

RAPE AS A BADGE OF SLAVERY: THE LEGAL HISTORY OF, AND REMEDIES FOR, PROSECUTORIAL RACE-OF-VICTIM CHARGING DISPARITIES

Jeffrey J. Pokorak*

ABSTRACT

This article explores the continuing gendered racism in rape prosecutions: the undervaluation of all rape offenses against Black women and the concomitant overvaluation of rape crimes against White women, particularly when committed by a Black man. In this article I review the legal and extra-legal factors that have historically evidenced the gendered racism in rape prosecutions. I also explore the prosecutorial methods that contribute to maintaining these racial disparities. Finally, I propose remedial actions for prosecutors, legislatures, and courts.

For most of this nation's history, raping a Black woman was simply not a crime. First, laws prevented the prosecution of any offender for the rape of a slave woman. At the same time, the rape of a White woman by a Black man was treated with especial violence. The Thirteenth and Fourteenth Amendments were proposed and ratified as vehicles to ensure the equal protection of the laws. After their enactment, although the de jure prohibition on prosecuting the rape of Black women ended, de facto barriers to prosecution remained.

The potent rape meta-narrative of a stranger who is a Black man violently assaulting a White woman continues to infect prosecutorial decisions. This influence is in part the product of prosecutors relying on system outcome bias regarding assessments of "convictability." Such "down streaming" is the practice of considering at charging what prejudices and biases hypothetical jurors will employ when judging whether a rape victim is credible.

In this article, I propose prosecutors adopt charging criteria and employ review committees to end system outcome bias. In addition, legislatures should require accurate recordkeeping regarding the race of victim and perpetrator in every rape case from initial report through case completion. Finally, in egregious cases of overt racial discrimination, victims should sue for their right to be protected by the laws as guaranteed by the Thirteenth and Fourteenth Amendments.

* Associate Professor of Law, Director of Clinical Programs, Suffolk University Law School. B.A., State University of New York, Binghamton; J.D., Northeastern University School of Law. My thanks go to several friends and colleagues who have given me valuable suggestions for this article, including Phyllis Crocker, Andrew Perlman, and Ilene Seidman. I also benefited a great deal from the research assistance of students Dan Moss and Jody Budz. Additionally, Suffolk University Law School's generous summer stipend system supported the research and production of this article.

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INTRODUCTION

The names and faces from the front pages of our newspapers and television screens, through media saturation, have become part of our nation's collective cultural consciousness: Chandra Levy,¹ Laci Peterson,² Jennifer Wilbanks,³ and Natalee Holloway.⁴ Each of these women has been the focus of massive media attention.⁵ The qualities that these women share are their

¹ See Katherine Q. Seelye, *Body of Intern Found in Park in Washington*, N.Y. TIMES, May 23, 2002, at A1 (describing how case effected re-election bid of Congressman Gary Condit).

² See Jim Rutenberg, *Presumed Innocence? Not on Cable TV News*, N.Y. TIMES, Apr. 26, 2003, at A16 (discussing the relative media treatment of Chandra Levy and Laci Peterson). See also Times Topics, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/p/laci_peterson/index.html?8qa (collecting articles about Laci Peterson).

³ See Ariel Hart, *Bride-to-Be Admits Fleeing and Making Up Kidnap Story*, N.Y. TIMES, May 1, 2005, at §1, 32 (discussing case and media attention to Wilbanks' family).

⁴ See Associated Press, *Two Suspects To Be Held in Girl's Case*, N.Y. TIMES, June 9, 2005, at A24; Hannah Wolfson, *Search for Teen Could Resume 2 Dive Teams Seek Return to Aruba*, BIRMINGHAM NEWS, Jan. 7, 2006, at 1C.

⁵ Add to these stories of missing women the stories of missing or murdered young White girls like JonBenet Ramsey and Elizabeth Smart, and some prefer to call the media focus the "Missing Pretty White Girl" effect rather than "Missing White Woman" syndrome.

race (all were White),⁶ the fact that they were probably missing as the result of a violent crime, and the consensus perception that they were all “attractive.”

The media emphasis on such stories has been dubbed the “White woman syndrome,” or the “damsel in distress” factor. Although the phenomenon is in part the product of the modern twenty-four-hour news cycle and its insatiable craving for constant entertaining information, the focus on one class of people – attractive White women – is much more than happenstance.

One of the most notable examples of this phenomenon is the case of Natalee Holloway. Between May 30 and July 28, 2005, there were over 500 stories on the major twenty-four-hour news stations related to her disappear-

⁶ In this article, contrary to current convention, I have chosen to capitalize both “Black” and “White” when referring to the race of a victim or offender. I agree with and accept the rationale for capitalizing “Black”:

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

Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS J. OF WOMEN IN CULTURE & SOC'Y 515, 516 (1982). See also Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983). As Professor Wriggins notes, “a parallel argument could support the capitalization of ‘white. . . .’” *Id.* at n.*. However, Professor Wriggins dismissed those arguments by claiming that “such a usage would resonate with a long tradition of dominance by whites and is hence rejected.” *Id.*

The rejection of the capitalization of “White” therefore comes from an appropriate desire not to linguistically reproduce the very power imbalance that scholars in the area of racial justice seek to address. I have come to believe, however, that *not* capitalizing “White” sends a much more linguistically troubling message. Scholarship since the creation of the convention has explored the many ways in which being “White” and “Whiteness” have intrinsic and specific value. See, e.g., Barbara J. Flagg, *Whiteness: Some Critical Perspectives: Forward: Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL'Y 1, 6 (2005) (“Whiteness is not only an identity, but the power to name and shape identities. Whiteness not only has control of valuable resources, but has the ability to limit access to those resources to those who reflect its own image. Whiteness not only constitutes a distinct perspective on events, but has the authority to generate definitive cultural narratives. And Whiteness not only is a set of unearned privileges, but the capacity to disguise those privileges behind structures of silence, obfuscation, and denial.”). By *not* capitalizing “White,” this article would be suggesting two theories that I do not support. First, it would suggest that Black Americans are no longer facing a formidable historical adversary, “Whiteness.” By using the diminutive “white,” authors improperly disguise a very important aspect of the struggle for racial justice. Second, by not granting “White” the status of proper noun, it would suggest that “white” and “whiteness” is the standard in the universe of value and the appropriate default perspective for all action and judgment. This use of language would re-objectify Black persons and their experiences. By suggesting that “Black” is a different normative – in specific and kind – than “White,” language would be employed to undermine the value of Blackness by visually reasserting its otherness. Certainly, there is power in asserting such a place, but for the gendered race arguments presented in this article, ignoring the specific cultural – indeed tribal – nature of being “White” would disserve the goal of understanding the raced nature of state action inequality in rape prosecutions.

ance in Aruba.⁷ Her story was followed in intricate detail: every police action was analyzed and every aspect of her life in the United States scrutinized, providing the platform for broad commentary on our current culture. Several major news outlets reported live from Aruba, even when there was no related news to report.⁸

In contrast, consider the case of Latoyia Figueroa, an African-American woman of Hispanic descent reported missing on July 18, 2005.⁹ Her story had all the hallmarks of a “damsel in distress” narrative: she was attractive, five months pregnant when she disappeared, and her disappearance suggested foul play. The police had a suspect, Stephen Poaches, Ms. Figueroa’s boyfriend and father of her child, although there was no solid evidence to connect him with any crime. Many compared the case to that of Laci Peterson, which dominated news reporting for two years from the time of her disappearance through the culmination of her husband’s trial for murder.¹⁰ However, Ms. Figueroa’s case was largely ignored by the same media that was happy to saturate its programming with other women’s cases. The only obvious distinction was the fact that Ms. Figueroa was of African-American and Hispanic descent.¹¹

By focusing media attention on one race of the damsel in distress, the value of White “damsels” is both reaffirmed and magnified. Likely, the media focus is the product of both viewer demographics and the values of media reporters, editors, advertisers, and publishers.¹² The stories are therefore presented to reinforce an already extant belief system. To simply identify the existence of this overvaluation of White women and undervaluation of women of color in popular culture and current media, however, does not explain it. In fact, recognition of the relatively benign valuation applied by media corporations is only a second-hand way of identifying the truly pernicious attitude it reveals: White women are more important than Black women and other women of color. In a society in which equality is a stated goal, overvaluing one group to the detriment of another must be considered a first-magnitude failure.

This disparate valuation is not, sadly, an issue infecting only our current news and entertainment culture. Such inequality of valuation remains a present reality throughout the economic, societal, and cultural aspects of our national community. However, in one area of our interactions – how the law is applied

⁷ CNN reported 75 stories and MSNBC aired 103, while FOX presented 434 stories on the disappearance in that period. *Lou Dobbs Tonight* (CNN television broadcast July 28, 2005).

⁸ See, e.g., Bill Carter, *Bob Costas Says No to Hour on Aruba*, N.Y. TIMES, Aug. 24, 2005, at E1 (“Some have deplored the emphasis on white women who go missing, while missing women of other ethnic groups are ignored.”).

⁹ See Rick Lyman, *Missing Woman’s Case Spurs Discussion of News Coverage*, N.Y. TIMES, Aug. 7, 2005, at § 1, 16 (“national news outlets focus relentlessly on missing white women, while giving little attention to equally compelling stories involving poorer minority women”).

¹⁰ *Id.*

¹¹ *Id.*

¹² See INA HOWARD, *Power Sources: On Party, Gender, Race and Class, TV News Looks to the Most Powerful Groups*, FAIR, May/ June 2002, <http://www.fair.org/index.php?page=1109> (discussing the racial disparity in media sources: 92% White, 7% Black, 0.6% Latinos, 0.6% Arab Americans, and 0.2% Asian Americans).

to citizens – we claim to prize equality of treatment as a core and defining principle. And, within this societal bubble of equal treatment, nowhere is equality mandated more than in the application of criminal laws.

The people that the media collectively considers “viewers” and advertisers consider “consumers,” prosecutors consider “jurors.” It is sometimes unclear whether prosecutors and police are allocating scarce resources to a case because the victim is White or because the media has focused on the case for that reason.¹³ When prosecutors attempt to predict the outcome of a case by considering how jurors will perceive defendants, witnesses, and victims based on race or class, then the prosecutor is adopting improper and potentially unconstitutional biases in his decisions about charges, pleas, and trials. This practice has been called “down streaming” by some researchers, but in this article I will refer to the practice as “system outcome bias.”¹⁴

Much scholarship and discussion have been focused on the system outcome bias as it affects minority defendants.¹⁵ Where there is perceived racial animus in prosecutions based on the race of a defendant, the entire legal system suffers from its inability to stand as a neutral and fair arbiter of disputes and facts. However, even if race-of-defendant disparities were ended, the overvaluation of White victims in prosecutorial charging decisions would continue to mark the criminal justice system as race-biased and therefore deeply flawed. It is this two-pronged quality of gendered racism in prosecutions that continues to taint the criminal justice system as a whole.¹⁶ Until prosecutors are credibly and demonstrably viewed as protecting each individual in the community who is a victim of a crime both respectfully and equally, the justice system will continue to be haunted by charges of racism in its application of power in the community.

Race-of-victim disparities are, in many ways, even more injurious to our notions of equal justice than race-of-defendant inequalities. The over-prosecution of minority defendants or increased sentences for minorities calls into question the inherent biases in the criminal justice system. At the end of the day, however, the defendants were prosecuted or more harshly sentenced after the application of a criminal trial process from which overtly race-specific laws have been allegedly removed.¹⁷ These defendants were, in most cases, proved

¹³ See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 72-74 (1997) (discussing the interplay between the increased police attention and the intensive media attention in the Central Park jogger “wilding” case).

¹⁴ See Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 *LAW & SOC'Y REV.* 531, 535 (1997) [hereinafter, Frohman, *Convictability*].

¹⁵ See *infra* notes 241-60 and accompanying text.

¹⁶ In this article, I embrace the construction of “gendered racism” expressed by Professor Phyllis Crocker regarding the crime of rape-murder:

I use “gendered racism” to refer to two phenomena of racial and sexual exploitation. First, the devaluation of the crime of [rape] by white men of African American women and second, the heightened valuation of the crime of [rape] of white women particularly when committed by an African-American man.

Phyllis L. Crocker, *Is the Death Penalty Good for Women?*, 4 *BUFF. CRIM. L. REV.* 917, 919 n.11 (2000-2001).

¹⁷ See *infra* notes 112-36 and accompanying text.

guilty of a facially race-neutral crime through a process in which every relevant defense could be presented to court or jury.¹⁸

This same opportunity to argue about the exercise of racially discriminatory discretion in a given case is not available in the same way to minority victims. In cases in which minority victims are undervalued, the inequality happens stealthily; generally, it is the product of unreviewable decisions made by investigators and prosecutors. The near-unfettered discretion afforded to prosecutors may be an important aspect of the public nature of the criminal law system. Sadly, it is also a license to discriminate, wittingly or not, without the need to answer to the courts or the public. This ability of state actors to effectively hide racially disparate prosecution patterns is particularly troublesome in cases of rape.¹⁹

For most of our nation's history, it was not a crime to rape a Black woman.²⁰ In the few places where the rape of a Black woman was technically criminalized, rules of procedure prevented Black women from testifying about their victimization.²¹ And in the very few places where the law did not bar

¹⁸ There certainly are recent examples of exceptions to this general patina of legal equality. See *Miller-El v. Cockrell*, 537 US 322, 347 (2003) (in juror exclusion based on race, "[e]ven if we presume at this stage that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it").

¹⁹ See Wriggins, *supra* note 6, at 104 n.1. In this article, I will use the term "rape" as articulated by Professor Wriggins:

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

²⁰ Although still a shocking realization, it is not a novel observation. See Crocker, *supra* note 16, at 931 n.40 ("During the time of slavery in this country, it was not illegal to rape an African-American woman slave.") (citing THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619-1860* 305 (1996)); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1056-57 (1992). See also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 31 (1997) ("In short, for most of American history the crime of rape of a Black woman did not exist."); Wriggins, *supra* note 6, at 118 ("The [pre-civil war] 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.").

Professor Crocker's work on modern rape-murder prosecutions and punishments is both illuminating and inspirational. See Phyllis Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689 (2000). Her explorations of the continued interrelationship between rape, race, and the death penalty in the United States, combined with her honest assessments regarding those relationships and modern feminist thought are a major impetus for my current work and research on behalf of sexual assault victims in and out of the criminal justice system.

²¹ For example, in 1849, Virginia passed a statute preventing a Black person from testifying against a White criminal defendant. 54 VA. CODE Chap. CC § 8 (1854). See also José Felipé Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367, 417 (1997) (adding the 1849 Virginia Code also "made it a crime to use 'provoking language or menacing gestures' to a White person . . . [and] applied to both free Blacks and slaves").

such rape prosecutions either explicitly or procedurally, prosecutorial discretion to decline prosecution completed the decriminalization of raping a Black woman.²²

While the Thirteenth and Fourteenth Amendments to the United States Constitution ended the *de jure* prohibition on prosecuting the rapists of Black women, antebellum prejudices and practices kept the prosecution of rape of a Black woman a rare, if extant, occurrence. Although the prosecution rates for rape of a Black woman have increased, there is still an identifiable pattern in prosecution in which White women victims are overvalued and women of color who are raped are undervalued. This means that Black women are less likely to have their cases prosecuted and perpetrators of sexual assaults on Black women will more likely escape punishment.

In Part I of this article, I explore the antebellum attitudes – both cultural and legal – regarding the race of rapists and rape victims. In Part II, I discuss the enactment of the Thirteenth and Fourteenth Amendments to the United States Constitution and the enabling legislation Congress promoted to curb the blatant racial inequality of prosecutions. In Part III, I discuss the continuing application of the pre-Civil War prejudices regarding the rape of Black women. In Part IV, I analyze recent research regarding the gendered racism of rape prosecutions and its implications for reform; and in Part V, I consider the traditional role of unfettered discretion in prosecutorial charging decisions and suggest legislative and litigation solutions to the under-prosecution of rapes against Black women.

I. BLACK WOMEN, RAPE, AND THE LACK OF LEGAL PROTECTION BEFORE THE CIVIL WAR

The history of rape prosecution has always been inextricably intertwined with the history of race relations in this country. The continuing demand to understand the interrelated aspects of the history of criminal prosecution, punishment, and race was summed up by Chief Justice Earl Warren shortly before he died when he expressed a strong interest in the historical development of slave laws because “of a reappraisal of [his] own thinking concerning slavery – not only what it meant in the past but the danger of what it will still mean to the future.”²³ Today, there remains a deep connection between centuries of institu-

²² Of course, the property theory of rape was not only extended to Black women, but had its own formulation that encompassed White women – as children or as wives. Nothing in this article is intended to diminish the history of gender discrimination and sexual violence against White women. This article explores the specific impact of historical gendered racism on current rape prosecution decisions with no intention of excluding other equally important discussions of the impact of gender stereotypes on race prosecution decisions. The interdependent attempt to seek justice and dignity of treatment under law for sexual assault for all women is a critical intersecting project. As Ilene Seidman and Susan Vickers state, treatment of both Black and White women’s experiences of sexual assault are somewhat different, and located in different constructs of power, but remain equally shameful. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467 (2005).

²³ A. LEON HIGGINBOTHAM, JR., IN *THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 391 (1978). See also Harold Norris, *A Perspective on the History of Civil Rights Law in Michigan*, 1996 DETROIT C. L. REV. 567, 568 (1996)

tionalized slavery and current racial polarization and anxiety.²⁴ The legacy of legalized oppression based on race can never be adequately understood and purged from our society if we continue to act as if one race never used the rule of law to enslave another race in this country.²⁵ Among the most egregious and time-transcendent form of discrimination perpetrated by the institution of slavery was the two-pronged criminal law response to Black sexuality: non-recognition of the crime of rape for Black women victims and severe punishments, including death, for unregulated Black male interactions with White women.

Raping a Black woman was not a crime for the majority of this Nation's history.²⁶ First, the rape of a Black woman was simply not criminalized.²⁷ And even when there was an argument that a statute was race neutral as to victimization, prosecutorial inaction and Court holdings made clear the lack of recourse for Black women who were raped. In fact, a White defendant could argue that his indictment ought to be dismissed for failing to state the victim was White.²⁸ The most extreme example of this lack of protection, however, was expressed in *George v. State*, in which the Supreme Court of Mississippi considered whether a trial court's sentence of death for a Black male slave raping a Black woman slave was a legal sentence.²⁹ The Court concluded that a male slave could only "commit a rape upon a white woman."³⁰ The Court reasoned that slaves were not protected by the common law or statutes because they were under the legal dominion of their masters as required by their status as property.³¹

Slavery was a complete system which was designed to create a permanent supply of human labor while maintaining complete control over the transfer,

(noting the nexus between the brutal centuries of colonial slavery and the racial disparity and apprehension of today).

²⁴ The Supreme Court's judicial mandates of school integration, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), spoke with great authority in attempting to rectify the legacy of slavery. Numerous sociologists have pointed to this case's command to racially integrate institutions as a primary reason for White people leaving inner cities. However, other scholars claim "White flight," and the trend toward suburbanization, is "more far-reaching and long-standing than any judicial mandate." Rachel F. Moran, *Milo's Miracle*, 29 CONN. L. REV. 1079, 1105 (1997). See also Reginald Leamon Robinson, *White Cultural Matrix and the Language of Nonverbal Advertising in Housing Segregation: Toward an Aggregate Theory of Liability*, 25 CAP. U. L. REV. 101, 134-35 (1996).

²⁵ This fundamental difference (the history of slavery) has made the African-American experience in America different from any other group. The difference penetrated historical, sociological, political, and legal aspects of life. See William J. Connolly, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483, 520 (1996).

²⁶ See *supra* note 20 and accompanying text.

²⁷ For example, the Louisiana rape code explicitly excluded Black women as a class that could be victimized. Judith Kelleher Schafer, *The Long Arm of the Law: Slave Criminals and the Supreme Court in Antebellum Louisiana*, 60 TUL. L. REV. 1247, 1256, 1265 (1985-1986).

²⁸ E.g., *State v. Charles*, 1 Fla. 298 (1847); *Commonwealth v. Mann*, 4 Va. 210 (1820).

²⁹ 37 Miss. 316, 1 (1859).

³⁰ *Id.* at 3 ("[T]here is no act which embraces either the attempted or actual commission of a rape by a slave on a female slave.").

³¹ *Id.* at 1. See also KENNEDY, *supra* note 13, at 35.

sale, use, and regeneration of that labor supply.³² In order to meet these demands of control, the legal systems of slavery had to control acts of both Black men and women which were perceived as contrary to the aims of the slave-based society. In the case of Black men, the tool of choice was repressive and excessive punishments, particularly state-sanctioned executions, for even minor crimes against the regime. For Black women, control came primarily in the form of the slave system of female dual-usage: slave women were expected to be both efficient laborers and efficient breeders. The legal system treated mother and child as property which required every tool of property law to protect, which necessarily negated any suggestion that a Black woman could be violated as an autonomous person.

These two doctrines combined to create a powerful myth of slave sexuality: Black men were lascivious³³ and must be kept from unrestrained sexual intercourse and assault, while Black women were portrayed as lascivious and therefore incapable of being raped.³⁴ Because of this lascivious nature, the myth continued; Black men could never be trusted to not attack White women, and Black women could never be trusted to be a constant and loyal mother.³⁵ The law, therefore, was thought to be needed to control both genders' wild sexual instincts.

A. *Controlling Slaves by Controlling Sex and Reproduction*

Slavery is commonly understood as the control of all aspects of a slave's social interactions. For a slave woman, that control extended to all aspects of her sexuality and biology. This was primarily a product of the strict caste system based on White race superiority required to maintain slavery. For slavery to be countenanced as anything other than cruel and unChristian subjugation and oppression, slavery supporters had to develop and maintain a theory of race purity supported by the legal system.³⁶ In this vein, one of the earliest laws in

³² See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 33 (1974) (noting the hegemonic relationship amongst the races permeated throughout the culture and the laws of the time).

³³ N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 *CARDOZO L. REV.* 1315, 1320 (2004) (analyzing construction of Black men as sexual "beasts"); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 *U.C. DAVIS L. REV.* 853, 860-61 (2006) ("[T]he Bad Black Man image emanates in part from a gender-specific assumption that heterosexual black men are a threat to the sexual security of white women.").

³⁴ This was in part due to the requirement of virginity or virtuous nature in prosecutions of rape. As Professor Roberts described, the attitude was not limited to prosecutors or White men generally: "As an unidentified Southern white woman wrote in *The Independent* in 1904, 'I cannot imagine such a creature as a virtuous black woman.' This construct of the licentious temptress served to justify white men's sexual abuse of Black women." ROBERTS, *supra* note 20, at 11.

³⁵ *Id.* at 14 ("The scapegoating of Black mothers dates back to slavery days, when mothers were blamed for the devastating effects of bondage on their children.").

³⁶ As stated so eloquently by Dorothy Roberts:

Only a theory rooted in nature could systematically account for the anomaly of slavery existing in a republic founded on a radical commitment to liberty, equality, and natural rights. Whites invented the hereditary trait of race and endowed it with the concept of racial superiority and inferiority to resolve the contradiction between slavery and liberty.

the American colonies was a 1662 statutory classification of the child of a White man and a slave woman as a “slave.”³⁷ This rule of descent, combined with the utter lack of criminal liability, created an economic incentive for owners to rape their slaves.³⁸

To justify this practice, it was necessary to construct and embrace an explanation for why a White man would have sex with his caste inferior.³⁹ The cognitive dissonance created by this reality led in large part to the creation of the myth of the sexually insatiable Black woman. By creating the narrative of the temptress slave, White men could absolve themselves of both their desires and their abuse of Black women by claiming to be victims of the female slaves’ power.⁴⁰

The second reason for controlling slave reproduction was the economic necessity of replenishing slave stock. The nation’s legal discomfiture with slavery ironically increased the slaveholder’s need to control slave women’s reproduction. The constitutional prohibition on the importation of slaves after 1808 further increased the need to regulate and control Black women’s reproduction.⁴¹ Once the slave population was stabilized by a prohibition on importation, the value of slave procreation was enhanced. This aspect of the control over slave reproduction hit its legal zenith with the adoption of the Constitution of the Confederate States of America.⁴² That constitution was the first written constitution in history to ban the importation of slaves:

Sec. 9. (I) The importation of negroes of the African race, from any foreign country other than the slaveholding States or Territories of the United States of America, is

Id. at 9.

³⁷ HIGGINBOTHAM, *supra* note 23, at 252.

³⁸ ROBERTS, *supra* note 20, at 22-23 (“Black procreation helped to sustain slavery, giving slave masters an economic incentive to govern Black women’s reproductive lives. Slave women’s childbearing replenished the enslaved labor force: Black women bore children who belonged to the slaveowner from the moment of their conception.”). See also Gail Elizabeth Wyatt, *The Sociocultural Context of African American and White American Women’s Rape*, 48 J. SOC. ISSUES 77, 79 (1992).

³⁹ This was not an imaginary practice; in 1860 10% of the slave population was categorized as “Mullato.” JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 37 (1986). See also ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 133 (1974) (estimating mixed-race slaves fathered by Whites were 1-2% of slave population).

⁴⁰ See ROBERTS, *supra* note 20, at 11.

⁴¹ U.S. CONST. art. 1, § 9. “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” *Id.* See also Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 457, 459 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004) (“Following the close of the (legal) international slave trade in 1808 . . . thriving domestic trade in black people emerged – supplied by black women’s childbearing.”); ROBERTS, *supra* note 20, at 24 (“The ban on importing slaves after 1808 and the steady inflation in their price made enslaved women’s childbearing even more valuable.”).

⁴² CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA, (1861), reprinted in MARSHALL L. DEROSA, *THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM* 135 (1991).

hereby forbidden; and Congress is required to pass such laws as shall effectually prevent the same.⁴³

B. *Controlling Slaves through Criminal Law and Punishments*

The influence of slavery and racism on criminal prosecutions and punishments cannot be overemphasized.⁴⁴ This control aspect was explicitly enshrined in laws that were written to single out Black defendants for execution for relatively petty crimes.⁴⁵ For example, in Virginia in the 1830s, there were five capital crimes for Whites and seventy-two capital offenses for Blacks.⁴⁶ In 1848, Virginia passed a statute that required the death penalty for a Black person convicted for any offense punishable by three years or more for a White.⁴⁷ In Louisiana, Virginia, "Tennessee, and Alabama slaves and free [B]lacks could receive the death penalty for burglary, arson, or the destruction of any house, building, or other property, including grain, corn and any other goods or chattel produced by [W]hites."⁴⁸ Whites convicted of the same offense might either receive two to five years in prison or were required to pay restitution.⁴⁹

The most dramatic changes in capital punishment statutes in America resulted from the development of slavery and large-scale plantation economies in the South.⁵⁰ Nowhere was the disparate treatment of Blacks and Whites

⁴³ *Id.* § 9, para. 1. The enforcement power was further described in paragraph 2: "Congress shall also have power to prohibit the introduction of slaves from any State not a member of, or Territory not belonging to, this Confederacy." *Id.* These provisions were reportedly a prerequisite to Virginia joining the Confederacy. With an excess slave population at the time, Virginia did not want foreign competition for one of its most readily marketable commodities.

⁴⁴ See, e.g., Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 49 (1995); Erika L. Johnson, "A Menace to Society:" *The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629, 637 (1994). In one specific context of punishment, scholars have argued that the current administration of the death penalty in America is closely linked to our country's history of slavery which maintains the attachment of stigma on Black Americans as a class. See generally WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982* (1984).

⁴⁵ BOWERS, *supra* note 44, at 140.

⁴⁶ DAVID A. JONES, *THE LAW OF CRIMINAL PROCEDURE: AN ANALYSIS AND CRITIQUE* 543 (1981). After the state of Virginia passed the Penitentiary Act of 1838, imprisonment for anywhere between five and twenty-one years penalized persons found guilty of second-degree murder. Due to the fact that slaves were not subject to incarceration in the penitentiary, enslaved persons could not be convicted of second-degree murder. The incapability of the jury to convict a slave of the lesser-included felony of second-degree murder most likely increased the probability that a slave charged with murder would receive the death penalty. See, e.g., L. Scott Stafford, *Slavery and the Arkansas Supreme Court*, 19 U. ARK. LITTLE ROCK L.J. 413, 464 (1996); Higginbotham & Jacobs, *supra* note 20, at 977.

⁴⁷ JONES, *supra* note 46.

⁴⁸ Vata Berger et al., *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437, 441 (1989).

⁴⁹ D. FLANIGAN, *THE CRIMINAL LAW OF SLAVERY AND FREEDOM, 1800-1868*, 24-27 (1987).

⁵⁰ Slavery and abolition have been linked throughout this nation's history. The original abolitionist movement during the nation's colonial period was religiously based. This movement, which was responsible for significant positive changes in the administration of the death penalty in the country, was not surprisingly subsumed in the anti-slavery movement, as human bondage based on race was then viewed as the greater evil facing the society. The most public and ardent critic of the death penalty during the colonial era was Dr. Benjamin

under the southern law more significant than in the area of capital sentencing.⁵¹ The laws of the southern states expressly prescribed different punishments depending on the race of the perpetrator of the crime.⁵² Racism played the legally explicit role in determining who was executed and who was spared.⁵³ State execution was a popular and oft-used method of slave population control.⁵⁴

As one consequence, southern states had far more capital crimes that reflected the value of a Black person as property.⁵⁵ Also because of the value of a slave, some states had to pay damages to owners whose slave was executed for committing a capital offense.⁵⁶

Perhaps in no other aspect of capital punishment was the effect of race more obvious than in sentencing for the crime of rape.⁵⁷ Severe punishments for Black men accused of even planning to rape a White woman were widely

Rush, a Pennsylvania physician, who in 1787 called the death penalty “an absurd and un-Christian practice,” and pushed for its abolition. See ROGER E. SCHWED, *ABOLITION AND CAPITAL PUNISHMENT: THE UNITED STATES’ JUDICIAL, POLITICAL, AND MORAL BAROMETER* 10-11 (1983). Dr. Rush’s treatise on the subject was America’s first reasoned argument that the death penalty exceeded the power of the government. Largely through Dr. Rush’s efforts, Pennsylvania abolished the death penalty in 1784 for all crimes except aggravated murder. An additional important reaction to the strong colonial abolitionist movement occurred in Tennessee which contributed to the capital punishment reform movement by abolishing mandatory sentence in favor of a discretionary system. These two innovations – aggravated mens rea requirements and discretionary sentencing where hailed by abolitionists but fell far short of the ultimate goal. See generally Thomas J. Smith Jr. & David E. Mullis, *McCleskey v. Kemp: An Equal Protection Challenge to Capital Punishment*, 39 *MERCER L. REV.* 675, 678 (1988). See also Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases*, *CHAMPION*, Feb. 21, 1997, at 19 (stating that capital punishment is “a direct descendant of lynching and other forms of racial violence,” and that it “remains as one of America’s most prominent vestiges of slavery and racial oppression”).

⁵¹ See Berger, *supra* note 48, at 441.

⁵² *Id.* (revealing the Slave Codes, both in the North and South, made it criminal for slaves to be “at large” or for more than a few slaves to gather at a single place. In addition, it was illegal for Blacks to make loud noises, smoke, or walk down the streets with canes.).

⁵³ Kweku Hanson, *Racial Disparities and the Law of Death: The Case for a New Hard Look at Race-Based Challenges to Capital Punishment*, 10 *NAT’L BLACK L.J.* 298, 303 (1987-1988).

⁵⁴ Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 *AM. U. J. GENDER & L.* 1, 11 (1995) (asserting in Virginia between 1706 and 1784, at least 555 slaves were condemned to death, and between 1785 and 1865, Virginia executed 628 slaves).

⁵⁵ BOWERS, *supra* note 44, at 13. Furthermore, it has been argued that because the form of slavery in United States was unregulated by the church or the crown – unlike slavery in Latin America – this country’s experience with slavery proved to be more brutal and dehumanizing.

⁵⁶ For example, some slave owners received as much as \$300 when one of their slaves was executed. *Id.*

⁵⁷ See, e.g., GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* 78 (Negro Univ. Press 1968). In mid-nineteenth century Virginia, blatant discrepancies in punishment for rape were easy to find. A White man convicted of raping a White woman would receive ten to twenty years imprisonment, whereas a free Black convicted of the same offense could receive death. Higginbotham & Jacobs, *supra* note 20, at 1059 (noting the great paranoia of the White male elite during this time period toward the threat of Black male sexuality).

used to restrict interactions between master and slave.⁵⁸ In 1816, Georgia required the death penalty for a Black man who raped or attempted to rape a White woman while reducing the minimum penalty from seven to two years and taking out the “hard labor” requirement for a White man convicted of the same crime.⁵⁹ The result was that the pre-Civil War statutory system not only reinforced the institution of slavery but perpetuated a gendered racist narrative that survived the war and informs our conceptions of prosecutable rape to this day.⁶⁰

II. CONSTITUTIONAL AMENDMENTS AND THE SEARCH FOR PROTECTION

The first step toward ending overt statutory disenfranchisement of Black women victims was taken, at least in the rebellious states, on January 1, 1863 with President Abraham Lincoln’s signing of the Emancipation Proclamation.⁶¹ In that document,⁶² President Lincoln first granted all persons held in bondage in the Confederate States their freedom: “[A]ll persons held as slaves within any state or designated part of a state, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever, free”⁶³

⁵⁸ For example, a Tennessee 1858 Law and Alabama Code of 1852 both required death as punishment for the rape of a White woman by a free Black or Black slave. Leigh Bienen, *Rape III – National Developments in Rape Reform Legislation*, 6 WOMEN’S RIGHTS L. REP. 170, 173 n.14 (1980). Both a Mississippi 1857 Statute and an Arkansas Code of 1838 made death the punishment for attempted rape by a Black man. *Id.* Additionally, death was not the only severe punishment as castration was also considered an appropriate punishment for attempted rape. *Id.*

⁵⁹ Compare GA. PENAL CODE (1816), §§ 33-34, app. 2a, n.5a, GA. ACTS (1816), No. 508, §. 1 with *id.* at app. 2a, n.6a (exhibiting the difference between the two punishments). See, e.g., Ursula Bentele, *Race and Capital Punishment in the United States and South Africa*, 19 BROOK. J. INT’L L. 235, 254 (1993); Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners *Coker v. Georgia*, 433 U.S. 584 (1977), 1976 WL 181482 at 50 n.72.

⁶⁰ See *infra* Section III. See also Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 56 (1996).

⁶¹ CARL SANDBURG, *STORM OVER THE LAND: A PROFILE OF THE CIVIL WAR TAKEN MAINLY FROM ABRAHAM LINCOLN: THE WAR YEARS* 153 (1942). The proclamation was originally drafted on September 22, 1862, but President Lincoln waited to sign and release the document until the beginning of 1863 when the war was more obviously favoring the Union. *Id.* at 152-53.

⁶² Emancipation Proclamation, No. 17, 12 Stat. 1268 (January 1, 1863). In an ironic twist, one of the underlying rationales for Lincoln’s claim that he had the power to emancipate the slaves was that the Confederacy considered slaves chattel and therefore were subject to control by the Union as part of the military’s right to seize enemy property. SANDBURG, *supra* note 61, at 21.

⁶³ Emancipation Proclamation, No. 17, 12 Stat. 1268 (January 1, 1863). For an excellent review of arguments for and against the legality or wisdom of the Emancipation Proclamation, see G. Sidney Buchanan et al., *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. REV. 1, 3-7 (1974). As noted by Professors Buchanan and Bass, there was no mention of race in the proclamation, merely to “persons held as slaves.” In the context of the White male politicians of the time, any such distinction would be redundant. *Id.* at 7. See also CONG. GLOBE, 38th Cong., 2d Sess. 120 (1864) (speech of Sen.

The primary purpose of the act was to disrupt the southern states' war effort by denying them the use of slave labor to support their government. The legal effect of the Emancipation Proclamation was to invalidate the discriminatory codes in the Confederate States and territories. The proclamation did not, however, alter the attitudes the slave codes embodied or the legal effects they occasioned. As one observer complained: "The proclamation *professes* to emancipate all slaves in places where the U.S. authorities cannot exercise any jurisdiction nor make emancipation a reality; but it does not *decree* emancipation of slaves in any states or parts of states occupied by federal troops."⁶⁴

As the legal response to the Emancipation Proclamation, almost all the former slave states enacted "Black Codes" regulating the legal and constitutional status of Black people. The Black Codes attempted to accomplish two goals: (1) enumerate the legal rights essential to the status of freedom of Blacks; and (2) provide a special criminal code for Blacks. The purpose of antebellum slave law was race control and labor discipline.⁶⁵ While the Black Codes did not serve exclusively to maintain slavery *qua* slavery, they were rooted in the cultural narrative of the inherent need to control Blacks through a rigid caste system because Blacks were inherently undisciplined and therefore inferior to Whites.⁶⁶

Furthermore, southern Whites did not view emancipation as creating a civil status for a freed slave so slave state legislatures drastically limited and sought to control the incidents of free status. These included the right to buy, sell, and own property; the right to contract valid marriages; the right to enjoy the legally recognized parent-child relationship; the right to travel and personal liberty; the right to sue and be sued; and the right to testify, but only in cases involving Black parties.⁶⁷

The Black Codes also recast the society of slavery by listing civil disabilities and recreating the race control features of the slave codes.⁶⁸ The Black

John A.J. Creswell, describing Maryland statute that made any Black person found in the State a slave).

⁶⁴ SANDBURG, *supra* note 61, at 23 (comment of English Foreign Minister Earl Russell).

⁶⁵ *Id.*

⁶⁶ See, e.g., Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89, 122-23 (1968) (noting that the Mississippi vagrancy laws were worded as to be facily used for the "reenslavement" of free Blacks); Kenneth L. Karst, *The Supreme Court 1976 Term Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 13 (1977) (asserting that Black Code statutes forbade African-Americans from owning or conveying property, inheriting property or goods, purchasing assets, or seeking access to the courts); Noel C. Richardson, *Is There a Current Incarceration Crisis in the Black Community? An Analysis of the Link Between Confinement, Capital, and Racism in the United States*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 183 (1997).

⁶⁷ Former U.S. Supreme Court Chief Justice Roger Taney interpreted the Privileges and Immunities Clause (Art. IV, 2) as the reason why free African-Americans could never be citizens of the United States. Taney could not envision free Blacks ever having the status of a full-fledged American citizen. See *Dred Scott v. Sandford*, 60 U.S. 393, 409-10 (1856). See also Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 381 (1993) (commenting on the great political and judicial debates dealing with the standing of the newly freed slaves).

⁶⁸ See, e.g., Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 90 (1985) (revealing that it is not astonishing that jurists and lawyers "born and reared" in the

Codes defined racial status, forbade Blacks from pursuing certain jobs or professions, prohibited Blacks from owning guns or other weapons, controlled the movement of Blacks through a series of passes, required proof of residence, prohibited the congregation of a group of Blacks, and listed a code of etiquette of deference to Whites. The Codes forbade racial intermarriage and provided the death penalty for Blacks who raped White women, while omitting similar punishments for Whites who raped Blacks. They excluded Blacks from jury duty, public office, and voting. They created racial segregation in public transportation and segregated schools. Most codes authorized whipping as punishments for freedmen's offenses.⁶⁹

The Codes brought back the labor-discipline elements of slave law through master-servant statutes, vagrancy and pauper provisions, apprenticeship regulation, and labor contract statutes – particularly those pertaining to farm labor.⁷⁰ Magistrates could hire out offenders unable to pay fines. These statutes provided the basis for subsequent efforts to create a legal or paralegal structure forcing Blacks to work and restricting their occupational mobility.⁷¹

Additionally, the Black Codes differentiated capital crimes based on race.⁷² In an effort to strengthen the landowner class's hold on wealth, to expel the threat posed by a populace of Blacks who had no property, and to arrange for a source of inexpensive labor, southern legislatures passed "pig laws." These statutes made the trivial theft of swine, mules, or cattle of any price a capital offense. The legislatures established these laws in a period when those most vulnerable to prosecution were impoverished Blacks. Once again, the

confederacy's slave culture of the mid to late nineteenth century manipulated the law to protect that culture); Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CALIF. L. REV. 441, 447-48 (1997) (remarking that "slave codes of the ante-bellum period were the basis of the Black codes of 1865-66 and later were resurrected as the segregation statutes of the period after 1877").

⁶⁹ See, e.g., IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 316-40 (1974) (noting that free Blacks were often subject to whipping on top of, or instead of fines or jail time); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 458 (1989) (commenting that lashing, tying up by the thumbs, deception of wages, overworking, combining for the prospect of extortion, and binding out of children as apprentices lacking parental consent were common in the years after slavery).

⁷⁰ See Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 HOW. L.J. 521, 522-23 (1995) (asserting that the complex codes of labor regulation were cautiously endorsed by state criminal justice systems that sold or rented incarcerated Blacks into farm labor, frequently with their former slave-masters as supervisors).

⁷¹ See, e.g., A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free": *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 42 (1991) (noting that these laws proscribed free Blacks from performing a number of occupations, including teaching, preaching, and ownership of a small business); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1054 (1994) (adding that after Reconstruction, southern Whites utilized segregation to counter the threat of African-American economic progress).

⁷² See generally Noel C. Richardson, *Is There a Current Incarceration Crisis in the Black Community? An Analysis of the Link Between Confinement, Capital, and Racism in the United States*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 183, 208 (1997).

criminal laws conspired to assert the economic control of Whites over all aspects of Black freedom.

A. *The Thirteenth Amendment and Slave Victimization*

The Congressional response to this re-enslavement by law was the proposal and enactment of a universal prohibition on the legal institution of slavery that would become the Thirteenth Amendment:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.⁷³

The two pithy sections of that Amendment masked a serious constitutional fight between those who sought to preserve states' power and those who saw a broad role for the general government after the civil war.

The primary arguments against the Thirteenth Amendment were based on the inevitable shift of power from states to the federal government in the regulation of social arrangements. The Democratic argument was summarized by Mr. Fernando Wood, who recognized that the Constitution allowed amendment upon ratification of three-fourths of the states, but nonetheless argued for nothing less than unanimity:

[F]or those three fourths to attempt a revolution in social or religious rights by seizing upon what was never intended to be delegated by any of the parties to the compact, would be a prodigy of injustice carried out under the forms of law, a wrong more fatally so because made by the very highest authority. . . . The local jurisdiction over slavery was one of the subjects particularly guarded and guarantied to the States, and an amendment ratified by any number of states less than the whole, though within the letter of the article which provides for amendments, would be contrary to the spirit of the instrument, and so in reality an act of gross bad faith.⁷⁴

The second argument against adoption was the unacceptable nature of equality suggested by the enactment. Although the end of slavery was at this point inevitable, true emancipation through legal equality was very much in question. One can discern the intended consequences of legislation or constitutional amendment by referring to the opponents arguments and understanding. For example, one Congressman, Elijah Ward, opposed the proposed amendment because it would "amend the Constitution so that all persons shall be equal under the law, without regard to color"⁷⁵ This expressed concern about legal equality was used by opponents to snidely suggest that the amendment would create a world in which "before the law a woman would be equal to a man [and a] wife would be equal to her husband and as free as her

⁷³ U.S. CONST. amend. XIII, §§ 1-2.

⁷⁴ CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864). See also *id.* at 2615-18 (comments of Rep. Anson Herrick); *id.* at 2981-83 (comments of Rep. Robert Mallory).

⁷⁵ CONG. GLOBE, 38th Cong., 2d Sess. 177 (1865). This is reminiscent of Justice Brennan's critique of the Supreme Court's decision in *McCleskey v. Kemp*, 481 US 279, 339 (1987) (Brennan, J., dissenting) ("Taken on its face, such a statement seems to suggest a fear of too much justice.").

husband before the law.”⁷⁶ This comment and other similar statements⁷⁷ indicate how few protections all women had at the framing of the Thirteenth Amendment, let alone Black women.

Those who believed that the ratification of the Thirteenth Amendment was an absolute necessity for the continuation of the Union argued first that the Emancipation Proclamation was insufficient to the cause of abolition.⁷⁸ The goal of the enactment was, to its proponents, nothing less than the goal of equal protection for all people of all races.⁷⁹ One Representative hopefully saw the ultimate role of the amendment as assuring “that the rights of mankind, without regard to color or race, are respected and protected.”⁸⁰

To that end, the supporters of the Thirteenth Amendment saw it as a much more general tool than one which simply ended the legal status of “slave.” The object was to create a legal structure in which all people could own, sell, purchase, devise, and inherit property; and to create a nation where each person could testify in court and could seek enforcement of contracts and redress for torts. Most importantly, each person would be protected equally and would have equal application of all laws.⁸¹ Representative Wilson, who expressed his hope that the Thirteenth Amendment would “make the future safe for the rights of each and every citizen”⁸² summarized the intended effect of ratification:

[T]he slavery which the Thirteenth Amendment would abolish [is] the involuntary personal servitude of the bondman; the denial to the blacks, bond and free, of their natural rights through the failure of the government to protect them and to protect them equally; the denial to the whites of their natural and constitutional rights through a similar failure of government.⁸³

Wilson’s focus on the failure of government to protect citizens against crimes of “kidnapping, imprisoning, mobbing, and murdering”⁸⁴ indicated just how much the failure of prosecutors to address the rights of victims of violent crimes played in the Congressional understanding of racial injustice.

⁷⁶ CONG. GLOBE, 1st Sess. 1488 (1864) (Comments of Senator Howard). This argument is reminiscent of the inclusion by opponents of the word “sex” as a poison pill in the civil rights act of 1964.

⁷⁷ See CONG. GLOBE, 38th Cong., 2d Sess. 2, 242 (1865) (Comments of Mr. Cox: “[Will this amendment] change the relation of parent and child, guardian and ward, husband and wife, the laws of inheritance, the laws of legitimacy?”).

⁷⁸ *Id.* at 174-75.

⁷⁹ See Buchanan et al., *supra* note 63, at 9-10 (examining the natural rights arguments put forward by the Thirteenth Amendment proponents). Under the natural rights view, enactment of the amendment would restore the natural rights of all people. Congressmen of this view argued that the original slavery compromise was an inevitable tension with the constitutional foundation as expressed in the preamble. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 1202-03 (1864) (comments of Rep. Wilson). See also *id.* at 1479-83, 2988-90 (comments of Rep. Ingersoll). See also JEROME HUYLER, *LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA*, 209-12, 246-50 (1995); Tania Tetlow, *The Founders and Slavery: A Crisis of Conscience*, 3 *LOY. J. PUB. INT. L.* 1, 11 (2001) (quoting Thomas Jefferson’s original anti-slavery draft of the Declaration of Independence).

⁸⁰ CONG. GLOBE, 38th Cong., 1st Sess. 2989 (1864).

⁸¹ See Buchanan et al., *supra* note 63, at 10-11.

⁸² CONG. GLOBE, 38th Cong., 1st Sess. 1203 (1864).

⁸³ Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 *CALIF. L. REV.* 171, 180 (1951).

⁸⁴ CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865).

To give substance to the promise of the Thirteenth Amendment, Congress began work on enabling and enforcement legislation at the opening of its 39th Session. Although many versions of enforcement legislation were proposed,⁸⁵ the primary bill urged in Congress was the proposal which originated in the Senate Judiciary Committee, chaired by Lyman Trumbull, Republican Senator from Connecticut.⁸⁶ The chief concern of the majority in Congress was that the newly freed slaves would now be treated equally under the laws of the several states and territories. Senator Trumbull's proposal adopted the concerns and goals of many of the proposals and eventually became the Civil Rights Act of 1866.⁸⁷

The second enforcement legislation was included in amendments to the Freedmen's Bureau Act that became law three months after the Civil Rights Act of 1866.⁸⁸ The original Freedmen's Bureau Act was passed in 1864, soon after the end of hostilities, to support the enforcement of the Emancipation Proclamation and to ease the transition from slavery to a free populace in the southern and border states.⁸⁹ As the leader of the Radical House Republicans, Thaddeus Stevens argued:

We have turned, or are about to turn, loose four million slaves without a hut to shelter them or a cent in their pockets. The infernal laws of slavery have prevented them from acquiring an education, understanding the commonest laws of contract, or of managing the ordinary business of life. This Congress is bound to provide for them until they can take care of themselves.⁹⁰

Both the Civil Rights Act and the amendments to the Freedmen's Bureau Act sought to create an equality of rights between all races, and therefore did not specifically single out Blacks or ex-slaves as the recipients of particular legal preference.⁹¹ In each act (§1 of the Civil Rights bill and §14 of the Freedmen's Bureau bill) Congress mandated a similar set of rights to be guaranteed to all citizens. As enacted in the Civil Rights Act:

[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall

⁸⁵ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 46 (1865) (Rep. Farnsworth's bill protecting Black soldiers seeking to grant them "full protection in the enjoyment of their inalienable rights"); *id.* at 39 (Sen. Wilson sponsored a bill to amend the Freedmen's Bureau Act of 1864 which would invalidate all laws that created or maintained any inequality between races or previous condition of slavery); *id.* at 91-95 (Sen. Sumner introduced two bills which would declare all persons equal before the law and designate the federal courts as possessing exclusive jurisdiction over actions in which a Black was a party).

⁸⁶ Buchanan et al., *supra* note 63, at 15 (quoting Sen. Trumbull as aiming to "abolish slavery, not only in name but in fact . . ." citing CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865)).

⁸⁷ Ch. 31, 14 Stat. 27-30 (1866) (current version at 42 U.S.C.A. § 1982 (2006)).

⁸⁸ Freedmen's Bureau Act, ch. 200, 14 Stat. 173-77 (1866).

⁸⁹ See generally W. E. Burghardt Du Bois, *The Freedmen's Bureau*, 87 ATLANTIC MONTHLY 354, 354-65 (1901).

⁹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865).

⁹¹ As President Andrew Johnson wrote to Congress in March of 1866 regarding the Civil Rights Act, "This provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes and persons of African blood." JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, Vol. 8, at 3603 (1897).

have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.⁹²

Both Acts included specific requirements that each person receive the full protection of laws related to personal security – in other words, equal application and access of criminal laws and their prosecution.⁹³ Although the criminal law discrimination in the Black Codes was one target of these Acts, many also understood that equality was also threatened by customary practice, prejudice and a failure to act. For example, Senator William Lawrence of Ohio argued that there were “two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them.”⁹⁴ For the proponents of these expressions of equal protection, the very quality of natural law-based citizenship required government action to protect each person equally in the pursuit of their inalienable rights.⁹⁵

Both the Civil Rights Act and the Freedmen’s Bureau Act of 1866 passed after original veto attempts by President Johnson.⁹⁶ The opposition to this enforcement regulation in the Executive branch and in Congress, as well as the continued resistance in the states, convinced many that Congressional enactment alone would not be sufficient to secure equal protection of the laws. In this way, these acts stood between the Thirteenth and Fourteenth Amendments – straddling the grand aspirations of the former and the need for the permanent and technical legal protections offered by the latter.

B. *The Fourteenth Amendment and Protecting the Freed*

The Fourteenth Amendment⁹⁷ was proposed in June of 1866 after Congress passed four statutes under its Thirteenth Amendment Power and after one

⁹² Civil Rights Act, ch 31, 14 Stat. 27 (1866) (current version at 42 U.S.C.A. § 1982 (2006)). Interestingly, the Freedmen’s Bureau Act was slightly different and included the right to bear arms, which was a direct result of the frequent attempt to disarm Black Union soldiers. Freedmen’s Bureau Act, ch. 200, 14 Stat. 176-77 (1866).

⁹³ The Freedmen’s Bureau Act, like the Civil Rights Act, mandated the “full and equal benefit of all laws and proceeding concerning personal liberty [and] personal security. . . .” Freedmen’s Bureau Act, ch. 200, 14 Stat. 176 (1866).

⁹⁴ CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

⁹⁵ See Buchanan et al., *supra* note 63, at 19 (“For [Senators] Trumbull and Lawrence, the abolition of slavery also eliminated the legal pretext for denying equal protection of the laws to any class of citizens.”).

⁹⁶ The Civil Rights Act was finally passed in April, 1866, after Congress overrode by narrow margins President Johnson’s veto. CONG. GLOBE, 39th Cong., 1st Sess. 1802 (Senate Vote April 6, 1866); *id.* at 1861 (House vote April 9, 1866). The Freedmen’s Bureau Act, after two veto efforts, was finally approved by President Johnson in July of 1866. S. EXEC. DOC. NO. 29, 39th Cong., 2d Sess. 75 (1866).

⁹⁷ U.S. CONST. amend. XIV. Proposed in June of 1866, between the final enactment of the Civil Rights Act of 1866 and the Freedmen’s Bureau Act of 1866, the final ratification of the Fourteenth Amendment did not occur until July, 1868.

of those statutes, the Civil Rights Act of 1866, was challenged in court. This reality was not lost on the reconstruction Congress which understood that race-of-victim and race-of-defendant discrimination was a widespread intolerable evil. Therefore Congress, during its attempts to address the racial wrongs still widely occasioned in the South, became aware of the specific problem of inadequate enforcement of the laws by White police, prosecutors, juries, and judges.⁹⁸ This unequal application of the law was especially true in criminal cases in which Black persons were victims of White perpetrators. Significantly, the Congress heard testimony of southern White officials' refusal to prosecute criminal cases in which White perpetrators committed serious violence against Blacks. A number of military officers stationed in the rebellious states testified to Congress about the lack of legal remedies for Black victims of crime.⁹⁹ For example, Lt. Col. Dexter Clapp testified: "Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me . . . I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons."¹⁰⁰ Similarly, Major General George Custer similarly testified: "I believe a white man has never been hung for murder in Texas, although it is the law. Cases have occurred of white men meeting freedmen they never saw before, and murdering them merely from this feeling of hostility to them as a class."¹⁰¹

This testimony, from those in the federal government charged with overseeing the reconstruction of the South, was available to those who ultimately enacted the Fourteenth Amendment.¹⁰² Further, this testimony supported the

⁹⁸ See generally REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, AT THE FIRST SESSION THIRTY-NINTH CONGRESS (Negro Universities Press 1969) (1866) [hereinafter JOINT COMMITTEE ON RECONSTRUCTION]. The Congressional Joint Committee on Reconstruction (also known as the Committee of Fifteen) drafted the bill that was eventually adopted as the Fourteenth Amendment. See *Adamson v. California*, 332 U.S. 46, 92-94 (1947) (Black, J., dissenting); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 19-21, 24-25, 41-42 (1949).

⁹⁹ See generally, JOINT COMMITTEE ON RECONSTRUCTION *supra* note 99, at Parts II-IV.

¹⁰⁰ *Id.* part II, at 209. The failure to prosecute crimes against Whites who attacked Blacks was a major motif of the Congressional testimony. See *id.* part II, at 25 (testimony of Mr. George Tucker, Commonwealth Attorney: "[the southern people] have not any idea of prosecuting white men for offences against colored people; they do not appreciate the idea."); *id.* part II, at 213 (testimony of Lt. Col. J. Campbell: "There was a case reported in Pitt County of a man named Carson who murdered a Negro. There was also a case reported to me of a man named Cooley who murdered a Negro near Goldsborough. Neither of these men has been tried or arrested."); *id.* part III, at 141 (testimony of Brevet Maj. Gen. Wagner Swayne: "I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung or sent to the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me.").

¹⁰¹ JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 99, at Part IV, at 75-76.

¹⁰² The Committee of Fifteen, after hearing extensive testimony of the type excerpted above, "ordered all evidence taken to be brought forward as rapidly as might be, to be printed." CONG. GLOBE, 39th Cong., 1st Sess. 1368 (1865-66). In fact, members of the House delegation to the Committee of Fifteen submitted substantial portions of the testimony to the House as early as March 7, 1866, months before the Fourteenth Amendment was debated in June, 1866. *Id.* at 1240 (remarks of Rep. Washburne). On March 13, 1866, the House passed a resolution that "twenty-five thousand extra copies of each of the reports of

arguments of those who sought enactment of the Fourteenth Amendment to secure equal legal redress of crimes for both Blacks and Whites.¹⁰³

There is other evidence suggesting that Congress was focused on the problem of racially biased prosecution when drafting and enacting the Fourteenth Amendment. For example, during the same session as debates over the Fourteenth Amendment, Congress debated the Freedman's Bureau Act of 1866.¹⁰⁴ As Representative Creswell stated:

I have received within the last two or three weeks letters from gentlemen of the highest respectability in my State asserting that combinations of returned rebel soldiers have been formed for the express purpose of persecuting, beating most cruelly, and in some cases actually murdering the returned colored soldiers of the Republic. In certain sections of my State the civil law affords no remedy at all. It is impossible there to enforce against these people so violating the law the penalties which the law has prescribed for these offenses.¹⁰⁵

In short, the vast amount of information before Congress at the time of the debate and enactment of the Fourteenth Amendment led inexorably to the conclusion that White authorities undervalued or disregarded Black victims of crimes. Failure to enact the Fourteenth Amendment was considered equivalent to re-enslavement.¹⁰⁶ Although the passage of the Thirteenth Amendment was sufficient to end slavery and was a reasonable basis for the end of *de jure* criminal discrimination, the passage of the Fourteenth Amendment pointedly

testimony taken by the joint select committee, together with the accompanying documents, be printed without covers for the use of the House." *Id.* at 1368.

¹⁰³ For example, Representative Bingham, a member of the Committee of Fifteen and drafter of § 1 of the Amendment, argued to the House that a constitutional amendment was needed in large part to eliminate the denial to certain citizens of the protection of the courts and the deprivation of these citizens' right to procure redress of injuries through the courts. CONG. GLOBE, 39th Cong., 1st Sess., 2459. Likewise, Representative Thaddeus Stevens, Chairman of the House delegation of the Committee of Fifteen and drafter of an earlier version of the amendment, argued on the floor of the House that the amendment was necessary to afford equal means of legal redress to Blacks and Whites. *Id.* at 2459.

¹⁰⁴ See CONG. GLOBE, 39th Cong., 1st Sess. (1864).

¹⁰⁵ *Id.* at 339. See also *id.* at 340 (remarks of Rep. Wilson: "[W]herever the Freedman's Bureau does not reach, where its agents are not to be found, there you will find injustice and cruelty, and whippings and scourgings and murders that darken the continent."); *id.* at 516-17 (remarks of Rep. Eliot: "[T]here is not one rebel State where these freedmen could live in safety if the arm of the Government is withheld. . . . In Mississippi houses have been burned and negroes have been murdered. . . . [I]f the arm of the Government is withheld from protecting these men, and the powers of this bureau are not continued and enlarged, much injustice will be done to these freedmen, and there will be no one there to tell the story.').

¹⁰⁶ CONG. GLOBE, 39th Cong., 1st Sess. 631 (1866). For another example, see the remarks of Rep. Moulton:

One object of the bill is to ameliorate the condition of the colored man and to protect him against the rapacity and violence of his southern prosecutors. . . . Suppose the Federal power was removed from the southern States to-day; suppose the Army was removed; suppose there was no Freedman's Bureau for the purpose of protecting freedmen and white refugees there, what would be the consequences? Why, sir, the entire body of the freedmen would be annihilated, enslaved, or expatriated. . . . The testimony which will be published that has been exhibited before the committee of fifteen will astonish the world as to . . . the condition of things in the South.

Id. at 633.

abolished the statutory assignment of different punishments for rapes committed by different races.¹⁰⁷

III. THE POST-AMENDMENT CENTURY OF RACE AND RAPE

The post-Civil War constitutional amendments sought to rebalance the natural law rights of all citizens and create a legal world of equality. However, in most areas, former slaves retained most of the burdens of their prior servitude and wore the badges of their slavery. Black women's standing as legally unprotected victims of rape was one of these badges. Although the laws no longer defined crimes and punishments by race of victim and race of offender, those with the discretionary power to wield the law – police, prosecutors and judges – mostly acted as if nothing had changed. Therefore, the societal norms that drove the rationalized underpinnings of slavery continued, mostly unabated, into the post-slavery period. This resulted in the stark continuation of the two-pronged gendered racism in criminal prosecution and punishments for rape.¹⁰⁸ After the enactment of the Thirteenth and Fourteenth Amendments, although statutes facially included victims of all races, raping a Black woman remained a crime not worthy of prosecutor's attention or effort.¹⁰⁹ The experience for Black women was the same under either legal regimen – no legal outlet for vindication of the most egregious violations.¹¹⁰

Although the legal barriers to prosecution had changed, the attitudes about race and sexuality had not. Black men and women were still considered sexually promiscuous in a way that allegedly endangered White women and made rape of a Black woman legally impossible.¹¹¹ One of the aspects of rape law that perpetuated this stereotype was the "force" element of the crime which required prosecutors to prove beyond a reasonable doubt that the sexual assault was accomplished through actual force or credible threat of force. The force element required a prosecutor to negate "consent" even before consent was raised as a defensive issue.¹¹² Under this statutory scheme, the dual evils of gendered racism played a strong part for presumably no White woman would ever consent to sex with a Black man, which relieved the prosecution of its burden on the element of "force." Similarly, no Black woman was presumed virginal or chaste and was therefore presumed promiscuous. These negative

¹⁰⁷ SAMUEL R. GROSS & ROBERTO MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 119 (1989). See also Bentele, *supra* note 59, at 255 (stating that the Equal Protection Clause of the Fourteenth Amendment was the reason for disparate criminal laws being eradicated); Wriggins, *supra* note 6, at 106 n.18 ("A compilation of all post-Civil War state legislation enacted prior to 1917 that mentioned race contained no rape statutes." citing F. JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO (1918)). The one exception to the end of overtly race-specific criminal regulation legislation was the many anti-miscegenation statutes which attempted once again to control, *inter alia*, the reproduction choices of Black citizens. See *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁰⁸ See *supra* note 16.

¹⁰⁹ See *infra* Section III.

¹¹⁰ See Holden-Smith, *supra* note 60, at 56.

¹¹¹ ROBERTS, *supra* note 20.

¹¹² Most troubling aspects of rape laws before the statutory improvements started in the 1970s.

presumptions made it all but impossible for the prosecutor to prove the force element.

Current statistics regarding the number and type of rape prosecutions across the United States are thin at best.¹¹³ Information regarding those practices in the period prior to 1930 is almost non-existent. However, two important facts of the first three-quarters of the twentieth century provide a complete picture of the gendered racism and politics of race during that period. First, the history of the practice of lynching in this country is reasonably well documented.¹¹⁴

The long anti-lynching campaign of the National Association for the Advancement of Colored People and other organizations afforded a reasonable view of the attitudes of the times from a century's remove. Second, the crime of "rape" standing alone was a death penalty offense in many jurisdictions, particularly in the former slave states, until 1976, when the Supreme Court held that the death penalty was an unconstitutional punishment for rape. The decades-long litigation in which capital rape cases were presented as prime examples of the racist nature of the criminal justice system of the time provides a sufficient body of research and statistics to form several conclusions and hypotheses about current prosecution practices. We therefore have more legal documentation of the racial disparities in rape prosecutions in the 100 years after the enactment of the Fourteenth Amendment than for any other individual crime.¹¹⁵

A. Lynching

Rape was used as a tool of oppression by those who sought to maintain White supremacy over Blacks. First, rape or threat of rape was the public argument given for lynching Black men. In addition to acting as one of the primary motives for lynching, rape of Black women was also a documented tool of mobs and the Ku Klux Klan.¹¹⁶

The violent act of murder by lynching can be considered one of the primary tools of race control after the enactment of the anti-slavery amendments. For the period between 1880 and 1950, researchers have placed the number of people lynched between 4700 and 5000.¹¹⁷ This means that nearly six people were lynched every month for seventy years. Three-quarters of these people –

¹¹³ See *infra* Section IV.

¹¹⁴ See *infra* notes 11-126 and accompanying text.

¹¹⁵ There is some information available regarding armed robbery, which was in many states a stand-alone capital offense prior to 1976. The information related to murder as a capital offense is complicated by the fact that many states proceeded on theories of felony murder, which is a mixed death and another crime category.

¹¹⁶ See ROBERTS, *supra* note 20, at 30:

[W]hite men also exploited Black women sexually as a means of subjugating the entire Black community. After Emancipation, the Ku Klux Klan's terror included the rape of Black women, as well as the more commonly cited lynching of Black men. White sexual violence attacked not only freed Black men's masculinity by challenging their ability to protect Black women; it also invaded freed Black women's dominion over their own bodies.

¹¹⁷ See Wriggins, *supra* note 6, at 107 (citing ARNOLD ROSE, *THE NEGRO IN AMERICA* 185 (1948); White, *A Statement of Fact [on Lynching]*, in *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 1910-1932* 610 (Herbert Aptheker ed., 1973)).

about 3700 – were Black.¹¹⁸ The most common public reason for lynching was that White women needed to be protected from Black rapists and attempted rapists.¹¹⁹

Hatton Summers, a Congressional Democrat from Texas, was one of many southerners in Congress during the 1920s that supported the lynching of Black men who were accused of raping White woman. During a 1921 Congressional debate, Summers argued:

When a white woman is raped by a black man the call to the man is from his two strongest, most primitive instincts When that call comes from the woman who has been raped by a man of alien blood, woman, who in every age of the world has been the faithful guardian of the purity of the race – when that call comes it is the call of his woman and the call of his blood, and he goes. It is not an easy situation to deal with He goes not alone. His neighbors, whose women live under the same danger, go with him. The impulse is to kill, to kill as a wild beast would be killed.¹²⁰

Such was the acceptable nature of gendered racism in the discussion of rape, that it was seen as a fitting topic for a speech on the floor of the United States Congress. This core attitude admitted by Mr. Summers was summed up by the anti-lynching advocate and crusader Ida B. Wells, who observed that “[w]hite men used their ownership of the body of the white female[s] as a terrain on which to lynch the black male.”¹²¹

Although the available statistics are incomplete, there is wide agreement that lynchings directed primarily against Blacks in the South far outnumber the number of executions legally imposed.¹²² Whites claimed that Blacks were an uncontrollable danger to White society, making lynching a necessary tool of controlling the Black populace.¹²³ During the twentieth century, lynching

¹¹⁸ *Id.*

¹¹⁹ See ROSE, *supra* note 117, at 185. See also ARTHUR F. RAPER, THE TRAGEDY OF LYNCHING 50 (1933) (indicating that the common wisdom was that all Blacks were “inclined to commit certain crimes, chief of which is the rape of white women”); Ida B. Wells, *Lynching Bee*, in A RED RECORD, LYNCHINGS IN THE UNITED STATES (1895) (describing the racial anger and physical torture that accompanied lynching).

¹²⁰ 62 CONG. REC. 799 (1921). In the same debate, Representative Percy Quin of Mississippi agreed with Summers, and went on to state that the “good black people” understood why White men lynched the Black rapist. 62 CONG. REC. 1788-89 (1921).

¹²¹ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600 (1990).

¹²² Southerners discovered in the early- to mid-twentieth century that lynching was a messy business that created bad press. Lynching was increasingly substituted by procedures “in which the Southern legal system prostituted itself to the mob’s demand.” DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 115 (rev. ed. 1979). Accountable officials pleaded for would-be lynchers to “let the law take its course,” thus virtually promising that there would be an expeditious trial and the death penalty. These proceedings retained the essential quality of mob murders, abandoning only its surface forms. *Id.* See also Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 819 (1998) (claiming that the legal system declined to discipline Whites who engaged in violence against African-Americans at the turn of the century).

¹²³ See Robert L. Zangrando, *The NAACP Crusade Against Lynching, 1909-1950* 3 (1980) (asserting that lynching was used to “intimidate, degrade, and control black people throughout the southern and border states, from Reconstruction to the mid-twentieth century”). See also 18 U.S.C. §§ 241-242 (2000) (principal federal statutes against lynching).

decreased from a high of 130 in 1901 to 2 in 1950, and none thereafter until 1957, when there was one lynching every other year until the mid-1960s.¹²⁴ This decrease in the number of lynchings, however, was inversely proportionate to the number of legal executions of Black men for the rape of White women. Where there once was mob violence to act on White gendered racism regarding rape, there would now be the law.

B. State Executions for Rape

A very public examination of the early twentieth century relationship between gender, race, rape, and capital punishment law came in the infamous "Scottsboro Boys" series of trials and appeals¹²⁵ in which nine young Black boys were charged with the armed rape of two White girls.¹²⁶ Although the case ultimately resulted in three monumental Supreme Court rulings,¹²⁷ the underlying arguments in the numerous trials played primarily on the image of White female purity and Black male (even very young Black male) uncontrollable lasciviousness.¹²⁸

These attitudes about rape were so firmly embedded in the national consciousness that tangible proof of the gendered racism of rape prosecutions was evident in the death rows across the country. Prior to 1976, execution was a legally available punishment for the crime of rape alone.¹²⁹ The availability of legal avenues as well as the continued male dominance of legal discourse in the middle of the twentieth century all but assured that the first prong of the gendered racism of rape prosecutions would be the victim/offender dyad associated with overvaluing White victims through the prosecution of Black male perpetrators.

¹²⁴ Tuskegee Institute, *Lynchings: by Year and Race, 1882-1968*, available at <http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html> (last visited Jan. 10, 2007).

¹²⁵ See, e.g., direct appeal decisions after the initial trials: *Patterson v. State*, 141 So. 195 (Ala. 1932); *Powell v. State*, 141 So. 201 (Ala. 1932); *Weems v. State*, 141 So. 215 (Ala. 1932).

¹²⁶ See generally CARTER, *supra* note 122, at 11-49 (describing the initial trial of the Scottsboro boys). Two books were written about the event and experience by one-time defendants in the case. See CLARENCE NORRIS & SYBIL D. WASHINGTON, *THE LAST OF THE SCOTTSBORO BOYS* (1979).

¹²⁷ See *Powell v. Alabama*, 287 U.S. 45, 72 (1932) (the execution of Black defendants charged with a capital crime who are young, illiterate, poor, and had no counsel "would be little short of judicial murder . . . [and is] a gross violation of the guarantee of due process of law . . ."); *Norris v. Alabama*, 294 U.S. 587 (1935) (Fourteenth Amendment right to participate in grand juries is a federal claim of mixed fact and law and general claims of performing duty as jury commissioner do not rebut presumption of unconstitutional exclusion of qualified Black jurors from sitting on grand juries in Morgan County, Alabama); *Patterson v. Alabama*, 294 U.S. 600 (1935) (same).

¹²⁸ In the closing comments to the jury, the judge presiding in the second round of Patterson's trial after the Supreme Court reversal in *Powell v. Alabama* instructed the jury that they should presume no White woman in Alabama would consent to sex with a Black. See N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 *CARDOZO L. REV.* 1315 (2004) (analyzing the constructed sexual image of Black men).

¹²⁹ See *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape of adult female violates Eighth Amendment proscription of cruel and unusual punishments). See *infra* notes 173-202 and accompanying text.

The focus of the majority of the early studies was on the race of the defendant, not the race of the victim. Data compiled before 1930 are not totally accurate because data on rape sentencing after a formal trial did not start until 1930.¹³⁰ Professor Guy B. Johnson, a noted Black culture researcher, claimed there were no comprehensive studies on the race of the victim in rape cases where the defendant was Black and ultimately sentenced to death.¹³¹ Much of the studies on rape between 1930 and the *Coker* opinion focused on specific cities or states and focused on Black defendants, not the race of the victims. Professor Johnson seems to be the first researcher to advocate a change in the way studies were conducted, by actually incorporating the races of the offenders and victims. When Professor Johnson wrote his article *The Negro and Crime* in 1941, the methodology for developing crime statistics focused mostly on the race of the offender.¹³² Professor Johnson advocated incorporating the race of the victim in research methods to develop more accurate and complete data.¹³³ Johnson felt that, at least in the South, Black offenses against Black victims were treated with "undue leniency," while Black offenses against White victims were treated with "undue severity."¹³⁴

As prescient as Johnson was, the efforts of most litigators and researchers continued to focus on the Black defendant/White victim aspect of the rape and race issue. Research studies from 1930 to 1950 show that rape made up 11.1% of the total number of death sentences, second only to murder.¹³⁵ The former slave states and the federal government employed the death penalty for rape and other sexual assaults.¹³⁶ The southern states that used the death penalty as punishment for rape primarily used the death penalty against Black men.¹³⁷ In all other parts of the country, the only crime for which the death penalty was frequently imposed during this time period was for a conviction of first degree

¹³⁰ See Brief for NAACP et al. as Amici Curiae Supporting Petitioner at 13, *Furman v. Georgia*, 408 U.S. 238 (1971) (Nos. 68-5027, 69-5030, 69-5003, 69-5031).

¹³¹ See Guy B. Johnson, *The Negro and Crime*, 217 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 98 (1941). "It is impossible to obtain a clear-cut answer from judicial statistics at present, for these statistics are especially weak for the southern states and they rarely present us with the necessary data, namely, the details of dispositions by offense, race, and sex." *Id.*
¹³² *Id.*

¹³³ See *id.* Professor Johnson hypothesized that differentials in the treatment of Black victims in southern courts existed and the data which would demonstrate different treatment was being obscured in the south because the conventional crime statistics only took into account the race of the offender. Furthermore, instead of two categories of offenders (Black and White) Johnson advocated a four category scheme: (1) Black versus White, (2) White versus White, (3) Black versus Black, and (4) White versus Black. *Id.*

¹³⁴ *Id.* See, e.g., Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 125 (1973) (mentioning a Florida study from 1940 to 1964 that included the race of victim and offender). During this time period, in six cases (or 5%) where a White male raped a White female were the accused executed. However, of the eighty-four Black males who raped White females, forty-five (or 54%) received the death penalty. In comparison, of the eight White offenders actually prosecuted for raping a Black female, none was given the death penalty. *Id.*

¹³⁵ Frank E. Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 10 (1952). From 1930 to 1950 there were 335 people sentenced to death for rape, second only to murder with 2645 people sentenced to death. *Id.*

¹³⁶ See *id.*

¹³⁷ See *id.*

murder.¹³⁸ A study by Edward B. Reuter showed that in spite of the fact that the population percentages of African-Americans in the North and the South were nearly the same in the first decade of the twentieth century, Black men accounted for 66% of the rape sentences in the South whereas Black men in the North only accounted for 13% of the rape sentences.¹³⁹

The legal challenges regarding whether racial disparities existed in the application of capital punishment for rape took years to develop.¹⁴⁰ However, the first time that the United States Supreme Court hinted that it might be interested in a constitutional regulation of the death penalty came in a case which questioned the legality of capital punishment for rape.¹⁴¹

Public attention remained focused on the problem of extra-judicial lynching in America. During the years following the Supreme Court's actions surrounding the Scottsboro Boys cases, however, the legal death penalty was a topic that "had received relatively little attention from the courts and . . . was not, at that time, an issue upon which either litigants or the press had begun to focus."¹⁴² In 1963, a "highly unusual" memorandum was circulated by Justice Goldberg to the members of the Court relating to six petitions for writ of certiorari in capital cases.¹⁴³ The memorandum urged the Court to grant certiorari in the six cases and address the issue of the constitutionality of the death penalty under the Eighth Amendment.¹⁴⁴ Although certiorari was not granted in any of these cases, Justice Goldberg wrote a dissent from the denial of certiorari in one of the cases, *Rudolph v. Alabama*.¹⁴⁵ The dissent was joined by Justice Douglas and Justice Brennan.¹⁴⁶ The focus of *Rudolph* was not the abolition of the death penalty in America, but rather the more focused issue of the constitutionality of the death penalty for someone convicted of rape and not murder.¹⁴⁷ As can be the case with short opinions issued from the Supreme Court, the *Rudolph* dissent from denial of certiorari was a signal to litigants that the constitutionality of at least certain aspects of the death penalty in America was in question.¹⁴⁸

¹³⁸ See *id.*

¹³⁹ See MARVIN E. WOLFGANG, *CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS* 42 (1964). Interestingly, a Chicago study showed that three out of 100 Negro women are the victims of a rape, robbery, or assault; however, the probability of a White woman being attacked in a given year was 35 out of 100,000. Thus, the statistics suggest that Blacks are more likely than Whites to be the victim of a serious crime which is contrary to generalized beliefs. *Id.* at 42-43.

¹⁴⁰ See William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986).

¹⁴¹ See *Rudolph v. Alabama*, 375 U.S. 889 (1963) (dissent to the denial of certiorari).

¹⁴² Brennan, *supra* note 140, at 315.

¹⁴³ *Id.* at 314.

¹⁴⁴ *Id.* at 315.

¹⁴⁵ *Rudolph*, 375 U.S. at 889.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The issue of whether the death penalty for rape was unconstitutional under the Eighth Amendment was not finally addressed until *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape of adult female violates Eighth Amendment proscription of cruel and unusual punishments).

¹⁴⁸ See generally Jeffrey J. Pokorak, "Death Stands Condemned." *Justice Brennan and the Death Penalty*, 27 CAL. W. L. REV. 239 (1991) [hereinafter Pokorak, *Brennan*].

In posing the first question upon which certiorari might have been granted,¹⁴⁹ the three dissenters queried whether the execution of an individual convicted of rape violates the "evolving standards of decency that mark the progress of [our] maturing society"¹⁵⁰ or "standards of decency more or less universally accepted."¹⁵¹ Although this language was race-neutral, it was well understood that the death penalty for rape was one of the most racially discriminatory legal schemes in the nation.¹⁵² The use of this language not only highlighted the opinion that the Eighth Amendment might be another tool for fighting racial discrimination, it also signaled that there would be a role for the federal government in the states' management of capital punishment.¹⁵³

The Supreme Court evaluation of the propriety of executions for rape first suggested in *Rudolph* did not begin in earnest until the 1968 term. As a response both to the overt racism endemic in the application of the death penalty for rape, and the indication that the Supreme Court was casting a watchful eye on the practice, litigators began earnest study of the role of race in the application of the death penalty for rape. Researchers Wolfgang and Riedel began a multi-jurisdictional evaluation of the impact of race in capital punishment.¹⁵⁴

One important part of their study, which focused on Arkansas, was presented in litigation on behalf of William Maxwell. Mr. Maxwell was a Black man sentenced to death in Arkansas for the rape of a White woman.¹⁵⁵ The Arkansas parts of the Wolfgang and Riedel research were presented in federal court to support Maxwell's claim that his death sentence for rape was the product of unconstitutional discrimination violating the Eighth and Four-

¹⁴⁹ *Rudolph*, 375 U.S. at 889-90.

¹⁵⁰ *Id.* at 890 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.)).

¹⁵¹ *Id.* (quoting *Francis v. Resweber*, 329 U.S. 459, 469 (1947) (Frankfurter, J., concurring)).

¹⁵² Both the raced history of lynching and the specific legal constructions surrounding capital punishment for rape could not have escaped the attention of the justices as they were both in the news and occasionally entered the Court's debates on critical issues of the day. See Brief for The United States as Amicus Curiae Supporting Appellants at 7, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (arguing that the Soviet Union was effectively using race problems in the United States for its own propagandistic goals). The Supreme Court, however, was able to take a direct challenge to the constitutionality of the death penalty for rape as applied in a discriminatory manner and suggest a perhaps less politically charged question of the facial validity of the practice.

¹⁵³ *Rudolph*, 375 U.S. 889. The structuring of the three questions that Justices Goldberg, Douglas, and Brennan would have granted was prefaced with the general issue of "whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life." *Id.* Although nowhere cited in the *Rudolph* dissent, the Supreme Court had, only four months earlier, first held that the Eighth Amendment's bar to cruel and unusual punishment was applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 675 (1962). *Robinson* struck down a statute requiring incarceration for the status crime of narcotic addiction as inflicting a cruel and unusual punishment prohibited by the Fourteenth Amendment. *Id.* at 667. The expansion of this rather minor incursion into states' criminal justice administration to potentially include the elimination of rape as a capital offense is quite remarkable. See generally Pokorak, *Brennan*, *supra* note 148.

¹⁵⁴ See Wolfgang & Riedel, *supra* note 134.

¹⁵⁵ *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968).

teenth Amendments.¹⁵⁶ The federal appellate court, however, chose to ignore the extensive evidence of racism because the Wolfgang and Riedel study did not relate specifically to the facts of Mr. Maxwell's individual prosecution.¹⁵⁷

The disturbing evidence of racial discrimination in capital sentencing for rape prosecutions compelled the United States Supreme Court to grant certiorari in *Maxwell v. Bishop*.¹⁵⁸ As with *Rudolph* just five years before, the Supreme Court did not address the plain underlying claim of racial discrimination, but rather considered *Maxwell* as a vehicle for either requiring capital trials to be bifurcated and/or to require reviewable standards as a prerequisite to the imposition of a sentence of death.¹⁵⁹ As an indication of both the Court's awareness of the constitutional vitality of the racial discrimination claims in *Maxwell*, the same term the Court was considering whether the application of the death penalty for armed robbery alone was unconstitutionally racially discriminatory as applied.¹⁶⁰

The *Maxwell* case was problematic for the Court because of the potential for dramatically changing the procedures by which people were sentenced to death in this country by applying both Fifth Amendment¹⁶¹ and Fourteenth Amendment¹⁶² strictures to capital punishment schemes.¹⁶³ In large part

¹⁵⁶ *Id.* at 141.

¹⁵⁷ *Id.* at 146-47. This proved to be a strange pre-echo of the cramped analysis of the United States Supreme Court. See *McCleskey v. Kemp*, 481 U.S. 279, 292-97 (1987) (petitioner failed to prove racial disparities relate directly to his prosecution). See also notes 265-84 and accompanying text.

¹⁵⁸ See Brennan, *supra* note 140, at 316. .

¹⁵⁹ *Id.* The first issue presented in *Maxwell* was whether, in a unified death penalty trial, the Fifth and Fourteenth Amendments "impermissibly penalized the accused's assertion of his constitutional rights by forcing him to choose between remaining silent to protect his innocence and presenting evidence to mitigate his potential punishment"; the second issue presented by *Maxwell* was whether the absolute discretion allowed the jury in deciding punishment violated the Fourteenth Amendment due process clause.

¹⁶⁰ *Boykin v. Alabama*, 395 U.S. 238 (1969). In *Boykin*, a 27-year-old Black man was charged with five counts of common law robbery which was a capital offense. *Id.* at 239. The defendant was indigent and was appointed counsel who, at arraignment three days later, promptly had the defendant plead guilty to all pending charges. *Id.* After a seemingly cursory proceeding, a jury sentenced Mr. Boykin to die for each of the charges. *Id.* at 240. The defendant, on automatic appeal to the Alabama Supreme Court, attacked the constitutionality of his death sentence for common law robbery under the United States Constitution's Eighth Amendment bar of cruel and unusual punishments. *Id.* The Alabama Supreme Court rejected the claim, and the defendant petitioned for a writ of certiorari to the United States Supreme Court. In an opinion delivered by Justice Douglas, the Supreme Court avoided the broad constitutional challenge and reversed the case on the narrow ground that the trial court failed to make an affirmative showing that the defendant's plea of guilty was knowingly and intelligently entered. *Id.* at 242-244.

¹⁶¹ "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

¹⁶² "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

¹⁶³ The Court was drawn directly into a debate over the regulation and federalization of all capital proceedings. Justice Brennan, in his 1986 Oliver Wendell Holmes, Jr., Lecture, described the initial discussions of *Maxwell*:

The conference vote was eight to one to reverse the court of appeals and vacate the sentence of death, but the discussion generated a variety of views, and it was not clear whether there were

because of the internal debates and changes in Court personnel, the case was scheduled for re-argument at the end of the 1969 term.¹⁶⁴ Ultimately, however, the Court decided not to reach the more far-reaching questions presented,¹⁶⁵ but rather reversed the case in light of their previous holding¹⁶⁶ in *Witherspoon v. Illinois*.¹⁶⁷

It would take several years and many legal changes before the questions raised in *Rudolph* and *Maxwell* were finally addressed by the United States Supreme Court. The legal analysis of the issue was sidelined by the successful litigation which culminated in *Furman v. Georgia* and ended the death penalty in the United States. In 1971 when Georgia filed its brief with the United States Supreme Court in the *Furman* case, of the thirty-three people under sentence of death in that state, ten were for rape convictions. Additionally, of the

five votes for any single rationale. Shortly thereafter, Justice Harlan, who had expressed at conference his view that the unitary procedure was, in this context, a violation of due process, circulated a note to all of us suggesting that he was having second thoughts and that perhaps the case should be discussed again at conference. The second conference clarified each Justice's position. Chief Justice Warren, Justice Douglas, and I agreed that the submission to the jury of the question of whether to impose death without also providing the jury preexisting standards to guide its deliberations violates due process. We also agreed, and were joined on this point by Justices Fortas and Marshall, that a bifurcated trial is constitutionally required in a capital case; thus, there was a Court for this position. Although not firmly committed, Justice Harlan was inclined to be a sixth vote on this issue. Justice Stewart, who had written *Witherspoon*, thought that *Maxwell* should be disposed of on the basis of *Witherspoon*. Justice White agreed. Justice Black was alone in dissent. The Chief assigned the opinion to Justice Douglas, who soon circulated a draft opinion reversing the lower court judgment on both the standards and bifurcation issues.

Brennan, *supra* note 140, at 316.

¹⁶⁴ Brennan, *supra* note 140, at 317. The *Maxwell* case was initially argued March 4, 1969 and was reargued May 4, 1970. *Maxwell v. Bishop*, 398 U.S. 262, 262 (1970).

¹⁶⁵ Because it was clear that there were not five votes for the "standardless sentencing" ground for reversal, Justice Douglas rewrote his draft opinion which would have reversed the case solely on the unified proceeding challenge. Brennan, *supra* note 140, at 316-17. Because Justice Brennan had come to believe firmly in the need for reviewable standards by which persons are condemned to die, he prepared a concurring opinion in which he argued that "the most elementary requirement of due process is that judicial determinations concerning life or liberty must be based on pre-existing standards of law and cannot be left to the unlimited discretion of a judge or jury." *Id.* at 317 (quoting BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 399, 431 (1985)). But by the time these drafts had been circulated, Chief Justice Warren's hand-picked successor, Justice Abe Fortas, resigned from the Court in May of 1969 – not to be replaced until Justice Blackmun was seated in June, 1970.

¹⁶⁶ *Maxwell*, 398 U.S. at 267.

¹⁶⁷ *Witherspoon v. Illinois*, 391 U.S. 510 (1968). With the resignation of Justice Fortas, Justice Harlan became the crucial fifth vote for a Court supporting reversal on the due process requirement of a bifurcated proceeding in capital cases. Although Justice Harlan originally indicated support for reversal on due process grounds, after preparing a concurring opinion supporting the majority, he urged the Court to hear re-argument in *Maxwell*. Once re-argument was ordered, the *Maxwell* decision was delayed until the next term. The original six person majority was then further compromised by the retirement of Chief Justice Warren at the end of the 1968 term. Justice Harlan's desire to reconsider *Maxwell*, combined with the changing Court, allowed Justice Stewart's original idea to reverse on *Witherspoon* grounds to win the day. Although *Maxwell* never pursued such an issue in the federal courts, the case was remanded to the Court of Appeals for the Eighth Circuit for further consideration of the applicability of *Witherspoon*.

ten convicted of rape, eight were Black males, all of whom were convicted of raping a White female.¹⁶⁸ Certainly the constant evidence that race was a primary factor in deciding who would be executed led the Court to its decision to find the application of the punishment violated the Eighth Amendment. As Justice Douglas explained, the Eighth Amendment was violated because

the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.¹⁶⁹

That decision proved short-lived as, just four years later, the Court decided in *Gregg v. Georgia* that, with appropriate procedural safeguards, the death penalty could withstand constitutional challenge. As soon as the Supreme Court again gave the green light to the death penalty for certain crimes, the question of whether it was an appropriate punishment for rape alone (as opposed to the double crime of rape-murder) was soon again litigated before the Supreme Court.

In 1972, a year after the Court's decision in *Furman* and three before the Court reinstated capital punishment in *Gregg*, researcher Marvin E. Wolfgang appeared before a Congressional Committee and testified that of the 455 people who had been executed for rape since 1930 in the United States, 89.5% had been non-white.¹⁷⁰ This overwhelming disparity between the numbers of Black defendants executed for rape versus White defendants for the same crime indicated that Blacks were disproportionately punished.¹⁷¹ It was on this landscape that the litigation in *Coker v. Georgia* was to proceed. At the time, the petitioner in *Coker* was one of only five people in the entire country under the sentence of death for rape.¹⁷²

The underlying legal argument in *Coker* was that a sentence of death for rape was a disproportionate penalty for a crime that did not result in death. However, the argument was advanced by the significant evidence of the racial disparities in capital sentencing for rape. For example, the Court considered a comprehensive study evaluating the application of the death penalty that was conducted by the Florida Civil Liberties Union. The study focused on the "relationship between rape, race and the death penalty" in Florida from 1940 to

¹⁶⁸ See Respondent's Brief at app. C, *Furman v. Georgia*, 408 U.S. 238 (1971) (No. 69-5003), 1971 WL 126674. Also noteworthy is that the two White males who were sentenced to death at this time had also raped White females. *Id.*

¹⁶⁹ 408 U.S. at 255 (Douglas, J., concurring).

¹⁷⁰ See Wolfgang & Riedel, *supra* note 134, at 123.

¹⁷¹ *Id.* at 124. The sentiment that Blacks were being punished disproportionately was echoed by Justice Powell in his *Furman* dissent: "If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established." *Furman*, 408 U.S. at 449 (Powell, J., dissenting).

¹⁷² See Petitioner's Brief, *Coker v. Georgia*, 433 U.S. 584 (1976) (No. 75-5444), 1976 WL 181481. Furthermore, two of the five sentenced to death at the petitions time were sentenced to death under a statute which limited the death penalty to the rape of children. *Id.*

1964.¹⁷³ Florida law imposed a mandatory death sentence upon a guilty verdict for rape unless the jury, by a majority vote, recommended mercy.¹⁷⁴ From 1940 to 1964, fifty-four men were sentenced to death after being convicted of rape – six White men and forty-eight Black men. Of the six White men, the only one to be executed was a homosexual. Three others had their death sentences commuted by the pardon board and Florida Supreme Court reversed the death sentence for the remaining two. Further, four of the six White men raped a White child and the remaining two, whose sentences were reversed, raped a White adult woman.¹⁷⁵ At the time the study was written, twenty-nine of the forty-eight Black men sentenced to death had already been executed for rape.¹⁷⁶ The pardon board commuted only two of the Black defendants' sentences of death for rape.¹⁷⁷

Unlike many studies at the time, this Florida study incorporated the race of the victim to further explain why the death penalty was used in certain cases. The limitations on information about the victim, as previously described by Professor Johnson,¹⁷⁸ were also a major obstacle for the Florida Civil Liberties Union to overcome. However, after months of careful research a complete record was obtained of all the rape convictions which included the race of the victim and defendant. The data showed that no White male had been sentenced to death for the rape of a Black woman.¹⁷⁹ In contrast, out of eighty-four convictions of a Black male defendant with a White female victim, forty-five (or 53%) were sentenced to death.¹⁸⁰ The study went on to further evaluate the use of the state's pardon board and the influence of race on the board's decisions to commute sentences. The facts of this study showed that race played a significant role in determining who was ultimately executed for their sentence of death.¹⁸¹

Similar trends in the application of the death penalty to rape occurred in other states throughout the South.¹⁸² Nationally, from 1937 to 1950, all the

¹⁷³ Florida Civil Liberties Union, *Rape: Selective Electrocutation Based on Race 2* (1965) [hereinafter "FCLU Report"].

¹⁷⁴ *Id.* at 2.

¹⁷⁵ *Id.* at 3-4.

¹⁷⁶ *Id.* at 5.

¹⁷⁷ *Id.* at 6.

¹⁷⁸ See notes 133-135 and accompanying text.

¹⁷⁹ See FCLU Report, *supra* note 173 at 12. Only one White man has been executed for the rape of a White female; however, this was for the rape of a White child. "Thus, no white man has died for the rape of a white adult."

¹⁸⁰ *Id.* During this period only one Black had been sentenced to death for the rape of a Black woman. That unique sentence, however, was reversed by the Supreme Court of Florida, resulting in the stark conclusion that "no black man has died for the rape of a black adult or child." The contrast between other defendant/victim categories is markedly different when the defendant was a Black male and the victim was a White female. *Id.* at 11-12.

¹⁸¹ *Id.* at 14. "The results presented over the 25 year period studied, rule out any possibility of accident or coincidence. The sad conclusion is inescapable – the death penalty is deliberately utilized by the State of Florida as a device to punish inter-racial sexual attacks by blacks." The Florida Civil Liberties Union advocated the Fourteenth Amendment be utilized to stop the discriminatory actions taken by the state. *Id.*

¹⁸² See Wolfgang & Riedel, *supra* note 134, at 125 (citing a study by Elmer Johnson showing that between 1909 and 1954, of those sentenced to death after a rape conviction, 56% were Black). See also Brief Amici Curiae of the NAACP et al. at 17, *Furman v. Georgia*,

executions for rape occurred in the South with the exception of three which took place in Missouri.¹⁸³ From 1909 to 1949 Virginia alone executed fifty-two Black men after their convictions for rape.¹⁸⁴ In stark contrast, from 1909 to the early 1950s no White male had been executed for rape in Virginia even though approximately 800 White men had been convicted of rape.¹⁸⁵

Louisiana had similar disparities in the way capital punishment was applied for the crime of rape. Black men in Louisiana were routinely charged with “aggravated rape” rather than “simple rape” as the former carried an automatic sentence of death upon conviction.¹⁸⁶ In comparison, White men were usually charged with “simple rape” or “carnal knowledge” which involved a sentence as short as one year.¹⁸⁷ Despite the obvious outcome discrimination inside the justice system, many citizens of Louisiana engaged in vigilantism and went outside the law to punish Black men for raping – or for simply being accused of raping – a White woman.¹⁸⁸ Even though the laws changed to be color-blind after the Civil War, much of the same mentality from before the civil war continued in the application of the law.¹⁸⁹ “[A]llegations of rape involving Black offenders and [W]hite victims were treated with heightened

408 U.S. 238 (1971) (Nos. 68-5027, 69-5030, 69-5003, 69-5031), 1971 WL 134376 (stating “[s]lavery was exclusively a Southern phenomenon, lynching was primarily a Southern phenomenon, and the general data with respect to all crimes, and particularly the crime of rape, indicates that the South has been the prime contributor to the disproportionate application of the death penalty to blacks.”).

¹⁸³ See, e.g., Hartung, *supra* note 135, at 15-16. Outside these executions, both Nevada and the federal government permitted executions for rape; however, none took place during this time. Similar national figures from 1937 to 1950 showed a general discriminatory trend in the application of the death penalty for capital offenses. Of the 3029 people executed for all crimes, 54% were Blacks. To put this figure in perspective, Blacks were therefore over-represented in the population of those executed by 550% of their representation in the general American population. *Id.* at 15.

¹⁸⁴ *Id.* at 16. One of the most notable cases was that of the Martinsville Seven. Seven young Black men were found guilty in 1950 of raping a White woman in Martinsville, Virginia. The case was appealed to the United States Supreme Court and was one of the earlier cases where an argument was made that the sentence of death for rape is primarily directed against Blacks.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* Furthermore, from 1900 to 1950 there were forty Black men and two White men executed for rape. However, after 1907 no White males were executed for rape. *Id.* at 16-17.

¹⁸⁸ *Id.* at 17 n.12. From 1882 to 1948 there were approximately 335 lynchings. From the available data eighty-four Black men were killed because they were accused of rape. Moreover, of the two White men who were executed for rape, one was a foreigner to the United States and the other was not a native Louisianan.

¹⁸⁹ See, e.g., *Stephen, (a Slave) v. Georgia*, 11 Ga. 225 (1852). The pre-Civil War mentality, as shown in *Stephen*, is the kind that continued into the post civil war era. The court in *Stephen* said “rape, and an attempt to commit a rape, by a slave or free person of color, upon a free white female, are both capitally punished by the laws of this State. It is argued, that these are distinct offences, and that they must be separately prosecuted . . . that upon the trial of an indictment for any offence, the Jury may find the accused not guilty of the offence charged in the indictment, but guilty of an attempt to commit such an offence, without any special count in said indictment for such attempt, provided the evidence before them will warrant such finding – applies to offences committed by free white persons, and not to such as may be committed by persons of color. . . . The Penal Code was not intended to apply to

virulence,' both through lynching and through blatant discrimination in the courts."¹⁹⁰

Even though the majority of the *Coker*-related studies focused on specific cities or states, a broader study reviewing the race of the victim in rape cases was conducted by Marvin E. Wolfgang and Marc Riedel which included data on the race of the victim in rape cases.¹⁹¹ The ultimate conclusion of the study was that when a Black male raped a White female, his chance of being executed turned mainly on the fact that the victim was White.¹⁹² Of the 1238 convicted rape defendants from 1945 thru 1965, 317 were Black defendants with White victims.¹⁹³ Of the 317 Black perpetrator/White victim crime combinations 113, or 36%, were sentenced to death. Of the remaining 921 other racial combinations, 2% of the defendants were sentenced to death.¹⁹⁴ The Wolfgang and Riedel study used data to show that Black defendants whose victims were White were sentenced to death 18 times more frequently than defendants in any other racial combination.¹⁹⁵ The Wolfgang study incorporated other non-racial contributing factors such as contemporaneous offenses; however, none of the non-racial factors played a "significant role in explaining the association between black defendants and the imposition of the death penalty."¹⁹⁶

Ultimately, the Supreme Court in *Coker* held that death penalty for the rape of an adult woman violates the Eighth Amendment proscription of cruel and unusual punishments.¹⁹⁷ The opinion barely alludes to the background of gendered racism that compelled the result.¹⁹⁸

Given the historical context and the application of the law, the mindset that a rape committed by a Black man against a White woman was "a crime which arouses the most violent indignation on the part of the whites, and which they accordingly treat with severity" continued throughout the twentieth century.¹⁹⁹ Similarly, it is not realistic to believe that such discrimination based on

slaves or free persons of color, in any of its enactments, unless they are expressly mentioned." 11 Ga. at 241-42.

¹⁹⁰ Elizabeth Kennedy, Feminist Sexual Ethics Project, *Victim Race and Rape: A Review of Recent Research* 7, <http://www.brandeis.edu/projects/fse/slavery/slav-us/slav-us-articles/slav-us-art-kennedy-full.pdf> (last visited Jan. 10, 2007) (quoting Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 107 (1983)).

¹⁹¹ Wolfgang & Riedel, *supra* note 134.

¹⁹² *Id.* at 130.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* The statistical chance of this correlation is less than 1 out of 1000. See also Petitioner's Brief at 34-35, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181481 where the included table shows the number of executions for rape from 1946 through 1975. During this period 185 Blacks were executed for rape while 22 Whites were executed. Black executions peaked at 22 in 1946 while White executions peaked in 1950 at only 4 executions.

¹⁹⁶ *Id.* at 132-133.

¹⁹⁷ *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977).

¹⁹⁸ In large part as a product of failing to deal honestly with the racial disparities in death penalty rape cases, the *Coker* decision has been criticized for an insufficient sensitivity to the true harm experienced by rape victims.

¹⁹⁹ See Raymond T. Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. & CRIMINOLOGY 234 (1926). See also Petitioner's Brief at 36

such potent racial archetypes could be scrubbed from our legal culture with the Supreme Court's ruling in *Coker*.²⁰⁰

IV. RACIAL DISPARITIES AFTER *COKER*

United States Supreme Court Justice Thurgood Marshall expressed the dangers of attempting simply to erase the memories of slavery from current legal analysis, arguing that the experience of Black people in America has been different in kind, not just degree, from other ethnic groups.²⁰¹ To Justice Marshall, it was not the history of slavery in and of itself that created this distinction, but rather the unique fact that a whole people was marked as inferior *by the law*.²⁰² It is naïve in the extreme to think that the passage of a mere twenty-five years is sufficient for the elimination of hundreds of years of gendered racism in criminal prosecutions. Although reforms in rape laws have created a superior environment for equal treatment of rape victims,²⁰³ insistent and unaddressed racial attitudes continue to infect prosecutors' charging decisions.²⁰⁴ Although variables other than race influence various aspects of the

n.63, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181481. As of October 1925, the following states permitted the death penalty for rape: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Virginia, West Virginia, and the Federal Penal Code. As of 1976, two states, Kentucky and North Carolina, added an automatic death sentence upon conviction for rape. At the time of the *Furman* opinion the death penalty for rape was permitted in "16 States and in the federal courts when committed within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 2031." The number of states using the death penalty for rape between 1925 and 1970 remained the same. In 1965, West Virginia stopped using the death penalty; however, Texas began applying the death penalty for rape during this time period. *Id.* at 240-42.

²⁰⁰ See Wolfgang & Riedel, *supra* note 134, at 123. The same concept espoused by Justice Powell in the *Furman* opinion should be applied to the racial disparities continuing in today's justice system: "if a negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established." *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 449 (1972)).

²⁰¹ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting).

²⁰² *Id.* at 400 ("The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot.").

²⁰³ Many commentators, however, have claimed that changes in rape statutes have not significantly impacted rape victims' access to justice in either the criminal or civil courts. See Cassia Spohn & Julia Horney, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT*, 77-104 (1992) (no identifiable change in sexual assault reports, indictments, or convictions post-statutory reform); 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, 573 (1993) ("statutory rape reform has not had a very substantial effect on either victim behavior or actual practices in the criminal justice system.") See also Seidman & Vickers, *supra* note 22, at 467.

²⁰⁴ See Comment, *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437, 439-47 (1989) (discussing "the history of disproportionate use of capital punishment" during slavery and the Reconstruction Period). See also *McCleskey v. Kemp*, 481 U.S. 277 (1987); *Coker v. Georgia*, 433 U.S. 584 (1977).

judicial process, Black rape victims still suffer from discrimination merely because they are not White.²⁰⁵

A. *Recent Race-of-Victim Statistics in Rape Cases*

An understanding of current rape prosecutions by race is made difficult because the discretionary decisions regarding prosecutions are made secretly and the privilege to do so is jealously guarded by prosecutors' offices. There have, however, been significant efforts to lift the near-Masonic cloak of secrecy that shields such decisions from public review and prosecutors from public accountability.

One of the first issues that must be addressed when discussing rape prosecution decisions is the statistic change in frequency of rape as a relative to population. In many earlier studies and commentaries, it appeared that Black women were raped at a greater frequency than White women.²⁰⁶ In the beginning of the twentieth century, commentators ascribed this quantitative difference as a product of two factors: the likelihood that Black women would be raped as part of racial control and terror,²⁰⁷ and the fact that Black women were more likely to work out of the home and therefore were more vulnerable to attack.²⁰⁸

However, the slightly confusing statistical differences in rape frequencies between population groups noted in the first part of the twentieth century have recently dissipated. Available statistics indicate that by 1998 the differences in the rate of overall Black and White victimization were statistically insignificant.²⁰⁹ However, when only rape or sexual assault is analyzed between 1993 and 1998, the "average annual rate of rape or sexual assault was somewhat higher for American Indians than that for blacks, and significantly higher for American Indians than that for Asians or whites."²¹⁰ Additionally, Asians and

²⁰⁵ See generally Kennedy, *supra* note 13.

²⁰⁶ GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* (1989).

²⁰⁷ See *supra* notes 117-23 and accompanying text.

²⁰⁸ See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 22, 71-72 (1981). See also Wriggins, *supra* note 6 at 119 ("because Black women worked outside the home, they were exposed to employers' sexual aggression as white women who worked inside the home were not.").

²⁰⁹ CALLIE RENNISON, U.S. DEP'T OF JUSTICE, *VIOLENT VICTIMIZATION AND RACE, 1993-98* 1 (2001) [hereinafter *VICTIMIZATION AND RACE REPORT*]. This Special Report issued by the Bureau of Justice Statistics, the statistical agency of the U.S. Department of Justice, discussed findings from the National Crime Victimization Survey (NCVS) from 1993 through 1998. Regarding *all categories* of violent victimization, "from 1993 to 1997, Black persons were victimized at rates significantly greater than those of Whites. By 1998, Black and White persons were victimized overall at similar rates." *Id.* Additionally, the statistical rate comparisons reveal that in 1993, 53.5 Whites/ per "1,000 persons age 12 or older" were victims of crimes of violence while 69.3 Blacks per "1,000 persons age 12 or older" were victims of crimes of violence in the same year. In 1994 Whites had a rate of 52.8 per 1000 and Blacks a rate of 64.8 per 1000. By 1998, the rates had mostly equalized, when 38 per 1000 Whites were victimized while 42.8 Blacks were victimized. *Id.* at 11.

²¹⁰ *Id.* at 2. Table 1 states that the "average annual victimizations, by race, 1993-98" shows that for "persons 12 or older" 5.8 per 1000 American Indians experienced a rape or sexual assault, while Blacks experienced the same crimes at a rate of 2.2 per 1,000. Additionally, 1.2 per 1000 Asians and 1.8 per 1000 Whites endured at rape or sexual assault.

Whites experienced “similar” rates of rape or sexual assault during this five-year span.²¹¹

This is also true of the statistics regarding rape victimization. The average annual victimization rates from 1993 to 1998 by gender and race indicate that Black females experienced rape or sexual assault at the rate of 3.7 “per 1,000 persons age 12 or older,” while the same rate of rape or sexual assault for White females was 3.1 per 1000; that is not a statistically significant difference.²¹² American Indian females had a 7.5 per 1000 rate of rape or sexual assault, but this number is based on 10 or fewer sample cases.²¹³ The only statistically significant difference in these rates was for Asian women, who had “a rate of rape or sexual assault that was slightly lower than the rate for American Indian females and significantly lower than those for white and black females, 1993-98.”²¹⁴

Further, a comparative examination of the previous studies that led to the impression of statistically significant frequency disparities in cross-racial rapes concluded that rapes are less *interracial* and more *intra-racial* than the population demographics would suggest.²¹⁵ For example, although the study found that the absolute number of Black offender/White victim sexual assaults was higher than the number of reported White offender/Black victim sexual assaults, their frequency relative to the populations was no greater.²¹⁶ This result occurs because of the unbalanced nature of the relative populations which in turn results in the much smaller Black population having much more frequent contact with White people than in the reverse situation.²¹⁷

Other recent statistical reports are marred by small reported numbers and differing categories of what constitute a reported crime in the category.²¹⁸ One

²¹¹ *Id.*

²¹² *Id.* at 3. This addresses the “[a]verage annual violent victimization rates, by gender, 1993-98.”

²¹³ *Id.*

²¹⁴ *Id.* at 3. As stated above, Asian females had an average annual violent victimization rate between 1993 and 1998 of 1.8 per “1,000 persons age 12 and older” for rape or sexual assault.

²¹⁵ Robert M. O’Brien, *The Interracial Nature of Violent Crimes: A Re-Examination*, 92 AM. J. SOC. 817, 817 (1987).

²¹⁶ *Id.* at 822. See also Larry W. Koch, *Interracial Rape: Examining the Increasing Frequency Argument*, 26 AM. SOCIOLOGIST 76, 79 (1995).

²¹⁷ *Id.* See also PETER M. BLAU, *INEQUALITY AND HETEROGENEITY: A PRIMITIVE THEORY OF SOCIAL STRUCTURE* 22 (1977) (“Minority groups . . . are more involved in inter-group relations with . . . a majority than the majority group is with them.”). See also O’Brien, *supra* note 215, at 819 (explaining that in a population of 1000, if 10% are Black and 90% White, 10 interracial marriages translates to a frequency of 10% interracial marriages for the Black community but only 1.1% for the White community).

²¹⁸ See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 276-277 (2002), available at <http://www.albany.edu/sourcebook/archive.html>. Like the Victimization and Rape Report, the Sourcebook examines the “number and rate (per 1,000 persons age 12 and older) of personal victimizations by type of crime, and sex and race of victim,” in the United States. While the sourcebook does include sub-category tables for rape and sexual assault, these statistics are based on any reported information which “includes verbal threats of rape and threats of sexual assault.” *Id.* at 196 (Table 3.103 addresses the “estimated number and rate (per 100,000 inhabitants) of offenses known to police, by offense in the United States 1960-2001”).

such statistical analysis, which explored the “estimated number and rate (per 100,000 inhabitants) of offenses known to police,” compared offenses from the years 1960 to 2002.²¹⁹ In 1960, 17,190 incidents of forcible rape were reported, which translates to an overall rate of 9.6 rapes per every 100,000 inhabitants.²²⁰ By 2001, the absolute number of forcible rapes increased to 90,491 which increased the rate to 31.8 forcible rapes per every 100,000 inhabitants.²²¹ Although these statistics are based on information which is unverifiable because it was voluntarily supplied by police officials regarding their understanding of the number of reports of victimization, they none the less demonstrate a marked increase in the number of reported rapes in the forty-one year period.

B. System Outcome Bias and “Down Streaming”

Another generalized yet extensive study regarding race-of-victim charging patterns in capital cases found that “race of victim influence [is] found at all stages of the criminal justice system process.”²²² For example, in 1990 the United States General Accounting Office (GAO) published a report analyzed twenty-eight existing studies to “determine if the race of either the victim or the defendant influences the likelihood that defendants will be sentenced to death.”²²³ This evaluation supported the statistical studies presented in *McCleskey*²²⁴ and revealed that there is a “strong race of victim influence” on the chances of a defendant being sentenced to the death penalty or “being charged with a capital crime.”²²⁵ Although the death penalty is no longer available as a punishment for a conviction of rape alone, the types and extent of race-of-victim bias uncovered in the above General Accounting Office report implicated crimes other than those for which death is the sentence.

At every phase of initial criminal prosecution – charge, plea, and trial – prosecuting attorneys enjoy the power of constitutionally protected discretion.²²⁶ Results like those from the GAO study have led researchers in the past fifteen years to investigate how racial disparity and bias infect the decision making processes of prosecutors. There have been serious research attempts to discern what factors and procedures lead prosecutors to make decisions that

²¹⁹ *Id.* In 1960, there was a “total crime index” of 3,384,200 and by 2001, the number for the “total crime index” had more than tripled to 11,849,006 incidents.

²²⁰ *Id.*

²²¹ *Id.*

²²² U.S. GEN. ACCT. OFF., REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), available at <http://archive.gao.gov/t2pbat11/141293.pdf> [hereinafter GAO REPORT] (statement of Lowell Dodge, Director, Admin. of Just. Issues).

²²³ *Id.* at 1, 5.

²²⁴ See *infra* note 271 and accompanying text.

²²⁵ GAO REPORT, *supra* note 222. Further, more than 80% of the studies showed that “those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks.”

²²⁶ See *infra* notes 261-64 and accompanying text. See also Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 652 (2001).

have demonstrable race-biased outcomes, particularly in relation to the race of the victim. In 1991, Professor Lisa Frohmann looked at the practice of prosecutors when making charging and dismissal decisions.²²⁷ Starting with the widely held belief that stranger rapes are more aggressively prosecuted than acquaintance rapes, Professor Frohmann sought to identify how prosecutors identify and employ their power in the face of deviations from a normative rape narrative. This prototypical rape is characterized as the kidnapping and forcible penetration of one White woman by one stranger who is a Black male.²²⁸ Every deviation from this meta-rape narrative is considered less prosecution-worthy by those who exercise charging discretion.

Professor Frohmann concluded that prosecutors hold a fixed idea of what constitutes the set of facts most likely to lead to a rape conviction.²²⁹ This idea is not only a product of the prosecutor's independent "repertoire of knowledge" based on experience,²³⁰ but also prosecutors' attempts to pre-figure the impact that ideas about the paradigmatic rape will have on other decision-makers such as judges and jurors. Professor Frohmann identifies the overall fixed belief structure regarding rape as "typifications of rape-relevant behaviors." Frohmann further divides the overall rape paradigm into four sub-typifications:

- (1) Typifications of rape scenarios: the victim's version of what happened is inconsistent with the prosecutor's beliefs about what *typically* happens in this type of sexual assault (e.g., the typical kidnapping-rape involves a variety of sexual acts and the victim states that the assault included only forced intercourse) or her behavior at the time of the assault raises questions about her character (e.g., the fact that she is walking alone late at night suggests that she is a prostitute);
- (2) Typifications of post-incident interactions: the behavior of the victim of an acquaintance rape is incongruent with the behavior of the typical victim (e.g., she has consensual sexual intercourse with the suspect following the alleged incident);
- (3) Typifications of rape reporting: the victim failed to make a prompt report and her reasons for late reporting are inconsistent with officially acknowledged and legitimate reasons (e.g., the victim did not report the crime for several days and there is no evidence that her failure to report was motivated by physical injury or psychological trauma);
- (4) Typifications of victim's demeanor: the victim's facial expression, mannerisms, and body language are inconsistent with those of a typical rape victim and/or suggest that the victim is not telling the truth.²³¹

Professor Frohmann argues that deviations from these typifications are considered by prosecutors as reason for case rejection. Further, prosecutors do not rely solely on their own experience that the deviation from the typification requires a charge dismissal or reduction. Rather, prosecutors rely on their

²²⁷ Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejection*, 38 SOC. PROBS. 213 (1991) [hereinafter Frohmann, *Discrediting*].

²²⁸ See SUSAN ESTRICH, REAL RAPE 28 (1987) (Prosecutors distinguish between "jump-from-the-bushes stranger rapes and the simple cases of unarmed rape by friends, neighbors, and acquaintances.").

²²⁹ Frohmann, *Discrediting*, *supra* note 227, at 219.

²³⁰ *Id.* at 217.

²³¹ Cassie Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48 SOC. PROBS. 206, 210 (2001) (describing Frohmann's typification paradigm).

beliefs about what jurors might believe about the deviation from the meta-rape storyline.

Prosecutors are often interested in concerns other than “justice,”²³² such as the likelihood that limited resources will be applied in a case to a positive result.²³³ The pursuit of this interest often forces prosecutors to consider the prejudices and biases of a hypothetical “juror.”²³⁴ This process is referred to by Frohmann as “downstreaming” but is more accurately labeled “system outcome bias.” Although there are justifications for biasing decisions in favor of juror belief structures, prosecutors should be wary when relying on a hypothetical juror’s potential feelings about non-legally relevant factors, such as race.²³⁵

In a recent follow-up study, Frohmann examined the ways in which class and race, as related to stereotypes regarding neighborhoods, impacted prosecutorial discretion.²³⁶ Frohmann found most rape victims are from lower class, racially mixed or minority communities. Most jurors, however, tend to come from more culturally homogeneous, predominantly White, middle and upper-middle class communities. These known class, race, and culture differences lead prosecutors to exercise their discretion in favor of not proceeding in rape cases because they fear “misinterpretation by jurors of victims that would result in ‘not guilty’ verdicts if the cases were forwarded.” Although these differences are legally insignificant, they have a serious impact on the nature of prosecution because of prosecutors’ downstream orientation and system outcome bias.

Starting from the very first discretionary decision of prosecutors, another study indicated that the race of the victim impacts the decision whether to seek charges.²³⁷ Researchers, including Professor Cassia Spohn, closely examined prosecutorial discretion at the initial charging decision in sexual assault cases in Miami, Dade County, Florida.²³⁸ The researchers examined the ways in which prosecutors evaluated the viability of a case based on what they believed other

²³² See, MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2004) (ABA model rules for prosecutors regarding justice duty).

²³³ One factor affecting prosecutorial decision making is risk aversion, or an attempt to avoid “uncertainty.” C. Albonetti, *Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Proceedings*, 24 CRIMINOLOGY 623 (1986). In terms of outcome, this avoidance of uncertainty is not tied to the prosecutor’s ethical duty to seek justice but to individual prosecutor’s desire to win cases. *Id.*

²³⁴ See *infra*, Section V (discussing the ethical impropriety of system outcome bias).

²³⁵ See *infra*, Section V (discussing techniques for ending and controlling system outcome bias). Frohmann notes that another legally insignificant technique employed by prosecutors is to use juror prejudices to impute ulterior motives to a rape victim. Frohmann, *supra* note 230, at 221-23. I am certainly not suggesting that a prepared prosecutor should not consider all the arguments experience suggests a competent defense attorney will make on her client’s behalf. This is an appropriate calculus in the plea negotiations with defendants and their counsel. Rather, I am arguing that no prosecutor should rely on juror ignorance or prejudice – particularly with regard to racially gendered rape prosecutions – when deciding whether to proceed or dismiss.

²³⁶ Frohmann, *Convictability*, *supra* note 14, at 531.

²³⁷ Spohn et al, *supra* note 234, at 206.

²³⁸ *Id.* at 207. This Spohn study looked at 140 sexual battery cases, from 1997, involving victims over 12 years old that were “cleared by arrest in 1997 from the Sexual Crimes Bureau of the Miami-Dade (Miami, Florida) Police Department.” *Id.* at 211. The authors

decision makers, particularly jurors, would believe about the strength of a witness or the available evidence.²³⁹ The study built upon earlier studies that demonstrated that a charge is more likely to be brought if the defendant is Black and the victim is White.²⁴⁰ What distinguished this study was its look at how prosecutors employed the paradigmatic “rape” by which all actual reported rapes were judged and typified.

It was discovered, not surprisingly, that victim characteristics also played an important part in prosecutor assessments of system outcomes. The further the victim deviated from a “stand-up” victim, the less likely prosecutors would be to pursue a case.²⁴¹ For example, prosecutors routinely consider what effect the victim’s risk-taking behavior, lifestyle, and the facts of the assault itself would have on juror determinations of witness/victim credibility.²⁴²

However important the assessments of victim behavior were to the prosecutorial decision, the study data demonstrated that victim race was a strong factor in the prosecutor’s decision regarding juror acceptance of the charges as “prosecutors rejected charges more often if the victim was a racial minority or if the suspect was [B]lack.”²⁴³ The researchers found that over half – 58.1% – of “all rejections and dismissals” involved Black victims.²⁴⁴ In contrast, only 31.1% of all rejected or dismissed cases involved victims who were White.²⁴⁵

conclude that “the decision to file charges was based on a combination of case and victim characteristics” which included race. *Id.* at 206.

²³⁹ *Id.* at 207. The research group termed this effect “downstream orientation,” but I will use the more descriptive term, “system outcome bias,” which I define as adopting presumed yet unknown prejudices of others to explain obvious discriminatory effects of ones own actions.

²⁴⁰ *Id.* at 228. The authors specifically set out to “replicate and extend Frohmann’s research on prosecutorial accounts of case rejection.” *Id.* See Frohmann, *Discrediting*, *supra* note 227, at 217 (prosecutors rely on their “typifications of rape-relevant behavior” in charging decisions); Frohmann, *Convictability*, *supra* note 14, at 531 (prosecutors apply class and race stereotypes of neighborhoods to victims of sexual assault).

²⁴¹ Spohn, Beichner & Davis-Freznel, *supra* note 231, at 207. “Stand-up” victim as used by the authors and in this article is a person who a jury would consider both “credible and undeserving of victimization.” *Id.*, citing Elizabeth Stanko, *The Impact of Victim Assessment on Prosecutor’s Screening Decisions: The Case of the New York County District Attorney’s Office*, 16 LAW & SOC’Y REV. 225 (1981-82); George F. Cole, CRIMINAL JUSTICE: LAW AND POLITICS 172 (1988).

²⁴² Spohn, Beichner & Davis-Freznel, *supra* note 231, at 215-220.

²⁴³ *Id.* at 226. The researchers reported on the several reasons prosecutors suggested for rejecting sexual assault cases including: “[Prosecutors] rejected charges less often if the victim was between thirteen and sixteen years old. Charge rejection was also more likely if the victim engaged in any risk-taking behavior at the time of the incident, or if the victim’s moral character was called into question by evidence in the file.” Further, “cases involving strangers were substantially more likely than those involving other types of victim/suspect relationships to be rejected or dismissed.” Prosecutorial rejection of sexual assault cases was not entirely limited to these rationales. See *id.* The rationale for rejection of sexual assault cases for Black suspect/defendants was fairly evenly split between questions of victim credibility and failure of the victim to pursue charges. *Id.* at 224.

²⁴⁴ *Id.* at 224, tbl.3.

²⁴⁵ *Id.* Hispanic victims or those associated with “other” racial groups made up only 10.9% of dismissals and rejections. *Id.*

Examining the effects of system outcome bias, Professor Spohn was involved, with Professor David Holleran, in another research review of sexual assault case prosecutorial decisions in two additional jurisdictions, Kansas City and Philadelphia.²⁴⁶ The initial hypothesis of the study was to determine whether jurors – and therefore prosecutors – perceive sexual assaults between acquaintances as less prosecution-worthy than similar crimes between strangers.²⁴⁷ Contrary to the general beliefs about “real rape,”²⁴⁸ the researchers found that prosecutorial decisions to dismiss or initially not to seek charges did not greatly decrease with increased with offender/victim familiarity.²⁴⁹ The factors that led to a failure to indict or dismissal of charges in most stranger rape cases and acquaintance rape cases involved legally relevant missing or inadequate evidence necessary to prove an element of the crime.²⁵⁰

What was unexpected was that the race of the victim played an important part in prosecutorial decisions – even in stranger rape cases. Spohn and Holleran concluded that “prosecutors were more likely to file rape charges if the victim were white.”²⁵¹ Specifically, “prosecutors were 4½ times more likely to file charges if the victim was white,”²⁵² than if the victim was Black. This race-based victim discrepancy was particularly pronounced in stranger rape cases in which no weapon was used.²⁵³ Prosecutors filed 75% of cases in which a White woman was attacked by an unarmed stranger, but in only 34% of similar cases when the victim was Black.²⁵⁴ The researchers further found that the aggravated nature of the crime was the area in which the largest race effects occurred in that prosecutors were “least likely to file charges when the victim was black and the suspect did not use a weapon; they were most likely to file charges when the victim was white and the suspect used a weapon.”²⁵⁵

Previous research had suggested that “the effect of legally irrelevant suspect and victim characteristics is confined to less serious cases, in which decision makers have more discretion in determining the appropriate outcome.”²⁵⁶ This study indicated, however, that in regard to charging discretion in stranger rape cases, race of victim was a critical factor for prosecutors:

In these two jurisdictions, [Kansas City and Philadelphia], prosecutors were more likely to file charges against men who assaulted white women who were strangers to

²⁴⁶ Spohn & Holleran, *supra* note 226. The jurisdictions were chosen because they each had invested in specific prosecutorial specialists in sexual assault. *Id.* at 662.

²⁴⁷ *Id.* at 651.

²⁴⁸ The “real rape” theory postulated by Estrich, *supra* note 231, was supported by research previously conducted by LaFree. LAFREE, *supra* note 208.

²⁴⁹ Spohn & Holleran, *supra* note 226, at 670-71. Some of the victim characteristics or actions that prosecutors believed would affect jurors were drinking, drugging, walking alone, hitchhiking, prior sexuality, being a single mother, exotic dancer, or sex worker. *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 680.

²⁵² *Id.* at 671.

²⁵³ *Id.* at 673. This reaffirms the basic hypothesis that the more aggravated the rape – the closer it is to the paradigmatic rape – the less race bias effects are observed.

²⁵⁴ *Id.* at 674, tbl. 4.

²⁵⁵ Spohn & Holleran, *supra* note 226, at 673.

²⁵⁶ *Id.* at 680 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); Cassia Spohn & Jerry Cederblom, *Race Disparities in Sentencing: A Test of the Liberation Hypothesis*, 8 JUST. Q. 305 (1991)).

them than men who assaulted black women who were strangers to them. The fact that this did not appear in the other two relationship categories [acquaintances and intimate partners] suggests that prosecutors view aggravated sexual assaults on white women as particularly serious.²⁵⁷

The uncontroverted results of research since *Coker* suggest that the centuries-long history of disparate treatment of Black rape victims continues today. This research, when considered as a body, indicates the confluence of three important aspects of prosecutorial discretion in rape cases: first, prosecutors rely on typification of rape narratives; second, prosecutors' understanding of typification incorporates jurors' class, culture, and race biases; and third, prosecutors' use of system outcome biases results in undervaluing and under-prosecuting the rape of Black women.

V. PROSECUTORIAL DISCRETION AND SUGGESTIONS FOR REFORM

The role of the prosecutor in the continuing under-representation of Black women in rape prosecutions must be addressed. It cannot be claimed that every rape prosecution is racially motivated or even that every prosecutor makes racially disparate charging decisions. What all available evidence points to, however, is a pervasive and intransigent effect of gendered racism in current rape charging decisions. Further, there is no research that proves the contrary theory that rape prosecution decisions are utterly free from gendered racism.

Prosecutorial discretion plays a pervasive role in the administration of criminal justice.²⁵⁸ The fate of those caught up in the criminal justice system lies in the hands of prosecutors. The prosecutor exercises near unlimited power to determine the charge, to offer plea bargains and to determine the severity of punishment.²⁵⁹ This extensive authority is exercised out of public view, without objective criteria, and is essentially not reviewable. The presumption that prosecutors act in good faith has created a virtual immunity for prosecutors' pre-trial decisions.²⁶⁰

²⁵⁷ Spohn & Holleran, *supra* note 226, at 680-81.

²⁵⁸ See, e.g., Charles P. Bubby & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 477 (1976) (describing the prosecutor as "the single most powerful figure in the administration of criminal justice"); Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 272 (1998) (noting that the prosecutor "has the freedom of a private actor but without the constraint of guidelines regulation"); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601, 638 (1992) (commenting that "the broad discretion enjoyed by prosecutors has resulted in an unguarded entrance for racism"). See also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

²⁵⁹ See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (asserting that "[s]o long as the prosecutor has probable cause . . . the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion"); Elisabeth Alden Bresee, *Prosecutorial Discretion*, 75 GEO. L.J. 859, 861 (1987) (asserting that "prosecuting attorneys have been granted absolute immunity from civil liability for their actions in initiating, pursuing, and presenting criminal charges").

²⁶⁰ See, e.g., Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 406 (citing *Bowers v. Hardwick*, 478 U.S. 1039 (1986), *Wayte v. U.S.*, 470 U.S. 598 (1985), *U.S. v. Batchelder*, 442 U.S. 114 (1979)). Prosecutors are protected not only by immunity

Limited resources and crowded criminal dockets force prosecutors to make many quasi-judicial decisions: determining whom to charge, the severity of the charge, whether to offer a plea and whether to proceed to trial. Yet there are few restraints on the prosecutor's choices at these critical points leading to trial. There are not, in most cases, articulated policies, procedures, or objective criteria for plea bargaining or charging.²⁶¹ This environment of too many cases and too little guidance is most susceptible to the influences of centuries-long gendered race narratives of what is a prosecutable rape.

I propose three ways of assessing and addressing the continuing race disparities in rape prosecutions. First, prosecutors should adopt "best practices," including standards and procedures that would recognize and end system outcome bias in charging, standardize prosecutorial charging decisions by developing and employing legal rejection criteria, and increase the accountability of discretionary charging decisions by implementing charging panels for sexual assault cases.

Second, legislatures should require information be gathered and reported on all legal aspects of a sexual assault – from its initial report to its final disposition. This information would include the race of the victim and perpetrator(s) and would be organized and publicly disseminated by the state or federal government.

Third, in egregious cases, victims should litigate for their right to be protected through prosecution. This might take the form of an order that a prosecutor proceed with a case, the appointment of a special prosecutor, or monetary damages for failing to prosecute. Certainly, this remedy would be available only in the most blatantly discriminatory situations, but it is naïve to think that such situations do not exist.

A. *Discretion, Race-of-Victim and Equal Protection*

Perhaps the case most relevant to the question of a prosecutor's constitutional duty when serious race of victim disparities have been demonstrated is *McCleskey v. Kemp*. Fifteen years before *McCleskey* was decided, Justice Douglas concluded that the death penalty, as then imposed, violated the Eighth Amendment because of the racially discriminatory aspects of capital conviction

doctrines, but also by such factors as (1) the hesitation of defense lawyers to bring suit against them for fear of legal revenge, (2) the propensity of jurors to side with prosecutors and discredit criminal defendants who might sue them, and (3) the limited restoration that adversely affected criminal defendants are likely to achieve. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 257 n.101 (1993).

²⁶¹ Critics of the current pre-trial system claim that prosecutors are not capable of developing their own policies to deal with discretion. See, e.g., KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 196, 212 (1969) (asserting that prosecutors, if left on their own to limit their discretion, "do little or nothing," and that "abuses are common"); Wayne R. LaFare, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970) (proclaiming that much of prosecutorial discretion is superfluous and that a reform of substantive criminal law would eliminate some crimes and any statutory overlap). See also David C. James, *The Prosecutor's Discretionary Screening and Charging Authority*, 29 THE PROSECUTOR 22 (1995) (urging adherence to ethical duties in screening and charging decisions and calling for written policies).

and sentencing.²⁶² Douglas found the capital punishment laws of the time “pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”²⁶³ After the re-institution of the death penalty across the country in 1976,²⁶⁴ the issue of whether the new death penalty statutes were applied in a racially discriminatory fashion was long the subject of speculation. In the 1986 term, the Supreme Court finally addressed the issue in *McCleskey v. Kemp*. The petitioner, Warren McCleskey, claimed that the Georgia death penalty statute, first found constitutional in *Gregg v. Georgia*,²⁶⁵ was applied in a racially discriminatory fashion in violation of the Equal Protection Clause of the Fourteenth Amendment²⁶⁶ and the “cruel and unusual” punishment clause of the Eighth Amendment.²⁶⁷ Mr. McCleskey also came to Court with the sophisticated statistical evidence to prove his claim.²⁶⁸

The Supreme Court cast Mr. McCleskey’s claims and evidence as “whether a complex statistical study that indicates a risk that racial considera-

²⁶² *Furman v. Georgia*, 408 U.S. 238 (1972). See *supra* notes 170-71 and accompanying text.

²⁶³ *Id.* at 257 (Douglas, J., concurring).

²⁶⁴ See *supra* notes 171-74 and accompanying text.

²⁶⁵ 428 U.S. 153 (1976). See also *supra*, notes 171-74 and accompanying text.

²⁶⁶ *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987).

²⁶⁷ See *id.* at 299.

²⁶⁸ See *id.* at 286:

In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the Baldus study) The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970’s. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases

Baldus also divided the case according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and black victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victim; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 13% of the cases involving white defendants and black victims.

Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.

Further, the entire Baldus study, complete with analysis of death penalty jurisprudence in relation to claims of racial discriminatory impact, has been published: D. Baldus, G. Woodworth & C. Pulaski, *EQUAL JUSTICE AND THE DEATH PENALTY* (1990). See also Berger et al., *supra* note 48; A. Bynam, *Eighth and Fourteenth Amendments – The Death Penalty Survives*, 78 J. CRIM. L. & CRIMINOLOGY 921 (1988); J. Cook, *Coming Full Circle: A Return to Arbitrary Sentencing Patterns in Capital Punishment Cases*, 56 UMKC L. REV. 387 (1988); M. E. Holland, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 CONN. L. REV. 1029 (1988); R. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

tions enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment."²⁶⁹ The majority, led by Justice Powell, began its analysis of McCleskey's claims with the Equal Protection arguments.²⁷⁰ The Court placed the burden of proving the existence of purposeful racial discrimination on McCleskey.²⁷¹ The specific translation of that burden to this case was that "to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose."²⁷² The Court ultimately found that proof of discriminatory impact was insufficient and that to prevail, a defendant must present "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."²⁷³

Although the Court conceded that such blatant statistical disparities based on race were sufficient proof in other contexts,²⁷⁴ it was unwilling to extend that analysis to situations where a defendant was complaining about the fairness of procedures that would result in his death.²⁷⁵ Relying on the "nature of the capital sentencing decision,"²⁷⁶ particularly the involvement of different jurors in each case,²⁷⁷ the Court concluded that statistical analysis, like that accepted in other Equal Protection Clause challenges, would not be viable proof in the death penalty sentencing context.²⁷⁸ Moreover, the Court con-

²⁶⁹ *McCleskey*, 481 U.S. at 282-83. By using the words "risk" and "prove" in their construction of McCleskey's claims, the Court prefigured the means of denying them. *See id.* at 291 n.7: "Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision."

²⁷⁰ *Id.* at 291. The Court characterizes the basis of McCleskey's claims as "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers." (note omitted). By replacing the various forms of "murder" with equivalent forms of "rape," the Court's construction is a perfect description of the gendered racism infecting such prosecutions. Because this article is focused on a victim's right to be protected by the laws, I will not treat McCleskey's Eighth Amendment claims in any detail.

²⁷¹ *Id.* at 292.

²⁷² *Id.*

²⁷³ *Id.* at 292-293.

²⁷⁴ *Id.* at 293-294. Specifically, the Court refers to claims brought pursuant to Title VII of the Civil Rights Act of 1964.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 294.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 294-295. The Court supported this rejection on the further grounds that it would be difficult to rebut the assumption created by the statistics because jurors could not testify about the motives of their verdicts and prosecutors should not have to. *Id.* at 296. The Court conflated the guilt determination with the punishment decision. McCleskey did not challenge the fact of his conviction, only the fact that he, as a Black man who was involved in the killing of a White man, was much more likely to be executed for the crime. As Justice Brennan pointed out in his dissent:

The capital sentencing rate for all white-victim cases was almost 11 times greater than the rate for black-victim cases. Furthermore, blacks who kill whites are sentenced to death at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks. In addition, prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims.

cluded that "absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."²⁷⁹ Therefore, the fact of guilt and the importance of discretion in the criminal justice system²⁸⁰ defeated McCleskey's Equal Protection Clause claim.²⁸¹

Since the decision in *McCleskey*, other studies have confirmed the stark pattern of race-of-victim disparities in criminal law sentencing.²⁸² Ultimately,

Id. at 326-327 (Brennan, J., dissenting) (citations omitted). These statistics led Justice Brennan to conclude: "The statistical evidence in this case thus relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations." *Id.* at 328.

²⁷⁹ *Id.* at 296-297 (note omitted).

²⁸⁰ *Id.* at 297: "Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." *Id.*

²⁸¹ In rejecting McCleskey's claim, the Court also considered "additional concerns" that informed its decision. *Id.* at 314. The first was that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." *Id.* at 314-315. This conclusion led the Court to worry that "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty." *Id.* at 315 (note omitted). The Court also fretted that if they accepted McCleskey's claim regarding race, it might later be faced with claims that related to "membership in other minority groups, and even to gender." *Id.* at 316-317 (notes omitted). The Court clearly feared a future of endless equal protection litigation: "As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey." *Id.* at 318 (note omitted).

Justice Brennan dissented in a moving and impassioned opinion. *Id.* at 320 (Brennan, J., dissenting). On the Court's concern that other litigation might follow a ruling in favor of McCleskey, Brennan famously wrote:

The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.

Id. at 339 (Brennan, J., dissenting) (citation omitted).

²⁸² See Stephen B. Bright, *Discrimination, Death And Denial: The Tolerance of Racial Discrimination In Infliction of The Death Penalty*, 35 SANTA CLARA L. REV. 433, 434-35 nn. 7-15 (1995). In a report to Congress in 1990, the United States General Accounting Office (GAO), after reviewing various studies, declared that the death penalty was much more likely to be imposed if the defendant is Black and the victim is White. The GAO confirmed the following: "Our synthesis of the 28 studies shows a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty" and that "race of victim influence was found at all stages of the criminal justice system process". U.S. GEN. ACCT. OFF., *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES, 5-6 (Hugo Adam Bedau ed., 1990); see Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 380 (1999) (noting that race played a statistically significant role in determining who receives the death penalty). It has been noted that one of the common trends in prosecutorial decisions is the devaluing of lost lives in poorer communities. Deaths in these communities are not treated as if they have the equivalent social value as the loss of the lives of victims from a more prosperous community. In other words, homicides in urban jurisdictions are downgraded by prosecutors as a matter of passive public policy. See, e.g., Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 283 (1996); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 616 (1985).

the Supreme Court, when given the opportunity to look at the responsibility that prosecutors owe to victims chose instead to focus their attention on what juries constitutionally owe to convicted defendants. In extolling its own “unceasing efforts to eradicate racial prejudice from our criminal justice system,”²⁸³ the Court apparently mistook the effort for the act by ignoring the potential and actual discrimination against victims resulting from unfettered prosecutorial discretion.²⁸⁴

B. Remedies for Racial Disparities in Charging

The gendered racism in rape prosecutions has been well researched and documented. However, little has been done to correct the obvious racial disparities in rape prosecutions. By employing an escalating set of remedies, from internal prosecutor office procedures, through legislative mandates to litigation, the longstanding problem of undervaluing Black victims in rape cases might begin to be addressed.

1. Improving Prosecutorial Discretion Procedures

The only ethical action for a prosecutor to take in the face of the overwhelming conclusion of history and research is to recognize that gendered racism in rape prosecutions is a real problem.²⁸⁵ The problem is best addressed by prosecutors taking responsible actions within their discretionary sphere. After all, discretion is constitutionally protected because of the system’s need for prosecutors to make independent judgments. However, with this protection comes the concomitant responsibility to exercise actual informed discretion rather than to act in a sloppy and ultimately racially disparate fashion.

The first and perhaps most obvious action would be to end system outcome bias or “downstream orientation” at charging. This proposal may seem counterintuitive since the jury might make the ultimate decision whether a crime is proven beyond a reasonable doubt. However, many factors compel the conclusion that system outcome bias is simply a way of infecting prosecutor decisions with prejudice that is not examined or owned by the prosecutor. In short, it is a way of blaming hypothetical jurors for the prosecutor’s gendered racism. This is part true because of the prosecutors’ overt generalization and stereotyping regarding of what a “juror” will find credible.

Second, the most important reality of the criminal justice system is that jurors rarely are involved in any decision making. Most cases end in a guilty

²⁸³ *McCleskey*, 481 U.S. at 309.

²⁸⁴ See Jane W. Gibson-Carpenter & James E. Carpenter, *Race, Poverty, and Justice: Looking Where the Streetlight Shines*, 3 KAN. J.L. & PUB. POL’Y 99, 103 (1994) (commenting that the majority’s focus in *McCleskey* on the bifurcated death penalty procedure, which places limits on the jury’s discretion to recommend death, essentially ignored the problem of excessive prosecutorial discretion).

²⁸⁵ As with so many unexamined issues, the first step is accepting that the problem exists. See William Berman, *When Will They Ever Learn? Learning and Teaching From Mistakes in the Clinical Context* 14 CLINICAL L. REV. (forthcoming 2006) (discussing a paradigm for recognizing, admitting and ameliorating mistakes).

plea.²⁸⁶ Available studies indicate that nearly nine in every ten cases result in a plea agreements.²⁸⁷ In light of the how rarely jurors are called upon to decide anything, the use of a hypothetical “juror” – not to mention one that is race and gender biased – is not the exercise of discretion but rather its abdication.

Third, system outcome bias seems premised more on the value of convictability rather than the value of justice. If prosecutors consider non-legal factors in their charging determination based on the supposed prejudices of a future jury, then they are in effect valuing winning over prosecuting someone who is likely guilty of a terrible crime. Although there are real constraints on prosecutorial time and resources, increasing the number of rape cases charged, considering the long history of disparate treatment of Black victims, would not substantially increase the prosecutorial burden. Further, the fear of “losing” before a jury should not be a lead motivating factor in the pursuit of a prosecutor’s duty to seek justice on behalf of the public.

Instead of outcome system bias and down stream juror orientation, prosecutors should develop criteria for case acceptance, rather than case rejection. These standards should be based on legal criteria including whether the necessary evidence exists to prove all elements, availability of witnesses, evidence of identification in a stranger rape case, evidence regarding the reporting time, and physical evidence of assault. This evidence should be evaluated without regard to questions of credibility or motive of the victim, which are factors best suited to consideration during later plea negotiations. The focus on standards for charging, rather than reasons for not charging, would further help prosecutors exercise their discretion in a more responsible fashion.

In addition to standards for charging, prosecutors should spread the discretion among several attorneys with both experience in the office and an understanding of the community. This could be accomplished by creating charging committees for sexual assault cases.²⁸⁸ Such Charge Review Committees would operate like case rounds in the medical profession. Before a final decision not to charge in a sexual assault case, three or more prosecutors would formally meet to consider the charging criteria and available evidence. This decision should be made without reference to system outcome juror bias. The purpose of such a committee is to spread the burden of discretionary decision-

²⁸⁶ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 24 (1998); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 1521 (1981).

²⁸⁷ See Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 *HARV. NEGOT. L. REV.* 115, 117 n.7 (1997) (collecting studies regarding plea rates).

²⁸⁸ Most of the discussion regarding charging committees surrounds prosecutorial discretion in the death penalty charging context. See Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 *S.D. L. REV.* 550 (2005) (comparing federal death penalty “Review Committee” and South Dakota’s unfettered prosecutorial charging discretion); John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2571 (1997); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L.J.* 1835 (1994); Edward C. Brewer, III, *Let’s Play Jeopardy: Where the Question Comes After the Answer for Stopping Prosecutorial Misconduct in Death-Penalty Cases*, 28 *N. KY. L. REV.* 34 (2001) (ethical error rates for prosecution offices suggest need for charging review committee).

making, ensure that decisions are generally consistent over time, and increase the accountability of the ultimate charging decision.

If adopted, these procedures would decrease the influence of external, non-legal biases in the decision to charge a rape crime. Such a decrease in system outcome biases would result in some improvement in the race-of-victim disparities in sexual assault charging. The advantage for prosecutors of adopting such procedures is that it would stave off future intrusive remedies by keeping the improvements within the closely guarded sphere of in-office exercise of prosecutorial discretion.

2. *Legislative Remedies*

One step removed from internal changes impacting decision-making within prosecutors' offices would be some efforts in state legislatures to require charging standards and review committees. The victims' rights lobby is powerful in most states and prosecutors would have a difficult time arguing that such changes would be onerous or inappropriate.

More intrusive legislative measures, however, should be considered. Specifically, the state and federal governments should require systematic record-keeping regarding sexual assault cases which would include race of victim and offender(s).²⁸⁹ Such record gathering would allow more accurate research and increase the potential for informed community responses to practices that are otherwise hidden.

A model for such recordkeeping and reporting legislation is the Federal Hate Crimes Statistics Act.²⁹⁰ Under that Act, Congress imposed a duty on the United States Attorney General to acquire information related to "hate crimes."²⁹¹ Interestingly, the Hate Crime Statistics Act includes "forcible rape" among the categories of crimes in which manifestations of discrimination assault might occur.²⁹² However, the statute does not require the collection of all data for the crime of forcible rape.²⁹³ Although the reporting duty is particularly aimed at the United States Attorney General, the law contemplates both input and dissemination of database information to all state law enforcement agencies.²⁹⁴

²⁸⁹ I fully endorse Professor Davis' call for racial impact studies regarding all types of criminal charging. See Davis, *supra* note 286 at 54:

Not every disparity is evidence of discrimination A prerequisite to eliminating race discrimination in the criminal process is the determination of whether dissimilar treatment of similarly situated people is based on race rather than some legitimate reason. Whether the treatment is intentional or purposeful should not matter – the goal should be the elimination of the harm. Thus, the first step is the implementation of racial impact studies designed to reveal racially discriminatory treatment. The second step is the publication of these studies so victims of discrimination and the general public may act to eradicate undesired policies and practices.

However, in the context of the specific history of discrimination in sexual assault cases, I believe data gathering regarding this crime is the best place to start.

²⁹⁰ Hate Crime Statistics Act, 28 U.S.C. §534 (2000).

²⁹¹ These are defined as "crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity". Hate Crime Statistics Act, Pub. L. No. 101-275 (1990).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ 28 U.S.C. §534(e)(2) (2000).

The simplest legislative route would be to specifically include "rape" as a hate crime for the purposes of the reporting statute. However, this solution would certainly engender legislative controversy.²⁹⁵ Although the violent stranger rape scenario would seem to fit the bill as a crime manifesting a prejudice based on gender, the same is not so obvious in complaints of same-sex rape. Also, the argument regarding the gendered nature of the hate crime categorization for rape diminishes the very real racial disparities associated with prosecution of the offense. Further, jurisdictions often already aggravate sentencing in rape, thereby further classifying the act as a hate crime duplicative.²⁹⁶ For these reasons, and because of the gendered racism of rape prosecutions that affects both victims and defendants, it is preferable to seek separate reporting requirement legislation for all types of sexual assault based on the reporting structure of the Hate Crimes Statistics Act.

Publication and access to such records would also further the goal of informing voters regarding the impact the prosecutor's decisions are having in his or her jurisdiction. The vast majority of prosecutors are elected from at-large districts.²⁹⁷ However, the means of operating their charge to the public that elected them is a secret process not understood by either citizens or, in most cases, the prosecutors themselves. The access to information on even one category of cases would greatly enhance the ability of citizens to evaluate the quality of the work performed by their representative in the criminal justice system.²⁹⁸ In this way, communities could assess whether a particular prosecutor office was actually working on behalf of all in the district, or primarily on behalf of those who were White.²⁹⁹

3. *Litigation Remedies*

Finally, in egregious cases of plain discriminatory intent *vis-a-vis* which victims receive the attention of a prosecutor, litigation would be another remedy. As described above, the courts have made it very difficult to litigate racial

²⁹⁵ See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Steve Bennett Weisburd & Brian Levin, "On the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21 (1994); Kathryn M. Carney, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315 (2001).

²⁹⁶ See Jonathan David Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes After R.A.V.*, 72 OR. L. REV. 157, 203 (1993).

²⁹⁷ As of 1990, one researcher put the percentage of elected chief prosecutors at over 90%. Bill Isaef, *Qualification, Selection, and Term*, in STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 15, 15 (Lynne M. Ross ed., 1990). In seven states and in the federal government, the chief prosecutors are appointed. Davis, *supra* note 286, at 57 n. 228. See Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L REV. 1811 (1998) (detailing the race of chief prosecutors with charging authority in capital cases) [hereinafter Pokorak, *Probing*].

²⁹⁸ Regardless whether elected or appointed, a prosecutor's duty is to represent the public in criminal matters in the courts. As Professor Davis explains: "The elected prosecutor emerged during the rise of Jeffersonian democracy in the 1820s No longer beholden to the governor or the court, the prosecutor was deemed accountable to this amorphous body called 'the people,' specifically his constituents." Davis, *supra* note 286, at 57-58 (notes omitted).

²⁹⁹ Pokorak, *Probing*, *supra* note 297, at 1819 ("expression of unconscious bias may result from the similarity between prosecutor and the victim populations").

disparity cases. However, as also noted above, these results invariably came in cases in which defendants sought relief from conviction or sentence. These cases reveal a tension between a prosecutor's two roles: on one hand as advocate for punishment in a particular case and on the other as a critical public servant charged in part with the duty to fairness and equality in the administration of criminal justice.³⁰⁰ The tension in almost every case in which there was not evidence of purposeful discrimination is resolved in favor of the prosecutor and against the defendant. This is primarily because the defendant's ultimate vindication is presumed to come in the question of individual guilt of innocence.³⁰¹

Such tension does not exist *vis-a-vis* victims. No one would argue that prosecutors are required to pursue every complaint regardless of evidence.³⁰² However, it is reasonable for citizens and courts to expect that the decision as to which victims' cases proceed should be based on articulable legal standards rather than prejudice or bias. The Supreme Court has indicated that a different analysis is appropriate when the Fourteenth Amendment Equal Protection clause complaint belongs to an actor other than the defendant. For example, in *Batson v. Kentucky*,³⁰³ the Court held that the prosecutors could not exercise peremptory challenges in a racially discriminatory fashion,³⁰⁴ despite the fact that peremptory challenges were traditionally discretionary and previously required neither rhyme nor reason to explain their exercise.³⁰⁵

In a series of cases following *Batson*, the court identified the equal protection claim as belonging to the juror who was dismissed for unconstitutional reasons.³⁰⁶ As such, any party to the case, civil or criminal, or the judge *sua sponte* could complain about the discriminatory use of a peremptory challenge.³⁰⁷ The vindication of the juror's right was independent of the outcome

³⁰⁰ See Davis, *supra* note 286, at 52. I wish to thank Professor Davis for this insight into the tensions when defendants litigate racial disparity claims.

³⁰¹ *Id.* at 52-53 ("If the defendants . . . are guilty . . . the government and society have an interest in their prosecution and punishment.").

³⁰² This position would require the "tortification" of criminal law – where the prosecutor was merely a publicly paid representative of an aggrieved and litigious victim.

³⁰³ 476 U.S. 79 (1986). *Batson* was decided the term before *McCleskey*.

³⁰⁴ *Id.* at 96. The Court in *Batson* developed a three-part prima facie test for determining whether a juror was unconstitutionally excluded requiring the defendant in the first instance to show that (1) the defendant was a member of a cognizable racial group; (2) that members of that group have been excluded from the jury; and (3) the circumstances suggest that the exclusion was based on race. Since *Batson*, this prima facie test has been changed to only require a showing of two and three above, eliminating the need for defendant and removed juror to share a racial identity. See *infra* note 310.

³⁰⁵ *Id.* at 91, 93.

³⁰⁶ See *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (defendant may object to race-based exclusion regardless of race of defendant); *Georgia v. McCollum*, 505 U.S. 42, 55-56 (state has standing to challenge defendant's discriminatory use of peremptory challenges).

³⁰⁷ The current structure of a *Batson* challenge requires a prima facie showing by the moving party that a juror has been removed based on a discriminatory reason. Thereafter, the burden shifts to the challenged party to offer a race-neutral reason for the use of the peremptory challenge. Finally, the burden of persuasion returns to the moving party to demonstrate that the reason proffered is either not race neutral or is pretextual and thereby convince the court that the juror was removed as a result of purposeful discrimination. See *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam).

of the trial and therefore did not implicate the same balancing of interests implicated by claims of discrimination asserted by a defendant.

The same is true of victims – particularly Black victims of rape. The history of rape as a badge of slavery, even more devastating than the sad history of excluding Black citizens from juries, requires more than simple assertions of the right to exercise discretion. In these cases, it should be incumbent on prosecutors to explain legal reasons for dismissal other than general denials of racial animus.

Such litigation would proceed under both the Thirteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. A victim whose case was dismissed by prosecutors for inappropriate reasons could bring suit for an injunctive order or mandamus to prosecute or appoint a special prosecutor to pursue the charges. Following the burden shifting structure formulated in *Batson*, the victim would plead a prima facie case of discriminatory intent by demonstrating: (1) she was a member of a racial group singled out for disparate treatment in the rape prosecution area; (2) there was a substantial likelihood that failure to prosecute was based on race; and (3) the process by which failure to prosecute took place is discretionary and susceptible to abuse.

The first two prongs would be satisfied with sufficient statistics of historical disparities in the prosecution of rape cases in the jurisdiction. The third prong would be easy to meet as there are generally no prosecutorial processes and the known research demonstrates overt reliance of others' stereotypes and prejudices in prosecutors' use of system outcome biases.³⁰⁸ The burden would then shift to the prosecutor to produce race-neutral reasons for dismissal or failure to charge. Because the system of prosecutorial discretion is so individualized and standardless, it is likely that most prosecutors would have a difficult time producing reasons that were not intertwined with improper race and gender considerations. Ultimately, it would be up to the court to determine if the proffered race-neutral reason was pretextual.³⁰⁹ Although a court might not rule in favor of an individual victim, the case itself might be sufficient to shed light on the continuing problem of racial disparities in sexual assault prosecution. That light might be sufficient for a prosecutor to institute improved case charging procedures, or for communities to choose another person for the position of prosecutor, or for a legislature to enact appropriate data reporting measures. Any of these results would stand as a victory for the cause of racial justice.

CONCLUSION

Gendered racism in rape cases is a longstanding stain on the promises of equality in the criminal justice system. Although the issue has been discussed, researched, and litigated, very little has changed in the way that prosecutors exercise their discretion over charging in rape cases. Although all information indicates a devaluation of Black women's rape experiences, prosecutors continue to rely on non-legal reasons when making critical discretionary decisions.

³⁰⁸ I wish to thank my colleague, Assistant Professor of Law Jessica Silbey, for her assistance and suggestions regarding this litigation remedy.

³⁰⁹ See *supra* note 307 (describing the shifting burden requirements of a *Batson* challenge).

Most significantly, prosecutors claim their use of discretion is governed by hypothetical juror prejudices against demeanor of poor and minority victims. This system outcome bias appears to be the primary entry point for the historical race based rape meta-narratives that maintain significant racial disparities in rape prosecution. The elimination of that practice, together with additional procedures within prosecutors' offices, would greatly diminish the effect of bias in the charging decision process. Additional legislative and litigation tools could likewise be applied to the problem. Considering the intransient nature of the race disparities in rape prosecutions, it is doubtful that these actions will lead to equality overnight. However, failing to take these relatively small steps will insure that rape prosecutions in this new century will be as tainted by racial prejudice as those of the last.