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Rape, Racism, and the Law

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

THE NARROW FOCUS ON BLACK OFFENDER/ WHITE VICTIM RAPE

There are many different kinds of rape. Its victims are of all races, and its perpetrators are of all races. Yet the kind of rape that has been treated most seriously throughout this nation's history has been the illegal forcible rape of a white woman by a Black man. The selective acknowledgement of Black accused/white victim rape was especially pronounced during slavery and through the first half of the twentieth century. Today a powerful legacy remains that permeates thought about rape and race.

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

In contrast to the harsh penalties imposed on Black offenders, courts occasionally released a defendant accused of raping a white woman when the evidence was inconclusive as to whether he was Black or mulatto. The rape of Black women by white or Black men, on the other hand, was legal; indictments were sometimes dismissed for failing to allege that the victim was white. In those states where it was illegal for white men to rape white women, statutes provided less severe penalties for the convicted white rapist than for the convicted Black one. In addition, common-law rules both defined rape narrowly and made it a difficult crime to prove....

After the Civil War, state legislatures made their rape statutes race-neutral, but the legal system treated rape in much the same way as it had before the war. Black women raped by white or Black men had no hope of recourse through the legal system. White women raped by white men faced traditional common-law barriers that protected most rapists from prosecution.

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

Between 1882 and 1946 at least 4,715 persons were lynched, about three-quarters of whom were Black. Although lynching tapered off after the early 1950s, occasional lynch-like killings persist to this day. The influence of lynching extended far beyond the numbers of Black people murdered because accounts of massive white crowds torturing, burning alive, and dismembering their victims created a widespread sense of terror in the Black community.

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

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

Gentlemen of the jury, this man, a nigger, is charged with breaking into the house of a white man in the nighttime and assaulting his wife, with the intent to rape her. Now, don't you know that, if this nigger had committed such a crime, he never would have been brought here and tried; that he would have been lynched, and if I were there I would help pull on the rope.¹

It is doubtful whether the legal system better protected the rights of a Black man accused of raping a white woman than did the mob. Contemporary legal literature used the term "legal lynching" to describe the legal system's treatment of Black men. Well past the first third of the twentieth century, courts were often coerced by violent mobs, which threatened to execute the defendant themselves unless the court convicted him. Such mobs often did lynch the defendant if the judicial proceedings were not acceptable to them. A contemporary authority on lynching commented in 1934 that "the local sentiment which would make a lynching possible would insure a conviction in the courts." Even if the mob was not overtly pressuring for execution, a Black defendant accused

of raping a white woman faced a hostile, racist legal system. State court submission to mob pressure is well illustrated by the most famous series of cases about interracial rape, the Scottsboro cases of the 1930s. Eight young Black men were convicted of what the Alabama Supreme Court called "a most foul and revolting crime," which was the rape of "two defenseless white girls." The defendants were summarily sentenced to death based on minimal and dubious evidence, having been denied effective assistance of counsel. The Alabama Supreme Court upheld the convictions in opinions demonstrating relentless determination to hold the defendants guilty regardless of strong evidence that mob pressure had influenced the verdicts and the weak evidence presented against the defendants. In one decision, that court affirmed the trial court's denial of a change of venue on the grounds that the mobs' threats of harm were not imminent enough although the National Guard had been called out to protect the defendants from mob executions. The U.S. Supreme Court later recognized that the proceedings had in fact taken place in an atmosphere of "tense, hostile, and excited public sentiment." After a lengthy appellate process, including three favorable Supreme Court rulings, all of the Scottsboro defendants were released, having spent a total of 104 years in prison.

In addition, courts applied special doctrinal rules to Black defendants accused of the rape or attempted rape of white women. One such rule allowed juries to consider the race of the defendant and victim in drawing factual conclusions as to the defendant's intent in attempted rape cases. If the accused was Black and the victim white, the jury was entitled to draw the inference, based on race alone, that he intended to rape her. One court wrote, "In determining the question of intention, the jury may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man."² The "social conditions and customs founded upon racial differences" which the jury was to consider included the assumption that Black men always and only want to rape white women, and that a white woman would never consent to sex with a Black man.

The Georgia Supreme Court of 1899 was even more explicit about the significance of race in the context of attempted rape, and particularly about the motivations of Black men. It held that race may properly be considered "to rebut any presumption that might otherwise arise in favor of the accused that his intention was to obtain the consent of the female, upon failure of which he would abandon his purpose to have sexual intercourse with her."³ Such a rebuttal denied to Black defendants procedural protection that was accorded white defendants....

The outcome of this disparate treatment of Black men by the legal system was often the same as lynching—death. Between 1930 and 1967, thirty-six percent of the Black men who were convicted of raping a white woman were executed. In stark contrast, only two percent of all defendants convicted of rape involving other racial combinations were executed. As a result of such disparate treatment, eighty-nine percent of the men executed for rape in this country were Black. While execution rates for all crimes were much higher for Black

... of white men, the differential was most dramatic when the crime

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

The rape of white women by Black men is also used to justify harsh rape penalties. One of the few law review articles written before 1970 that takes a firm position in favor of strong rape laws to secure convictions begins with a long quote from a newspaper article describing rapes by three Black men, who at 3 a.m. on Palm Sunday "broke into a West Philadelphia home occupied by an eighty-year-old widow, her forty-four-year-old daughter and fourteen-year-old granddaughter," brutally beat and raped the white women, and left the grandmother unconscious "lying in a pool of blood." This introduction presents rape as a crime committed by violent Black men against helpless white women. It is an image of a highly atypical rape—the defendants are Black and the victims white, the defendants and victims are strangers to each other, extreme violence is used, and it is a group rape. Contemporaneous statistical data on forcible rapes reported to the Philadelphia police department reveals that this rape case was virtually unique.⁴ Use of this highly unrepresentative image of rape to justify strict rape laws is consistent with recent research showing that it is a prevalent, although false, belief about rape that the most common racial combination is Black offender and white victim.⁵

Charges of rapes committed by Black men against white women are still surrounded by sensationalism and public pressure for prosecution. Black men seem to face a special threat of being unjustly prosecuted or convicted. One example is Willie Sanders.⁶ Sanders is a Black Boston man who was arrested and charged with the rapes of four young white women after a sensational media campaign and intense pressure on the police to apprehend the rapist. Although the rapes continued after Sanders was incarcerated, and the evidence against him was extremely weak, the state subjected him to a vigorous twenty-month prosecution. After a lengthy and expensive trial, and an active public defense, he was eventually acquitted. Although Sanders was clearly innocent, he could have been convicted; he and his family suffered incalculable damage despite his acquittal....

From slavery to the present day, the legal system has consistently treated the rape of white women by Black men with more harshness than any other kind of rape....

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

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

THE DENIAL OF THE RAPE OF BLACK WOMEN

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

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

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

[T]his indictment can not be sustained, either at common law or under our statutes. It charges no offense known to either system. [Slavery] was unknown to the common law ... and hence its provisions are inapplicable.... There is no act (of our legislature on this subject) which embraces either the attempted or actual commission of a rape by a slave on a female slave.... Masters and slaves can not be governed by the same a slave on a female slave.... Masters and slaves can not be governed by the same system or laws; so different are their positions, rights and duties.⁷

This decision is illuminating in several respects. First, Black men are held to lesser standards of sexual restraint with Black women than are white men with

Black women than are Black men with white women. Neither white nor Black men were expected to show sexual restraint with Black women.

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

The legal system's denial that Black women experienced sexual abuse by both white and Black men also persisted, although statutes had been made race-neutral. Even if a Black victim's case went to trial—in itself highly unlikely—procedural barriers and prejudice against Black women protected any man accused of rape or attempted rape. The racist rule which facilitated prosecutions of Black offender/white victim attempted rapes by allowing the jury to consider the defendant's race as evidence of his intent, for instance, was not applied where both persons were "of color and there was no evidence of their social standing."⁸ That is, the fact that a defendant was Black was considered relevant only to prove intent to rape a white woman; it was not relevant to prove intent to rape a Black woman. By using disparate procedures, the court implicitly makes two assertions. First, Black men do not want to rape Black women with the same intensity or regularity that Black men want to rape white women. Second, Black women do not experience coerced sex in the sense that white women experience it.

These attitudes reflect a set of myths about Black women's supposed promiscuity which were used to excuse white men's sexual abuse of Black women. An example of early twentieth century assumptions about Black women's purported promiscuity was provided by the Florida Supreme Court in 1918. In discussing whether the prior chastity of the victim in a statutory rape case should be presumed subject to defendant's rebuttal or should be an element of the crime which the state must prove, the court explained that:

What has been said by some of our courts about an unchaste female being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race, but we would blind ourselves to actual conditions if we adopted this rule where another race that is largely immoral constitutes an appreciable part of the population.⁹

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

The criminal justice system continues to take the rape of Black women less seriously than the rape of white women. Studies show that judges generally

impose harsher sentences for rape when the victim is white than when the victim is Black. The behavior of white jurors shows a similar bias. A recent study found that sample white jurors imposed significantly lighter sentences on defendants whose victims were Black than on defendants whose victims were white. Black jurors exhibited no such bias.

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

The thorough denial of Black women's experiences of rape by the legal system is especially shocking in light of the fact that Black women are much more likely to be victims of rape than are white women.¹⁰ Based on data from national surveys of rape victims, "the profile of the most frequent rape victim is a young woman, divorced or separated, Black and poverty stricken."...

CONCLUSION

The legal system's treatment of rape both has furthered racism and has denied the reality of women's sexual subordination. It has disproportionately targeted Black men for punishment and made Black women both particularly vulnerable and particularly without redress. It has denied the reality of women's sexual subordination by creating a social meaning of rape which implies that the only type of sexual abuse is illegal rape and the only form of illegal rape is Black offender/white victim. Because of the interconnectedness of rape and racism, successful work against rape and other sexual coercion must deal with racism. Struggles against rape must acknowledge the differences among women and the different ways that groups other than women are disempowered. In addition, work against rape must go beyond the focus on illegal rape to include all forms of coerced sex, in order to avoid the racist historical legacy surrounding rape and to combat effectively the subordination of women.

NOTES

1. *State v. Petit*, 119 La., 44 So. (1907).
2. *McQuirter v. State*, 36 Ala., 63 So. 2d (1953).
3. *Dorsey v. State*, 108 Ga., 34 S.E. (1899).
4. Out of 343 rapes reported to the Philadelphia police, 3.3% involved Black defendants accused of raping white women; 42% involved complaints of stranger rape; 20.5% involved brutal beatings; 43% involved group rapes.
5. In answer to the question, "Among which racial combination do most rapes occur?"