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The Unintentional Rapist

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THE UNINTENTIONAL RAPIST

I. BENNETT CAPERS*

I am a rapist. Not by choice. But when I look in the mirror and see what others see, I know there's no hiding it. I am a rapist.

No, I have never followed a woman to her car at night, pulled a knife on her, and forced her to put out or be killed. Nor have I tackled an early morning jogger in the park, putting one hand over her mouth before she could scream and yanking down her running shorts with my other hand. In terms of crawling through windows in apartment complexes where single women live, that hasn't been my thing either. I am not that kind of rapist. Nor have I laced the drink of a girl at a frat party, or explained to a girl who kept saying no and crying as I unbuttoned her blouse that she really meant yes. I could go on, but suffice it to say that I'm like a boy scout when it comes to women. Honest.

Okay. I can tell you're confused. You're wondering, is this guy a rapist or what?

Sometimes, I ask myself the same question.

Maybe it's all in his mind, you're wondering.

Not in my mind.

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INTRODUCTION

When it comes to rape, the case law is replete with troubling cases, but one of the most troubling is *McQuirter v. State*.¹ Part of the trouble has to do with the outcome of the case: notwithstanding the ambiguous evidence and a questionable confession, the Alabama court affirmed the conviction of McQuirter, “a Negro man,” for attempting to commit an assault with intent to rape.² Part of the trouble also has to do with the court’s endorsement of the means by which the jury was permitted to find the requisite intent to commit rape: “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.”³ But this, I think, is only part of why the case is so troubling.

Since the case is not well known—it broke no new ground, and the legal issue it addressed was not novel—some recitation of the “facts” is in order. According to the opinion:

About 8:00 o’clock on the night of June 29, 1951, Mrs. Ted Allen, a white woman, with her two children and a neighbor’s little girl, were drinking Coca-Cola at the “Tiny Diner” in Atmore. When they started in the direction of Mrs. Allen’s home she noticed appellant sitting in the cab of a parked truck. As she passed the truck appellant said something unintelligible, opened the truck door and placed his foot on the running board.⁴

1. 63 So. 2d 388 (Ala. Ct. App. 1953).

2. *Id.* at 388.

3. *Id.* at 390.

4. *Id.* at 389.

This much did not appear to be in dispute. In terms of what happened next, however, or rather how to interpret what happened next, the prosecutrix and the defendant had very different views.

Mrs. Allen testified appellant followed her down the street and when she reached Suell Lufkin's house she stopped. As she turned into the Lufkin house appellant was within two or three feet of her. She waited ten minutes for appellant to pass. When she proceeded on her way, appellant came toward her from behind a telephone pole. She told the children to run to Mr. Simmons' house and tell him to come and meet her. When appellant saw Mr. Simmons he turned and went back down the street to the intersection and leaned on a stop sign just across the street from Mrs. Allen's home. Mrs. Allen watched him at the sign from Mr. Simmons' porch for about thirty minutes, after which time he came back down the street and appellant went on home.⁵

For his part, the defendant, who had never before been arrested, presented several character witnesses.⁶ The defendant also testified in his own defense, denying that he followed Mrs. Allen or otherwise acted inappropriately.

Appellant, as a witness in his own behalf, testified he and Bill Page, another Negro, carried a load of junk-iron from Monroeville to Pensacola; on their way back to Monroeville they stopped in Atmore. They parked the truck near the "Tiny Diner" and rode to the "Front," the colored section, in a cab. [He] came back to the truck around 8:00 o'clock and sat in the truck cab for about thirty minutes. He decided to go back to the "Front" to look for Bill Page. As he started up the street he saw prosecutrix and her children. He turned around and waited until he decided they were gone, then he walked up the street toward the "Front." When he reached the intersection at the telegraph pole he decided he didn't want to go to the "Front" and sat around there a few minutes, then went on to the "Front" and stayed about 25 or 30 minutes, and came back to the truck.⁷

5. *Id.*

6. Two residents of Monroeville testified as to McQuirter's "good reputation for peace and quiet and for truth and veracity." *Id.*

7. *Id.*

Again, *McQuirter v. State* is a troubling case. There are the troubling legal and factual issues. Demarcating the line between innocent acts, mere preparation, and criminal attempt is notoriously difficult.⁸ And since the crime of assault is itself predicated on the notion of attempt—an attempted battery—McQuirter’s conviction on the charge of “attempt to commit an assault with intent to rape” seems doubly problematic.⁹ The court’s circular clarification—the court translates the charge as “an attempt to rape which has not proceeded far enough to amount to an assault”¹⁰—only adds to the difficulty.

There are also the racial issues. I have already referenced the court’s conclusion that the jury was permitted to consider “social conditions and customs founded upon racial differences” in inferring intent.¹¹ But the racial issues go beyond this overt remark. There are also the racialized mores. For example, the court, in identifying the white witnesses, uses the address “Mr.” or “Mrs.”¹² No titles are allowed either McQuirter or the identified black witnesses.¹³ (There are gender issues as well, to be sure; that the prosecutrix is referred to by her husband’s full name, a common practice in the 1950s, is but one example.) The opinion takes for granted, and in doing so adds legitimacy to, the notion of racialized spaces. That McQuirter had stopped in the white part of town, and that there existed the “‘Front,’ the colored section,”¹⁴ is taken as a given. That McQuirter’s walking alone on the same street as Mrs. Ted Allen, “a white woman,”¹⁵ was an encroachment upon her space, is also taken as a given. Even McQuirter, in his testimony, understood that the proper thing to do once he saw Mrs. Ted Allen was to “turn[] around and wait[] until . . . they had gone.”¹⁶ Space is racialized, and so is sex. By sex, I am not referring to

8. On this difficulty, see generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 423 (2006) (discussing the difficulty in “drawing a line between noncriminal preparation and criminal attempt”). As one court observed, “the line of demarkation [sic] is not a line at all but a murky ‘twilight zone.’” *United States v. Williamson*, 42 M.J. 613, 617 n.2 (N-M. Ct. Crim. App. 1995).

9. *McQuirter*, 63 So. 2d at 388.

10. *Id.* at 390.

11. *Id.*

12. *Id. passim*.

13. *Id.* It would be more than a decade before a black litigant would successfully contest this form of address before the Supreme Court. In *Hamilton v. Alabama*, 376 U.S. 650 (1964), the Court reversed a judgment of contempt against Mary Hamilton for refusing to answer questions in court. The reason for her refusal was simple: the lawyer kept addressing her as “Mary,” despite her request to be addressed as “Miss Hamilton” and thus accorded the same respect as the white witnesses in the courtroom. See *Ex Parte Hamilton*, 156 So. 2d 926 (Ala. 1963).

14. *McQuirter*, 63 So. 2d at 389.

15. *Id.* at 389, 390.

16. *Id.* at 389.

gender here. I am referring to actual sex. It is not only the possibility of non-consensual sex that is being policed; what is also rendered illicit is even the possibility of interracial consensual sex. What is at risk is not just sexual intercourse, but its natural precursor, social intercourse.

All of these are troubling issues. And when I teach *McQuirter*, many students respond by attempting—there is that word again—to de-trouble the case. They do this in one of two ways, either through hypothesis or by engaging in a distancing maneuver. The hypothesis posits that it really was McQuirter's intent to rape Mrs. Ted Allen, in which case the guilty verdict was a just one. The distancing reaction assumes that, whether or not McQuirter intended to rape Mrs. Ted Allen, the significance of the case is entirely historical—a vestigial relic of how easy it was to bring rape charges against black men in the South, at least where there was a white "victim."

For me, *McQuirter* is not so easily cabined. It is not so easily dismissed. When I read and re-read *McQuirter*, I find that the case raises more questions than it answers. *McQuirter* raises questions about the law of rape. But it also raises questions about the sexualization of race, the racialization of rape, and ultimately the specter of *not* rape.

This Article proceeds as follows. Part I begins with an overview of the black letter law of rape, from its common law foundation through its recent reforms. The point of this overview is not to be exhaustive or to provide a hornbook on the law of rape. Indeed, there are aspects of rape law—such as rape by fraud in the inducement, statutory rape, and the change in evidentiary rules ushered in by rape shield laws—that I put to the side almost entirely.¹⁷ Rather, the point of the overview is to show that any understanding of the development of the black letter law of rape in this country is incomplete without an understanding of what I have termed the "white letter law of rape."¹⁸ Though rarely made explicit, this white

17. For an overview of these issues, I cannot recommend more Joshua Dressler's chapter on rape in *Understanding Criminal Law*. See DRESSLER, *supra* note 8, at 617–41. For entirely different reasons, I also put to the side other types of rape, such as same-sex rape. This is not to diminish the harm of same-sex rape, which occurs far more frequently than most individuals realize. See, e.g., HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001); MALE VICTIMS OF SEXUAL ASSAULT (Gillian C. Mezey & Michael B. King eds., 1992); Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006). Rather, it is an acknowledgement that it is male perpetrator–female victim rape that has driven, shaped, and informed the law of rape and the law of *not* rape, which this Article critiques.

18. I first introduced the concept "white letter law" in an earlier article. See I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 7–8 (2006). Unlike black letter law—which brings to mind "statutory law, the written law, the easily discernible law set forth as black letters on a white page"—"white letter law" suggests "societal and

letter law of rape often governs the application of the black letter law, determining its presumptions and reallocating its burdens of proof and persuasion. But it is more than this. It also informs which complainants are believed, which suspects are prosecuted and convicted, and the severity of their punishment. Understanding this white letter law of rape is a first step in arguing for a change in the law of rape. And it is the first step in arguing for a change in the law of *not* rape.

Part II focuses on the issue of mens rea in rape cases, and argues that here, too, the sexualization of race and the racialization of rape matters. There is something akin to presumption of criminal intent in rape cases involving black male defendants and white female complainants. Equally troubling, when it comes to the defense of reasonable belief in the presence of consent, there seems to be a presumption of *un*-reasonability.

Part III returns to the case of *McQuirter v. State*, and questions the reforms pressed by feminist legal scholars. Finally, Part IV attempts to answer the question that, more than any other, motivates this Article: What if McQuirter was an unintentional rapist? By this I mean, what happens when we: (i) assume that McQuirter did not have the intent to rape Mrs. Ted Allen; (ii) assume that Mrs. Ted Allen nonetheless perceived McQuirter to have the intent to rape; and (iii) reorient ourselves to look at the case from McQuirter's perspective? Is it possible to recast McQuirter not as the defendant, but as a crime victim, with Mrs. Ted Allen cast as the perpetrator? Can we reframe *McQuirter v. State* into a hypothetical *State v. Allen*? Should we?

My approach to rape law is unconventional, to be sure. Part of this has to do with who I am. In Susan Estrich's influential *Yale Law Journal* Article, "Rape," she begins with her own story of being raped by a black man—the cops derogatorily refer to him as a "crow"—and the acknowledgment that as a rape victim, she is neither unbiased, nor an objective observer.¹⁹ In her subsequent book, *Real Rape*, she continues, "In writing about rape, I am writing about my own life."²⁰ She explicitly calls into question the very notion of objectivity when it comes to the law of rape, which, until the 1970s, was largely written by men.²¹ Privileged white men, to be more specific.

normative laws that stand side by side with, and often undergird, black letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye." *Id.*

19. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1087 (1986).

20. SUSAN ESTRICH, *REAL RAPE* 3 (1987).

21. Estrich, *supra* note 19, at 1089 & n.2.

Like Estrich, I, too, want to put my cards on the table. Like Estrich, I make no claim to be unbiased or objective—except I am not a rape victim, at least not in the conventional sense. Rather, I am someone whose voice and point of view have been absent too long from rape law discourse. In Estrich’s story, I would be the crow. I am a black man who teaches rape to mostly white students. I am a black man living in a country where encounters with overt racism are now rare,²² but where encounters with unacknowledged and implicit biases about race and sexuality are a daily occurrence. In 1950s Alabama, I could easily have been McQuirter. Now, when I go on solitary evening strolls in the predominantly white neighborhood where I live, I am not afraid that I will be arrested, prosecuted, and convicted of “attempt to commit assault with the intent to commit rape.”²³ But I do know that to many unaccompanied women, my race and gender prefigure me as a potential rapist. To many unaccompanied women, I am still McQuirter. Just walking in my neighborhood, I am both raced and sexualized. In short, I become a rapist.

I. THE BLACK LETTER/WHITE LETTER LAW OF RAPE

A. *The Black Letter Law of Rape*

The black letter law of rape has always been deceptively simple. At English common law, it was defined as “carnal knowledge of a woman forcibly and against her will,”²⁴ and was understood as including three basic elements: vaginal intercourse, force, and non-consent.²⁵ American jurisdictions adopted these basic elements, and even today, most rape statutes have these elements as their foundation.²⁶

This is not to suggest that the proof required to establish each of these three elements—vaginal intercourse, force, and non-consent—has remained constant. Initially, proof of force required not only proof that the

22. As several scholars have noted, while forms of overt racism have declined, structural or institutional racism continues to act as a barrier to equality. See generally I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1726–27 (2000); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1130 (2008); Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1320–21 (2008).

23. *McQuirter v. State*, 63 So. 2d 388, 388 (Ala. Ct. App. 1953).

24. 4 WILLIAM BLACKSTONE, COMMENTARIES *210.

25. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 318 (7th ed. 2001).

26. See *id.*

defendant had acted forcibly in engaging in intercourse; it also required proof that the complainant responded to his force with force of her own.²⁷ As such, rape was one of the few crimes where the actions of the defendant alone were by definition insufficient to satisfy the elements of the crime. His force might render him guilty of assault or battery, but it would not render him guilty of rape unless there was also a specified reaction from the victim: utmost resistance.²⁸ Both the quantity and the quality of her response were put on trial, deliberated over and adjudicated. Indeed, proof of her response was necessary for two elements: to prove that the defendant's force was really force, and to prove that the victim's non-consent—no matter how many times expressed verbally—was really non-consent. As one court put it, “Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.”²⁹ Or as another court put it in explaining the utmost resistance requirement, “[I]f a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant?”³⁰ In short, early rape law allowed men something akin to a “woman's failure of *actus reus* defense.”³¹

This was the law initially. By the 1960s and 1970s, this requirement that women resist to the utmost had given way to the requirement that they resist when it is reasonable to do so.³² The 1981 case of *State v. Rusk*³³ illustrates this shift. In *Rusk*, the Maryland Court of Appeals, sitting en banc, upheld a conviction for rape where the victim—who met the defendant at a bar and gave him a ride home, where she was pressured to come up to his room and pressured to have sex—failed to physically resist at all.³⁴ In a departure from the prior requirement that a victim resist to the

27. DRESSLER, *supra* note 8, at 627–28.

28. JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 904–05 (5th ed. 2004).

29. *Brown v. State*, 106 N.W. 536 (Wis. 1906).

30. *People v. Dohring*, 59 N.Y. 374, 384 (1874).

31. Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 36 (1998).

32. This change was largely the result of activism by women's rights groups, who pointed out that rape was the only crime where the victim had to “prove” herself and was in effect “put on trial along with the defendant to have [her] conduct judged.” JOHN DELANEY, *LEARNING CRIMINAL LAW AS ADVOCACY ARGUMENT* 308 (2004) (citing Snyder, *Reform of New York's Rape Law Proposed*, N.Y. L.J., Dec. 14, 1978, at 4).

33. 424 A.2d 720 (Md. 1981).

34. *Id.* at 724, 728. According to the prosecutrix, she repeatedly declined to accompany the defendant to his apartment, and only did so after he grabbed her car keys. *Id.* at 721. Once in the apartment, defendant asked her to remove her clothes and she did. *Id.* at 722. She testified:

utmost *no matter what*, the court ruled that since her failure to resist was based on her reasonable fear, resistance was excused.³⁵ That this decision was four to three, with the three dissenters invoking “the natural instinct of every proud female to resist,”³⁶ illustrates what a difficult shift it has been.

In the last few decades, there has also been a shift in the emphasis placed on certain elements. Jurisdictions initially placed primary emphasis on the use of force, as evidenced by resistance or reasonable resistance, in determining whether a rape had occurred.³⁷ Indeed, in the 1950s, the authors of the Model Penal Code defined rape almost entirely based on the presence of force,³⁸ as did several jurisdictions influenced by the Model Penal Code.³⁹ Since the 1980s, however, the trend has been to de-emphasize the presence of force and to instead emphasize the absence of consent.⁴⁰ New Jersey, for example, no longer requires proof of any force beyond the force inherent in the act of sexual penetration. In *In re M.T.S.*,⁴¹ the New Jersey Supreme Court ruled that a person commits forcible rape when he commits an act of penetration in the absence of affirmative and freely given permission;⁴² in short, the force inherent in the sexual act itself satisfies the force requirement. Another case

I was still begging him to please let, you know, let me leave. I said, “you can get a lot of other girls down there, for what you want,” and he just kept saying, “no;” and then I was really scared, because I can’t describe, you know, what was said. It was more the look in his eyes; and I said, at that point—I didn’t know what to say; and I said, “If I do what you want, will you let me go without killing me?” Because I didn’t know, at that point, what he was going to do; and I started to cry; and when I did, he put his hands on my throat, and started lightly to choke me; and I said, “If I do what you want, will you let me go?” And he said, yes, and at that time, I proceeded to do what he wanted me to.

Id. at 722.

35. *Id.* at 726. The court ruled that a reasonably grounded fear “obviate[s] the need for either proof of actual force on the part of the assailant or physical resistance on the part of the victim.” *Id.* at 727.

36. *Id.* at 733 (Cole, J., dissenting).

37. DRESSLER, *supra* note 8, at 625–35.

38. MODEL PENAL CODE & COMMENTARIES § 213.1(1)(a); *see also* Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 210 (2003).

39. ESTRICH, *supra* note 20, at 59; *see also* Matthew R. Lyon, Note, *No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 284–85 (2004).

40. *See, e.g.*, VT. STAT. ANN. tit. 13, § 3252(a)(1) (2009) (criminalizing nonconsensual sex); WIS. STAT. ANN. § 940.225(4) (West 2005); N.Y. PENAL LAW § 130.20(1) (McKinney 2009) (defining sexual misconduct as sexual intercourse without consent); *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992) (redefining rape to include nonconsensual sex). *See generally* DRESSLER, *supra* note 8, at 632–33; Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 601 (2004).

41. 609 A.2d 1266 (N.J. 1992).

42. *Id.* at 1277.

illustrating the growing emphasis on consent is *People v. John Z.*⁴³ In *John Z.*, the California Supreme Court upheld a conviction where the victim consented to intercourse with the defendant, but withdrew consent after the intercourse had begun.⁴⁴ Even *State v. Rusk* illustrates this trend to a certain extent, since there, the Maryland Court of Appeals suggested that the need for proof of actual force by the assailant may be obviated by proof of reasonably grounded fear on the part of the victim.⁴⁵

There have been other changes as well. Under traditional common law, the crime of rape did not apply to husbands who forced their wives to have sex, even when such force was accompanied by physical violence.⁴⁶ The thinking was that by consenting to marriage, women necessarily consented to permanent access,⁴⁷ or, in the alternative, that by consenting to marriage, the personage of the wife had been “incorporated and consolidated into that of the husband.”⁴⁸ At the urging of feminist scholars, this marital immunity has been all but eliminated, though remnants of the rule appear in more than a half dozen states.⁴⁹ States have also broadened the definition of prohibited conduct to include conduct other than penile-vaginal intercourse, and have revised their rape statutes to make them gender neutral (allowing for the prosecution of female perpetrators and/or rapes involving male victims).⁵⁰

These substantive changes to the rape law have not been inconsequential.⁵¹ But at bottom, they have been changes at the margins.

43. 60 P.3d 183 (Cal. 2003).

44. *Id.* at 186–88.

45. 424 A.2d 720, 727 (Md. 1981).

46. 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE* [HISTORY OF THE PLEAS OF THE CROWN] *628–29. See generally DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* 17 (rev. ed. 1990); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

47. Sir Matthew Hale put it more delicately: “[B]y their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” HALE, *supra* note 46, at *629.

48. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *430.

49. See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1468 & nn.9–13 (2003).

50. There have been other changes in rape law as well. The requirement in many jurisdictions that a rape victim’s account be corroborated has been eliminated, DRESSLER, *supra* note 8, at 642–43, as well as the requirement that a rape victim make a “prompt complaint.” KAPLAN ET AL., *supra* note 28, at 901. Rape shield laws, similar to those codified in Federal Rule of Evidence 412, limit inquiry at trial into the victim’s sexual history and reputation. *Id.*; see also FED. R. EVID. 412. Courts have also abandoned the practice of giving cautionary instructions to juries alerting them that accusations of rape are easy to fabricate and thus deserve special scrutiny. DRESSLER, *supra* note 8, at 642–43.

51. Of course, several scholars have made the opposite point: that these changes have been inconsequential. They make the empirical claim that these changes have been largely ineffectual in changing the application of rape law in terms of which rapes are prosecuted and result in convictions.

Though the emphasis on the elements may have changed, the basic black letter definition of rape continues to prohibit sexual intercourse by force and without consent. The point here is not to assay this definition, but to show that the definition “really explains very little.”⁵² It is neither descriptive nor predictive of rape law as applied. And one main reason that it is incomplete is because it obscures the sexualization of race and the racialization of rape.

B. The Black Letter/White Letter Law of Rape

To fully understand the story of the law of rape in this country, one must understand how the law of rape has been shaped by the law of race.

1. Explicit Laws

Historically, the interplay between the law of rape and the law of race was explicit. This was especially true in the case of punishment. Early Pennsylvania law, for example, specified that blacks convicted of raping, or attempting to rape, white women were to be punished by castration.⁵³ Missouri and Kansas similarly provided for castration.⁵⁴ The Virginia Code, after initially authorizing castration, authorized the death penalty for a black convicted of raping a white woman, but set the maximum punishment for a white convicted of rape at twenty years’ imprisonment.⁵⁵ Other states followed a similar practice, removing capital punishment in rape cases for white defendants, but retaining it for slaves and in some cases for all blacks, slave and free, convicted of either raping or attempting to rape white women.⁵⁶

See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554 (1993); Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 613 (1980). These arguments, however, miss a larger point. If nothing else, reforms have had a signaling function about what conduct is tolerated, instilling a kind of self-policing.

52. KAPLAN ET AL., *supra* note 28, at 897.

53. An Act for the Trial of Negroes, ch. LXI, § IV, 1700 Pa. Laws 79.

54. An Act Concerning Crimes and Punishments, § 99, 1825 Mo. Laws 312; *see also* Jennifer Wiggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103, 105 n.8 (1983) (citing Kansas Compilation of 1855).

55. For more on these early laws, see WINTHROP D. JORDAN, *THE WHITE MAN’S BURDEN* 81–82 (1974); *see also* Donald H. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH & LEE L. REV. 43 (1965); Wiggins, *supra* note 54, at 105 n.8 (1983).

56. THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 305 (1996).

As the foregoing suggests, both the race of the defendant and the race of the complainant mattered. In *Grandison v. State*,⁵⁷ for example, the court ruled that the race of the prosecutrix “must be charged in the indictment and proved” at trial.⁵⁸ The court explained, “Such an act committed upon a black woman would not be punished with death,” since it is the white race of the victim that “gives to the offense its enormity”⁵⁹ In *Pleasant v. State*,⁶⁰ the court reversed the conviction of a slave accused of raping a white woman where the issue of her whiteness was not proved to the jury. As the court put it, “a fair complexion is not inconsistent with the taint of negro blood”; proof that her grandfather was a negro would preclude the defendant being sentenced to death.⁶¹

2. Indirect Laws

At other times, the black letter law of race operated indirectly to inform the law of rape. For example, it is impossible to fully understand the dominant response to even the specter of interracial rape without understanding our 300-year history of prohibiting interracial marriage⁶² and even interracial sexual intercourse.⁶³ These antimiscegenation statutes, if they did not dictate the outcome of rape allegations, at least limited the range of possibilities.⁶⁴ Imagine, for a second, that McQuarter had been white.⁶⁵ It is possible that the cops who arrested him, or the prosecutor

57. 21 Tenn. (2 Hum.) 451 (1841).

58. *Id.* at 452.

59. *Id.* A *Yale Law Journal* Article expressed a similar sentiment, bidding its readers to: “[C]onsider how profoundly humiliated any woman must feel who has been the victim of [rape], and how, under existing social conditions, this humiliation must be greatly intensified by the wrong having been committed by a negro” Wm. Reynolds, *The Remedy for Lynch Law*, 7 *YALE L.J.* 20, 21 (1897).

60. 13 Ark. 360 (1853).

61. *Id.* at 376.

62. As many as thirty-eight states at one time banned interracial marriage. See RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 17 (2001); see also Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 *WASH. U. L.Q.* 611, 627–28 (2004). At the time *Loving v. Virginia* was decided in 1967, invalidating all antimiscegenation laws, sixteen states had such statutes. *Loving v. Virginia*, 388 U.S. 1, 6 & n.5 (1967).

63. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (invalidating a statute authorizing greater penalties for interracial cohabitation and adultery). In so holding, the Court overruled its prior decision in *Pace v. Alabama*, 106 U.S. 583 (1883), upholding a similar Alabama statute.

64. Ida B. Wells, one of the most prominent African American intellectuals of the late-nineteenth century, also noted the interrelation between antimiscegenation laws and rape. See IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* 8 (1892).

65. On the advantages that obtain from using switching exercises to override inappropriate biases in the criminal law, see I. Bennett Capers, *Cross Dressing and the Criminal*, 20 *YALE J.L. & HUMAN.* 1 (2008).

who filed charges, or the judge who tried him, or the jury that decided his fate would have speculated that McQuirter did notice Mrs. Ted Allen. They may have even concluded that he did intentionally follow her and did intentionally wait outside her home. But switch McQuirter's race, and they could easily have concluded that McQuirter's actions were all in courtship, all in seduction. The fact that Alabama prohibited even consensual interracial intercourse contributed to making that option unimaginable.⁶⁶

3. *White Letter Laws and the Resistance Requirement*

Most of the time, however, a type of unwritten law of race, what I have termed "white letter law"⁶⁷—suggesting near invisibility, something akin to laws "inscribed in white ink on white paper"⁶⁸—dictated whether the elements of the crime of rape had been satisfied; indeed, whether the elements were even capable of being satisfied. Even under Blackstone's definition that rape was "carnal knowledge of a woman forcibly and against her will,"⁶⁹ jurisdictions in this country applied a type of white letter law exemption. It was understood, for example, that the definition of rape did not prohibit the rape of black slaves,⁷⁰ or, for that matter, slave children.⁷¹

The unwritten white letter law of rape held particular sway following ratification of the Reconstruction Amendments, when explicit distinctions based on race in criminal statutes risked invalidation under the Fourteenth Amendment's Equal Protection Clause. Evidence of this can be seen in the black letter law's initial requirement of proof that the victim resisted to the utmost before a conviction of rape would be sustained. Though the "utmost resistance" requirement was clear, what it meant in practice—in terms of which victims were believed, which men were prosecuted, and

66. Indeed, in *Dorsey v. State*, the Georgia Supreme Court allowed race to be considered to rebut this very possibility. *Dorsey v. State*, 34 S.E. 135, 136–37 (Ga. 1899).

67. See Capers, *supra* note 18, at 7–8.

68. *Id.* at 8.

69. BLACKSTONE, *supra* note 24, at *210.

70. MORRIS, *supra* note 56, at 305–06; see also Sharon Block, *Lines of Color, Sex, and Service: Comparative Sexual Coercion in Early America*, in *SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY* 141 (Martha Hodes ed., 1999); Catherine Clinton, "With a Whip in His Hand": *Rape, Memory, and African-American Women*, in *HISTORY AND MEMORY IN AFRICAN-AMERICAN CULTURE* 205, 211 (Geneviève Fabre & Robert O'Meally eds., 1994).

71. See, e.g., *George v. State*, 37 Miss. 316, 318 (1859) (dismissing rape indictment because victim, who was under the age of ten, was a slave, and hence not protected by the criminal law). Mississippi subsequently revised its law to prohibit the rape of black or mulatto females under twelve, but only if the rape was committed by another black or mulatto.

which defendants were found guilty—turned on what was often unsaid, i.e., the white letter law. As Susan Estrich aptly observed in her analysis of cases from this period, resistance itself was color-dependent: “white women [were] not required to resist black men”⁷²

Two cases illustrate this point. In *Brown v. State*,⁷³ a sixteen-year-old girl was forced to the ground as she walked across the field to her grandmother’s house. The court did not dispute that she screamed as hard as she could, repeatedly tried to get up, clawed at the grass, and kept screaming until her attacker almost strangled her.⁷⁴ Nonetheless, the court concluded that her attacker (white) was *not* guilty of rape *because she didn’t resist enough*.⁷⁵ By contrast, *Hart v. Commonwealth*⁷⁶ involved a seventeen-year-old girl who was attacked by “a full-grown negro man” but did not cry for help when two white men were in earshot; instead, she freed herself and “walk[ed] to the nearest house” to call for help.⁷⁷ That she could have done more to resist, and therefore did not resist to the utmost, was beside the point. The white-letter law of rape dictated that there was more than enough evidence to overlook the “utmost resistance” requirement and find her attacker guilty of attempted rape. After all, he was a “full-grown negro man.” Indeed, the white letter law dictated that there was more than enough to affirm Hart’s sentence for the crime of attempting to rape a white woman: death.

In short, though the black letter law was, at least on the books, “color-blind,” the white letter law provided caveats and exceptions that were color-coded.⁷⁸ In cases involving black defendants and white

72. ESTRICH, *supra* note 20, at 36. In Estrich’s account, the “appropriateness” of the relationship determined whether, in practice, the resistance requirement would be applied.

Strangers need not be resisted, even if unarmed; dates must be. A stepdaughter is not required to resist her stepfather, but she is required to resist the boy or man next-door. Adult women are required to resist when the man is an adult neighbor, but not when he is a drunken youth.

White women are not required to resist black men, but black women are.

Id. Stephen Schulhofer makes a similar observation regarding race. “[T]he stringent force requirement [the precursor to resistance] was usually ignored when a black defendant was accused of raping a white woman.” STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 24 (1998).

73. 106 N.W. 536, 537 (Wis. 1906).

74. *Id.* at 537.

75. *Id.* at 538–39.

76. 109 S.E. 582, 583 (Va. 1921).

77. *Id.* at 583 (emphasis added).

78. This is not to suggest that color was the only way in which the white letter law was coded. It was also coded in a host of other ways, including class, status, and something that is perhaps best understood as idealization. Just as women at times have been held up to an ideal standard of beauty and behavior—during the nineteenth century, white, young, chaste, gender-conforming, and of a particular class—we have understood rape in terms of ideal rape victims and ideal rapists. The

complainants, the defendant's blackness operated to relieve the prosecution of the burden of proving utmost resistance.⁷⁹ This was true regardless of the social standing of the white complainant. As one court infamously put it in a case involving rape charges brought by a white prostitute:

[T]hough a white woman be a prostitute, the presumption is strong, nearly conclusive . . . that she will not yield—has not yielded—even in her confirmed depravity, to commerce with a negro charged with an offense against her person.⁸⁰

Or as the judge in the Scottsboro trial of nine black youths put it:

Where the woman charged to have been raped, as in this case is a white woman[,] there is a very strong presumption under the law that she would not and did not yield voluntarily to intercourse with the defendant, a Negro; and this is true, whatever the station in life the prosecutrix may occupy, whether she be the most despised, ignorant and abandoned woman of the community, or the spotless virgin and daughter of a prominent home of luxury and learning.⁸¹

By the 1960s and 1970s, of course, the requirement that women resist to the utmost had given way to the requirement that they resist when it is reasonable to do so. But again, this black letter requirement had a white letter emendation. Whether or not the victim's decision to resist was reasonable, i.e., whether she was reasonably put in fear of her attacker, could now simply turn on the race of the defendant. In other words, the

likelihood of prosecution and likely outcome have often depended on how closely the actual rape matches on to our preconceptions of the ideal rape victim and the ideal rapist. For more about the effect of victim status, see Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985).

79. See Jacquelyn Dowd Hall, "The Mind That Burns in Each Body": Women, Rape, and Racial Violence, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 328, 336 (Ann Snitow et al. eds., 1983) (noting that in situations involving a black man and a white woman, "intercourse was prima facie evidence of rape"); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 363 (1993) ("Courts often appear to be asking the question, 'How much force should we allow this type of man to use against this type of woman?' Very little force, if any, was required to convict a Black man of raping a white woman."); Wriggins, *supra* note 54, at 111 ("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.").

80. *Story v. State*, 59 So. 480, 482 (Ala. 1912).

81. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 297 (1969). In the Scottsboro Boys case, nine black youths were repeatedly convicted of raping two white women on a freight train, notwithstanding the fact that one of the women testified for the defense and admitted that they had fabricated the accusation, or the fact that the medical evidence contradicted the claim. See *generally id.*

presence of a black man was often enough to raise a *presumption* of reasonable fear. As the court put it in *People v. Harris*,⁸² in a rape case involving a “young, white woman returning home” and encountering a “strange, male person of the Negro race” on a quiet street, “it would border upon the stupid to find that she freely acquiesced in his acts as he ravished her body. While she made some resistance, it may be safely presumed that she would have rebelled with a vengeance but for her fear of bodily harm.”⁸³ After all, the defendant was a “strange, male person of the Negro race.”

4. *White Letter Laws and Punishment*

In addition, long after the black letter law ceased to explicitly mete punishment for rape along lines of race, the white letter law still did. Between 1930 and 1967, 89% of all of the men *officially* executed for rape in the United States were black.⁸⁴ This does not include unofficial executions committed through lynching, which would certainly result in an even higher percentage of executions.⁸⁵ Focusing solely on legal executions for rape, a study concluded that the overwhelming majority (85%) involved a particular dyad—black male defendants and white female victims—and that a black man found guilty of raping a white woman was eighteen times more likely to receive a death sentence than an offender in any other offender-victim dyad.⁸⁶ Perhaps most revealing: no one, white or black, has been executed for raping a black woman,⁸⁷ notwithstanding the absence of significant variation in the rate of victimization of white women and black women.⁸⁸

This racial disparity in rape executions has not gone unnoticed by the Court. Concerns about this disparity were at the heart of Justice Douglas’s

82. 238 P.2d 158 (Cal. Dist. Ct. App. 1951).

83. *Id.* at 160.

84. See Marvin E. Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, in EXECUTIONS IN AMERICA 110–20 (William J. Bowers ed., 1974).

85. In the nineteenth century, lynchings in fact outnumbered state-sponsored executions. In the first few decades of the twentieth century, such lynchings constituted about a third of all executions. See WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 40–44 (1974).

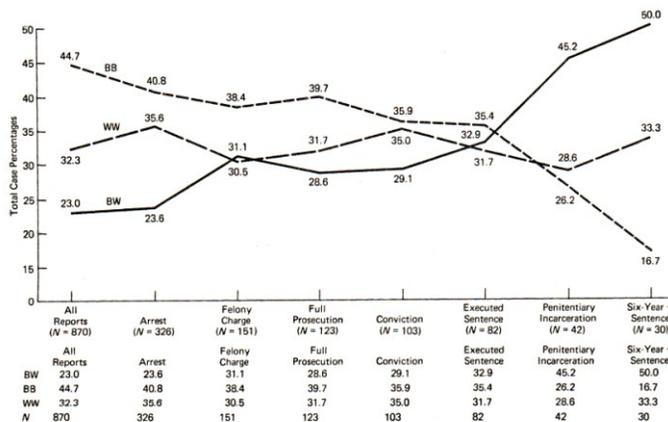
86. Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 130 (1973); see also Marvin E. Wolfgang & Marc Riedel, *Rape, Racial Discrimination and the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES 99, 111 (Hugo Adam Bedau & Chester M. Pierce eds., 1976).

87. See Coramae Richey Mann & Lance H. Seva, *The Sexualization of Racism: The Black as Rapist and White Justice*, 3 J. BLACK STUD. 168, 173 (1979).

88. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ-205455, CRIMINAL VICTIMIZATION, 2003, at 7 (2004).

and Justice Marshall's concurrences in *Furman v. Georgia*,⁸⁹ and at the heart of Court's decision in *Coker v. Georgia*,⁹⁰ in which the Court invoked the Eighth Amendment's implied proportionality principle to abolish the death penalty as a possible punishment for rape. But in addressing one problem, that of race-based executions, the *Coker* decision left unaddressed another. Though black men are no longer executed for the crime of rape alone, a type of white letter law of punishment continues to persist with respect to non-capital sentences.

Consider the results of Gary LaFree's study of the racial disparity in prosecution and sentencing in rape cases.⁹¹ LaFree examined the impact of race composition in nine separate processing decisions in the 881 forcible-sex offenses reported to the Indianapolis police during a three-year period.⁹² His findings, represented in the graph below,⁹³ support the conclusion that the racial composition of the defendant-victim dyad is a significant factor in several of the processing decisions.



Note: N indicates total cases reaching each processing stage. Two dependent variables, Trial (whether trial or guilty plea) and Verdict (guilty or not guilty for court trial) are submitted here by conviction. Variation in total number of cases reported is due to missing data.

Although black men accused of assaulting black women accounted for 45% of the reported rapes, they accounted for only 16.7% of the men who

89. 408 U.S. 238, 240, 255 (1972) (Douglas, J., concurring); 408 U.S. at 364–65 (Marshall, J., concurring).

90. 433 U.S. 584, 592 (1977) (holding that the imposition of death for the crime of rape of an adult woman was grossly disproportionate in violation of the Eighth Amendment).

91. GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 129 (1989).

92. *Id.* at 129–31.

93. *Id.* at 132.

received sentences of six or more years.⁹⁴ “By contrast, black men accused of assaulting white women,” though accounting for only 23% of the reported rapes, accounted “for 50 percent of all men who received sentences of six or more years.”⁹⁵ Indeed, as the graph reveals, LaFree found that “the percentage of cases involving black suspects and white victims steadily increased” from the reported crime stage to the sentencing stage, while “the percentage of black intraracial assaults steadily declined, and the percentage of white intraracial assaults remained relatively constant.”⁹⁶ A multivariate analysis controlling for the strength of the evidence, criminal history, and other case characteristics also supported the conclusion that a black-white dyad was a significant factor in several decisions, including the decision to bring felony charges (as opposed to lesser charges) and in the place and length of sentence.⁹⁷ A reanalysis controlling for the suspect-victim relationship—on the theory that stranger rape may be prosecuted more vigorously than acquaintance rape—did not change this result.⁹⁸ A study of sentences for rape convictions in Dallas, Texas, reached a similar conclusion.⁹⁹

94. *Id.* at 133.

95. *Id.*

96. *Id.*

97. *Id.* at 135–40. LaFree used multivariate analysis “to control for the possibility that legal differences between the cases might explain their different treatments.” *Id.* at 135. Using multiple correlation coefficients (R), LaFree measured “how closely associated independent variables are” to each dependant variable. *Id.* at 138. The independent variables included: race-composition, the defendant’s age, the defendant’s criminal record, eyewitnesses, charge seriousness, type of trial, the presence of a weapon, the offense type, conviction by plea, and the victim’s willingness to testify. *Id.* at 137. The dependent variables were nine criminal justice outcomes: arrest, charge seriousness, felony screening, case prosecution, trial, verdict, sentence type, place of incarceration, and sentence length. *Id.* at 130–31.

LaFree chose the most correlated independent variable as the best single predictor of each criminal justice outcome. *Id.* When additional predictors entered the equation, LaFree used R-square to determine “how much of an additional contribution specific variables made to explaining each processing outcome.” *Id.* at 138. The multivariate analysis shows us that “the inclusion of the race-composition variables does improve prediction of outcomes appreciably . . .” *Id.* at 138. To complete the multivariate analysis, LaFree reestimated the equations where the independent variables had significant net effect. This beta coefficient analysis showed no indication that race composition had a net effect on case prosecution and trial. *Id.* at 140–41. Overall,

[c]ompared to other defendants, blacks who were suspected of assaulting white women received more serious charges, were more likely to have their cases filed as felonies, were more likely to receive prison sentences if convicted, were more likely to be incarcerated in the state penitentiary (as opposed to a jail or minimum-security facility), and received longer sentences on the average.

Id. at 139–40.

98. *Id.* at 142–43.

99. See Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES HERALD, Aug. 19, 1990, at A1 (reporting a study, which found that the median sentence for a black man convicted of

Finally, there is evidence that a type of white letter law persists, *sub stratum*, even in capital cases, notwithstanding the Court's decision in *Coker v. Georgia*, abolishing the death penalty as punishment for rape.¹⁰⁰ Phyllis Crocker's examination of death sentences in Ohio based on felony-murder convictions where the predicate felony was rape, suggests that a black-white dyad continues to function as an unwritten factor in imposing the penalty of death in felony-murder cases.¹⁰¹ For example, Crocker found that even though only approximately 14% of the sexual assault-murder cases in Ohio during the period examined were interracial, these cases comprised 32% of the cases resulting in a sentence of death.¹⁰² All of the interracial cases found deserving of death involved white victims.¹⁰³

To be clear, none of this is to suggest that decision makers are racist or consciously take race into consideration. However, given recent studies documenting the prevalence of implicit biases about race,¹⁰⁴ including implicit biases about race and dangerousness,¹⁰⁵ these differences do

raping a white woman was nineteen years, while the median sentence for a white man convicted of raping a black woman was ten years).

100. 433 U.S. 584 (1977).

101. See Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 697-701 (2000).

102. *Id.* at 700-01 & n.58.

103. *Id.* These outcomes largely parallel other studies about the disparity in punishment for crimes involving black defendants and white victims. The most widely cited of these is the Baldus study. See David C. Baldus, Charles Pulaski, & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); see also SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 110 (1989); Robert J. Hunter, Paige Heather Ralph, & James Marquart, *The Death Sentencing of Rapists in Pre-Furman Texas (1942-1971): The Racial Dimension*, 20 AM. J. CRIM. L. 313 (1993). A more recent study found that in Maryland, while the race of victims in capital cases between 1978 and 1999 were roughly evenly split, in 80% of the cases where the death penalty was imposed, the victim was white. Adam Liptak, *Death Penalty Found More Likely if Victim Is White*, N.Y. TIMES, Jan. 8, 2003, at A12. The Court considered these disparities in *McCleskey v. Kemp*, 481 U.S. 279 (1987), but concluded that these disparities, "an inevitable part of our criminal justice system," were not "constitutionally significant" enough to establish an Eighth Amendment violation. *Id.* at 312-13.

104. Using implicit association tests (IATs), which measure the speed with which an individual associates a categorical status with a characteristic, social-cognition researchers have shown that implicit biases continue to be widespread. Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004). Legal scholars have also called attention to implicit biases and the failure of the law, at least to date, to address them. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

105. Recent studies suggest that associations between race and violence continue to be prevalent. See, e.g., Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCH. BULL. 1139, 1139-50 (1995); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876-93 (2004); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 438, 483-504 (2004).

illustrate how these biases can affect the prosecution and resolution of rape cases, contributing to a racial disparity in outcome.¹⁰⁶

C. Consequences

As all of this should make clear, the black letter law of rape has always been just one component of the law of rape. What has given context to the black letter law, and informed its application, is a white letter law predicated on notions about race and sex.¹⁰⁷ It is this white letter law that dictates which victims are believed and which suspects are prosecuted; that informs the applicable presumptions and allocates the burdens of persuasion; and that, invoking a racialized notion of deterrence and retribution,¹⁰⁸ adds a thumb to the scale of punishment. This is to say nothing of how the white letter law likely informs the largely discretionary evidentiary rules that are applied in court.¹⁰⁹ This white letter law prefigures black men as highly sexed, and prefigures white women as sexually unavailable. It lends substance to, and is inseparable from, the supposition that black men are less able to control their desire or sexual urges than white men, a supposition that has found expression in discourse

106. LaFree's study was not the first to document racial disparities in rape prosecutions. For an overview of other studies, see RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 312–26 (1997). For studies reaching contrary results, see Rodney Kingsnorth et al., *Adult Sexual Assault: The Role of Racial/Ethnic Composition in Prosecution and Sentencing*, 26 J. CRIM. JUST. 359 (1998); Anthony Walsh, *The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race*, 25 CRIMINOLOGY 153 (1987).

107. Conflict theory provides another way of thinking about this white letter law. Viewed through the lens of conflict theory, the white letter law is a compilation of unwritten but widely understood rules that permit powerful groups to both claim neutrality and objectivity and simultaneously maintain their own favorable access to certain resources, while limiting access to those resources by other, less powerful groups. Sexual intercourse is one such resource, and its access is determined by power relationships within a stratified sexual marketplace. Those in power regulate the access to this resource both through norms and through the force of the law. Although the black letter law may proscribe all forcible, nonconsensual sex, the white letter law insures certain barriers to prosecution for powerful insiders (in this case, privileged, white men) at the same time that it eliminates other barriers when it comes to prosecuting less powerful outsiders (in this case, underprivileged, black men). For more on conflict theory in general, see WILLIAM J. CHAMBLISS & ROBERT B. SEIDMAN, *LAW, ORDER, AND POWER* (1971); JEROME HALL, *THEFT, LAW AND SOCIETY* (1935).

108. Deterrence is racialized here because, for the consequentialist, the severity of the punishment is calibrated based on the race of the individuals to be deterred. Retribution is also racialized, since what informs the severity of the punishment is the gravity of the crime; and the gravity of the crime, in turn, depends upon the race of the victim and the race of the defendant.

109. This is true not only in how courts apply their rape shield laws, which prohibit inquiry into the victim's sexual history except in certain situations, but also how the courts apply state analogues to Federal Rules of Evidence 404(b) (governing the admission of other crimes evidence), 609 (governing impeachment through prior conviction), and more generally 401 (relevance) and 403 (allowing courts to exclude relevant evidence when the value of that evidence is substantially outweighed by the risk of unfair prejudice). See FED. R. EVID. 401, 403, 404(b), 609.

as diverse as Thomas Jefferson's *Notes on Virginia*¹¹⁰ and D.W. Griffith's *Birth of a Nation*.¹¹¹ And it suggests that the original conception of rape as a property crime, sounding in trespass, is not entirely past.¹¹² Originally, the rape of a woman amounted to a trespass upon a husband's property (in the case of a married woman) or father's property (in the case of an unmarried daughter), i.e., requiring recompense to him. Under our rape laws as applied, the trespass is no longer to a father or husband. But there does seem to be something akin to a trespass to a racial collective.¹¹³

Little else explains the prurient frenzy that accompanies any crime involving a white female victim and a black male defendant—see Kobe Bryant; compare Mike Tyson.¹¹⁴ It is why an eighteen-year-old in Georgia can be prosecuted for statutory rape for sleeping with his just-shy-of-sixteen white girlfriend.¹¹⁵ It is why, in Spike Lee's film *Jungle Fever*, when Wesley Snipes and his white girlfriend begin horsing around one night on a quiet New York street and a resident sees them and misreads them, the prospect of the police showing up seems so real.¹¹⁶ It is why, in Paul Haggis's film *Crash*, the perception that Terrence Howard has an expensive car and a white girlfriend is enough to prompt a police stop and a real assault.¹¹⁷ It is why, in 1989, so much attention was devoted to the Central Park jogger case.¹¹⁸ Never mind that there were 3254 other

110. Thomas Jefferson, *Notes on Virginia*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 187, 257 (Adrienne Koch & William Peden eds., 1944).

111. *BIRTH OF A NATION* (Griffith Feature Films 1915).

112. On rape's origin as a property crime, see DRESSLER, *supra* note 8, at 621; see also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 218, 230–36 (1999); Gayle Rubin, *THE TRAFFIC IN WOMEN: NOTES ON A "POLITICAL ECONOMY" OF SEX*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157 (Ragna R. Reiter ed., 1975).

113. For more on the collective ownership of race, see Cheryl J. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). For more on this concept applied to rape cases, see Capers, *supra* note 18, at 38–39; see also Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 608 (1997) ("Some members of white culture are particularly offended by interracial rape not because the white woman has suffered a more egregious violation, but because all of white culture, its 'law' and 'system of values,' has been defied.").

114. For a discussion of the role of race in the media frenzy accompanying the Simpson and Bryant cases, see *On The Media* (NPR radio broadcast Aug. 8, 2008), available at http://www.onthemedial.org/transcripts/transcripts_080803_media.html. The media devoted relatively less coverage to the prosecution of Mike Tyson for raping Desiree Washington, a black woman.

115. See Ariel Hart, *Child Molester Conviction Overturned in Georgia Classmate Case*, N.Y. TIMES, May 4, 2004, at A20; Andrew Jacobs, *Student Sex Case in Georgia Stirs Claims of Old South Justice*, N.Y. TIMES, Jan. 22, 2004, at A14; Courtland Milloy, *Marcus Dixon Doesn't Belong in Ga. Prison*, WASH. POST, Jan. 25, 2004, at C1.

116. *JUNGLE FEVER* (40 Acres and a Mule Filmworks 1991).

117. *CRASH* (Lions Gate Films 2005). In the film, Terrence Howard's "girlfriend" is in fact his wife, who is a light-skinned African American. *Id.* The assumption, made explicit during the stop, is that the police singled them out because the police assumed that she was white.

118. For example, a Westlaw search of the "allnews" database using the term "central park

reported rapes in New York City that year, mostly of black women,¹¹⁹ including “one the following week involving the near decapitation of a black woman in Fort Tryon Park and one two weeks later of a black woman in Brooklyn who was robbed, raped, sodomized, and thrown down an air shaft of a four-story building.”¹²⁰ It is why even a pro-life advocate like President Nixon could condone abortion to avoid mixed-race offspring.¹²¹ It is why the release of a political ad depicting Willie Horton, a black man convicted of raping a white woman, could affect a presidential election.¹²² It is why, even still, in 2006, a single television ad showing a white woman seductively murmuring, “Harold, call me,” could derail the campaign of a black candidate for U.S. senator.¹²³ It is why, even in the liberal, tony enclave of Cape Cod, Massachusetts, discussions about the race of the defendant—“a big black guy,” reason alone to induce “fear” in at least one of the jurors—could make its way into jury deliberations in a rape and murder trial involving a white victim.¹²⁴

All of this has consequences for how we think about the black letter law of rape. This is particularly true of reforms made at the urging of feminist scholars. Consider the resistance requirement. Responding to concerns raised by feminist scholars about the utmost resistance requirement, some jurisdictions have abandoned the requirement.¹²⁵

jogger” and dates 1989 through 1990 retrieved 1710 articles.

119. Cf. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 376 (1975) (observing that “New York City police statistics showed that black women were more frequent victims of rape than white women”).

120. JOAN DIDION, *AFTER HENRY* 255–56 (1992).

121. Charlie Savage, *On Nixon Tapes, Ambivalence Over Abortion, Not Watergate*, N.Y. TIMES, June 24, 2009, at A1 (discussing newly released tapes in which President Nixon discusses *Roe v. Wade* and confides to an aide, “‘There are times when an abortion is necessary. I know that. When you have a black and a white,’ he told an aide, before adding, ‘or a rape.’”).

122. In his 1988 race against Massachusetts Governor Dukakis, George Bush ran ads depicting Willie Horton, a black convicted killer who, while on a Massachusetts furlough program, raped a white woman. As Regina Austin put it, “Willie Horton symbolized the threat that black males, aided by white liberal politicians, pose to innocent whites. Playing on racial fears, the ads’ signifying [sic] was not limited to the criminal element; every black man was a potential Willie Horton, rapist, and murderer.” See Regina Austin, *Beyond Black Demons and White Devils: Anti-Black Conspiracy Theorizing and the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021, 1024 (1995). For more on this appeal to race, see D. Marvin Jones, “*We’re All Stuck Here for a While*”: *Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35 (1998).

123. See Robin Toner, *Ad Seen as Playing to Racial Fears*, N.Y. TIMES, Oct. 26, 2006, at A1, available at <http://www.nytimes.com/2006/10/26/us/politics/26tennessee.html> (discussing television ad against black senate candidate Harold Ford, Jr.); Peter Wallsten, *GOP Attack Ad Draws Heat for Racial Overtones*, L.A. TIMES, Oct. 24, 2006, A14.

124. See Abby Goodnough, *Jurors in a Cape Cod Murder Case Testify About Racial Remarks*, N.Y. TIMES, Jan. 11, 2008, at A10.

125. For a discussion of this development, see Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962–68.

Others, instead of abandoning the requirement in its entirety, have relaxed the requirement, excusing women from resisting if failure to resist is reasonable.¹²⁶ In other words, if the defendant's words or actions create in the mind of the victim a reasonable fear that she would be harmed if she resisted, or that force would be used to overcome her resistance, resistance will be excused.

But in adopting a "reasonable woman" standard, states have given their imprimatur to a standard that has, at its core, implicit biases. In determining whether a "reasonable woman" would be in fear, decision makers necessarily rely on implicit biases and heuristics that take into consideration the race of the defendant. The standard allows decision-makers to conclude that a reasonable white female might be in fear of a black stranger, while obscuring the fact that a reasonable white female would not be in fear of a stranger under the identical circumstances if the stranger were white.¹²⁷ Indeed, it allows decision-makers to engage in the same calculus and reach the same conclusion, even in cases involving black acquaintances. It thus eases the proof necessary in cases involving black men and white women. This should be of particular concern to feminist scholars, since it suggests that in attempting to eradicate sexism in rape laws, feminist scholars have entrenched an approach to analyzing rape allegations that is, if not overtly racist, very much racialized.

This standard also harms black female victims,¹²⁸ particularly in intraracial cases. Implicit in the reasonable resistance standard is not only the objective requirement that a reasonable woman might have feared resisting, but also the subjective requirement that the complainant was in fact afraid to resist.¹²⁹ This presents a double hurdle for black victims, who

126. *Id.*

127. *Cf.* CORNEL WEST, RACE MATTERS 83 (1993) (describing a culture of fear that exists with respect to black men, in which fear "is rooted in visceral feelings about black bodies fueled by sexual myths").

128. It should be noted that black women in rape cases also face a credibility hurdle. As Darren Hutchinson observed, "the construction of black women as promiscuous causes jurors in sexual assault prosecutions to doubt black women's credibility . . ." Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 85 (1999). Studies confirm this. *See* LaFree et al., *supra* note 78, at 401–02 (finding that jurors in the thirty-eight rape trials studied were less likely to believe black complainants); Kitty Klein & Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21, 30 (1982) (finding jurors in experiments less likely to credit black rape victims).

129. *See* DRESSLER, *supra* note 8, at 628 (observing that, in general, "both components—the female's subjective apprehension, and some conduct by the male that places her in reasonable apprehension of her safety—are required."); *see also* *People v. Iniguez*, 872 P.2d 1183, 1188 (Cal. 1994).

are often treated as negligible by the law,¹³⁰ as “unrapeable.”¹³¹ Even if decision makers imagine the “reasonable woman” as a “reasonable black woman,” they may assume that because of the race sameness, a reasonable black woman would not be in fear of a black man. In the alternative, if they view the reasonable woman as a “reasonable white woman,” they might conclude that a reasonable woman (i.e., the reasonable white woman) would be afraid (the objective component), but discount the claim that this victim (an actual black woman) was in fact afraid (the subjective component), again relying on implicit biases about race.¹³² In short, while the reasonable resistance standard may relieve women of the burden of exercising the utmost requirement and thus ease the prosecution of rape cases, it does so at an expense that is disproportionately borne by black men and black women.¹³³

130. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1266–69 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598–99 (1990); Roberts, *supra* note 79, at 364–69; Wriggins, *supra* note 54, at 117–23; Gail Elizabeth Wyatt, *The Sociocultural Context of African American and White American Women’s Rape*, 48 J. SOC. ISSUES 77 (1992).

131. CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 229 (2000). The treatment of a black rape victim in Richard Wright’s 1940 novel, *Native Son*, is particularly revealing. In the novel, which is loosely based on an actual case, the law assumes that Bigger, on trial for murdering a white woman, must have been motivated by rape, even though there is no evidence of rape. See generally RICHARD WRIGHT, *NATIVE SON* (1940). Meanwhile, even though there is proof that Bigger raped and murdered a black woman, he is charged neither with her rape nor her murder. *Id.* Rather, the law treats Bigger’s rape and murder of the black woman as merely “other crimes” evidence to be offered by the prosecution to prove that he in fact raped and murdered the white woman.

132. Moreover, this affects every decisional stage of the proceeding: what resources law enforcement will bring to bear in investigating the case; what charges, if any, will be filed; what resources will be allocated by prosecutors to the case; whether the case will be taken to trial; and so on.

133. *State v. Alston*, 312 S.E.2d 470 (N.C. 1984), illustrates this point. Alston had struck his girlfriend, Cottie Brown, several times during the period in which they lived together, eventually prompting her to break off the relationship and move in with her mother. *Id.* at 471. Alston tracked her down at the community college where she was taking classes, forcibly grabbed her arm, and told her she was going with him. *Id.* He then complained about her mother interfering in their relationship and threatened to “fix” Brown’s face so that her mother would see that “he was not playing,” and told her that he had the right to have sex with her. *Id.* at 472. Alston then took her to the house of one his friends where, notwithstanding her protests, he forced her into the bedroom, told her to lay down on the bed, pushed apart her legs, and had intercourse with her. *Id.* at 472–73. She cried during the intercourse. *Id.* Notwithstanding these facts, including Alston’s threat to “fix” her face, the North Carolina Supreme Court concluded that there was insufficient evidence of force or even the threat of force to overcome the will of the victim to resist the sexual intercourse. *Id.* at 476. Although neither the race of Alston nor Brown is discussed in the case, there is ample circumstantial evidence to suggest that they were both African American. At least one other scholar has also made this observation. See Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in the Criminal Law*, 48 ST. LOUIS U. L.J. 1261, 1277–78 n.88 (2004).

Lastly, this standard potentially harms white women. A necessary corollary to taking interracial rape more seriously is taking intraracial rape less seriously. If it is reasonable for a white woman to fear a black man simply because he is black, then it stands to reason that it is less reasonable for a white woman to fear a white man. What this means in practice is that decision makers on one end¹³⁴—cops and prosecutors—are less likely to devote limited resources to prosecuting white intraracial rape than they would devote to prosecuting interracial rape.¹³⁵ Estrich observed as much in describing her own rape. It is when she tells the police that her attacker was black that they begin “really listening,” that her account becomes “more believable” to them.¹³⁶

What the “reasonable resistance” standard means on the back end is equally troubling, since jurors and judges are less likely to excuse resistance in intraracial cases. The defendant is white and was not brandishing a weapon, so what was there to fear? Thus, in *Commonwealth v. Berkowitz*,¹³⁷ a court could vacate a rape conviction, finding that there was insufficient evidence of even the threat of force. It did not matter that the defendant, ignoring the victim’s repeated protests, straddled the victim, tried to put his penis in her mouth, got up and locked the door, then pushed her onto the bed and pushed his penis into her, all while the victim kept

134. Front-end decision making, by the victims themselves, is equally problematic. Studies estimate that the vast majority of rapes go unreported. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-163392, SEX OFFENSES AND OFFENDERS 2 (1997) (estimating a 32% reporting rate); see also Catherine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 143 & n.47 (2000) (citing studies). Studies also suggest that women are least likely to report acquaintance rape. See, e.g., Crystal S. Mills & Barbara J. Granoff, *Date and Acquaintance Rape Among a Sample of College Students*, 37 SOC. WORK. 504, 506 (1992) (reporting that, among college students surveyed, none of the twenty women who were raped reported the offense to the police).

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

136. ESTRICH, *supra* note 20, at 1, 3. Indeed, Estrich notes that, in many respects, she is a “very lucky rape victim, if there can be such a thing.” *Id.* at 3. She elaborates:

[E]veryone agrees that I was “really” raped. When I tell my story, no one doubts my status as a victim. No one suggests that I was “asking for it.” . . . No one seems to identify with the rapist. His being black, I fear, probably makes my account more believable to some people, as it certainly did with the police. But the most important thing is that he was a stranger; that he approached me not only armed but uninvited; that he was after my money and car, which I surely don’t give away lightly, as well as my body. As one person put it: “You didn’t really do anything wrong.”

Id. Although Estrich briefly addresses race in *Real Rape*, she makes clear that race is not her focus, and that, for her purposes, she has “put aside the additional problems” of race. *Id.* at 6. Had Estrich not “put aside” race, she might have noted that one of the most important reasons she was a “lucky rape victim” is attributable to her status as a white woman.

137. 641 A.2d 1161, 1166 (Pa. 1994).

saying “no.”¹³⁸ None of this was force that would prevent resistance from a person of reasonable resolution. In sum, while the reasonable resistance standard may benefit white women who are victims of interracial rape, it also raises the bar, thus harming white women who are victims of intraracial rape. This is all the more troubling, since the vast majority of rapes involving white victims are intraracial.¹³⁹

Again, all of this has consequences for how we think of the black letter law of rape. But it also has consequences for how we think about the white letter law of rape, and the extent to which it informs application of the black letter law. As the public discourse around *Grutter v. Bollinger*¹⁴⁰ revealed, as well as the discourse around the Seattle and Louisville cases,¹⁴¹ much of the public objects to the use of race in determining admission to institutions of higher learning.¹⁴² At the same time, however, our white letter law encourages similar racial considerations on the part of cops, prosecutors, and jurors in a way that reifies racial hierarchies.¹⁴³

Lastly, unlike the black letter law, the white letter law works in ways that are hard to repeal or subject to judicial invalidation or review. This is perhaps easiest understood by analogy. Between 1662, when Maryland passed the first anti-miscegenation statute, and 1967, when the Court decided *Loving v. Virginia*,¹⁴⁴ as many as half of the states had laws criminalizing interracial intimacy.¹⁴⁵ Notwithstanding the fact that *Loving v. Virginia* voided those black letter laws, white letter laws—manifested in

138. *Id.* at 1163–64.

139. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-163392, SEX OFFENSES AND OFFENDERS 11 (1997); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-126826, FEMALE VICTIMS OF VIOLENT CRIME 10 (1991) (seven out of every ten white rape victims were raped by white men).

140. 539 U.S. 306 (2003).

141. Seattle and Louisville refers to the consolidated cases of *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007) and *Meredith v. Jefferson County Board of Education*, 127 S. Ct. 2738 (2007) (invalidating both school districts’ integration plans). As the Court noted, Seattle implemented its school integration plan to combat the effects of “racially identifiable housing patterns.” *Id.* at 2747.

142. *See, e.g.*, Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, § 6 (magazine), at 38 (noting public opposition running two-to-one against race-based preferences at the time *Grutter* was decided).

143. To put this differently, the white letter law permits an unwritten point system. Stranger rape? Check. Victim dressed appropriately? Check. White victim? Check. Black or Hispanic perpetrator? Jackpot. *See* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 40–43 (2006) (citing studies documenting the continued correlation between the black-white dyad and prosecutorial decision making in rape cases).

144. 388 U.S. 1 (1967) (invalidating antimiscegenation laws as violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

145. Moran, *supra* note 62, at 17.

social norms and expectations—still exist. Indeed, these white letter laws help explain why rates of interracial marriage remain statistically low, especially in those states that officially prohibited such marriages.¹⁴⁶ By analogy, this suggests a critical limitation in the reform of racially tinged rape laws. While changes to the black letter law may be enacted through legislation, such changes, without more, are unlikely to affect how rape laws are applied.

And all of this has consequences for the unintentional rapist.

II. RACE AND MENS REA, OR RACE IPSA LOQUITUR¹⁴⁷

A. Rape and Mens Rea: An Overview

Before rape law reform, the issue of criminal intent in rape prosecutions tended to be a nonissue.¹⁴⁸ This makes sense when one thinks about it. The common law of rape, after all, required more than just proof of the use of force by the male. It also required proof of the use of responding force by the female amounting to utmost resistance, to show that his force really was force after all, was more than mere battery, was rape force, and to show that her verbal “no” really meant no.¹⁴⁹ She was required to “follow the natural instinct of every proud female”¹⁵⁰ to physically resist her attacker “until exhausted or overpowered,”¹⁵¹ or, as another court put it, resist “the attack in every way possible . . . until she was overcome by force, was insensible through fright, or ceased resistance from exhaustion, fear of death or great bodily harm.”¹⁵² In a way, the thinking was that anything less might give the attacker the wrong impression. While feminists rightly attacked¹⁵³ this standard as embodying sexism—as putting the victim on trial as much as the defendant—this standard did serve one purpose: it obviated the need to worry about the

146. *Id.* at 101 (“Legal barriers have fallen, but interracial marriages, particularly between blacks and whites, remain an anomaly even thirty years after the decision.”); see also R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 MICH. J. RACE & LAW 115, 129–32 (2005).

147. This play on words comes from the title of Jody Armour’s seminal article. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

148. Estrich, *supra* note 19, at 1097–98.

149. *Id.*

150. *State v. Rusk*, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting).

151. *People v. Dohring*, 59 N.Y. 374, 386 (1874).

152. *King v. State*, 357 S.W.2d 42, 45 (Tenn. 1962).

153. Estrich, *supra* note 19, at 1095.

defendant's mens rea with respect to the issue of the victim's non-consent. The attacker *had* to know.¹⁵⁴

Even when jurisdictions began to relax the utmost resistance requirement and instead require reasonable resistance, mens rea often remained a non-issue.¹⁵⁵ There are at least three explanations for this. One, the cases that prosecutors tended to take to trial still remained, for the most part, stranger rape cases—where the defendant's knowledge, or at least reckless disregard, of the victim's non-consent could be presumed. Two, parties perhaps assumed that the mens rea required for rape was of the broad, "exceedingly vague"¹⁵⁶ type that existed at common law. In other words, it was enough that the defendant was acting immorally or with a morally blameworthy state of mind.¹⁵⁷ Given that common law rape already required force or threatened force, not to mention the fact that fornication itself was viewed as immoral, a morally blameworthy state of mind could likely be assumed. Three, mens rea had gone un-discussed for so long that defendants often failed to adequately raise the issue.¹⁵⁸

Two cases illustrate this last point. Recall *State v. Rusk*,¹⁵⁹ decided in 1981. From Rusk's point of view, assuming we credit his testimony, he met a woman at a bar, convinced her to give him a ride home, convinced her to come up for a nightcap, and then convinced her to have sex with him by kissing and petting her.¹⁶⁰ As Rusk probably saw it, he was studious. He was a smooth operator who wanted to score and did. Even though the woman conceded that she had never physically resisted,¹⁶¹ there is nothing in the several opinions resulting from Rusk's conviction to suggest that he ever raised the issue of mens rea or mistake of fact.

154. Professor Joshua Dressler puts this slightly differently:

If a male used or threatened force to obtain intercourse, then it was evident that he purposely or knowingly had nonconsensual sexual relations. If his conduct was not forcible, the female had to resist, and this gave the male reasonable warning of her lack of consent: if he proceeded against her resistance, a jury could reasonably assume that he knew she did not want sexual relations. At a minimum, the resistance meant that the male acted recklessly or negligently in regard to her wishes.

Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 431–32 (1998).

155. Estrich, *supra* note 19, at 1097–98.

156. Frances Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994 (1932).

157. See, e.g., *Morrisette v. United States*, 342 U.S. 246, 251 (1952) (mens rea as "evil-meaning mind"); *Commonwealth v. Buckley*, 238 N.E.2d 335, 337 (Mass. 1968) (mens rea as a "blameworthy condition of the mind"); BLACKSTONE, *supra* note 24, at *21 (mens rea as "vi[c]ious will").

158. Dressler, *supra* note 154, at 431 (noting that "[b]efore rape law reform, the issue of mens rea rarely arose in rape trials").

159. 424 A.2d 720 (Md. 1981).

160. *Id.* at 723–24.

161. *Id.* at 722.

Commonwealth v. Sherry,¹⁶² decided in 1982, is even more revealing. In *Sherry*, the three defendants, all doctors, claimed that as far as they could tell, the nurse they had picked up at a party—and who never physically resisted—was into the group sex that ensued.¹⁶³ In short, they argued that they lacked knowledge of the victim's non-consent, and at a minimum were entitled to an instruction that, unless they had actual knowledge of the victim's non-consent, they must be found not guilty.¹⁶⁴ The trial court refused to give the instruction, or any instruction on the issue of mens rea, and the highest court in Massachusetts affirmed.¹⁶⁵ What is telling is the court's acknowledgment that "[w]hether a reasonable good faith mistake of fact as to the fact of consent is a defense to the crime of rape has never, to our knowledge, been decided in this Commonwealth."¹⁶⁶ What is also telling is the court's reason for affirming: though the defendants had requested an instruction on mens rea, they had not requested an instruction on mistake of fact, which, to the court, was the gravamen of their complaint.¹⁶⁷

What has made mens rea an issue in recent years is a confluence of things: the growing abandonment of the resistance requirement, the increasing emphasis on non-consent, and the enactment of rape shield laws generally barring inquiry at trial into the victim's sexual history. And what has emerged is variation in how courts address the issue.

The most famous case addressing mens rea in a rape prosecution is not an American case, but a British one. In *Regina v. Morgan*,¹⁶⁸ three members of the Royal Air Force Academy were invited to the home of Morgan, their military superior, to have sex with his wife, whom he described as "kinky" and "turned on" by the use of force.¹⁶⁹ At trial, the three men did not deny that they had engaged in forcible sex with the victim, but asserted that they should not be convicted if they mistakenly believed the forcible sex was consensual, *even if their mistaken belief was unreasonable or negligently held*.¹⁷⁰ To the surprise and outrage of many, the House of Lords agreed. By a 3–2 vote, the Lords in effect held that rape should be treated as a specific intent crime, thus allowing an honest

162. 437 N.E.2d 224 (Mass. 1982).

163. *Id.* at 226–27.

164. *Id.* at 232 & n.8.

165. *Id.* at 232–33.

166. *Id.* at 233.

167. *Id.*

168. [1976] A.C. 182 (H.L.) (U.K.).

169. *Id.* at 206.

170. *Id.* at 203–04, 214–15, 235–39.

mistake—regardless of whether that mistake was reasonable or not—to negate intent.¹⁷¹

At another end of the spectrum, several American jurisdictions have rejected the idea that rape carries any mens rea requirement at all regarding the victim's lack of consent.¹⁷² Recall that in *Commonwealth v. Sherry*, the highest court in Massachusetts declined to address the issue of mens rea.¹⁷³ Several years later, in *Commonwealth v. Ascolillo*, the court did address the issue and answered that no proof of mens rea was required.¹⁷⁴ In these jurisdictions, even a reasonable belief in the victim's consent will not exculpate the defendant.

For the most part, these approaches are the outliers. The vast majority of jurisdictions that have addressed the issue treat rape as a general intent crime, requiring only a morally blameworthy state of mind regarding the lack of consent.¹⁷⁵ Under this standard, a person will not be guilty of rape if he honestly and reasonably believed that the sex act was consensual.¹⁷⁶

B. Race and Mens Rea: Presumptive Intent and Presumptive Non-Consent

Each of these mens rea standards is problematic, and scholars have rightly criticized them. Susan Estrich has criticized allowing an honest, but negligent, belief defense on the ground that it serves as a disincentive for men to take care before acting.¹⁷⁷ Joshua Dressler has criticized the “no defense” rule as akin to making rape a strict-liability offense, imposing liability even when a defendant is acting without moral culpability.¹⁷⁸

But both of these criticisms miss a larger problem: even when we recognize rape as requiring a certain mens rea, we treat that mens rea differently. We treat it not as something the prosecution has to prove beyond a reasonable doubt, but as a mistake of fact “defense.” Though technically this may be a failure of proof defense, and we say that the burden remains with the prosecution in proving this element, in actuality, this is not how the “defense” is treated. It is burden shifting without

171. *Id.* at 191–92.

172. *See, e.g.*, *Commonwealth v. Ascolillo*, 541 N.E.2d 570, 575 (Mass. 1989); *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984); *Commonwealth v. Fischer*, 721 A.2d 1111, 1117 (Pa. Super. Ct. 1998); *Clifton v. Commonwealth*, 468 S.E.2d 155, 158 (Va. Ct. App. 1996).

173. *Commonwealth v. Sherry*, 437 N.E.2d 224, 233 (Mass. 1982).

174. 541 N.E.2d at 570–72.

175. DRESSLER, *supra* note 8, at 637–38.

176. *See, e.g.*, *In re M.T.S.*, 609 A.2d 1266, 1279 (N.J. 1992); *State v. Smith*, 554 A.2d 713, 717 (Conn. 1989); *People v. Mayberry*, 542 P.2d 1337, 1345 (Cal. 1975).

177. ESTRICH, *supra* note 20, at 98.

178. DRESSLER, *supra* note 8, at 638.

calling it burden shifting. For feminists who have argued that the crime of rape should be treated like other crimes in terms of burdens, this should be a cause for concern.

And both of these criticisms fail to take into account the sexualization of race and the racialization of rape. Because of the sexualization of race, decision makers historically treated as a given that black men, because of their blackness, had the intent to ravish white women.¹⁷⁹ Even when black men were not cast as hypersexual, their actions were often read as indicative of intent.¹⁸⁰ Recall that in *McQuirter*, the Alabama Supreme Court suggested that in finding intent to rape, the jury could consider “racial differences, such as that the prosecutrix was a white woman and the defendant was a Negro man.”¹⁸¹ And *McQuirter* is not alone. In North Carolina, a black sharecropper and father of nine was charged with assault for having “leered” at a “pretty 17-year-old blonde” woman.¹⁸² The woman testified that the defendant “looked at [her] funny,” though he got no closer than “about 75 feet.”¹⁸³ Even black children have been cast as having an intent to rape. Again in North Carolina, two black boys, ages six and seven, were sentenced to twelve years’ imprisonment for attempted rape when their six-year-old white female playmate kissed one of the boys on the cheek.¹⁸⁴

At the same time that something akin to presumptive intent applied in cases involving black defendants and white women, the white letter law has compounded the problem by also applying something akin to presumptive non-consent.¹⁸⁵ The white letter law assumed that white

179. See, e.g., Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 HOW. L.J. 459 (1997); N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1345 (2004) (exploring the association of black men as sexual predators); Gruber, *supra* note 40, at 587 (observing that during the late-nineteenth and early twentieth centuries, “the law of rape incorporated the paradigm of a pathological stranger, prototypically a black man, lurking in the shadows, ready to violently assault the presumed-chaste (white) woman”); Roberts, *supra* note 79, at 365 (1993) (noting the “image of Black men as a constant threat to the virtue of white womanhood”).

180. Perhaps the most famous example of this is the treatment of Emmett Till, the black fifteen-year-old who was lynched in Mississippi for looking and whistling at a white woman. For more on the murder of Emmett Till, see STEVEN J. WHITFIELD, *DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988).

181. 63 So. 2d at 389.

182. *Id.*

183. *Deadlock in Yanceyville*, NEWSWEEK, Nov. 26, 1951, at 25–26.

184. For a discussion of this case, see CONRAD LYNN, *THERE IS A FOUNTAIN: AUTOBIOGRAPHY OF A CIVIL RIGHTS LAWYER* 141, 145 (1979).

185. The one exception was where there was evidence to suggest that the white woman had previously been intimate, sexually or socially, with a black man, in which case consent was presumed.

women, because of their whiteness, would be repulsed by any such advances, rendering non-consent a given.¹⁸⁶ Consider the argument made by a prosecutor in *State v. Miller*,¹⁸⁷ in response to the defendants' assertions that the complainant had consented to sex. The prosecutor argued to the jury:

[I]f [consent] was the case [the complainant] could not come into this courtroom and relate the story that she has . . . to you good people, because I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate within us¹⁸⁸

It took a federal court to vacate the conviction on the grounds of prosecutorial misconduct.¹⁸⁹ This history matters.

C. Race and Mens Rea: Credibility Determinations

The presence or absence of consent has always turned on credibility, and here, too, history matters. As feminists have been quick to point out, the law of rape has been rife with distrust of women, "assuming that women lie about their lack of consent for various reasons: to blackmail men, to explain the discovery of a consensual affair, or because of psychological illness."¹⁹⁰ English Lord Chief Justice Matthew Hale warned that rape is a charge "easily to be made,"¹⁹¹ casting suspicion on all rape claims and prompting a norm of cautionary instructions to juries.¹⁹² John Henry Wigmore believed that no judge should let a rape

For example, in *State v. Vaughn*, 431 So. 2d 358 (La. 1982), the Louisiana Supreme Court, on rehearing, reversed a rape conviction of two black defendants where the trial court had excluded evidence that the prosecutrix's brother-in-law was black, which she had denied, finding that such evidence was relevant to consent. *Id.* at 368–71.

186. During the infamous Scottsboro Boys case, when it was revealed that Victoria Price, one of the alleged rape victims, was a prostitute and that her story was filled with contradictions, one spectator pointed out, she "might be a fallen woman, but by God she is a white woman." See CARTER, *supra* note 81, at 295.

187. 220 S.E.2d 326 (N.C. 1975).

188. *Id.* at 337.

189. *Miller v. North Carolina*, 583 F.2d 701 (4th Cir. 1978). In reversing, the Fourth Circuit held that the prosecutor's summation, "by deliberately injecting the issue of race into [the trial] so infected the trial with unfairness as to deny [the defendants] due process of law." *Id.* at 703. Interestingly, the Supreme Court of North Carolina had found no error in the convictions. *Miller*, 220 S.E.2d at 340.

190. Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 403 (1988).

191. HALE, *supra* note 46, at *635.

192. At one time, as many as half the states gave cautionary instructions at the end of rape trials, advising jurors to view the allegations of the prosecutrix with special caution. See generally A.

charge go to the jury “unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician.”¹⁹³ A *Yale Law Journal* Note opined, “[A] woman’s need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feeling which might arise after willing participation.”¹⁹⁴ Many jurisdictions originally required corroboration to sustain a rape conviction.¹⁹⁵ And a victim’s sexual history was treated as relevant to her veracity.¹⁹⁶

This distrust of women continues to pervade rape prosecutions, though it is less explicit these days. It explains why cops and prosecutors continue to decline to prosecute many acquaintance rape cases, to say nothing of marital rape cases.¹⁹⁷ It explains why, when professional basketball player Kobe Bryant was accused of rape, a tabloid newspaper had no qualms about running a prom photo of his accuser, raising her prom dress to reveal a garter belt, with the following headline: “Kobe’s Accuser: Did She Really Say No?”¹⁹⁸

But there is another history of distrust that is equally important: the distrust of testimony by black men. At one point or another, nearly all of the Southern states, and several of the Northern states, prohibited blacks (and often other minorities as well) from testifying against whites.¹⁹⁹ Louisiana was an exception, of a sort. Rather than having an outright bar, Louisiana allowed free blacks to testify with the understanding that race,

Thomas Morris, Note, *The Empirical, Historical, and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154, 156.

193. 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a (Little, Brown & Co. 1970) (1904).

194. Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 67–68 (1952) (citations omitted).

195. See generally Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

196. See, e.g., *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895); see also Julia Simon-Kerr, Note, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854 (2008).

197. For studies on the attrition rate for various types of rapes, see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. & CRIMINOLOGY 1194 (1997); see also LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 151–52 (1993); Lisa Frohmann, *Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 217–24 (1991).

198. *Kobe’s Accuser: Did She Really Say No?*, THE GLOBE, Nov. 31, 2003, at 1; see also Rebecca Traister, *Did Bonnie Fuller Really Betray Women?: Female Editors Condemn the Globe for Running a Tawdry Photograph of Kobe Bryant’s Accuser*, SALON, Oct. 31, 2003, <http://dir.salon.com/mwt/feature/2003/10/31/kobe/index.html>.

199. MORRIS, *supra* note 56, at 239–48; Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996).

depending upon “the circumstances,” may “diminish the extent of [their] credibility.”²⁰⁰ In part, these rules can be attributed to the perceived unseemliness of having blacks testify against whites. The Ohio Supreme Court put it this way:

No matter how pure the character, yet, if the color is not right, the man can not testify. The truth shall not be received from a black man, to settle a controversy where a white man is a party. Let a man be Christian or infidel . . . let him be of good character or bad; even let him be sunk to the lowest depths of degradation; he may be a witness in our courts if he is not black.²⁰¹

But these rules also reflected a general distrust of the veracity of blacks. In short, courts deemed blacks inherently unreliable. The sentiment expressed by one slaveholder is likely representative: “Do you bring your negroe to contradict me! A negroe and a passionate woman are equal as to truth or falsehood; for neither thinks of what they say.”²⁰² Or as one legal commentator warned, “the negro, as a general rule, is mendacious.”²⁰³

It was only after the Civil War, when the Freedmen’s Courts refused to surrender jurisdiction to state courts until race-based competency rules were removed, that states permitted blacks to testify in some cases.²⁰⁴ Even still, some courts allowed blackness to be used as a basis for impeachment. North Carolina permitted blacks to testify but required that “whenever a person of color shall be examined as a witness, the court shall warn the witness to declare the truth.”²⁰⁵ Elsewhere, prosecutors argued of black witnesses, “You must deal with a negro in the light of the fact he is a negro, and applying your experience and common sense.”²⁰⁶ And well into the twentieth century, prosecutors still appealed to race as a basis for discrediting testimony.²⁰⁷

200. George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 671 n.451 (1997) (citing LA. CIV. CODE ANN. art. 2261 (1857)).

201. *Jordan v. Smith*, 14 Ohio 199, 201 (1846).

202. 2 THE DIARY OF COLONEL LANDON CARTER OF SABINE HALL, 1752–1778, at 1107 (Jack P. Greene ed., 1965).

203. 1 THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 233 (1858).

204. See Fisher, *supra* note 200, at 667–76.

205. *Id.* at 685.

206. *Simmons v. State*, 71 So. 979 (Ala. Ct. App. 1916) (reversing conviction on the ground of prosecutorial misconduct).

207. See Johnson, *supra* note 199 (discussing cases involving prosecutorial appeals to race). There are also recent examples of appeals to race. See, e.g., *Moore v. Morton*, 255 F.3d 95, 99–100 (3d Cir. 2001) (finding defendant in rape case was denied a fair trial where prosecutor argued that jury could infer that black defendant, who had white wife, selected the victim because she was white); *State v.*

Although black letter law biases may no longer be with us, these biases do linger in the white letter law. Lawyers may no longer explicitly use race to impeach; courts may no longer give racially inflected cautionary instructions. But excising the word is not the same as excising the sentiment. As social-science literature makes clear, race is still a factor in credibility determinations.²⁰⁸ These credibility determinations have consequences.

Consider *People v. Williams*,²⁰⁹ in which the California Supreme Court held that Wash Jones Williams was not entitled to an instruction on reasonable mistake regarding consent.²¹⁰ Williams, a fifty-two-year-old volunteer and resident at a homeless shelter, testified that “Deborah,” another resident, had initiated sexual contact by hugging and kissing him and removing her clothes, that she had fondled him to overcome his impotence, and that she had inserted his penis inside her.²¹¹ In stark contrast, Deborah testified that she was forcibly raped.²¹² The jury agreed with Deborah and convicted the defendant, but the defendant appealed on the ground that the trial court had erred in refusing to instruct the jury on his honest and reasonable belief defense.²¹³ Notwithstanding the fact that the California Supreme Court had previously allowed a reasonable mistake defense in *People v. Mayberry*,²¹⁴ in this instance, it sided with the trial judge. Finding that there was not “substantial evidence of equivocal conduct” on Deborah’s part,²¹⁵ the court ruled that Williams was not entitled to a reasonable and honest belief instruction and affirmed the conviction.²¹⁶

At first blush, the court’s decision barring Williams from even raising a reasonable mistake defense might seem odd, or at least at odds with the

Rogan, 984 P.2d 1231, 1238–40 (Haw. 1999) (finding denial of fair trial where prosecutor argued in closing that it is “every mother’s nightmare” to find “some black, military guy on top of your daughter”); Reynolds v. State, 580 So.2d 254, 255–57 (Fla. Dist. Ct. App. 1991) (reversing conviction on fundamental fairness grounds where prosecutor repeatedly and gratuitously injected race into case involving black defendant and white victim).

208. See, e.g., James W. Neuliep et al., *The Influence of Ethnocentrism in Organizational Contexts: Perceptions of Interviewee and Managerial Attractiveness, Credibility, and Effectiveness*, 53 COMMUNICATION Q. 41 (2005); see also Chet K.W. Pagar, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373 (2005); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1 (2000).

209. 841 P.2d 961 (Cal. 1992).

210. *Id.* at 966.

211. *Id.* at 964.

212. *Id.* at 962–63.

213. *Id.* at 962, 964.

214. 542 P.2d 1337, 1340 (Cal. 1975).

215. *Williams*, 841 P.2d. at 966.

216. *Id.*

court's prior decision in *Mayberry*. To accept the *Williams* decision is to accept the court's claim that Williams could not both believe that Deborah had consented, *and* claim that he honestly and reasonably believed that Deborah consented.²¹⁷ To accept the *Williams* decision is also to discount Williams's testimony, since objectively his testimony, if credited, supports both a finding of consent and a finding that he reasonably and honestly believed that consent was present.

But there is another way to read the case that does suggest coherency, if not logic.²¹⁸ Wash Jones Williams was black.²¹⁹ Deborah was white.²²⁰ A white woman's allegation of rape may still be open to question. But perhaps not as much as a black man's claim that she consented, or the reasonableness of his belief that she consented. Martha Chamallas has argued that in the battle of "he said/she said," the competing versions "are structured predictably along gender lines."²²¹ They are also structured along race lines.

In recent years, feminist scholars have pressed for rape laws that eliminate the element of force entirely, that turn only on the issue of consent.²²² In short, they have pressed for rape laws that turn largely on whether the complainant said "no."²²³ As such, rape law reforms in recent years reflect not so much an evolution as a deliberate feminist strategy to shift the balance of power in rape prosecutions, giving more power to women vis-à-vis men in general. This strategy is not necessarily wrong. It may indeed level the playing field, at least in cases involving white

217. For a critique of the *Williams* court's approach to the mistake defense, see Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 838–40 (1996).

218. As I have written elsewhere, part of what motivates me as a scholar is "my awareness that, to a certain extent, I have always read judicial opinions 'differently,' attuned to matters of race even in the face of efforts to excise race—to render race invisible, immaterial." I. Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 11 (2006). This way of reading, I argued, is part and parcel of much critical race scholarship. *See id.*

219. According to Williams, the prosecutrix called him a "welching Nigger" when he refused to pay her after sex. *Williams*, 841 P.2d at 964.

220. *Id.* The opinion further hints at Deborah's race by noting that she was from Wichita, Kansas. *Id.* at 962.

221. CHAMALLAS, *supra* note 112, at 229.

222. Some scholars take this a step further, arguing for a standard of "communicative sexuality." *See, e.g.*, Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217, 233–37 (1989); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35, 77 (1992).

223. *See* BROWNMILLER, *supra* note 119, at 8 (1975) ("A female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape."); FORELL & MATHEWS, *supra* note 131, at 223 (arguing for a standard in which "sexual penetration without a woman's consent is rape"); Lucy Reed Harris, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976).

intra-racial rape. The problem lies in the prototypical case that even feminists must acknowledge is more likely to be taken seriously by law enforcement officers, more likely to be prosecuted by district attorneys, more likely to receive guilty verdicts, and more likely to receive disproportionately harsh sentences: not the typical, intra-racial rape, but the atypical interracial rape involving a white complainant and a black defendant.²²⁴ And given our history of not crediting black witnesses, this “he said/she said” contest is unlikely to be a level contest at all.

Aya Gruber has recently argued that feminists’ reforms have, perhaps unintentionally, resulted in the strengthening of the penal state and in increased incarceration without any concomitant benefit to women.²²⁵ As such, she argues that feminists would do well to reassess their continued involvement in rape reform.²²⁶ I join her in her call for reassessment, and offer an additional reason: in attempting to eradicate sexism, feminists have entrenched racism. The strategy for rape reform may be a noble one, but it is also a flawed one.

III. *MCQUIRTER V. STATE* REVISITED

A. *Revisiting the Case*

Understanding how the white letter law of rape informs the application of the black letter law of rape contributes to a better understanding of *McQuirter v. State*.²²⁷ This white letter law adjusts the black letter law’s presumptions, effects subtle shifts in its burdens of proof and persuasion, suggests whose story should be credited, and affects the finding of criminal intent and the absence of reasonable belief in consent. In short, this white letter law adds a racial thumb to the scales of justice that determine guilt or innocence, punishment, and, notwithstanding *Coker v. Georgia*,²²⁸ life or death. All of this helps me understand why I find *McQuirter* so troubling.

Arrested and charged with attempting to commit an assault with intent to rape, *McQuirter* called character witnesses to testify to his good

224. It is estimated that sixty to eighty percent of rapes do not fit the prototypical rape case. See Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1104 (1993).

225. Gruber, *supra* note 40, at 582–84.

226. *Id.* at 585.

227. 63 So. 2d 385 (Ala. Ct. App. 1953)

228. 433 U.S. 584 (1977).

character and took the stand in his own defense.²²⁹ He explained that he and a friend had been working in Pensacola, and that they had stopped for a break in Atmore on their way back to Monroeville.²³⁰ The two had split up, the friend going to the “colored section” of town, and later McQuirter decided to follow him.²³¹ After McQuirter started up the street, he saw the complainant and her children, and decided to wait until they had gone.²³² He then continued to walk toward the colored section, though he hesitated at the intersection to reconsider.²³³ After thinking about it for a few minutes, he resumed walking toward the colored section. This was his sole interaction with the complainant.²³⁴ Taking McQuirter at his word, each of his actions was constrained to avoid the appearance of being a threat.

If we credit McQuirter’s testimony, his conviction on the charge of attempt to commit assault with intent to rape seems unjust. But this is not necessarily a case of “he said/she said,” compelling radically different outcomes. Even were we to credit the prosecutrix’s testimony, we could reach the same conclusion. Recall that Mrs. Ted Allen testified that as she and her children passed the cab of McQuirter’s truck, she heard McQuirter say something unintelligible, and that McQuirter then opened the cab door and placed his foot on the running board.²³⁵ She also testified that as she walked down the street, McQuirter was walking behind her, leading her to think that he was following her.²³⁶ She and the children turned into a friend’s house and waited ten minutes for him to pass.²³⁷ But when she proceeded again, she observed McQuirter coming toward her from behind a telephone pole.²³⁸ When a neighbor approached, McQuirter turned and went back to the intersection “across the street from Mrs. Allen’s home,” where he stayed for about thirty minutes before moving on.²³⁹ This was her sole interaction with the defendant. Taking Mrs. Ted Allen at her word, she honestly perceived McQuirter to be a sexual threat.

This is not a case where the testimony of the accuser and accused are wholly divergent or irreconcilable. It is a case where one could accept that

229. 63 So. 2d at 389.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *McQuirter v. State*, 63 So. 2d 380, 389 (Ala. Ct. App. 1953). For a more thorough discussion of the facts, see *supra* notes 1–7 and accompanying text.

235. 63 So. 2d at 389.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

the accuser genuinely believed that the accused intended to rape her, and yet conclude that the accused lacked any such intent. In short, that he was an unintentional rapist. Critical of the legal prerequisites to rape, Catherine MacKinnon has argued that there may be situations where a “woman is raped but not by a rapist.”²⁴⁰ What I am suggesting here is a slightly different situation, where there is neither a rape nor a rapist.

One could imagine that when she passed McQuirter’s cab and heard the appellant say something unintelligible, his intent was not to address her; that instead he was mumbling to himself, deciding whether to follow his friend to the colored section. One could imagine that when he placed his foot on the running board and began walking in the same direction that Mrs. Allen was walking, it was not with the intent to follow her, but with the intent to walk to the colored section. One could imagine that when she turned into a friend’s house to wait for him to pass, it was McQuirter’s intent, given the mores of the time, to do the same—to “wait[] until he decided they were gone.”²⁴¹ One could imagine that when she proceeded again and saw McQuirter approaching, it was not because he intended to assault her or even accost her, but because he had assumed that “they were gone.” And one could imagine that when she observed McQuirter lingering at the intersection across the street from her home, he was not lying in wait for her to come home—being from out of town, could he have even known he was standing in front of her home?—but having second thoughts about whether to proceed to the colored section of town. One could credit both McQuirter’s testimony and Mrs. Ted Allen’s testimony and reach this conclusion. Or one could simply credit Mrs. Ted Allen’s testimony. That is what McQuirter’s jury decided to do.

But McQuirter’s jury did more than this. The jury also found that each of the elements of the black letter law of rape was satisfied.²⁴² To find McQuirter guilty of “attempt to commit an assault with intent to commit rape,” the jury presumably had to find beyond a reasonable doubt that McQuirter committed an act sufficient to constitute the *actus reus* of

240. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 654 (1983).

241. 63 So. 2d at 389.

242. To find the defendant guilty, the jury was necessarily required to find that the prosecutor had proved each element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363 (1970) (holding that the Due Process Clause requires the prosecutor to persuade the factfinder beyond a reasonable doubt of “every fact necessary to constitute the crime charged”). Whether the jury in fact made these findings, or was charged as such, is anyone’s guess. McQuirter did not appeal the jury instructions. What is clear is that general principles of the law of criminal attempt would require such findings. See generally DRESSLER, *supra* note 8, at 417–21.

attempt *and* that McQuirter possessed the requisite mens rea, in this case a series of intents: he intended to commit the act constituting the *actus reus* of attempt—in other words, some act bringing him in proximity of the offense of assault; he committed this act with the specific intention of committing assault; and that he also had the specific intent to commit assault with the specific intent to commit rape. Specifically, he intended to have sex with Mrs. Ted Allen; intended to secure sex by use of force or threat of force; and intended to secure sex without Mrs. Allen's consent, or was at least indifferent to consent. Presumably, the jury was also required to find that Mrs. Ted Allen would have resisted to the utmost. Even crediting Mrs. Ted Allen's testimony, finding that McQuirter had the requisite mens rea necessary for a verdict of guilty should have been difficult. It was not—not to the jury, and not to the court that reviewed and affirmed McQuirter's conviction on appeal. It was not difficult because the white letter law made it easy.

The white letter law allowed the jurors to presume the veracity of Mrs. Ted Allen's testimony and to presume the falsity of McQuirter's testimony. The white letter law allowed the jury to presume that Mrs. Allen's apprehensiveness was reasonable; that, if propositioned, she would not have consented; that she would have resisted any attack "in every way possible . . . until she was overcome by force, was insensible through fright, or ceased resistance from exhaustion, fear of death or great bodily harm."²⁴³ The white letter law allowed the jurors to presume that McQuirter intentionally followed Mrs. Allen, or intentionally lay in wait for her, with the intent to engage in forcible sex with Mrs. Ted Allen without her consent. In short, the white letter law allowed the jury to use blackness as a substitute for intent, and to use the dyad of black male defendant and white female accuser as a substitute for the absence of consent. When all was said and done, the white letter law may not have entirely relieved the prosecution of its burden of proof, but it certainly rendered its burden much lighter.

Still, the argument might be made that *McQuirter* is purely historical. The presumptions and subtle shifts in burdens and other shadings that allowed McQuirter's conviction are things of the past. But, of course, race still matters. It is why the Supreme Court has made clear that failure to permit the defense to inquire during voir dire about racial prejudice in cases involving interracial crime is reversible error.²⁴⁴ It is why states such

243. *King v. State*, 357 S.W.2d 42, 45 (Tenn. 1962).

244. *Turner v. Murray*, 476 U.S. 28, 38–39 (1986).

as Massachusetts and Pennsylvania continue to have particular rules about voir dire in cases alleging interracial rape.²⁴⁵ It is why in Mississippi, of all places, there is a presumption that a defendant is unable to receive a fair trial, thus warranting the granting of a change of venue motion, in cases where the crime was “committed by a black defendant upon a white victim.”²⁴⁶

When I first read *McQuirter*, what troubled me as much as McQuirter’s conviction was the appellate court’s ruling that, “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 the defendant was a negro man.”²⁴⁷ Now, when I read *McQuirter*, I appreciate the court’s honesty. It helps that the white letter law is not always invisible. Sometimes, if only for a brief moment, as if written on a *tabula rasa* or an Etch-a-Sketch, it is there in black and white. I appreciate the court’s honesty, though faced with the court’s instruction, I might have applied the instruction differently. The court suggested that McQuirter’s intent was inferable from racial mores. But would not the mores of the time have supported a finding of the absence of intent? Is it really likely that McQuirter, alone in the white part of town in Alabama in 1951, and observing Mrs. Ted Allen walking along a residential street with two children, intended to assault her, let alone rape her? With neighbors on either side of the street? With Suell Lufkin’s house right there and with Mr. Simmons watching him?²⁴⁸ With Mrs. Allen watching him from Mrs. Simmons’s porch?²⁴⁹ In the state known for the Scottsboro Boys case, that had a history of lynching black men, and where two black men had been lynched just the year before?²⁵⁰ But then again, maybe the jury applied different mores. Or perhaps the “social conditions and customs” that allowed the jury to infer guilt trumped the “social conditions and customs” that suggested the absence of intent.

245. *Commonwealth v. Glaspy*, 616 A.2d 1359, 1362 (Pa. 1992) (holding that defendants were entitled to voir dire prospective jurors about racial prejudice in cases alleging interracial rape); *Commonwealth v. Sanders*, 421 N.E.2d 436 (Mass. 1981) (same).

246. *Barfield v. State*, 22 So. 3d 1175, 1183 (Miss. 2009) (citing *White v. State*, 495 So. 2d 1346, 1349 (Miss. 1986)); see also *Gray v. Epps*, No. 4:04CV234LG, 2008 WL 4793796 (S.D. Miss. Oct. 27, 2008).

247. *McQuirter v. State*, 63 So. 2d 388, 390 (Ala. Ct. App. 1953).

248. *Id.* at 389.

249. *Id.*

250. For a list of the approximately 2400 African Americans who were lynched between 1865 and 1965, see *The Lynching Calendar*, <http://www.autopsis.org/foot/lynch.html> (last visited May 12, 2010).

B. *Rethinking Feminist Reforms*

Catharine MacKinnon has provocatively argued that rape laws are but another mechanism for sustaining male dominance over women.²⁵¹ But even this looks at the law too myopically. In fact, the criminal law has always been about the maintenance of power, whether that power lies in privileges associated with gender, race, class, or some other status.²⁵² Rape laws may further the interest of men to the detriment of women, but they also reflect broader notions of power.

The rape laws in this country, whatever the black letter law may have said or may say, have always been obsessed with certain types of rapists (strangers and black men) and certain types of rape victims (white, pure, demure, chaste, and of the right class).²⁵³ Indeed, there are parallels between rape law's obsession with strangers and black men. It is quite possible that the concern with stranger rape was predicated on a concern for interclass rape. As with interracial rape, which was concerned primarily with the rape of white women by nonwhites, interclass rape was also unidirectional—concerned primarily with the rape of the not-poor by the poor.²⁵⁴ This perhaps explains why the law developed in such a way to facilitate interclass and interracial rape prosecutions. This perhaps explains why the law, for the longest time, was indifferent to marital rape and to acquaintance rape, both assumed to be intraclass and intraracial.

Again, there are parallels between the fear of interclass rape and interracial rape. But interracial rape is the type of rape that has been most feared.²⁵⁵ MacKinnon speaks of rape as sustaining male dominance over

251. MacKinnon, *supra* note 240, at 644.

252. For an overview of this relationship between criminal laws and control, see generally DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (1990).

253. Dorothy Roberts makes a similar observation:

American society has always defined rape in terms of race. Race is not a peculiar aspect of rape; race helps to determine what rape means. The racialized history of rape does not diminish rape's roots in ordinary heterosexual relations; in America, rape's racial and sexual origins are inseparably intertwined. . . . The image of the violent man, who is the rapist, and who is therefore the target of the law, is a Black man.

Roberts, *supra* note 79, at 364–65.

254. As Joanna Bourke has observed, well into the beginning of the twentieth century, it was often assumed that women of the working classes were more familiar with sex, more capable of defending themselves, and thus unrape-able; it was therefore often assumed that “any women from the lower classes who dared claim to have been assaulted was patently lying.” JOANNA BOURKE, *RAPE: SEX, VIOLENCE, HISTORY* 27 (2007). Similarly, working-class men were viewed as naturally prone to rape. Even Clarence Darrow, the renowned trial attorney, espoused this view, stating that rape was “almost always the crime of the poor, the hardworking, the uneducated and the abnormal.” CLARENCE SEWARD DARROW, *CRIME: ITS CAUSES AND TREATMENT* 88 (1922).

255. See *supra* note 178.

women. But this ignores at least four things. First, our rape laws—at least as applied—have not operated to regulate the autonomy of “women,” but rather only certain types of women.²⁵⁶ Second, our rape laws—at least as applied and informed by the white letter law—have also operated to regulate the autonomy of black men.²⁵⁷ Black men are given unconscionable latitude when it comes to access to black women, and a leash when it comes to access to white women.

Third, our rape laws, though color-neutral, have always operated in tandem with other laws to entrench power in ways that are color-coded. At first, these rape laws operated in tandem with black letter laws (such as laws criminalizing interracial marriage or cohabitation) to make certain rapes easier to prosecute *and* to police the autonomy of white women and black men. In *Loving v. Virginia*,²⁵⁸ the Supreme Court invalidated Virginia’s anti-miscegenation statute because its focus on regulating “marriage involving white persons” made it clear that the measure was “designed to maintain White Supremacy.”²⁵⁹ What the Court missed, and what MacKinnon misses, is that rape laws operated in tandem with these laws. Rape laws were also “designed to maintain White Supremacy.” And, to a certain extent, now with the help of white letter law, they still are. How else are we to understand the uproar surrounding the rape of the Central Park jogger, and the corresponding lack of uproar regarding the many black women that were brutalized and raped that year?²⁶⁰

But the most important thing, what MacKinnon and Estrich and, indeed, the vast majority of feminist legal scholars miss, is this: the acquiescence of women in maintaining this system of laws. Susan Estrich has observed that women have difficulty recognizing simple rape—where the perpetrator is an acquaintance and where no weapon was used—as real rape, whereas they all recognize sex with a stranger as rape.²⁶¹ What Estrich left unsaid is the extent to which white women recognize that forcible, nonconsensual sex with black men is rape. This is what society teaches them.²⁶² But it is also what they participate in maintaining. The

256. FORELL & MATTHEWS, *supra* note 131, at 229 (describing certain types of women, such as prostitutes and black women, as “unrapeable”).

257. Gruber, *supra* note 40, at 587 (observing that rape law was part of the larger state effort to enforce white racial supremacy); Ristroph, *supra* note 17, at 179 (observing that rape law was used to enforce gender and racial hierarchies).

258. 388 U.S. 1 (1967).

259. *Id.* at 11.

260. See *supra* notes 118–20 and accompanying text.

261. ESTRICH, *supra* note 20, at 13–14.

262. See CHAMALLAS, *supra* note 112, at 225 (observing that “the prototypical rape evokes an implicit racialized image”).

fact is that women have never been innocent bystanders in first determining what is rape, and then reporting it as such. No rape case discussed in this Article could have existed without a woman at its center as the prosecutrix.²⁶³ By participating in the prosecution of interracial rape cases while allowing intraracial rape cases to be taken less seriously, indeed swept to the side, women—especially white women—have in fact added legitimacy to the notion that some rapes are “real rapes,” and other rapes are not. That is, when a white woman has forcible, nonconsensual sex with a white man, especially if the white man is someone she knows, then it is less egregious; it is not rape. It may be Scarlett O’Hara and Rhett Butler, but it is not rape, at least not real rape. If the substantive goal is to prohibit and punish all forcible sex, or even all nonconsensual sex, women have undermined that goal by willingly participating in a system that in fact only prohibits and punishes nonconsensual sex in certain cases, a system that is underinclusive. I am not suggesting women have done this intentionally. In fact, I assume just the opposite.

The consequences of this underreporting are many. Perhaps most troubling, by failing to recognize and report all rapes as rape, white women have unintentionally skewed the racial demographics of reported rapists, and in effect legitimized and reinforced racial stereotypes that prefigure black men as hypersexual and aggressive, and white women as racially vulnerable. In addition, by underreporting white-assailant rape, white women unintentionally participate in promoting and giving valence to the very “rape script,”²⁶⁴ to borrow from Sharon Marcus’s term, that renders inconsequential and invisible the frequency of intraracial rape while simultaneously undervaluing the harm resulting from such rapes.²⁶⁵ Lastly, by engaging in reporting that is not just racially skewed but also interracially skewed, white women unintentionally reproduce white

263. These cases, of course, are just a fraction of the rape cases reported. But the cases reported are just a fraction of all rapes. The fact is that women are far more likely to report rapes perpetrated by strangers—perceived to be real rapes—than rapes by acquaintances. And when it comes to white women, it appears that white women are more likely to report rapes when their assailants are non-white than when their assailants are white. Part of this may be attributable to believability. Because the credibility of rape victims is often put in question, rape victims are more likely to report rapes where their credibility will be least doubted. In these circumstances, women report rapes that society will accept as real rapes, i.e., rapes involving strangers or black men.

264. See Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 385, 389–95 (Judith Butler & Joan W. Scott eds., 1992).

265. Wiggins, *supra* note 54, at 124 (noting that “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”).

privilege (both their own and that of their white assailants) and reproduce imbalances of power along axes of race and gender.

To be clear, my agenda here is not to lay all the blame at the feet of women. Women may have acquiesced in the application of the rules, but they did not write the rules, at least not initially. Men did. Nor is my goal to draw a battle line. Rather, my goal is to make visible a battle line that has long existed, and to begin the process of erasing it. The point is to forge alliances for a common goal of remaking the law of rape, and the law of not rape, so that it is fair to everyone. The first step to such a coalition, however, is honest dialogue, and honest reflection. We should all be prepared to ask ourselves tough questions. To that end, feminist scholars need to ask themselves, what would have happened, and what would happen, if women really said “no”; i.e., if women refused to testify or otherwise cooperate in any “real rape” prosecution unless other rapes (intra-racial rapes, acquaintance rapes, simple rapes, rapes involving victims of color) were prosecuted too? In short, if one goal of feminism has been to instill in women their right to say no, one goal of this Article is to encourage women to embrace a more important no. “No” to prosecuting aggravated rape, but not date rape. “No” to treating strangers as rapists, but not their acquaintances. And “no” to treating black men as rapists, when the white letter law would not treat similarly situated white men as rapists.

IV. RAPE HARMS, AND IMAGINING *STATE V. ALLEN*

In the end, of course, it is impossible to definitively say whether McQuirter was innocent or guilty. Even the jury that convicted McQuirter may have had its doubts.²⁶⁶ But even assuming *arguendo* that McQuirter was in fact guilty—that he did have the intent to rape Mrs. Ted Allen—we should still find the case troubling. We should find the case troubling because the proof required to convict him—the proof purportedly required by the black letter law—was in fact a lesser standard of proof than that which would have been required had McQuirter been white. Mostly, though, we should find the case troubling because of the very real

266. The punishment they set for McQuirter was *de minimis*: the jury assessed a fine of \$500. *McQuirter v. State*, 63 So. 2d 388, 388 (Ala. Ct. App. 1953). Of course, a fine of \$500 in 1953 was likely the equivalent of sentencing McQuirter to hard labor, given the practice in many southern states of incarcerating defendants unable to pay fines. The Supreme Court finally declared this practice unconstitutional in 1971. *See Tate v. Short*, 401 U.S. 395, 400–01 (1971); *see also* Derek A. Westen, Comment, *Fines, Imprisonment, and the Poor: “Thirty Dollars or Thirty Days,”* 57 CAL. L. REV. 778 (1969).

likelihood that McQuirter was innocent. This is certainly the aspect that troubles me. It is the possibility that McQuirter, at worst, was an unintentional rapist.

As a black man who, in 1950s Alabama, could easily have ended up in McQuirter's position, or who, in Susan Estrich's rape story, would be described by the police as "a crow," I find these issues more than academic. I began this Article by confiding that, to many, my blackness and maleness mark me as a threat to white women, as a potential rapist. In fact, I am one of the few men who, if ever charged with rape in such a case, would be tempted to assert a factual impossibility defense. I am not only black and male, but also decidedly gay. Nonetheless, my life is replete with encounters in which I have been cast as a rapist.²⁶⁷ It has not mattered that the vast majority of rapes are intraracial, acquaintance rapes. Because we have imagined the "classic rape" as interracial, stranger rape, I have been cast as a rapist, or a potential rapist, or a rapist in waiting, time and again.²⁶⁸ These incidents are why, when I see a woman glancing apprehensively at me as she waits for an elevator, I find a way to wait for the next elevator. These incidents are why, in the predominantly white neighborhood where I live, I rarely take strolls in the evening alone. These incidents are why, even at the law firms where I once worked, I made sure not to work too late if there were just a few women on the floor.²⁶⁹ Devon Carbado and Mitu Gulati have written about the work that racial minorities

267. The first time was when I was still in college, during a study abroad program in London. I was walking to an evening class when I noticed one of my classmates just ahead of me. This classmate—I cannot remember her name, so let's call her Julie—had sat next to me just a few days earlier during orientation. We had talked. We had gotten along. So when I spotted her walking ahead of me, I called her name and when she glanced back, I waved. She didn't wave back, though. Instead, she quickened her pace. Then she started running. When I arrived at the university a few minutes later, she was in class, breathing hard. But I was the one that felt shaken. She looked at me, and I could tell she realized then that it had only been me behind her—her classmate, the nice black boy from America she'd met a few days before. She looked relieved. I still felt shaken. Of course, we didn't speak about what had happened, what she had assumed. And I'm sure she quickly forgot about the whole thing. I am the one who has not forgotten. In part, this is because I kept replaying the incident in my head, feeling shame each time, even though I knew I had done nothing to warrant her reaction. But I also cannot forget because I have experienced so many similar incidents since then.

268. Dorothy Roberts makes a similar observation in discussing women's fear of male strangers, noting that "[w]omen's fear of strangers on the street is complicated by the deeply-embedded [sic] image of the dangerous Black man." Roberts, *supra* note 79, at 378.

269. Frank Rudy Cooper discusses a similar dynamic. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 886–87 (2006). As may be evident, my concerns here are broader than the harm faced by men who are falsely accused of rape. Rather, I am including here men who have never been accused of rape, but who have readjusted their lives so that they appear non-threatening. It is this harm that concerns me the most.

do to provide “racial comfort.”²⁷⁰ But even this misses the work that many black men must do to instill sexual comfort. And it misses the stigmatic harm of repeatedly being raced and sexed as a rapist.

For some years now, feminist scholars have argued that the real harm of rape is not only the harm caused by the physical violence, but the harm to their sense of self.²⁷¹ Feminist scholars have described rape as a “harm to the spirit,”²⁷² as a form of “spiritual murder,”²⁷³ and as “soul-murder.”²⁷⁴ It is beyond dispute that this harm is real. But it should also be beyond dispute that there is a harm suffered by all men,²⁷⁵ particularly black men, perceived to be rapists. To be sure, the harms I am describing do not begin to compare to the physical and emotional harm of rape. In fact, they pale in comparison. But that does not mean these harms are not significant. They are. These harms do matter.

In many respects, these harms parallel the harm that women experience. According to Susan Brownmiller, “the rapist performs a myrmidon function for all men by keeping all women in a thrall of anxiety and fear.”²⁷⁶ Susan Estrich has written, “I don’t think I know a single woman who does not live with some fear of being raped. A few of us—more than a few, really—live with our own histories.”²⁷⁷ And Margaret Gordon and Stephanie Riger have found empirical support for these assertions.²⁷⁸ One-third of the women they surveyed said they worry at least once a month about being raped, and that the fear of rape is “always there.”²⁷⁹ Many men,²⁸⁰ especially black men, experience parallel harms. Even a black woman I know has voiced a similar experience: hailing a white female friend one evening on a college campus, only to have the

270. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1289–90 (2000).

271. BROWNMILLER, *supra* note 119, at 376.

272. Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 897 (2002).

273. Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993).

274. Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 164 (1992).

275. Recall *State v. Rusk*, 424 A.2d 720 (Md. 1981). Assuming Rusk was telling the truth, Rusk was harmed when he was perceived as an intentional rapist and convicted.

276. BROWNMILLER, *supra* note 119, at 208–09.

277. ESTRICH, *supra* note 20, at 3.

278. MARGARET GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COSTS OF RAPE* (1991).

279. *Id.* at 15.

280. To be clear, this harm is not unique to black men. Richard Orton, a white male, describes a similar experience. See Richard S. Orton, *Learning to Listen: One Man’s Work in the Antirape Movement*, in *TRANSFORMING A RAPE CULTURE* 233, 242 (Emilie Buchwald et al. eds., 2005).

white female friend glance back and, seeing a black figure, react with fear, fearing rape.

Gordon and Riger also found that a third of the women they surveyed reported taking precautions to avoid rape.²⁸¹ As another scholar put it, “women live their lives according to a rape schedule” that dictates when they go out, with whom they go out, and where they go.²⁸² Many black men do the same, taking related precautions. Many live their lives according to a schedule that minimizes both the risk of being perceived as a rapist, and the consequences of such a perception. These concerns impact where many black men choose to live, how they interact with white women at work, and even the decision whether to go for an evening run.²⁸³

Black men are harmed in other ways as well. Here, feminist theorist Ann Cahill’s examination of the harm that rape does to women is useful. Rejecting as overly simplistic the observation that rape objectifies women, Cahill argues that rape is a form of “derivatization.” Cahill defines the term as:

“[T]reating the person as a derivative,” where the ethical principle being violated is not that persons are things (a principle that denies the materiality of human existence) but rather that persons should not be reduced to other person’s desires, wishes, or projects. . . . To derivatize is to portray, render, understand, or approach a subject solely as the reflection, projection, or expression of another subject’s being, desires, fears, etc.²⁸⁴

281. GORDON & RIGER, *supra* note 278, at 15.

282. D. Herman, *The Rape Culture*, in CHANGING OUR POWER 260 (J.W. Cochran & D. Langon eds., 1988).

283. Consider *Johnson v. York Simpson Underwood*, No. 1:03CV01141, 2005 WL 1378848 (M.D.N.C. June 9, 2005), a case alleging racial discrimination under 42 U.S.C. §§ 1981 and 1982. *Id.* at *1. Johnson, a recent graduate of University of North Carolina who had just started working as a social worker with the Department of Social Services, had enlisted a broker to help him purchase a house, had put bids on two homes, and had toured a third house with his broker that he thought might be the perfect house. *Id.* Learning that the house would be available for viewing again during an open house, Johnson made arrangements to view the house a second time. *Id.* His broker explained that there was no need for her to accompany him, since it was an open house. *Id.* Wanting additional input, Johnson asked two of his cousins to accompany him to the open house. *Id.* However, when they arrived at the open house and rang the bell, the white woman who was the listing agent refused to open the door, even after Johnson explained that they were there for the open house. *Id.* at *2. After Johnson and his cousins left, the listing agent called 911 to report “three young black males dressed in gang-like clothing seeking entrance to an open house held by a realtor.” *Id.* In fact, the three men were in their twenties and were not dressed in gang-like clothing. *Id.* at *1. To defend her actions, the listing agent later explained that she feared sexual assault. *Id.* at *2. Such encounters between black men and white women are not uncommon.

284. Ann J. Cahill, *Sexual Violence and Objectification*, in THEORIZING SEXUAL VIOLENCE 14, 14 (Renée J. Heberle & Victoria Grace eds., 2009).

This concept of derivatization seems to apply with equal force when we consider the interactions that sometimes occur between white women and black men. In these interactions, where the black male is perceived as a sexual threat, it is the black male whose individuality and ontological autonomy is denied. It is the black male who becomes a projection of someone else's fears. It is the black man who is reduced not only to a raced and sexed body, but to a dangerous body as well.

My awareness of these harms informs my reading of *McQuirter* and leads me to think again about his encounter with Mrs. Ted Allen. It prompts me to wonder who was in greater fear: Mrs. Ted Allen, surrounded by three children, on her own street securely on the white side of town, with Suell Lufkin's house nearby, with Mr. Simmons at her side eventually standing on Mrs. Simmons's porch, watching McQuirter "for about thirty minutes"²⁸⁵ Or was it McQuirter, a black man alone on the white side of town in 1950s Alabama, knowing that when he saw a white woman it would be best if he "turned around and waited until . . . they were gone"²⁸⁶

Let me be absolutely clear. Even if McQuirter had never been arrested that day, he still experienced harm. He was harmed by a white letter law that constrained his movement, and that put him at great risk—no matter what precautions he took—of being perceived as a rapist. And he was harmed by Mrs. Ted Allen.

If the task at hand is to rethink rape law, then what is required is to rethink not only what harm we seek to prevent by proscribing rape, but also to rethink why we seek to prevent some harms but not others. Part of the task is to ask who benefits and why. And part of the task is to then refashion the law so that there is not merely a shift in power, with white women gaining power vis-à-vis black men. Rather, the task is to refashion the law so that there is a more egalitarian and just distribution of power.

And this leads me to ask the question that originally motivated this Article. What happens when we: (i) assume that McQuirter did not have the intent to rape Mrs. Ted Allen; (ii) assume that Mrs. Ted Allen, using race as a marker of intent, wrongly perceived McQuirter to have the intent to rape; (iii) that Mrs. Ted Allen, acting on this inaccurate belief, took evasive measures that included stopping at a friend's house, summoning Mr. Simmons to watch McQuirter, and watching McQuirter herself "for about thirty minutes"²⁸⁷ from Mr. Simmons's porch; and (iv) that Mrs. Ted

285. *McQuirter v. State*, 63 So. 2d 388, 389 (Ala. Ct. App. 1953).

286. *Id.*

287. *Id.*

Allen's actions in fact put McQuirter in fear of imminent bodily injury or in fear of a wrongful arrest? Is it possible to recast McQuirter not as the defendant, but as a crime victim, with Mrs. Ted Allen cast as the perpetrator, causing a racially motivated harm? In short, is it possible to reframe *McQuirter v. State* into a hypothetical *State v. Allen*?

The state's "police power" has been described as "the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."²⁸⁸ It allows the state to criminalize whatever conduct it reasonably deems harmful to the public health, safety, welfare, or morals, so long as it does not prohibit some individual right guaranteed by the Constitution, and the criminalized conduct is rationally related to the harm sought to be avoided.²⁸⁹ Based on its broad police powers, a state could, if it chose to do so, reframe *McQuirter v. State* into a hypothetical *State v. Allen*. For example, a state could, invoking its broad police powers, make it a crime to unjustifiably or inexcusably inflict racially motivated harm. Under such a statute, a person who recklessly puts another person in fear of imminent bodily injury or wrongful arrest would be guilty of an offense if the basis for the person's conduct was motivated by race and was otherwise unjustified or inexcusable.

But, already, it should be apparent that the gap between "could" and "would" is a wide one. It should be apparent that whether the state could criminalize Mrs. Ted Allen's conduct, or for that matter Mr. Simmons's conduct as an aider and abettor, is not the real question. Nor is the real question whether the state is interested in creating such a law. Common sense tells us that it is not.

The real question raised by this Article—through its foregrounding of the white letter law of rape and its impact on the black letter law of rape, through its re-imagining of *McQuirter v. State*, and through its concerns for the everyday lives of black men—is this: How do we get to a point where a white woman can walk alone at night, and a black man can walk alone at night, and neither has reason to fear the other? The real question is: How do we get to a point where rape is rape, and all rape is real rape, regardless of race? The real question is: Can changing the law—black letter or white letter—get us there; and if not, what can?

288. *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909).

289. For a discussion of the breadth of police power, see Markus Dirk Dubber, "The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law, 52 *BUFF. L. REV.* 1277 (2004).

CONCLUSION

The goal of this Article has not been to write a blueprint for a new and better law of rape. But hopefully this Article has shed light on where we have been, how we have gotten to where we are, and how the law of rape owes much to, and remains stained by, the sexualization of race and the racialization of rape. Hopefully, too, this Article has argued for a change in course, and has set a goal: to a way of thinking about and applying the law of rape that is free from gendered stereotypes *and* free from racial stereotypes. The goal has been set. The task now is in setting the course.

But here is the important thing: in setting the course, what is needed is thoughtful, critical, and honest dialogue representing multiple points of address and analysis. Rape law, as it existed at common law, was written, crafted, and shaped entirely by privileged men. Meanwhile, the rape laws, as they exist today, owe much of their provenance to feminist scholars working in the 1970s and 1980s. And while much of the blatant sexism in original rape laws has been eradicated, still, there is work to be done. Still, there is inequality. In the end, then, this Article is a call, an invitation, and a challenge. If we want to fashion a law of rape that is fair to everyone, then we need everyone at the table in fashioning that law. That includes black men. That includes those who know what it means to be an unintentional rapist.