.00(8) (McKinney Supp. 1981); WASH. REV. CODE ANN. § 9A. 44.010(5) (West Supp. 1981). On the other hand, rape victims who do resist are more likely to be seriously injured than are victims who do not. *See* NATIONAL INSTITUTE FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE, LEAA, FORCIBLE RAPE: FINAL PROJECT REPORT (1978) cited in Field, *Rape*, in ENCYCLOPEDIA OF CRIME AND JUSTICE (S. Kadish ed. forthcoming 1983); *Black Offender*, *supra* note 122, at 134; Note, *supra* note 17, at 345-47.

<sup>163</sup> *See infra* text accompanying notes 209-210.

<sup>164</sup> S. BROWN MILLER, *supra* note 13, at 408; S. GRIFFIN, *supra* note 103, at 13-14; Note, *supra* note 17, at 348; *see* York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964). Traditionally police were trained to expect that rape was one of the most falsely reported crimes. G. PAYTON, PATROL PROCEDURE 283 (1967), cited in Comment, *supra* note 117, at 277 n.6. Several recent studies claim that police have become more sensitive. *See, e.g.,* THE VICTIM OF RAPE, *supra* note 103, at 38-41; W. SANDERS, RAPE AND WOMAN'S IDENTITY

plainants have been disbelieved by police more frequently than complainants of other crimes.<sup>165</sup>

### *Women's Actual Experiences*

While denial of any experience is a significant indication of powerlessness, the widespread denial of women's experiences of coerced sex is the denial of a phenomenon which deeply affects every woman's life.

The crime of illegal rape is a terrifying, traumatic experience which often has long-term damaging effects on its victims.<sup>166</sup> Illegal rape is much more widespread than is reported to police. A recent study concluded that twenty to thirty percent of girls currently aged twelve will suffer a sexual attack during their lifetimes.<sup>167</sup> A recent random survey of San Francisco households revealed that forty-four to forty-six percent of women in that city had been victims of rape or attempted rape.<sup>168</sup>

Additionally, the fear and threat of rape influences many women who are never actually raped.<sup>169</sup> It restricts movement and forces

---

82 (1980). The accounts of negative treatment experienced by many women become notorious and thus have a disproportionately large impact on victims' reluctance to report and on the image of the police, *THE VICTIM OF RAPE*, *supra* note 103, at 53-55. These studies do not indicate whether police sensitivity towards women of color has increased; *see supra* note 122.

<sup>165</sup> In one study, the "unfounding" determination by the police for forcible rape was 18%, while for larceny it was only two percent. G. NETTLER, *EXPLAINING CRIME* 45 (1974), cited in Robin, *Forcible Rape: Institutionalized Sexism in the Criminal Justice System* in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN*, *supra* note 118, at 246.

<sup>166</sup> *See* J. BARKAS, *supra* note 135, 107-29; S. BROWNMILLER, *supra* note 13, 404-07; E. HILBERMAN, *THE RAPE VICTIM* 17-19, 33-40 (1976); T. McCAHILL, L. MEYER & A. FISCHMAN, *THE AFTERMATH OF RAPE* (1979); *THE VICTIM OF RAPE*, *supra* note 103; Burgess & Holmstrom, *Rape Trauma Syndrome*, in *FORCIBLE RAPE*, *supra* note 2 at 315 [hereinafter cited as *Rape Trauma*]; Note, *supra* note 17.

<sup>167</sup> Johnson, *supra* note 122, at 145.

<sup>168</sup> Russell & Howell, *Revisions/Reports: The Prevalence of Rape in the United States Revisited*, 8 *SIGNS* (forthcoming Summer 1983). The researchers concluded that there is a 26% probability that a woman will be a victim of a completed rape at some point in her lifetime, and that there is a 46% probability that a woman will be a victim of a completed or attempted rape at some point in her life, *see* Russell, *Sexual Assault: The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females*, 7 *VICTIMOLOGY* (forthcoming 1983).

<sup>169</sup> "I have never been free of the fear of rape. From a very early age I, like most women, have thought of rape as part of my natural environment—something to be feared and prayed against like fire or lightning." S. GRIFFIN, *supra* note 103, at 3; *see* S. BROWNMILLER, *supra* note 13, at 449; Riger, Gordon & LeBailly, *Women's Fear of Crime: From Blaming to Restricting the Victim*, 3 *VICTIMOLOGY* 274, 278-80 (1978) [hereinafter cited as *Women's Fear of Crime*].

women to maintain a special wariness about the situations in which they place themselves.<sup>170</sup>

Illegal rape is neither the only nor necessarily the most harmful kind of coerced sex for women.<sup>171</sup> Although the definition of rape has been expanded in many statutes,<sup>172</sup> the requirement of penetration remains in some states.<sup>173</sup> Spousal rape is legal in most states,<sup>174</sup> and its incidence is widespread.<sup>175</sup> Other forms of sexual coercion are also pervasive. The incidence of incest is difficult to calculate, but it is certainly widespread; whatever the exact incidence, there is unanimity among researchers that the victims are overwhelmingly female, the perpetrators male.<sup>176</sup> A large proportion of working

<sup>170</sup> A recent study found that women feared crime more than men, and that their greater fear was rooted in a fear of rape. 93% of women expressed fear of the thought of rape. The major practical effect on women of the fear of rape is a restriction of freedom of action. *Women's Fear of Crime*, *supra* note 169, at 282-83. The researchers concluded: "The effect of women's greater fear of crime is to produce social constraints upon them; women not heeding those constraints may be punished not only by direct victimization, but also by being blamed for their own victimization. The irony of course, is that these restrictions do not guarantee that safety." *Id.* at 282-83; see Reynolds, *Rape as Social Control*, 8 CATALYST 62 (Winter 1974).

<sup>171</sup> An essential element of the traditional common-law definition of rape is sexual intercourse including penetration by the penis, see S. BROWNMILLER, *supra* note 13, at 424-25; L. CLARK & D. LEWIS, *supra* note 81, at 130-32, 160; Bienen, *supra* note 8, at 174-75; MacKinnon, *supra* note 2, at 15-16; Comment, *supra* note 2, at 83. Ignored by such a definition are forced oral sex, fondling, and penetration with an object, for example.

<sup>172</sup> *E.g.*, acts other than sexual intercourse, N.J. STAT. ANN. § 2C:14-1 (West Supp. 1982); sexual assaults with an object, S.D. CODIFIED LAWS ANN. § 22-22-2 (Supp. 1982).

<sup>173</sup> *E.g.*, IDAHO CODE 18-6101, 6103 (1979); MISSOURI REV. STAT. § 566.040 (1979).

<sup>174</sup> The spousal rape exemption has been abolished in only three states (New Jersey, Nebraska, Oregon). JURORS, *supra* note 16, at 196. All other states retain some version of it, based on a notion that the decision to marry implies continual consent to sexual intercourse. *Id.* at 165. The exemption originated in a conception of the wife as the sexual property of the husband. Lord Hale explained, "[The] husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind into her husband, which she cannot retract," Bienen, *supra* note 8, at 184, quoting M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (S. Emlyn ed. 1778).

<sup>175</sup> The incidence of spousal rape is difficult to estimate, partly because it is legal in most states. JURORS, *supra* note 16, at 163-66; see note 174. However, estimates of wife-battering run as high as 50% of marriages, R. LANGLEY & R. LEVY, WIFE BEATING 4 (1977); and most battered wives are apparently also victims of rape by their husbands, S. SCHECTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 17, 223 (1982); L. WALKER, THE BATTERED WOMAN 108 (1979).

<sup>176</sup> One estimate is that at least 200,000 girls a year are sexually molested, overwhelmingly by men. L. SANFORD, THE SILENT CHILDREN: A PARENT'S GUIDE TO THE PREVENTION OF CHILD ABUSE 83 (1980). Another source estimates the number of incest victims at one million a year. F. RUSH, THE BEST KEPT SECRET: THE SEXUAL ABUSE OF CHILDREN, 2, 4-5 (1980). An estimate by the Children's Division of the American Humane Association is that a minimum of 80,000 to 100,000 children are sexually molested each year. The pattern appears to be 97% male offenders, 92% female victims. In the majority of the cases the molester is well-known to the child; in one quarter, the molester is a relative. The Humane Association's figures were

women are sexually harassed on the job.<sup>177</sup> Women also face harassment on the street.<sup>178</sup>

Very little is done about these forms of sexual abuse, and what has been done has largely been done by women themselves, in the last decade.<sup>179</sup> Widespread societal ignorance and general denial of sexual coercion by the legal system persist.<sup>180</sup>

### *Conclusion*

The legal system's treatment of rape is not designed to protect women from sexual coercion. Through discriminatory punishment, the language of opinions, scholarly writing, and the manipulation of doctrine, the legal system has implicitly defined rape so as to limit it to the rape of white women by Black men. The social meaning of rape is thus limited to a Black offender and white victim. In addition, because of the legal system's traditionally narrow definition of rape, coupled with the widespread acceptance of other forms of sexual coercion, the legal system has also implied that illegal rape is the only form of sexual abuse. In fact, both of these implications are false. The great majority of rapes of white women are committed by white men; and women are subjected to a range of sexual coercion in addition to illegal rape.

Because of the specific social meaning of rape, sole responsibility for the coerced sex of white women has been placed on the shoulders of Black men, and Black women have been ignored as rape victims.

---

based on poor and disorganized families who came to the attention of social service agencies. Most incest, however, probably occurs in intact families which escape social service agencies' attention; thus the actual incest incidence is probably much higher. Herman & Hirschman, *Father-Daughter Incest*, 2 *SIGNS* 735, 736 (1977); see S. BROWNMILLER, *supra* note 13, at 307-12. For personal analyses, see *VOICES IN THE NIGHT: WOMEN SPEAKING ABOUT INCEST* (T. McNaron & Y. Morgan eds. 1982); and Cottom, *Resistance to Incestuous Assault*, in *FIGHT BACK!* 26-27 (F. Delacoste & F. Newman eds. 1981).

<sup>177</sup> C. MACKINNON, *supra* note 124, at 26-55.

<sup>178</sup> Despite its ubiquitousness, very little has been published concerning street harassment. See L. WALKER, *supra* note 175, 107-08; Benard & Schlaffer, *The Man in the Street: Why He Harasses*, Ms., May 1981, at 18; di Leonardo, *Political Economy of Street Harassment*, *AEGIS*, Summer 1981, at 51-56.

<sup>179</sup> See, e.g., *FIGHT BACK!*, *supra* note 176.

<sup>180</sup> The problems of sexual harassment, incest, and spousal abuse have received very little attention and action until very recently. For examples of recent discussions of these problems, see C. MACKINNON, *supra* note 124 at 158-74 (1979) (sexual harassment); F. RUSH, *supra* note 176, at 137-38 (incest); L. WALKER, *supra* note 175, at 212-13 (spousal abuse).

Those who work against rape and other forms of sexual coercion must be vigilant not to support this racist social meaning. Activists must realize that the false image of rape sustained by the legal system fosters fear and resentment between white women and Black people. It is not true that efforts to fight racist abuses of rape charges necessarily deny the reality of women's experiences of sexual coercion. Nor is it correct that efforts to fight sexist denials of women's experiences of sexual coercion necessarily deny the reality of racist abuses of rape charges.

#### PART IV: RECASTING THE FORM OF THE DEBATE—BEYOND LEGAL REFORM

##### *The Master's Tools Will Never Dismantle the Master's House* —AUDRE LORDE<sup>181</sup>

The pervasiveness of racism and its historical connection to rape raise complex issues for those who oppose sexual coercion. As leaders of the movement against rape,<sup>182</sup> feminists are responsible for examining closely the implications of their actions and proposals.<sup>183</sup> The foregoing analysis raises considerations often neglected in feminist writing<sup>184</sup> and thus leads to some conclusions about strategies to fight sexual coercion that differ in emphasis from other feminist work.

<sup>181</sup> Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *THIS BRIDGE CALLED MY BACK* 98 (C. Moraga & G. Anzaldúa eds. 1981).

<sup>182</sup> See Rose, *Rape as a Social Problem: A By-Product of the Feminist Movement* 25 *SOC. PROBS.* 75, 75-77 (1977).

<sup>183</sup> Various commentators have noted that white feminists often demonstrate ignorance of the racist uses of the rape charge, and have pointed out the limitations of anti-rape theories and strategies that fail to deal with issues of racism. See, e.g., A. DAVIS, *supra* note 73, at 178-82, 196-99; A. EDWARDS, *supra* note 155; *THE RACIST USE OF RAPE AND THE RAPE CHARGE*, *supra* note 73; Braden, *supra* note 73; *Does the Women's Movement Compromise the Struggle of Minorities?* 4 *WOMEN'S RTS. L. REP.* 27, 31 (1977); Friedman, *Rape, Racism and Reality*, *AEGIS*, Summer 1981, at 14; Hare, *Revolution Without A Revolution: The Psychology of Sex and Race* 13, *THE BLACK SCHOLAR*, Summer 1982, at 14; Sagarin, *supra* note 135, at 146; Sands, *supra* note 75.

<sup>184</sup> A fairly common analogy in feminist literature is between lynching and rape. S. BROWN MILLER, *supra* note 13, at 281 ("Rape is to women what lynching was to blacks: the ultimate physical threat by which all men keep all women in a state of psychological intimidation."); D. RUSSELL, *THE POLITICS OF RAPE* 231 (1974) ("Just as lynching may be seen as the supreme political act of whites against blacks, so rape may be seen as the supreme political act of men against women."); Karmen, *supra* note 118, at 196 ("Rapes serve, as other crimes against women, to remind them of their 'appropriate' place in society—beneath men, just as the lynchings of blacks by whites in the south carried the message—accept your lot in life—



The legal system has historically ignored or denied the claims of women who have been victims of rape.<sup>185</sup> At the same time, women have been traumatized by the criminal justice system,<sup>186</sup> few men have been convicted of rape,<sup>187</sup> and women continue to be victimized by rape in appalling numbers.<sup>188</sup>

Feminist strategies to combat rape have included encouraging self-defense and protection,<sup>189</sup> improving the treatment rape victims receive after their attack,<sup>190</sup> and reforming rape laws so as to increase the conviction rate.<sup>191</sup>

### *Improving the Treatment of Rape Victims*

One of the most degrading aspects of rape for victims has been the treatment they receive from the criminal justice system.<sup>192</sup> One

---

don't step out of line."); MacMillan & Klein, *FAAR Editorial*, AEGIS, Summer 1981, at 5 ("Rape is a mechanism used to terrorize and subjugate women in much the same way that lynching has been used against blacks.").

This comparison between the functions of rape and lynching is problematic in several respects. First, it suggests that it is simple to compare racism and sexism, and in fact implies that they function in the same way. Actually, the two operate in complex and different, but related ways, as this Note demonstrates. Second, the comparison in itself is ill-chosen. Rapes rarely end in murder while lynchings by definition *are* murder, so from the potential victim's perspective, the terror created by the threats of lynching and rape must be different. Third, the comparison ignores the fact that the usual excuse for lynching Black men was actually the rape of white women, so that to glibly compare the two is insensitive at best.

Certain aspects of lynching and rape may be meaningfully analogous. For example, the fact that lynching was illegal but socially acceptable, Reynolds, *supra* note 170, at 64, is also true of rape. Also, the seemingly random nature of both crimes and the attendant fear and denial by potential victims that the randomness makes possible may make them comparable in that respect. But much more historical analysis is needed before such parallels can be constructively drawn. Works that begin this process include Aptheker, *Woman Suffrage and the Crusade Against Lynching 1890-1920*, in *WOMAN'S LEGACY* 53 (1982); Hall, *supra* note 30.

<sup>185</sup> See Parts II and III, *supra* text accompanying notes 84-180.

<sup>186</sup> See *supra* notes 164, 192 and accompanying text.

<sup>187</sup> NATIONAL INSTITUTE FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE, LEAA, FORCIBLE RAPE: FINAL PROJECT REPORT (1978) (one in 50 chance that a conviction will result if the rape is reported).

<sup>188</sup> See *supra* note 168.

<sup>189</sup> D. RUSSELL, *supra* note 184, at 284-86; Note, *supra* note 17, at 352. The philosophy and implications of the women's self-defense movement are beyond the scope of this Note; for a discussion of the movement, see Telsey, *Karate and the Feminist Resistance Movement* in *FIGHT BACK!*, *supra* note 176, at 184; see also James, *Do It Yourself Self-Defense* in *id.* at 201; and Telsey, *Some Facts on Self-Defense* in *id.* at 197.

<sup>190</sup> See THE VICTIM OF RAPE, *supra* note 103, at 264-65; D. RUSSELL, *supra* note 184, at 287-88; Bienen, *supra* note 8, at 171; Rose, *supra* note 182, at 75-76; Note, *supra* note 17, at 351-54.

<sup>191</sup> See S. BROWNMILLER, *supra* note 13, at 436; J. MARSH, A. GEIST & N. CAPLAN, RAPE AND THE LIMITS OF LAW REFORM 22-23 (1982) [hereinafter cited as RAPE AND THE LIMITS OF LAW REFORM]; BIENEN, *supra* note 8, at 171; Comment, *The Rape Victim*, *supra* note 103, at 54.

<sup>192</sup> See S. BROWNMILLER, *supra* note 13, at 408-10; THE VICTIM OF RAPE, *supra* note 103, at 1-4; Berger, *supra* note 17, at 23-24; Note, *supra* note 17, at 347-51.

of the critical contributions of feminist anti-rape work has been to increase public awareness of this unsympathetic treatment. One proposal to improve the treatment rape victims receive has been to increase the representation of women who deal with rape victims within the criminal justice system.<sup>193</sup> A second proposal has been to exclude evidence of a complainant's prior sexual experiences at trial.<sup>194</sup>

The first proposal is a positive one as far as it goes, but placing more women in law enforcement is not in itself adequate to improve the treatment victims receive. If the women participants are all white, or have little understanding of racism, many of the problems pointed out in this Note will remain.<sup>195</sup> Black women's rape claims will continue to lack credibility because white women share with white men notions of Black people's promiscuity and untrustworthiness.<sup>196</sup> The special harshness reserved for Black men who are accused of raping white women will also continue.<sup>197</sup>

<sup>193</sup> See S. BROWNMILLER, *supra* note 13, at 434-37; Note, *supra* note 17, at 352.

<sup>194</sup> See RAPE AND THE LIMITS OF LAW REFORM, *supra* note 191, at 22-23; THE VICTIM OF RAPE, *supra* note 103, at 279; Rose, *supra* note 182, at 80; Note, *supra* note 17, at 353.

<sup>195</sup> Howard, *Battered and Raped: The Physical/Sexual Abuse of Women*, in FIGHT BACK!, *supra* note 176, at 80-81.

<sup>196</sup> See THIS BRIDGE CALLED MY BACK, *supra* note 181 (especially pp. 61-101 including *And When You Leave, Take Your Pictures With You*). See generally TOP RANKING (J. Gibbs & S. Bennett eds. 1980) (especially Cornwall, *Notes From a Third World Woman* 61; Gwendolyn, *Righteous Anger in Three Parts: Racism in the Lesbian Community—One Black Lesbian's Perspective* 70; Calderone & Charoula, *The Personal is Political Revisited: An Exploration of Racism in the Lesbian Community* 79); Bethel, *What chou mean we, white girl?* 86 CONDITIONS: FIVE, Autumn 1979 (The Black Women's Issue); Smith, *supra* note 87.

<sup>197</sup> Both men and women were included in the studies of beliefs about rape, *supra* note 71, which showed that most people incorrectly believed the most common racial combination in rape cases was Black offender/white victim. Similarly, the study of white jurors which showed that the heaviest sentences were given to Black men accused of raping white women, *supra* note 67, was based on a sample of both female and male jurors. Many white feminists have been reluctant or have refused to support Black men falsely accused of raping white women. See Braden, *supra* note 73; Sands, *supra* note 75. Angela Davis eloquently exposes the contributions of several white feminists' work to the perpetuation of racism with respect to rape. A. DAVIS, *supra* note 73, 178-82, 198-99. Even more recent writings which have ideological roots in feminism contain inaccurate statements which perpetuate racism. A most striking example appears in WOMEN AND CRIME IN AMERICA, *supra* note 1. This book, published in 1981, is intended to fill the need for a text on women in the criminal justice system, *id.* at v.

When an interracial rape occurs today, it is most likely to be a black rapist and a white victim, which is a reversal of the historical situation that existed in the United States during the days of slavery and the decades that followed its termination. During this period, it was black women who were constantly in danger of being sexually assaulted by white men.

If increasing the number of women involved in the legal and criminal justice systems is to create a system more sympathetic to all women, it is imperative that substantial numbers of these women be Black and that all individuals working with rape victims are keenly aware of, and strongly opposed to, racism.<sup>198</sup>

Another proposal for improving the legal system's treatment of rape victims has been the reform of rape statutes to exclude evidence of rape victims' sexual history from trial.<sup>199</sup> Cross-examination on the details of one's sexual history, a common defense technique, is one of the victim's most traumatic contacts with the legal system.<sup>200</sup> Another rationale for this proposal is that the introduction of the rape victim's sexual history as evidence reflects and reinforces misogynistic attitudes about women and sexuality.<sup>201</sup>

In Michigan, where the law has forbidden the introduction of evidence of past sexual behavior since 1975,<sup>202</sup> the overall experiences of victims, as reported by rape crisis center workers and criminal justice participants, seem to have improved markedly.<sup>203</sup> It does not appear from the Michigan study, however, that attitudes about the right of women to be free from sexual coercion have changed as a result of the statutory change.<sup>204</sup>

---

*Id.* at 182. First, this statement is empirically false, as is acknowledged several pages earlier: "[Based on the 1975 LEAA crime survey data] Blacks were about as likely to rape whites as whites were to rape blacks in the limited proportion of rapes that were interracial." *Id.* at 172. Second, even if it were true that the number of illegal rapes committed by Black men against white women outnumbered white rapist/Black victim rapes, the vulnerability of white women would not be analogous to the vulnerability of Black women to white masters during slavery. To suggest such a comparison is offensive because it denies the seriousness of Black women's sexual victimization. See Part II, *supra* notes 89-124 and accompanying text. In addition, the analogy resonates with a mythology that defines Black men as rapists of white women. See *supra* note 35.

<sup>198</sup> In one recent study only about three percent of the rape victims commented specifically on the sex of the police officers who investigated their cases, although all were male; most of the victims' responses about the police were positive, although 10% had serious complaints about their treatment by police. THE VICTIM OF RAPE, *supra* note 103, at 51, 53-54.

<sup>199</sup> See *supra* note 194.

<sup>200</sup> THE VICTIM OF RAPE, *supra* note 103, at 179-83; Note, *supra* note 17, at 350-51; Comment, *The Rape Victim*, *supra* note 103, at 45-46.

<sup>201</sup> See note 153.

<sup>202</sup> Michigan's sexual assault statute, which took effect in 1975, is widely considered one of the nation's most innovative and comprehensive rape laws and has served as the model for many states. Bienen, *supra* note 8, at 172. The most detailed published research on the impact of rape laws deals with Michigan. See RAPE AND THE LIMITS OF LAW REFORM, *supra* note 191. For these reasons, the discussion on reforming rape laws is limited to Michigan.

<sup>203</sup> RAPE AND THE LIMITS OF LAW REFORM, *supra* note 191, at 68-71.

<sup>204</sup> *Id.* at 106-107.

### *Increasing the Conviction Rate*

Another major goal of feminists has been to increase rape convictions.<sup>205</sup> Law reform proposals offered to accomplish this have included limiting the admissibility of evidence of a victim's sexual history,<sup>206</sup> reducing the penalties allowed for rape,<sup>207</sup> and introducing degrees of rape.<sup>208</sup>

In Michigan, the conviction rate for sexual assaults has increased markedly since the passage of its law making sexual history inadmissible as evidence and introducing degrees of rape.<sup>209</sup> Apparently the increase is largely due to the provision limiting admissibility of prior sexual activities.<sup>210</sup>

It is understandable that many white feminists initially perceive an increased rape conviction rate as a victory. Rape has been denied so consistently by the criminal justice system<sup>211</sup> until so recently<sup>212</sup> that any type of recognition of it by the legal system seems positive. Also, upperclass white women until recently have been fairly isolated in a private sphere in which their subordination to men has been furthered by the law's absence,<sup>213</sup> so that the prospect of the law's presence in an area, seemingly acting on behalf of women, is attractive.

However, the subordination of other groups has been furthered by the law's presence,<sup>214</sup> and rape laws in particular have functioned

<sup>205</sup> See note 191.

<sup>206</sup> RAPE AND THE LIMITS OF LAW REFORM, *supra* note 191, at 23.

<sup>207</sup> Many reformers favor reducing penalties for rape because they think the severity of traditional penalties deters juries from convicting. Bienen, *supra* note 8, at 173.

<sup>208</sup> S. BROWNMILLER, *supra* note 13, at 425; Note, *supra* note 17, at 353.

<sup>209</sup> RAPE AND THE LIMITS OF LAW REFORM, *supra* note 191, at 29-33, 62.

<sup>210</sup> *Id.* at 57-62.

<sup>211</sup> See *supra* text accompanying notes 138-165.

<sup>212</sup> The anti-rape movement began scarcely more than a decade ago, see Rose, *supra* note 182, at 76. Susan Griffin's essay *Rape: The All-American Crime* in RAMPARTS, September 1971, was one of the first major pieces published. The essay is reprinted in FORCIBLE RAPE, *supra* note 2, at 47. The first law review pieces that had roots in the movement against rape also appeared in the early 1970s, e.g., Note, *supra* note 17; Comment, *supra* note 2.

<sup>213</sup> See Taub & Schneider, *supra* note 99, at 117, 121-24. Examples cited by the authors include tort law's family immunity provisions, the marital rape exemption, and contract law's failure to deal with financial commitments relating to marriage, *id.* at 121-22. "For example, when the police do not respond to a battered woman's call for assistance or when a civil court refuses to evict her husband, the woman is relegated to self-help, while the man who beats her receives the law's tacit encouragement. . . . By declining to punish a man for inflicting injuries on his wife, for example, the law implies she is his property and he is free to control her as he sees fit." *Id.* at 122.

<sup>214</sup> The criminal justice system allows women to be victimized in their homes and actively victimizes people of color. A recent survey of seven geographically diverse U.S. cities found

to further white supremacy.<sup>215</sup> In light of the racist history surrounding the legal system's treatment of rape, the goal of increasing the rape conviction rate must be examined in more detail.

Working to increase the conviction rate for rape is not necessarily a constructive tactic in the struggle against sexual coercion for several reasons. First, most pragmatically, raising the conviction rate has not been shown to have any impact on the incidence of rape, although long-term data are not yet available.<sup>216</sup> Second, given the existing disparities in punishments between whites and Blacks, an across-the-board increase would simply reproduce these disparities.<sup>217</sup> Third, the increasingly racist political climate,<sup>218</sup> and the Supreme Court's destruction of various constitutional procedures to protect defendants,<sup>219</sup> suggest that the punishment disparities are likely to increase. Fourth, to the extent these disparities implicitly indicate that men are being punished on racial grounds and not because they committed rape, the credibility of the underlying claim of sexual abuse is undermined.<sup>220</sup> Fifth, to press for convictions under rape laws suggests that women accept the narrow definitions and limited conceptions of sexual abuse that underlie those laws. Finally, to say that rape should be treated like other crimes is problematic in that it implicitly validates the way other crimes have been and are treated. The criminal justice system has radical shortcomings—the treatment,<sup>221</sup>

---

that 78% of persons fatally shot by police during 1973 and 1974 were Black. C. MILTON, J. HALLECK, J. LARDNER & G. ALBRECHT, *POLICE USE OF DEADLY FORCE* 19, 22 (1975). Black women are not immune from police violence. See R. KNOOHUIZEN, R. FAHEY & D. PALMER, *THE POLICE AND THEIR USE OF FATAL FORCE IN CHICAGO* 20 (1972); Los Angeles Board of Police Commissioners, *Concerning the Shooting of Eula Love*, reprinted in 14 *CRIME & SOC. JUST.*, Winter 1980, at 2. See generally D. BELL, *supra* note 18; A. L. HIGGINBOTHAM, *supra* note 13; Burns, *supra* note 8.

<sup>215</sup> See Parts I and II, *supra* text accompanying notes 1-124.

<sup>216</sup> *RAPE AND THE LIMITS OF LAW REFORM*, *supra* note 191, at 27.

<sup>217</sup> See *supra* note 67.

<sup>218</sup> See Braden, *The Ku Klux Klan Mentality—A Threat in the 1980's*, 20 *FREEDOMWAYS* 7 (1980).

<sup>219</sup> For example, for limitations on federal habeas corpus rights, see *Engle v. Isaac*, 102 S. Ct. 1558 (1982), *reh. den.*, 102 S. Ct. 2286 (1982); *Rose v. Lundy*, 102 S. Ct. 1198 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977), *reh. den.*, 434 U.S. 880 (1977); *Stone v. Powell*, 428 U.S. 465 (1976), *reh. den.*, 429 U.S. 874 (1976).

<sup>220</sup> Williams and Holmes claim that "To a great extent, the lack of credibility given the charge of rape today is attributable to the interwoven history of rape and racism where all involved *know* from their own experience (whether that of White male oppressor, White female, or Black male) that rape has been a technique of social control to maintain the White Patriarchy." *THE SECOND ASSAULT*, *supra* note 3, at 35.

<sup>221</sup> See Rudovsky, *The Criminal Justice System and the Role of the Police*, *THE POLITICS OF LAW*, *supra* note 8, at 242-52. For example, the shooting of civilians by police officers,

definition,<sup>222</sup> and punishment<sup>223</sup> of many other crimes should be deplored rather than endorsed. It has refused to protect and indeed has consistently worked against the interests of Black men, Black women, and white women.<sup>224</sup>

The *Sanders* and *Hines* cases discussed earlier<sup>225</sup> illustrate the risks of pressuring the criminal justice system to “do something” about specific rapes, especially rapes committed by Black men against white women. Rather than leading to apprehension of the actual rapist,<sup>226</sup> such pressure can lead police to scapegoat an innocent Black man. This is not to argue that Black men never rape white women; but rather that, where such a rape claim is being prosecuted, white feminists must not overlook the circumstances surrounding the event in order to be certain that the prosecution is not a racial act against the wrong man in an attempt to defuse community pressures.<sup>227</sup> Such prosecutions not only hurt Black people,<sup>228</sup> they also divide women along color lines, and do nothing to halt rape.

### Conclusion

Attempting to reform rape laws to increase convictions thus has numerous shortcomings as a feminist strategy. Improving the criminal

---

*see supra* note 214, almost invariably goes unpunished—out of 1500 killings of civilians by police from 1960–1970, only three resulted in criminal punishment, according to a study by A. Kobler, *Police Homicide in a Democracy*, 31 J. OF SOC. ISSUES, Winter 1975, at 163–64.

<sup>222</sup> The illegality of consensual sexual acts other than penis-vagina intercourse between unmarried persons is an excellent example. *See* *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. denied*, 101 S. Ct. 2323 (1981) (New York’s prohibition against consensual sodomy held unconstitutional on privacy and equal protection grounds); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

<sup>223</sup> Strong evidence suggests that Black defendants generally receive longer sentences than do white defendants for most crimes. *See* JURORS, *supra* note 16, at 117; Owens, *Looking Back Black* in BLACKS AND CRIMINAL JUSTICE, *supra* note 13, 7 at 11.

<sup>224</sup> *See* Rudovsky, *supra* note 221, at 244; Taub & Schneider, *supra* note 99, at 117. Janet Howard notes that “given the history and nature of the ‘justice’ system, [using the legal system] can only bring small concessions to women’s safety, and is more likely to strengthen the repressive, racist power of the police, the courts, and the prisons.” Howard, *supra* note 195, at 82.

<sup>225</sup> *See supra* text accompanying notes 74–80.

<sup>226</sup> *See* Sands, *supra* note 75.

<sup>227</sup> Sagarin, *supra* note 135, at 148.

<sup>228</sup> The targetting of Black men for punishment also affects Black women. Alice Walker writes, “Whenever interracial rape is mentioned, a black woman’s first thought is to protect the lives of her brothers, her father, her sons, her lover. A history of lynching has bred this in her.” A. WALKER, *supra* note 84, at 93; *see* A. DAVIS, *supra* note 73, at 173–74.

justice system's treatment of the victim is a positive goal but does not change the fact of women's victimization. A problem with both approaches is that they only address the problems of women who are known victims of illegal rape. This focus is insufficient. First, even if the activity forbidden by rape laws stopped, other powerful forms of women's sexual subordination would persist.<sup>229</sup> Second, given the racist content of the social meaning of rape, struggles limited to illegal rape are likely to have the racist repercussion of targeting Black men.<sup>230</sup>

A response must be devised which goes beyond the formulation of rape as an extraordinary crime to which only some unlucky women fall victim, to a conception that the sexual coercion of women is pervasive, multivariate, and wholly unacceptable in every form.<sup>231</sup> If women go beyond the formulation given by the legal system they may be able to escape some of the traps of racism, and claim their own lives and sexuality.

This means linking rape issues with other issues of sexual coercion such as incest,<sup>232</sup> spousal abuse, and sexual harassment. It also means recognizing that rape will be treated by the criminal justice system in a racist way as long as this society is racist.

## CONCLUSION

*. . . Eyes that only see the bruises inflicted by men miss seeing other bruises and deep scars.* — JANET HOWARD<sup>233</sup>

The legal system's treatment of rape both has furthered racism and has denied the reality of women's sexual subordination. It has disproportionately targeted Black men for punishment and made Black women both particularly vulnerable and particularly without

---

<sup>229</sup> See *supra* notes 171-178 and accompanying text.

<sup>230</sup> See Part I, *supra* text accompanying notes 1-83.

<sup>231</sup> See *supra* notes 171-178 and accompanying text; see also Hoagland, *Violence, Victimization, Violation*, 15 SINISTER WISDOM, Fall 1980, at 70.

<sup>232</sup> Susan Brownmiller observes that "If protection of the bodily integrity of all children is to be genuinely reflected in the law, and not simply the protection of patriarchal interests, then the current division of offenses (statutory rape for outsiders; incest for a member's family) must be erased." S. BROWNMILLER, *supra* note 13, at 429.

<sup>233</sup> Howard, *supra* note 195, at 80.

redress. It has denied the reality of women's sexual subordination by creating a social meaning of rape which implies that the only type of sexual abuse is illegal rape and the only form of illegal rape is Black offender/white victim. Because of the interconnectedness of rape and racism, successful work against rape and other sexual coercion must deal with racism. Struggles against rape must acknowledge the differences among women and the different ways that groups other than women are disempowered. In addition, work against rape must go beyond the focus on illegal rape to include all forms of coerced sex, in order to avoid the racist historical legacy surrounding rape and to combat effectively the subordination of women.