

Feminist Sexual Ethics Project

VICTIM RACE AND RAPE: A REVIEW OF RECENT RESEARCH

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INTRODUCTION

For rape, more than any other crime, successful prosecution of the perpetrator often depends to an inordinate degree on the identity of the victim. What she was wearing, what she was doing, where she was—such questions continue to permeate trials and everyday understandings of rape, despite changes in attitudes and in the law.¹

¹ For example, most states now have “rape shield” laws, which limit the introduction of evidence about victims’ sexual history. For a discussion of the history and impetus behind the rape shield movement, see Rebekah Smith, *Protecting the Victim: Rape and Sexual Harassment Shields Under Maine and Federal Law*, 49 MAINE LAW REVIEW 443–512, 453–71 (1997). Despite such reforms, stereotypes persist in the legal definition of rape; for example, New York’s rape shield law has a notable exception: the defense may introduce evidence of the victim’s prior conviction for prostitution, if it occurred within three years of the alleged rape. See N.Y. CRIMINAL PROCEDURE CODE § 60.42.

Some have questioned the effectiveness of statutory rape reform. Ronet Bachman and Raymond Paternoster analyzed the effects of changes to rape laws in three areas—victim reporting, imprisonment rates, and acquaintance rape—and found only minor increases in each area, concluding that “statutory rape law reform has not had a very substantial effect on either victim behavior or actual practices in the criminal justice system.” See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 554–74, 573 (1993). The authors also observe that “the intended goals of rape law reform have not always been clear,” see *id.* at 554, owing in part to the different agendas of the various reform groups militating for change: feminist groups, for example, sought to change general attitudes about rape and explode myths about victim behavior, while victims’ rights groups sought to increase penalties and conviction rates, see *id.* at 554–55.

These problems in the effectiveness of rape reform laws may tie into a more general fact about rape cases: they are harder to prosecute successfully than other violent crimes. While I could not find more recent work on this issue, an older study concludes that “defendants in rape cases have a greater probability of being acquitted or having their case dismissed than defendants of other violent crimes. Additionally, an individual who

Among victim characteristics that scholars and criminologists have examined for their potential extralegal effects on jurors, prosecutors, and other actors in the legal system, race has received significant attention. In this paper, I collect and attempt to synthesize the findings of a number of recent studies of how race—specifically the race of the victim—affects numerous stages of criminal prosecutions for rape. The general trend of this research indicates that African American women who are victims of rape face significant obstacles in almost every aspect of a rape prosecution that white women do not encounter. However, this result often appears to be dependent on a complicated mix of factors, not simply the race of the victim. The racial combination of the victim and defendant, the jury’s racial composition, the type of rape (that is, acquaintance or stranger), and even the strength of the evidence, play different roles in exacerbating the difficulties African American women face in rape prosecutions.²

In order to situate these works in a historical context, Part I of this paper briefly reviews the history of African Americans’ legal status as rape victims, from the time of slavery to the present day. Part II then discusses a number of sociological and psychological studies (covering analyses of actual rape trials as well as research using volunteers and mock juries) that demonstrate a number of disparate outcomes—in the

commits rape has only about 4 chances in 100 of being arrested, prosecuted, *and* found guilty of *any* offense.” See Hubert S. Feild, *Rape Trials and Jurors’ Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 LAW & HUMAN BEHAVIOR 261–84, 262 (1979).

² This analysis focuses on the African American experience simply because I found little research into the impact of other races and ethnicities on legal outcomes. The only study I found, which examines the impact of the victim’s race on her likelihood of reporting the crime to various sources, used samples of African American, Hispanic, and Asian American women, and is discussed *infra* pp. 18–19.

legal system, in victims' personal lives, and in the public perception of rape victims—that appear to correlate with victim race.

I. SLAVERY AND RAPE: HISTORICAL BACKGROUND

The intersection of slavery and sexual violence, and the perpetuation of such violence after slavery's official end, are critical components of an understanding of the present-day significance of race in African American women's experience of rape. In this Part, I offer a brief overview of the history of African American women's encounters with sexual assault, tracing the prevalence and legal status of rape prior to the Civil War and the slow pace of change in the law and in perceptions following Emancipation. The Part concludes with a brief discussion of the perpetuation of racial stereotypes in common perceptions of what rape really "is."

A. *Rape Before the Civil War*

The most striking fact about legal prosecutions for the rape of enslaved black women in the antebellum South is their nonexistence: before the Civil War, the rape of enslaved black women—whether by other slaves or by white men—was simply not a crime.³ Randall Kennedy recounts a Mississippi appellate court decision, *George, a Slave, v. State*,⁴ that overturned the conviction of a male slave for the rape of a young girl: the court concluded “that there is no act which embraces either the attempted or

³ See Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARVARD WOMEN'S L.J. 103–41, 118 (1983).

⁴ 37 Miss. Rep. 316 (1959).

actual commission of a rape by a slave on a female slave.”⁵ Furthermore, the rape of enslaved women by white men was commonplace, yet, “as a definitional matter, the law did not view as a crime the rape of slave women by white men.”⁶ The disparate treatment of enslaved black men accused of sexually assaulting white women is well known: they faced statutes setting their penalty at death or castration; they also frequently faced angry mobs that made those statutes moot.⁷

Kennedy notes that while the law treated free black women somewhat better, they were accorded nowhere near the same status as white women victims of rape: not only did some courts state that the punishment of death was unavailable for such a crime, no records exist of any white man tried for the rape of a free black woman. Kennedy further notes that the inability of blacks to testify against whites in court during that time period would make such cases nearly impossible to prosecute.⁸

By all accounts, the sexual assault of enslaved women was widespread.⁹ Commentators suggest that the pervasiveness of rape, and the legal system’s refusal to accord enslaved women justice for these assaults, were grounded in sexual stereotypes about black men and women, gender stereotypes, and simple economics. Karen Getman notes that one of the early justifications for slavery was the belief that Africans required a

⁵ RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 35 (1997).

⁶ *Id.* As Wriggins notes, indictments were often dismissed for a failure to state that the victim was white. Wriggins, *supra* note 3, at 106.

⁷ *See* Wriggins, *supra* note 3, at 105. By contrast, “statutes provided less severe penalties for the convicted white rapist than for the convicted Black one.” *Id.* at 106.

⁸ KENNEDY, *supra* note 5, at 36. Kennedy’s discussion of the Scottsboro rape trial, *see id.* at 29–75, offers an excellent analysis of the kinds of legal obstacles that African Americans historically faced as defendants, plaintiffs, jurors, and witnesses, both before and after the Civil War.

⁹ *See* Wriggins, *supra* note 3, at 118 & n.89 (citing numerous sources).

“civilizing influence upon [their] supposed unrestrained sexuality.”¹⁰ Patricia Hill Collins speaks of the image of the black woman as “jezebel,” which “originated under slavery when Black women were portrayed as being . . . ‘sexually aggressive wet nurses.’”¹¹ By relegating “all Black women to the category of sexually aggressive women,” Collins argues, this image “provid[ed] a powerful rationale for the widespread sexual assaults by White men” during the time leading up to the Civil War.¹² Thus, sexual stereotypes that justified enslavement served also to justify the law’s refusal to perceive the rape of black women as a crime. Stereotypes about the “moral and sexual virtue” of white women¹³ also justified white men’s assaults against black women: black women became an outlet for white sexuality that would otherwise have “defiled” the image of white womanhood.

Sexual assault of enslaved women by white men was also “a means of enhancing the labor force”; Gail Wyatt points out that children born to enslaved mothers became the

¹⁰ Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARVARD WOMEN’S L.J. 115–152, 116 (1984); see also *id.* at 117 (discussing the prevalence of these stereotypes despite the importance of marriage and family to the enslaved people themselves). Kimberlé Crenshaw notes that “[s]exualized images of African Americans go all the way back to Europeans’ first engagement with Africans. Blacks have long been portrayed as more sexual, . . . more gratification-oriented. . . . Thus Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot.” Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD LAW REVIEW 1241–99, 1271 (1991).

¹¹ PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 81 (2d ed. 2000) (quoting Cheryl Clarke et al., *Conversations and Questions: Black Women on Black Women Writers*, 3 CONDITIONS: NINE, 88–137 (1983)) (internal quotation marks omitted).

¹² COLLINS, *supra* note 11, at 81. Wriggins notes that cases like *George* demonstrate that “white men are held to lesser standards of restraint with Black women than are Black men with white women. . . . [and] neither white nor Black men were expected to show sexual restraint with Black women.” Wriggins, *supra* note 1, at 119 (footnote omitted).

¹³ Getman, *supra* note 10, at 117.

property of those mothers' owners,¹⁴ offering slave owners an economic incentive to rape. Adrienne Davis has characterized slavery as “an early and particularly virulent strain of institutionalized sexual harassment,” noting that “slavery’s law and markets extracted from enslaved women reproductive and sexual labor Enslaved women reproduced the workforce.”¹⁵ The one-sided effect of rape laws—punishing almost exclusively black men accused of raping white women—may also have served as a more subtle means of perpetuating slavery, by reinforcing the always fragile racial hierarchy upon which slavery depended. Getman traces the development of anti-miscegenation laws, and of notions of white supremacy itself, to the need of southern slaveholders to enforce that hierarchy and thus protect their labor supply: these laws sought to prevent interracial relationships between black men and white women that would produce “a new class—mulattoes—who had no clearly defined role in the caste system,”¹⁶ and who, as free individuals, would pose a risk to that system.

Thus, enslaved African American women faced laws that utterly failed to protect them from sexual assault as well as a system of labor that encouraged that assault.

¹⁴ Gail Elizabeth Wyatt, *The Sociocultural Context of African American and White American Women’s Rape*, 48 *JOURNAL OF SOCIAL ISSUES* 77–91, 79 (1992); *see also* COLLINS, *supra* note 11, at 50.

¹⁵ Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment* 1, 3 (University of North Carolina-Chapel Hill School of Law, Public Law and Legal Theory Research Paper No. 02-13, 2002) (forthcoming in *DIRECTIONS IN SEXUAL HARASSMENT* (Catharine MacKinnon & Reva Siegel, eds.)). Davis further notes that “[f]ollowing the close of the (legal) international slave trade in 1808 and accompanying the rising labor demands driving by the expanding cotton market and southern frontier, a thriving domestic trade in black people emerged—supplied by black women’s childbearing.” *Id.* at 2.

¹⁶ Getman, *supra* note 10, at 124; *see also id.* at 124–33.

B. *The Post-Civil War Period*

While rape statutes, as Wriggins notes, became race neutral after the Civil War and the passage of the Fourteenth Amendment, their application was anything but.¹⁷ While African American women continued to face barriers in the legal prosecution of their assaults, “[a]llegations of rape involving Black offenders and white victims were treated with heightened virulence,” both through lynching and through blatant discrimination in the courts.¹⁸ Stereotypes about sexuality persisted: for example, some court procedures permitted juries to consider the race of the defendant as evidence of intent only where the parties were of *different* races; indicating, as Wriggins notes, that “Black men do not want to rape Black women with the same intensity or regularity that Black men want to rape white women.”¹⁹ Courts also continued to subscribe to the belief that most young African American women, owing to their “sexual appetites,” were not virgins, and therefore ineligible for the law’s protections: many traditional rape statutes provided that rape is not a crime against unchaste women.²⁰

Outside the courtroom, the rape of African American women became a tool for inspiring terror and ensuring continued subordination in the Reconstruction South. Wriggins notes that unlike white women, black women were vulnerable both to the Ku Klux Klan’s use of rape as a means of subjugation²¹ and to “employers’ sexual

¹⁷ See Wriggins, *supra* note 1, at 106–07.

¹⁸ *Id.* at 107.

¹⁹ *Id.* at 120.

²⁰ *Id.* at 121.

²¹ *Id.* at 119. For an extensive discussion of the Klan’s use of sexual violence to terrorize and subordinate African Americans, see Lisa Cardyn, *Sexualized Racism/Gendered*

aggression,” because they almost always worked outside the home.²² At the same time, the white population’s longstanding fear of the depredations of African American males was supplemented with what Lisa Cardyn calls a crisis of masculinity engendered by the loss of the Civil War,²³ two conditions that conspired to create an atmosphere of panic about the possibility of the rape of white women, and consequent reaction in the form of brutal repression and lynchings.

Even as the legal climate slowly changed, and prosecutions for the rape of African American women became more common, the racially disparate treatment of accused rapists and victims persisted, most obviously in the area of sentencing. Before 1976, when the Supreme Court ruled that the death penalty for the crime of rape constituted cruel and unusual punishment in violation of the Eighth Amendment,²⁴ studies of executions for rape in the southern states demonstrated a widespread pattern of racial bias: compared to white defendants, African American men were disproportionately

Violence: Outraging the Body Politic in the Reconstruction South, 100 MICHIGAN LAW REVIEW 675–867 (2002).

²² See Wriggins, *supra* note 3, at 119. Wriggins recounts the story of one black woman’s unsuccessful attempt to seek redress for sexual harassment:

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

Id. at 120 n.103 (alterations in original) (quoting *More Slavery at the South*, 72 THE INDEPENDENT, Jan. 25, 1912, at 197–200, reprinted in G. LERNER, BLACK WOMEN IN WHITE AMERICA 155–56 (1972)).

²³ See Cardyn, *supra* note 22, at 813.

²⁴ *Coker v. Georgia*, 433 U.S. 584 (1976).

sentenced to death for rape, and their victims were invariably white women.²⁵ Only one appellate opinion records an attempt to challenge the application of the penalty to black men on equal protection grounds, but in *Maxwell v. Bishop*,²⁶ the Eighth Circuit Court of Appeals rejected this argument, and its supporting statistical evidence, as insufficient to prove intent to discriminate, a prerequisite for a constitutional challenge. The statistics I note above, and others like them, are often used in arguments that focus on the problems of racial discrimination perpetrated against African American men; but they just as clearly show the law's failure to accord to African American women victims the same status and protections as white women.²⁷

C. *The Legacy of Historical Discrimination*

While the following Part outlines continuing racial disparities in the public perception and criminal prosecution of rape involving African American victims, disparities that many argue are the legacy of slavery,²⁸ a specific observation should be made at the outset. Many of the studies indicate that interracial rapes involving an African American male attacking a white female constitute a significant percentage of total rapes reported, while rapes involving a white assailant and black victim are

²⁵ See *infra* notes 60–63 and accompanying text; see also Patricia Evans, *Rape, Race, and Research*, in *BLACKS AND CRIMINAL JUSTICE* 75–84, 80 (Charles E. Owens & Jimmy Bell eds., 1977).

²⁶ 257 F. Supp. 710–21 (E.D. Ark. 1966), *aff'd* 398 F.2d 138–54 (8th Cir. 1968). For a discussion of *Maxwell*, see KENNEDY, *supra* note 5, at 318–23.

²⁷ Cf. Crenshaw, *supra* note 10, at 1278 (“In order to understand and treat the victimization of Black women as a consequence of racism and sexism, it is necessary to shift the analysis away from the differential access of men and more toward the differential protection of women.”).

²⁸ See, e.g., Wriggins, *supra* note 3, at 121–22; see also Lily D. McNair & Helen A. Neville, *African American Women Survivors of Sexual Assault: The Intersection of Race and Class*, 18 *WOMEN & THERAPY* 107–18, 109–12 (1996).

comparatively rare. Statistics such as these perpetuate the kinds of myths and stereotypes about black aggression and white victimization recurring throughout the history just described, and contribute to the persistent belief that the paradigm rape involves a black perpetrator and a white victim.

However, studies have shown that rape is far more intraracial, and less interracial, than has commonly been believed. By looking at population distributions rather than simply at number of reported rapes, Robert O'Brien demonstrated that even though the *number* of black assailant-white victim rapes is higher than the number of white offender-black victim rapes, its relative *frequency* is not.²⁹ O'Brien based his statistical model on the premise that when one group in a population is smaller than another, members of the smaller group will experience a higher rate of interaction with members of the larger group than vice versa.³⁰ After taking into account the distributions of whites and blacks in the general population and in the offender population, O'Brien concluded that not only are rapes less interracial than would be expected by looking at population distributions, they are actually more *intraracial* than would be expected.³¹ Thus, the common

²⁹ See Robert M. O'Brien, *The Interracial Nature of Violent Crimes: A Reexamination*, 92 AMERICAN JOURNAL OF SOCIOLOGY 817–35 (1987). His theory depends on the insight that because there are fewer African Americans in the population than there are whites, the relative frequency of blacks' interacting with whites will be higher than whites' interacting with blacks in "asymmetrical" situations like rape. That is, "[a]ll minority groups, singly or in combination, are more involved in intergroup relations with a group constituting a majority than the majority group is with them." *Id.* at 820 (quoting PETER M. BLAU, *INEQUALITY AND HETEROGENEITY: A PRIMITIVE THEORY OF SOCIAL STRUCTURE* 22- 23 (1977)) (internal quotation marks omitted).

³⁰ "To illustrate, assume that there are 10% blacks and 90% whites in a population of 1,000; then, if there are 10 black-white marriages, 10% . . . of the blacks would be intermarried, while only 1.1% . . . of the whites would be intermarried." *Id.* at 819.

³¹ *Id.* at 822.

understanding that African Americans are more likely to rape white people than the reverse is unfounded.³²

II. VICTIM RACE: ACTUAL OUTCOMES AND JUROR PROPENSITIES

In the following Part, I examine recent sociological and psychological research into the interplay between victim race and numerous aspects of the crime of rape—from victim self-perception to sentencing decisions in actual cases. The overwhelming majority of studies confirm that the victim’s race plays a significant role throughout the process of investigating and prosecuting rape crimes: specifically, these studies suggest that African American women who are victims of rape encounter a legal system that perceives them and the seriousness of their injuries differently because of their race. They also appear to view themselves as victims differently than do white women. Several studies indicate that it is not victim race alone that affects legal outcomes, but a complicated mix of factors that include the defendant’s race, the racial and gender composition of the jury, and the type of rape in question.³³

I have divided the studies into two general categories. The first group includes what I characterize as “official” reactions to rape: these studies—which primarily employ outcomes in actual cases—scrutinize decisions and results, including charging decisions of prosecutors and the processing of rape cases through the court system, that appear to be influenced by the victim’s race. The second group of studies examines “unofficial” reactions to rape: these studies examine the racial implications of choices and responses

³² See also Larry W. Koch, *Interracial Rape: Examining the Increasing Frequency Argument*, 26 AMERICAN SOCIOLOGIST 76–86 (1995).

³³ That is, whether the assault involves a stranger, acquaintance, date, or intimate partner.

of victims and potential jurors on topics ranging from rates of reporting to perceived victim credibility. Obviously, these two categorizations are not perfect—after all, a juror’s reaction is just as “official” as a prosecutor’s—but because many of the juror studies involve mock, rather than actual, juries, they seemed more naturally grouped with studies of victims and other individuals whose perceptions and reactions have a source external to the criminal justice system.

A. *Racial Influence on “Official” Reactions to Rape*

A number of studies indicate that because of their race, African American rape victims face significant obstacles in pursuing justice within the legal system.³⁴ One study, for example, suggests that victim race has an effect quite early in the process of criminal prosecution: the prosecutor’s decision whether to file a complaint. Prosecutors typically have significant discretion to file charges and to make related decisions involving the seriousness of the charges, whether to plea bargain, and what sentences to recommend.³⁵ Because prosecutors focus on assessing which cases are likely to be successful, some researchers have suggested that their charging decisions may have a “downstream orientation”—that is, apart from any preconceived notions they themselves

³⁴ A number of authors suggest that police officers who investigate rape are less likely to take complaints by African American women seriously, but I could find no recent research that bears out this claim. For an example of the argument, see Note, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 277–323 (1968). See also KENNEDY, *supra* note 5, at 72–74 (describing the contention that the Central Park Jogger case received the intensive police attention that it did because the victim was white but warning that media coverage is likely to affect how law enforcement allocates its resources).

³⁵ Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUSTICE QUARTERLY 651–88, 652 (2001).

may hold regarding rape victims and victim behavior, they may be influenced in their decisionmaking by their knowledge that jurors often hold such stereotypes.³⁶ Researchers seeking to test this hypothesis examined the actual charging decisions of prosecutors in two jurisdictions: Kansas City and Philadelphia.³⁷ The authors investigated the interplay among “victim, suspect, and case characteristics,” and the resultant effect on prosecutorial charging decisions,³⁸ hypothesizing that because “crimes between intimates are perceived as less serious than crimes between strangers,”³⁹ legally irrelevant victim characteristics would affect charging decisions in cases of date, acquaintance, or intimate partner rape, but not in cases of stranger rape.⁴⁰

For all but one victim characteristic, the data fulfilled the authors’ expectations. They found that the effects on charging decisions of victim characteristics—for example, engaging in risk-taking behavior at the time of the incident,⁴¹ possessing questionable

³⁶ *Id.* at 653.

³⁷ The authors chose two jurisdictions in order to test differences in outcomes between jurisdictions that have “specialized units for the prosecution of sexual offenses” and those that are handled simply by available attorneys in the District Attorney’s office. *Id.* at 662–63. Both Kansas City and Philadelphia have such specialized units, but in Philadelphia the unit does not enter the process until after the charging decision has been made. *Id.* at 662. The sample sizes were similar: 259 cases in Kansas City and 267 in Philadelphia. *Id.* at 665.

³⁸ *Id.* at 654.

³⁹ *Id.* at 653.

⁴⁰ They hypothesized that prosecutors would be less likely to be influenced by victim characteristics in the latter cases because prosecutors generally tend to have less discretion in those cases—the outcomes are more often determined by “legally relevant factors such as the seriousness of the offense, the strength of the evidence in the case, and the culpability of the defendant.” *Id.* at 654. By contrast, in the “less serious cases, . . . the appropriate outcome is not indicated clearly by the nature of the crime nor by other legally relevant factors.” *Id.*

⁴¹ Examples include hitchhiking, walking home alone late at night, drinking, and taking drugs. *Id.* at 668.

moral character,⁴² failing to make a prompt report of the incident, and failing to resist the attack physically—were “confined to cases involving acquaintances and intimates.”⁴³ Such characteristics had no effect on decisions to charge in cases of stranger rape.⁴⁴ However, race did have an effect. As the authors note: “[s]omewhat surprisingly, charging decisions in cases involving strangers . . . were affected by the victim’s race: prosecutors were 4 1/2 times more likely to file charges if the victim was white.”⁴⁵ Combining victim’s race with another case factor—the suspect’s use of a weapon—the authors further concluded that “[p]rosecutors 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.”⁴⁶ The discrepancy between charging decisions where a weapon is lacking is most telling: while prosecutors filed charges in 75 percent of the cases in which a white woman was attacked by an unarmed assailant, when the victim was black prosecutors filed charges only 34 percent of the time.⁴⁷

The authors attempted to explain this unexpected effect by hypothesizing that the issue behind these statistics was not victim race so much as it was a possible interplay

⁴² Questionable moral character included prior sexual activity, out-of-wedlock birth, alcohol or drug abuse, and working as a prostitute or exotic dancer. *Id.*

⁴³ *Id.* at 671.

⁴⁴ By contrast, most of the characteristics that affected decisions in stranger rape cases were legally relevant—they included the presence of physical evidence and the use of a weapon. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 673. The authors also note that “[u]se of a gun or knife . . . increases twofold the probability of charging in cases involving black women, but has a more modest effect in cases involving white women.” *Id.* at 673–74.

⁴⁷ *Id.* at 674 tbl.4. There is a discrepancy between the text and the tabular material in the study however: the text reports that assailants of white women who did not use a weapon were charged 70 percent of the time. *Id.* at 673. In the comparison to the statistic for black victims, however, the 5 percent difference is fairly irrelevant.

between victim and assailant race, because a higher percentage of stranger cases involved a black assailant and a white victim.⁴⁸ Reanalyzing the data to test for this possibility, however, showed no such effect.⁴⁹ The authors concluded that “[i]n these two jurisdictions, . . . prosecutors were more likely to file charges against men who assaulted white women who were strangers to them than men who assaulted black women who were strangers to them.”⁵⁰

Another study indicates that the effects of victim race on rape prosecutions extends much further than the decision to prosecute. Gary LaFree analyzed nearly 900 forcible sexual assault investigations in Indianapolis occurring over a 3-year period,⁵¹ focusing on nine separate stages of “official reactions” to a rape charge—ranging from arrest to sentence length.⁵² As the observed cases continued through each of the stages, which “form[ed] a funnel in which fewer cases remain[ed] at each subsequent stage,”⁵³ the racial composition of the cases changed markedly. While the percentage of cases in which a white man was accused of raping a white woman remained constant throughout the stages, the percentage of black intraracial cases fell sharply, and black assailant-white victim cases increased. Thus,

⁴⁸ *Id.* at 680.

⁴⁹ *Id.*

⁵⁰ *Id.* at 680–81.

⁵¹ See GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989); see also Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AMERICAN SOCIOLOGICAL REVIEW 842–54 (1980) (discussing the same study).

⁵² Specifically, the nine decisions were whether to arrest, the seriousness of the charge filed, whether to file felony charges, case prosecution (as opposed to dismissal of charges), adjudication via trial or plea agreement, verdict reached (if adjudicated through a trial), sentence type (whether the sentence involved prison time), place of incarceration (security level of prison), and sentence length. See LAFREE, *supra* note 51, at 130–31.

⁵³ *Id.* at 131.

[b]lack men accused of assaulting black women accounted for 45 percent of all reported rapes, but for only 26 percent of all men sentenced to the state penitentiary and for only 17 percent of all men who received sentences of six or more years. By contrast, black men accused of assaulting white women accounted for 23 percent of all reported rapes, but for 45 percent of all men sent to the state penitentiary and for 50 percent of all men who received sentences of six or more years.⁵⁴

The author then refined the analysis by including a number of other variables, including whether the victim was willing to prosecute, the availability of witnesses, the presence of a weapon, and the type of offense (rape versus attempted rape).⁵⁵ As a result of adding these factors, the effects of racial composition decline somewhat, no longer having a statistically significant effect on the outcomes in the decisions whether to prosecute and whether to bring a case to trial.⁵⁶ However, as LaFree pointed out,

[c]ompared to other defendants, blacks who were suspected of assaulting white women received more serious charges, were more likely to have their cases filed as felonies, were more likely to receive prison sentences if convicted, were more likely to be incarcerated in the state penitentiary (as opposed to a jail or minimum-security facility), and received longer sentences on average.⁵⁷

While not indicating that victim race alone has a significant effect on legal outcomes, this study shows that “processing decisions in these sexual assault cases were affected by the race composition of the *victim-defendant dyad*, and the cumulative effect of race composition was substantial.”⁵⁸ Given that the racial effects were most pronounced in the areas of sentencing and charge seriousness, these results suggest that “the racial composition of the victim-defendant dyad has a greater effect on decisions

⁵⁴ *Id.* at 133; *see also id.* at 132 fig.6.1

⁵⁵ *See id.* at 135.

⁵⁶ *See id.* at 139.

⁵⁷ *Id.* at 139–40.

⁵⁸ *Id.* at 140 (emphasis added).

measuring seriousness of the offense than on those indicating guilt or innocence.”⁵⁹ An earlier study investigating racial disparities in executions for rape reaches a similar conclusion. Prior to 1976, a number of states made the death penalty available to punish rape, and the differential application of the penalty based on race are clear: the authors note that a study of Florida between 1940 and 1964 showed that forty-five of the eighty-four black defendants convicted of raping white women receiving the death penalty (fifty-four percent), “while none of the eight white offenders who raped black females received the death penalty.”⁶⁰ While many studies had examined the issue in terms of the race of the defendant, these authors examined cases in Georgia from 1945 to 1965 using both defendant and victim race as factors.⁶¹ After controlling for a number of other variables,⁶² they concluded that “it is the combination of a black defendant and white

⁵⁹ LaFree, *supra* note 51, at 852. Crenshaw criticizes LaFree’s approach, suggesting that [His] analysis focuses on the harsh regulation of access by Black men to white women, but is silent about the relative subordination of Black women to white women. . . . From this prevailing viewpoint, the problem of discrimination is that white men can rape Black women with relative impunity while Black men cannot do the same with white women. Black women are considered victims of discrimination only to the extent that white men can rape them without fear of significant punishment. Rather than being viewed as victims of discrimination in their own right, they become merely the means by which discrimination against Black men can be recognized. The inevitable result of this orientation is that efforts to fight discrimination tend to ignore the particularly vulnerable position of Black women, who must both confront racial bias *and* challenge their status as instruments, rather than beneficiaries, of the civil rights struggle.

Crenshaw, *supra* note 10, at 1276–77 (footnote omitted).

⁶⁰ Marvin E. Wolfgang & Marc Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 658–68, 662 (1975). Furthermore, only six white men convicted of raping white women received the death penalty, a mere five percent. *Id.*

⁶¹ *Id.* at 663

⁶² *Id.* at 663–64. Those variables included such offense-related factors as whether the defendant and victim knew each other, the amount of physical injury to the victim, prior sexual relations, and any defense of consent. *Id.*

victim in contrast to all other racial combinations of defendants and victims that is most likely to result in a death sentence.”⁶³

None of these studies paints a complete picture: they involve limited samples, diverse geographic areas, and cannot account for all possible factors that may go into the consideration of the various stages of an official rape prosecution. However, they do demonstrate that the race of the victim, alone or in conjunction with other factors, likely plays a significant role in a range of decisions that ultimately affect the outcome of cases.

B. “Unofficial” Reactions: Victims, Potential Victims, and Jurors

The following section describes a group of studies that cover a range of rape-related issues. Although “unofficial” is something of a misnomer, most of the “jury” studies here do not involve actual legal determinations, but rather mock studies prepared for research purposes using volunteers and students. As with the studies discussed in the previous section, these works demonstrate that victim role plays a pervasive role in issues surrounding rape.

1. Disclosure

Several studies indicate that African-American women are “significantly less likely to disclose incidents involving sexual assault.”⁶⁴ Gail Wyatt analyzed the detailed responses of 55 women who reported 146 incidents of assault,⁶⁵ discovering that “[o]f incidents that were not disclosed to anyone until years later, 64% involved African

⁶³ *Id.* at 666.

⁶⁴ Wyatt, *supra* note 14, at 86.

⁶⁵ *Id.* at 82.

American women as compared to 36% for White women.”⁶⁶ While white women reported 31 percent of their attacks to the police, only 23 percent of black women did so.⁶⁷ The author notes that 58 percent of the incidents that African American women did not report were attempted rapes (as compared to 42 percent of the incidents that white women did not report),⁶⁸ and suggests that black women, long accustomed to not being taken seriously by the police, may themselves have failed to perceive these incidents as “real rape,” or may have been unwilling to report those incidents where they felt their credibility was weakest.⁶⁹ The author then offers several other hypotheses for the racial disparity in reporting. For example, black survivors may feel a lack of community support as a result of perceiving that “[t]he credibility of Black women as rape victims has never been established as firmly as it has for White women.”⁷⁰ They may mistrust the police as a result of other experiences of racial discrimination.⁷¹ The author also notes that African American women were significantly more likely to have heard such statements as “[s]ome women are more likely to be raped than others,” and to believe that they were at risk for rape:⁷² these outcomes “suggest[] that rape is perceived as a likely rather than an unlikely occurrence in their lives. . . . If women’s rights to be protected are

⁶⁶ *Id.* at 83.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See id.* at 86.

⁷⁰ *Id.*

⁷¹ *See id.* at 86–87.

⁷² *Id.* at 85. Eighty-four percent of African American women had heard such statements as compared to 60 percent of white women; 36 percent of African American women felt they were at greatest risk for rape, compared to 17 percent of white women. *Id.* According to the study, however, the prevalence of rape among African American and white women was the same. *Id.* Others contest this assertion, suggesting that African American women are more frequently the victims of rape than white women. *See, e.g.,* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARVARD LAW REVIEW 563–624, 595 (1997).

contingent upon the color of their skin, perceptions of the likelihood of rape occurring may also lower women's efforts to prevent its occurrence."⁷³ Wyatt also suggests that the heightened awareness of rape evinced by the African American subjects of her study may stem from "membership in an ethnic group that lived through a period of American history where their incidents of sexual assault were not considered crimes."⁷⁴

Another study focused on racial patterns involving potential recipients of disclosures. The authors interviewed women of four ethnic groups—Asian, black, Hispanic, and white—and assessed their self-reported willingness to report sexual abuse to a variety of different recipients, including the police, physicians, rape counseling centers, husbands or boyfriends, parents, female friends, and clergy.⁷⁵ The authors found significant variations by ethnicity in intentions to report to different authorities and individuals, noting that "White women tended to indicate a greater likelihood of reporting a rape than minority women across all potential report recipients, [and] this difference

⁷³ Wyatt, *supra* note 14, at 87.

⁷⁴ *Id.* at 88. Wyatt makes the connections between present day experience and the legacy of slavery more explicit, noting that that

In the present study, some women recalled incidents that renewed memories of the historical treatment of Black women who were raped during the slavery era. For example, one African American woman recalled hearing about a relative who was abducted, beaten, raped, and killed while her family was living in the South. Even though the family moved West following the incident, all of the women in the family were told about the incident, seemingly as a part of a "rite of passage" into womanhood. Rape was described as something that could happen to you just because you were Black and female. . . . African American women may seem more vulnerable to crime because they do not anticipate that they will be protected by traditional authorities and institutions. There is no historical basis for women of color to grow up with that assumption.

Id.

⁷⁵ See Shirley Feldman-Summers & Clark D. Ashworth, *Factors Related to Intentions to Report a Rape*, 37 J. SOC. ISSUES 53–70, 56 (1981). The study involved fifty women from each of the four ethnic groups. *Id.* at 55.

was most marked in relation to the ‘police’ and rape crisis center categories.⁷⁶ The authors explain this result by reference to the distrust minority group members often have for public authorities and their perception that they have less credibility than white victims.⁷⁷ Among the different minority groups and categories of potential recipients, African American women were generally more likely to report than Asian or Hispanic women, particularly to physicians, mental health professionals, and female friends.⁷⁸ Although the authors do not examine this outcome specifically, they do note the “cultural expectations” of Asian women that may affect their willingness to report.⁷⁹ African American women were also slightly more likely than white women to report sexual abuse to physicians, mental health professionals, and female friends.⁸⁰ Interestingly, Hispanic women were far more likely than women in any of the other ethnic groups to report their abuse to clergy.⁸¹

2. *Perceptions about Victims*

a. Victim Self-Perception. Victim and potential victim beliefs about the causes of rape and their acceptance of rape myths are likely linked to issues about disclosure. In the study discussed above, Gail Wyatt found that participants’ responses to questions involving their beliefs about why they were victimized varied considerably along the lines of race. African American women “were significantly more likely than White women to offer explanations about their victimization that involved the riskiness of their living circumstances”—specifically, 76 percent of the African American women

⁷⁶ *Id.* at 65.

⁷⁷ *Id.* at 65–66.

⁷⁸ *See id.* at 61 tbl.2.

⁷⁹ *Id.* at 66.

⁸⁰ *See id.*

⁸¹ *See id.* at 61 tbl.2.

compared to 24 percent of the White women.⁸² This recognition of the “danger in their living environments that placed them at risk of being victimized by men,” according to Wyatt, was a “realistic assessment of barriers to their safety” rarely addressed in current discussions of how to respond to the problem of rape.⁸³

b. Acceptance of Rape Myths. Another important variable involves to what extent potential victims and potential jurors accept rape myths, and whether acceptance is affected by racial considerations. One study analyzed the responses of a group of university students to a set of statements driven by commonly held beliefs about what rape is, characteristics of victims, and characteristics of defendants.⁸⁴ The statements about rape included such notions as “a female cannot be forced to have intercourse against her will,” and “one of the most common types of rape is that of a black man against a white woman;” victim-based statements included “victims of rape are usually a little to blame for the crime,” and “many females have fantasy dreams about rape;” statements about defendants included “most rapists have severe psychological problems,” and “normal males do not commit rape.”⁸⁵

Separating out the responses of white men, black men, white women, and black women, the authors found that a substantial number of individuals strongly or moderately agreed with each of the myths, but the number varied significantly by demographic

⁸² Wyatt, *supra* note 14, at 84. It is not entirely clear what “riskiness of their living circumstances” involves, although at least one element appears to involve women’s belief that they lived in the wrong sort of neighborhood. *Id.*

⁸³ *Id.* at 87.

⁸⁴ See David J. Giacopassi & R. Thomas Dull, *Gender and Racial Differences in the Acceptance of Rape Myths Within a College Population*, 15 *SEX ROLES* 63–75, 66 (1986). The sample comprised 449 students, 181 of whom were male and 306 of whom were white. *Id.* at 67.

⁸⁵ *Id.* at 66.

category.⁸⁶ Many of the differences could be explained by the tendency of individuals “to reject those myths that reflect negatively on themselves, and . . . to accept myths and stereotypes that deflect blame to other racial or sexual groups.”⁸⁷ Not so with African American women: the authors found that they tended “to see both victim and offender as more blameworthy than [did] white females;” while they were more likely to believe that normal men commit rape, they were also “more likely than white females to believe women cannot be forced to have sex against their will, . . . and victims of rape are frequently somewhat to blame for the crime.”⁸⁸ Interestingly, of all groups, black women were the most likely to disagree with the notion that black assailant-white victim assault was one of the most common types of rape.⁸⁹ These results suggest both that black women have a realistic understanding of their vulnerability to rape, as well as certain questionable assumptions about victim culpability.

c. Victim Credibility and Culpability. Many commentators have suggested that, as a result of a history of racial discrimination, African American rape victims are commonly thought by police, other authority figures, and jurors to be less credible than white victims, and that their accusations and their testimony are consequently less likely to be believed.⁹⁰

Several studies do find racially disparate results in victim credibility. Gary LaFree interviewed 360 individuals who had sat on juries in actual rape trials.⁹¹ While

⁸⁶ *See id.* at 67.

⁸⁷ *Id.* at 68.

⁸⁸ *Id.* at 71.

⁸⁹ *Id.*

⁹⁰ *See, e.g.,* Wyatt, *supra* note 14, at 89.

⁹¹ *See* LAFREE, *supra* note 51, at 208.

recognizing that other factors are likely at play in such determinations,⁹² his interviews did reveal that victim race played a significant role in case outcomes.⁹³ “Jurors were less likely to believe in a defendant’s guilt when the victim was black.”⁹⁴ The interviews revealed two possible reasons for this disparity. First, many jurors “were influenced by stereotypes of black women as more likely to consent to sex or as more sexually experienced and hence less harmed by the assault.”⁹⁵ Second, jurors were sometimes simply unwilling to give credence to the testimony of African American witnesses.⁹⁶

Another study reports similar results in an investigation of the responses of victim assistance workers during police interviews of rape victims.⁹⁷ The authors did not analyze actual rape cases, but rather conducted interviews of a random sample of 286 such workers.⁹⁸ They found several significant results: first, “[b]lack victims were perceived as less credible . . . and as more responsible for the event . . . than white

⁹² See *id.* at 142–43 (noting, for example, that he did not include prior victim-offender relationship as a possible variable in this analysis).

⁹³ In contrast to his analysis of the stages of a criminal prosecution, it was victim race alone, not defendant-victim racial dyad, that was significant here; however, LaFree points out that very few interracial cases were presented in this sample. *Id.* at 219–20 n.*.

⁹⁴ *Id.* at 219.

⁹⁵ *Id.* at 220. The notion that African American women would experience less harm seems to correlate with the finding that while race does not necessarily affect issues relating to guilt or innocence, it does affect punishment: the question is not so much whether the assault occurred, but the extent of the harm and consequently the seriousness of the punishment.

⁹⁶ LaFree recounts the statement of one juror: “Negroes have a way of not telling the truth. They’ve a knack for coloring the story. So you know you can’t believe everything they say.” *Id.*

⁹⁷ Frans W. Winkel & Simone de Winter, *The Perceived Credibility of Rape Victims During a Police Interview: an Experiment Among Victim Assistance Workers*, in *PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE* 3–12 (Graham Davies et al., eds., 1996). This study took place in the Netherlands, not in the United States, so its usefulness may be limited.

⁹⁸ See *id.* at 6.

victims,” and second, “[f]or black victims the consequences of the event were considered less serious.”⁹⁹

These studies suggest that race can play a significant role in determinations of victim credibility. Other work suggests a more complicated picture, however. A study that sought to examine the effect of the additional factor of juror racism found surprising effects based not on the race of the victim per se, but on the nature—interracial or intraracial—of the rape itself.¹⁰⁰ The authors hypothesized that African American victims would be blamed more if raped inter- rather than intraracially.¹⁰¹ In a study of college students provided with a standard vignette in which variables of race and victim behavior were manipulated, the authors found that “[v]ictims—whether White or Black—were blamed more if raped interracially.”¹⁰² This pattern of differential blame was gauged in several different areas: when the crime was interracial, the mock jurors found the victims more culpable, perceived their refusal as less credible, considered the defendants less culpable, and were less likely to view the incident as “definitely rape.”¹⁰³

⁹⁹ *Id.* at 8.

¹⁰⁰ William H. George & Lorraine J. Martinez, *Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism*, 26 *PSYCHOLOGY OF WOMEN QUARTERLY* 110–19 (2002).

¹⁰¹ *See id.* at 115. The study involved 332 participants, 170 of whom were men. *Id.* at 110.

¹⁰² *Id.* at 115.

¹⁰³ *Id.* The authors offered several theories to account for the outcome, including the possibility that negative stereotypes about white women who fraternized with black men were stronger, in the subjects’ minds, than stereotypes about black men, as well as the possibility that general disapproval of interracial sexual interaction was motivating the subjects’ choices. *Id.*

Another study confirmed this outcome, at least in the situation of acquaintance rape. *See* Robert W. Hymes et al., *Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions*, 133 *JOURNAL OF SOCIAL PSYCHOLOGY* 627–34 (1993). The authors presented 78 mock jurors with a trial transcript that established a relationship between the defendant and victim and created ambiguity

When factoring in the possible role of juror racism,¹⁰⁴ the authors found further surprising results that correlated with subject gender. Female participants who exhibited stronger degrees of racism were more likely to blame victims raped interracial—this confirmed the authors’ hypothesis that “presence of a Black person activated stereotypes differentially in prejudiced respondents.”¹⁰⁵ By contrast, “[r]egardless of race conditions [that is, whether the rape was inter- or intraracial], men with higher racism scores saw victims as more culpable and less credible and saw the rapist as less culpable.”¹⁰⁶ The authors concluded that this result indicates “some degree of overlap between racism and other rape-supportive constructs such as rape myth acceptance or traditional sex roles.”¹⁰⁷ Thus, race alone might not fully explain differential patterns in victim blame.

3. *Perception of Guilt*

How does victim race affect jurors’ beliefs about a defendant’s guilt? A number of studies pursue this question. One study attempted to reveal what biases jurors may bring into the process of assessing culpability in rape trials by gauging pretrial estimates

concerning the victims’ consent. The authors then manipulated defendant and victim race and analyzed the responses proposing verdicts and sentences. *Id.* at 631. The authors found that the defendants were more likely to be found guilty if their race varied from that of their victim, *see id.* at 631, and that the sentences for black defendants were no harsher than those for the white defendants in interracial or intraracial scenarios, *see id.* at 632. They concluded that “the jurors appeared to consider the racial relationship between the victim and the defendant and what they thought this relationship implied about the victim’s willingness.” *Id.* at 632.

¹⁰⁴ The subjects were administered a test called the Modern Racism Scale to detect “subtle racism toward Blacks expressed as resentment about undeserved benefits.” George & Martinez, *supra* note 100, at 112.

¹⁰⁵ *Id.* at 115.

¹⁰⁶ *Id.* at 116.

¹⁰⁷ *Id.*

of guilt.¹⁰⁸ The authors performed the experiment on a group of mock jurors, giving them written scenarios about a number of different crimes¹⁰⁹ and manipulating the defendant-victim racial combinations. The subjects were offered two different defendants and asked which was more likely to have committed the crime. The results show a significant racial effect. In the rape analyses, the subjects reported that they believed that the assailant of a white victim was guilty in 69 percent of the cases, while the assailant of a black victim was guilty in only 43 percent of the cases.¹¹⁰

The same authors then attempted to discern whether this outcome is compounded in the process of a criminal trial, by gauging reactions to indeterminate evidence. Subjects were presented with segments of trial testimony and a description of a case, and asked to rate the testimony as either favorable to the prosecution or to the defense, and then to assess the probability of guilt.¹¹¹ The evidence involved the victim and the defendant each stating their names, marital status, and occupations, and a detective's testimony regarding being called to investigate the rape report.¹¹² Subjects also viewed evidence that was more clearly supportive of the prosecution's and the defense's case, for purposes of comparison. The authors discovered no racial effect on the evidence that was clearly slanted toward one side of the case or the other, but "neutral items [of evidence] were rated more favorable to prosecution when the victim was White . . . than when she

¹⁰⁸ See Kitty Klein & Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOCIAL PSYCHOLOGY 21–33, 22 (1982). One hundred and four individuals participated in the study, sixty-five of whom were men.

¹⁰⁹ These crimes included rape, murder, drug sales, and burglary. *Id.* at 23.

¹¹⁰ See *id.* at 24. This result actually obtained in three of the four crimes tested: "for rape, murder, and burglary, three crimes in which the victim is presumably innocent, the defendant accused of transgressing against a Black woman is believed less likely to be guilty than a defendant accused of a crime against a White woman." *Id.*

¹¹¹ *Id.* at 27.

¹¹² *Id.*

was Black.”¹¹³ Finally, the authors found “a strong . . . correlation between how favorable to prosecution the neutral evidence was seen and the strength of the estimate that the defendant was guilty,”¹¹⁴ suggesting that “[t]he more a ‘juror’ believed the neutral evidence favored the White victim, the more likely he/she believed the defendant was guilty.”¹¹⁵ Thus, the authors conclude that differential treatment of African American and white victims “arises primarily because the White victim receives preferential consideration in all stages of the decision process.”¹¹⁶

Another study sought to determine differential treatment based on the interaction of factors like victim race, defendant race, victim attractiveness, and victim sexual experience.¹¹⁷ The author took as subjects nearly 900 white citizens who volunteered to serve as mock jurors.¹¹⁸ The study found significant effects that indicated “that the jurors treated the defendant differently depending upon the race of the defendant and the race of the victim”; specifically, “black and white offenders were treated no differently when a black woman was the victim. Differences were found to occur, however, when the victim was white.”¹¹⁹ Interestingly, victim attractiveness also played a role: black defendants accused of raping attractive white women were punished more severely than

¹¹³ *Id.*

¹¹⁴ *Id.* at 29.

¹¹⁵ *Id.* at 30.

¹¹⁶ *Id.*

¹¹⁷ Feild, *supra* note 1.

¹¹⁸ *Id.* at 266. The author was wary of those studies that used college students as subjects, citing other work indicating that “college students are likely to be quite different from adult citizens in their verdicts [because they are] more lenient with the defendant than were citizens.” *Id.* at 263.

¹¹⁹ *Id.* at 272. “A black offender . . . who assaulted a white woman received a longer sentence . . . than a black . . . or a white . . . man assaulting a black woman, or a white man . . . accused of raping a white woman.” *Id.*

black defendants accused of raping attractive black women; “[n]o such difference was apparent for the white defendant.”¹²⁰

4. *Juror-Victim Racial Similarity*

Several studies have sought to determine the effects on assessments of guilt and credibility of juror race. One author sought to “determine the conditions under which racial similarity of a juror to the victim or the defendant influenced the juror’s evaluation of a defendant in a case involving interracial forcible rape.”¹²¹ Hypothesizing that a rape victim will arouse more sympathy in jurors of similar racial background, and that interracial rape will be punished more severely than intraracial rape when the victim and juror are of the same racial group, the author offered a similar scenario to white and African American mock jurors, manipulating only the race of the participants and the strength of the evidence.¹²² For both groups the hypotheses were borne out: “black interracial rape was more punitively punished by white jurors than white interracial or black intraracial rape;”¹²³ similarly, African American subjects rated black defendants as less culpable than white defendants, and considered the offense less culpable when the victim was white than when she was black.¹²⁴ In each case, where the evidence was ambiguous, jurors attributed more culpability to defendants of the other race than those of

¹²⁰ *Id.* at 273.

¹²¹ Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 *JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY* 133–46, 143 (1979). Two hundred and forty-four white undergraduates participated, 120 of whom were men, and 186 black undergraduates participated, 88 of whom were men. *Id.* at 136, 141.

¹²² *Id.* at 136–38.

¹²³ *Id.* at 140.

¹²⁴ *Id.* at 141.

their own race.¹²⁵ The author noted that the effects based on ambiguous evidence are particularly important, given that such cases tend to be those that make it to trial,¹²⁶ making it possible for juror racial biases to come into play.¹²⁷

Another study examined race and participants' adherence to rape myths¹²⁸ in a scenario of acquaintance rape, with some surprising results. Using African American and white students as mock jurors, the authors hypothesized that white jurors would "attribute more responsibility than Black participants to a Black perpetrator who victimized a White woman," and vice-versa.¹²⁹ They also proposed that if both assailant and victim were African American, white participants would attribute less responsibility to the assailant than African American participants would.¹³⁰ However, support for these hypotheses turned out to be limited. While the white participants "attributed less responsibility to a White woman raped by a Black man than to a Black woman raped by a Black man," the authors found that "Black participants attributed the most responsibility to the Black

¹²⁵ *Id.* at 140, 141. Interestingly, there was one difference: African-American jurors "showed a significant bias in favor of own-race defendants" when the evidence pointed strongly toward guilt; white jurors showed no such bias. *Id.* at 143. The author theorized that negative experiences with the law may prompt black jurors to mistrust the ability of police and prosecutors to treat African Americans fairly. *Id.* at 144.

¹²⁶ This is because charges involving only weak evidence tend to be dismissed, and cases with strong evidence against the defendant tend to prompt guilty pleas and plea bargaining. *Id.* at 143.

¹²⁷ *Id.*

¹²⁸ The rape myths investigated by the study involve the notion that a "real rape" involves a violent assault by a stranger, and that the typical rape involves a white victim and an African American assailant. See Nicole Varelas & Linda A. Foley, *Blacks' and Whites' Perceptions of Interracial and Intra-racial Date Rape*, 138 JOURNAL OF SOCIAL PSYCHOLOGY 392-400, 392-93 (1998).

¹²⁹ See *id.* at 394. The study involved 126 participants, 30 of whom were African American. *Id.* at 392.

¹³⁰ See *id.* at 394.

woman raped by a White man, much more than if she were raped by a Black man.”¹³¹ In general, it was perpetrator race, not victim race, that the authors found to drive most of the outcomes, suggesting that “the myth of the Black rapist . . . was quite strong,”¹³² even to the extent of impelling the “unexpected result . . . that the Black participants were much more lenient toward the White rapist than toward the Black rapist,” even more so than the white participants.¹³³ The authors concluded that the persistence of rape myths continue to influence reactions to perpetrator and victim responsibility, in some cases more than racial similarities between juror and victim.¹³⁴

5. *Type of Rape*

A number of studies examine possible correlations between victim race and the type of attack—that is, acquaintance rape, date rape, or stranger rape. One study presented simple vignettes of stranger and date rape to college students, and gauged their feelings of similarity to the vignette characters and their attributions of blame by both gender and race.¹³⁵ In the responses to all of the vignettes, an unsurprising division by gender appeared: female subjects felt far more similar to the victim than men did (although their feelings of similarity were significantly greater in the stranger than in the date rape situation),¹³⁶ and men felt more similar to the rapist than the women did.¹³⁷ In

¹³¹ *Id.* at 398.

¹³² *Id.* at 399.

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ Susan T. Bell et al., *Understanding Attributions of Blame in Stranger Rape and Date Rape Situations: An Examination of Gender, Race, Identification, and Students' Social Perceptions of Rape Victims*, 24 *JOURNAL OF APPLIED SOCIAL PSYCHOLOGY* 1719–34, 1723 (1994). Three hundred and three students participated in the study, 135 of whom were male. The racial breakdown was 232 Caucasians, 40 Asians, 21 African Americans, 3 Hispanics, and 7 who did not respond to the question. *Id.* at 1722.

¹³⁶ *See id.* at 1724 & 1725 tbl.1.

terms of blame, male subjects blamed the victim to a greater extent than did the female subjects, and both types of subjects blamed the victim more in the date rape than in the stranger situation.¹³⁸ The authors also found that the more an individual subject empathized with a participant in the vignette, the more likely was that person to blame the other participant.¹³⁹ For none of these outcomes, however, did the authors find variations in response according to subject race.¹⁴⁰ This result may be, in part, because the vignettes did not appear to specify the race of the characters; indeed, the authors' final hypothesis, that "when respondents in the present study felt that they could just have likely been the victim, they were hesitant to assign responsibility since doing so might be comparable to stigmatizing themselves,"¹⁴¹ suggests that a closer identification with the victim along the lines of race might produce different outcomes.

Another study looked at potential racial influences on perceptions of the seriousness of a sexual assault. The authors presented college students with a vignette involving a date rape, manipulating only the race of victim and assailant.¹⁴² The authors' hypothesis that subjects would perceive a forced sexual encounter as less serious when the victim was a black woman was confirmed: participants "agreed more strongly that the male should be held legally accountable for his actions when the victim was White than they did when the victim was Black"; they "agreed significantly more that the

¹³⁷ See *id.* at 1725.

¹³⁸ See *id.* at 1726.

¹³⁹ See *id.* at 1727.

¹⁴⁰ See *id.* at 1725–28.

¹⁴¹ *Id.* at 1728.

¹⁴² See Linda A. Foley et al., *Date Rape: Effects of Race of Assailant and Victim and Gender of Subjects on Perceptions*, 21 JOURNAL OF BLACK PSYCHOLOGY 6–18, 11 (1995). Seventy-five subjects participated in the experiment; 43 were white females, 10 were black females, 15 were white males, and 2 were black males. *Id.* at 10.

behavior of the male was a crime when the victim was White than they did when the victim was Black”; they were “significantly more likely to agree that the man’s behavior toward the woman was ‘alright’ when the victim was Black than . . . when the victim was white”; and “were significantly more likely to agree that the behavior was only an act of love when the victim was Black than . . . when the victim was White.”¹⁴³ The authors noted that the study confirmed the perception that rape against African American women is taken less seriously and supported Wyatt’s contention that they are less likely to disclose incidents of rape for that reason.¹⁴⁴

CONCLUSION

With occasional dissent, those studies that have sought to determine the impact of victim race on rape cases have found significant effects across the spectrum of legal decisions that occur within any prosecution, from the decision to charge to the severity of the sentence imposed. Although the connection between victim race and legal outcomes is not a clear-cut, cause-and-effect linkage in any area, the addition of complicating factors such as defendant race, jury composition, and characteristics of the crime itself do not detract from the fact that the legally irrelevant characteristic of victim race does matter, in ways that undercut the law’s race-neutral protections for African American victims of rape.

Perhaps more striking, and unexpected, are the studies suggesting that African American women have internalized historical racism as well as rape myths, in ways that affect their status and potential and actual victims of rape. African American women’s

¹⁴³ *Id.* at 12.

¹⁴⁴ *See id.* at 14–15.

unwillingness to report rapes to the police,¹⁴⁵ their beliefs in their own culpability for some incidents of rape,¹⁴⁶ and their continued acceptance of rape myths¹⁴⁷ suggest that African American women have, in some sense, taken to heart the legal system's comparative deafness to their claims for redress.

Surprisingly, few of the studies made explicit reference to the history of discrimination against African American women, or discussed the results as the potential legacy of that discrimination. The connection seems inescapable, and further study could illuminate the specific ways in which slavery, the violent aftermath of the Civil War, and persistent societal discrimination against African Americans contribute to the range of inequalities that African American women face as victims of rape. While entrenched discrimination in the legal system—both against African Americans in general and against rape victims—may account for many of the institutional barriers revealed in these studies, other aspects of the history of slavery may explain the more elusive, and in some ways more troubling, ways in which victim race affects the decisions of those selected to assess the guilt of accused rapists, as well as the decisions of the victims themselves.

<http://www.brandeis.edu/projects/fse/>

¹⁴⁵ *See supra* pp. 17–19.

¹⁴⁶ *See supra* pp. 19–20.

¹⁴⁷ *See supra* p. 21.