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Rape as a Legal Symbol: An Essay on Sexual Violence and Racism

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[L]aw and language only serve to carry out an earlier decision not to see what exists, a decision made by a whole culture, a decision which is itself made invisibly.[1]

—Men rape because they own (have) the law.

. . . .

Bodily rape is merely the acting out of a daily ideological reality.
Rape is an initiation
they say that we are becoming women,
we say that we are being forced to enter the legal system.[2]

I. INTRODUCTION

In the latter part of the twentieth century, social activists have challenged the legal definitions of rape. Yet this movement for legal reform has divided feminists between those who have faith in the law to foster the autonomy of women and those who do not. Feminist reformers identify the problem in statutory definitions and the legal system's "double victimization" of women. They presume that the adoption of rape legislation devoid of negative stereotypes of the victim will lessen the burden on adult women to prove nonconsent. The

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1. S. GRIFFIN, RAPE: THE POLITICS OF CONSCIOUSNESS 58 (1986).

2. *Rape Is an Abuse of Power*, in NEW FRENCH FEMINISMS 194-95 (E. Marks & I. de Courtivron eds. 1980).

alternative view of radical feminists has emphasized the power relationships between men and women that shape both sexual relations and rape. Consequently, the radical feminist does not anticipate that modest changes in the definition of crimes of sexual assault will transform the cultural expression of sexual domination in a patriarchal system of law. The tensions are dramatized by the statement of a feminist who finds a conceptual harmony between sexist attitudes and the radical feminist vision in that neither supports a distinction between rape and normal sex: "According to the radical feminist, all of it is rape; according to the traditionalist [sexist], it is all permissible sex and seduction."[3]

The emergence of rape as a political issue in the United States and other Western democracies can largely be attributed to the role of feminist activists in promoting law reform.[4] Their strategies for reform are, for the most part, directed toward broadening the legal recognition of rape, thereby encouraging more women who experience sexual violence to pursue criminal complaints. Many feminists saw themselves breaking through a historical "silence" about rape. From the perspective of the contemporary reformer, the rare instances in which the issue of rape was made public in trials were chance openings in the submerged private history of sexual violence.[5] For the silence to be broken, the voice of the victims had to find a "protected space" for the shared awareness among women that the fear of rape controlled all women. The women's movement claimed their territory within the existing power structures of police and judicial bureaucracies by seeking institutionalized forms of victim advocacy.

Both traditional rape law and the feminist law reformers share a vision in which the boundary between sex and rape is defined by the woman's nonconsent. In rape cases, unlike other areas of criminal law, it is necessary for the prosecution to show the absence of consent in order to establish that the crime was committed. Recent law reforms (i.e., the rape shield laws and the elimination of corroboration requirements) have not abandoned the theory of nonconsent; rather, they are designed to mitigate legal tactics that undermine the victim's credibility. This movement, in particular, has defended a woman's right to be free from sexual violence by dispelling the myths that deni-

3. Estrich, *Rape*, 95 YALE L.J. 1087, 1093 (1986). The quotation is from an article that makes a powerful and important feminist statement about rape. An undercurrent throughout the article, however, is this mistrust of the "radical" position.

4. *See* Temkin, *Women, Rape and Law Reform*, in RAPE 26-34 (S. Tomaselli & R. Porter eds. 1986).

5. *See* S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 6-22 (1975).

grate her words. The underlying principle is that only when the woman is "taken for her word" is she given the same treatment as victims of less serious "nonsexual" crimes.

The vision of consent versus nonconsent, however, is incongruent with the conditions of sexual domination that inhibit the voices of victims. Rather than reject the traditional model, the reformer attempts to change the standards set by legislation and common law to reflect the "objective" conditions of sexual assault. The "rape trauma syndrome," for example, is offered both as psychological *evidence* of the appropriateness of women's responses to their attacker and to document rape cases that otherwise would be considered unsubstantiated.[6] The reliance on objective standards is fundamentally inconsistent with the social reality of rape: Women who are sexually attacked are concerned with their survival, not with the demonstration of nonconsent. In the extreme case, feminists hope to, but cannot, repudiate acts of violence against women that are consensual in nature when they lack a theory to account for women's self-denial of their oppression or the structure of violent relationships. The need to legitimate women's claims, in terms of legal discourse, forces the comparison between all acts of sexual violence and the hypothetical "real rape" (i.e., a woman resisting a stranger with a lethal weapon on the street).[7] The liberalization of the law depends on establishing the validity of women's claims that are least likely to fit into the law's "ideal type."

The deeply contradictory impulses of the movement rest within strategies of consciousness-raising, which for some led to the uncovering of a new "objective truth" about rape, and for others inevitably raised questions about the social construction of sexual roles. The rape trial became the focal point of consciousness-raising strategies: within its forum, the trial subjected the woman to a re-enactment of the victimization process, and outside the trial forum, the public reacted to the statements of powerful judges and attorneys who condoned sexist stereotypes of women. The rape trial, however, also revealed the restraints on reconstructing a society without rape:

> The experience of rape trials, which began to be attended and presided over by groups of feminists, both imposed a limit to this exploration [of reconstructing the meaning of rape] and contributed to the transformation of rape into a political issue. The transformation of the victim into the accused, the abundant use of sexist stereotypes by the court and lawyers, the rough treatment of the

6. J. ROWLAND, THE ULTIMATE VIOLATION *passim* (1985).

7. S. ESTRICH, REAL RAPE 8-26 (1987).

> victim at the hands of police and medics, and her isolation, shame and fear, sharply appeared to make a firm stand necessary. Such a stand could only rely on a "restricted" definition of rape, whose scope was however significantly altered from the traditional legal one . . . .[8]

Immediate political goals, framed and fashioned in the confines of the legal system and liberal legalistic reform, inhibited feminists from moving beyond this "restricted" definition of rape to phenomenological accounts of victims' experiences that did not easily flow from the framing of events. My theory seeks to move beyond the restricted definition of rape by presenting an alternative version of social reality informed by feminist analysis rather than legal discourse.[9]

In this essay, I restate and defend the feminist position on rape. My objective is neither to intensify the disagreements nor to find a middle ground, but rather to introduce a perspective on the politics of rape that focuses on the social construction of the power relations in rape trials. Susan Griffin's quotation, which introduces this paper, suggests that legal language reinforces existing definitions of rape. These conceptions are transformed only to the degree that "reformed" rape law recreates the political consciousness. In the following section, I draw from my own observations of a rape trial to describe how legal discourse imposes restraints on the interpretation of events.

II. HER STORY

In July 1986, three University of Minnesota basketball players were tried in Madison, Wisconsin for the sexual assault of a young female college student.[10] The trial became the focus of public attention because it involved black college students accused of interracial gang rape. Also, there was an outcry about the presumption of guilt by the administration of the University of Minnesota, which had

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8. Pitch, *Critical Criminology, the Construction of Social Problems, and the Question of Rape*, 13 INT'L J. SOC. L. 35, 39 (1985).

9. This paper presents some preliminary observations from a project on "symbolic criminal trials" on which I began field work in March 1987. The project will focus on the symbolic discourse presented in trials of interracial crime and immigration violations. The objective of the research is to gain an understanding of how legal ideologies reconstruct social meanings in trials that evoke controversial racist and feminist images.

The discussion in the next section of the paper is drawn from my observations of a rape trial. These conclusions are preliminary in that this project will be based on further analysis of this particular trial as well as other rape trials.

10. State v. Williams, No. 86CF73 (Dane County Ct. July 24, 1986); State v. Smith, No. 86CF72 (Dane County Ct. July 24, 1986); State v. Lee, No. 86CF71 (Dane County Ct. July 24, 1986).

taken disciplinary action against the players immediately after the incident. The basic "facts" of the case were public knowledge: The defendants admitted to engaging in sexual activity with the woman, but claimed that she had consented. Even sympathetic media reports toward the defendants' actions described them as brutal and inhumane.[11]

The media highlighted the issue of race, and this issue was indirectly raised at trial. The defense attorneys played on the theme of cultural differences to their advantage. The physical differences between the woman and the men were striking: The victim was a vision of stark whiteness, with a petite young frame, blond hair, and fair skin, while the defendants were athletic-looking and imposingly tall. One defense attorney suggested that the victim was racist and that her charge of rape was, in essence, an outgrowth of an inner battle between her feelings of hatred for blacks and her feelings that they were mysterious and sexually exciting. For instance, the defense attorney asked her if she thought it would be "fun to go to bed" with black men. Thus, he implied that, for the "modern woman," who freely consents to and enjoys sexual activity, racist fears and misconceptions may be a source of hidden desires. The defense reversed the old racist story of the black man who seduces the innocent white woman as a ploy to pervert the woman's motives. Although the dynamics of racism lie behind the incident and society's judgment of the incident, in the context of the trial, cultural differences between blacks and whites are seen as a source of attraction to the modern woman.

Her story, which she was able to reveal only partially in her testimony, was confused and disjointed. The case turned on the victim's consent, and the defense built its theory of her willingness to engage in sex with the defendants on a series of events that led her to their hotel room. The sequence began with her meeting a basketball player at a party where the defense suggested that she showed romantic interest in him. The defense attorney implied that she willingly agreed to go to his hotel room with the expectation of engaging in sexual activity, and that she offered no "significant" resistance, even after two other men appeared in the room. The prosecution challenged this interpretation of the events by introducing the victim's claim that, although she danced and talked with the man at the party, she expected to join another party in the hotel room. The prosecution, however, did not challenge the presuppositions underlying the

11. *See, e.g.*, Carr-Elsing & Johnson, *Reaction: Disappointment, Surprise*, Cap. Times, July 25, 1986, at 5, col. 1.

defense's interpretation of the events: they all assumed that the man and woman reached a "prior agreement" about permissible activity in the hotel room, and the prosecution asked the jury to believe her version.

The victim not only challenged the defense's frame of reference, but also told a fundamentally different story. Her story did not converge on the issue of consent, but rather on the distinction between sex and violence. She implied that a friendly encounter led to violence because she had assumed incorrectly that she could trust the man with whom she left the party. He initially gave her the impression that he was a gentleman based on his dress, language, and manners. Thus, she made the decision to leave the party with him on the assumption that he was not a "dangerous" person. She did not become concerned about her well-being until, upon walking down a hallway of the hotel, the man pushed her into one of the rooms. She described this point as the crossing of an imaginary line—a signal that she was in danger. The defense attorney ridiculed her reference to an "imaginary" line, presumably because he did not consider it to be a reasonable explanation under a theory of consent. Yet it explains why she perceived herself crossing from a situation of sexual encounter to one of violence. The man she had previously seen as a "nice guy" had become, in her eyes, a violent man. The defense attorney also ridiculed her choice of words in describing her resistance (i.e., "What in the hell are you doing? What . . . do you want from me?") because they did not conform to his idea of a woman rejecting sexual advances. The attorney asked, for example, "Did you yell out *help*? Did you scream?" Her expressions make sense, however, when they are heard as cries of a terrified woman.

The day the headlines announced the acquittal of the three defendants, I overheard a conversation between two young women. One woman read the headline and said to her companion, "This is really too bad. When a girl makes a story up like this, it makes it more difficult for the woman who is *really* raped." This statement is revealing in terms of the political consciousness of rape. Potential victims understand that society pits the credibility of one woman against another. Women risk repudiation of their claims of violation unless they can present objective evidence. The impression that reforming the legal system bolsters the validity of women's words, in fact, may result in legitimizing the narrow conception of rape.

III. CRITICAL PERSPECTIVES ON RAPE LAW REFORM

The inability of the victim in the Madison rape trial to describe

her actions in terms of legal discourse results from the failure of the concept of consent to account for acts of sexual domination and submission. The feminist awareness has shown that rape is not intrinsically a sexual act, but is an act of violence. The radical potential of this insight has been lost in efforts for law reform when the distinction between sex and violence is seen as a surrogate for consent and nonconsent. The law reformer operates from a model in which the passivity of females—their right to say "no"—is protected from male aggression. The provocative German feminist, Barbara Sichtermann, argues that there will be no clear dividing line between physical assault and sexuality as long as rape is seen as an attack on female sexuality, "the *peaceful* side of sexual experience."[12] When rape is seen as a violation of sexual passivity, women must defend the meaning of "no" (and "yes") against the patriarchal fantasies of sexual aggression. Yet Sichtermann reminds us that rape is an act of contempt for both women and sexuality. In her words, "[T]he patriarchy has above all condemned its own sexuality" by creating a confusion about the meaning of the victim's "no."[13] "[T]he implication [of treating rape as a sexual offense] is that men's sexuality is depraved to the point of being an instrument of repression."[14] Rape is an act of violence similar to other crimes of physical assault, but the meaning of this violence is unmistakably the demonstration of power over women.[15]

The distinction between sex and violence may be as illusive and subtle as the "imaginary line" crossed in the story of the young victim. The patriarchy's fear that its sexual aggression may be mistaken for sexual violence has served as an excuse to ignore rape, particularly in the family and by nonstrangers. Each effort at law reform, therefore, is challenged by those who fear that broader definitions of sexual assault will distort accepted understandings of "normal" sexual relationships, and, at worst, will create a climate of suspicion that would jeopardize innocent men. The feminist response has been to expose the prevalence of nonconsensual sexual relations and to document the "underreporting" of rape. Retrospectively, feminists have begun to see how the desire of their early work to "document" rape as a crime problem has restricted the social imagination.[16] Conventional thought will remain unchallenged as long as reformers attempt to establish new objective truths from a feminist perspective, rather than

12. B. SICHTERMANN, FEMININITY: THE POLITICS OF THE PERSONAL 32 (1986).
13. *Id.* at 40.
14. *Id.*
15. *See id.* at 39.
16. S. GRIFFIN, *supra* note 1, at 27-68.

shaping a different language for speaking of rape. The politics of rape reform needs to go beyond the goal of creating a "refuge in which women's words are believed,"[17] to that of creating a language in which the full impact of the stories of victims are heard.

IV. THE LANGUAGE OF RAPE

The language of rape is about emotional truths. There is a women's discourse that to some extent reflects a nonlegal conception of rape that describes women's feelings of violation and is not bound by the nature of the act (thus not limited to sexual penetration) or the nature of the relationship. For example, when women talk about experiences of discrimination or sexual harassment, they often describe their trauma with the words, "I feel raped." They intend not only to make an analogy to the type and degree of physical harm inflicted by a rapist, but also to suggest that the perpetrator's actions have threatened their sense of security and self-worth.

The language of rape is also about helplessness. The person may feel that it is hopeless to fight against someone who has more power, authority, or physical strength. The woman who feels raped may be shocked by her vulnerability to the violence that men can impose on women with a knife, fist, or threats. The cry of rape defies the suggestion that the victim can be compensated for her damages; the words express the victim's feelings of subjection to depersonalizing violence. How can these emotional truths be translated into a language of rights? Can these truths generate a new political consciousness about rape?

Women's truths are often lost in efforts for law reform. The political movement for rape law reform is motivated by a sense of injustice; yet the moral issues are deflated by the movement's own strategies for legislative action. One study of rape victims' advocacy in Italy found that members of an organization that sponsored "sit-ins" participated because they desired to see their concept of justice acknowledged by the courts in rape cases. The establishment of a few basic principles about the dignity of women within the law satisfied their sense of justice. Because they geared their efforts to modifying the application of law as it affected women, they diffused the "radical potential" of their anger by reconciling their viewpoint with the prevailing ideologies of citizenship and equality.[18] Another study of a successful recall campaign of a judge who made a sexist remark during a rape trial found that some participants were motivated by a per-

17. *Id.* at 26.

18. Pitch, *supra* note 8, at 35-46.

sonal anger directed toward a society that condones rape, but their expectations for reform were limited to the removal of a "bad" judge.[19] These experiences of participants in movements for social change show the incongruity between the rage against social injustice and the limited range of legislative efforts to redefine rape.

When moral issues about rape, pornography, and sexuality are framed in terms of rights analysis, the reconciliation of the right to privacy or freedom and the right to protection or security becomes the subject of dispute.[20] The rights debate divides feminists between those who are alarmed about the excessive sexual freedom of men to exploit women and those who fear the social control of women through protective legislation.[21] In terms of the rights debate, the definition of consent reflects the trade-off between men's right to sexual freedom and women's interest in security. The imposition of the balancing framework is incompatible with the feminist message, particularly from Sichtermann's perspective, which cautions us against accepting the confusion between men's interests in both freedom and security and the patriarchy's desire to preserve its license for sexual domination.[22] The objective of radical feminism is not to strike the balance at a point more favorable to women, but to fight the confusion between sexuality and violence, and thereby repudiate a social consciousness that causes us to believe that the opposition of interests between the sexes is inevitable. The fundamental issue is to challenge the nature of sexuality reflected in sexist interpretations of rape, and to reconstruct it through a rights analysis.

For rights analysis to be transformed, the law must "visualize" rape as an act of violence. Violence or physical coercion is a necessary element of rape, but the use of force is often measured against the woman's resistance. Susan Estrich explains:

> For many courts and jurisdictions, "force" triggers an inquiry identical to that which informs the understanding of consent. . . . Force is required to constitute rape, but force—even force that goes far beyond the physical contact necessary to accomplish penetration—is not itself prohibited. Rather, what is required, and prohibited, is force used to overcome female nonconsent. The prohibition is defined in terms of a woman's resistance.
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19. L. Woliver, Sputtering Interests: Ad Hoc, Grass Roots Interest Groups in the United States (Aug. 1986) (doctoral dissertation, University of Wisconsin, Madison).

20. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

21. *See id.* at 389.

22. *See* B. SICHTERMANN, *supra* note 12, at 40.

> . . . [T]he conclusion that no force is present may emerge as a judgment not that the man did not act unreasonably, but as a judgment that the woman victim did.[23]

To the extent that courts recognize the violence of the crime, women are expected to respond violently to prove their innocence. This world view produces judicial opinions that condone sexual violence as long as it is distinguishable from the violence of *real rape*; rather than finding the brutal coercion of forced sexual intercourse to be criminal, courts often see it as "reprehensible." Their judgment rests on their image of the rape victim as a reactive agent, the dynamics of the relationship having been made invisible through the legal definition of force.

Another fundamental element of the transformation of rights language about rape is the disentanglement of the relationship between the victim and the state.[24] The push for rape law reform has followed in the tide of the victimization movement, and is therefore fueled by moral righteousness for the victim and contempt for the lenient treatment of criminals.[25] The aim of reform is to restrain the defense from abusive treatment of victims in court and to enlarge the victim's role in the prosecution of cases. Yet the victimology movement may have oversimplified the problem and the solution. Doreen McBarnett describes that, from the prosecutor's perspective, the testimony of victims must be limited in order to prevent them from discrediting themselves or jeopardizing the case.[26] The prosecutor submits the victim's testimony in order to bolster the professional's case—not to reveal the "complexities and ambiguities of real life but . . . the black and white conceptions of the adversarial trial."[27] She concludes: "Too narrow a focus on the victim in isolation has underplayed the complexity of courtroom interaction. Indeed the basic

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23. Estrich, *supra* note 3, at 1107, 1112.

24. For an example of a discussion that takes account of the relationships between the state and the victim, see Olsen, *supra* note 20, at 407-09. She argues that the reforms can be self-consciously devised to empower women, while decreasing the power of the state (i.e., reforms that give women more control over the prosecutorial decision in statutory rape cases). *Id.* at 407-08.

25. The victims' rights movement advocates reforms that reinforce both due process and law-and-order values. Victims' rights groups have put primary emphasis on seeking legislative change and the establishment of institutional procedures to strengthen the role of the victim in the criminal disposition process. *See* J. HAGAN, VICTIMS BEFORE THE LAW: THE ORGANIZATIONAL DOMINATION OF CRIMINAL LAW 13-18 (1983); *cf.* E. SCHUR, THE POLITICS OF DEVIANCE: STIGMA CONTESTS AND THE USES OF POWER 154-68 (1980); Elias, *Alienating the Victim: Compensation and Victim Attitudes*, 40 J. SOC. ISSUES 103 (1984).

26. McBarnett, *Victim in the Witness Box—Confronting Victimology's Stereotype*, in CRIMINAL LAW IN ACTION 332 (W. Chambliss 2d eds. 1984).

27. *Id.*

concept of victimology contains an endemic paradox. Its very concern with isolating victims for special attention renders it incapable of accurately explaining their experiences at all."[28] These observations contradict the victimology movement's assumption that augmenting the role of the victim in the prosecution of cases will serve women's interests. Neither can we be assured that a more complete telling of the victim's story in the adversarial setting will change the standards of justice.

The interpretation of social history that claims that the prevalence of rape had been ignored suggests that women's silence is associated with powerlessness while their voice is a symbol of power. This perspective leads to the assumption that victims serve their own interests by telling the full story in the courtroom. This is *not* true, however, because it is not the victim's perception of experience that frames the questions. The victim in the Madison rape trial, for example, discovered that telling *more* of the story at each stage of the criminal process (from police report to trial) enabled the defense to highlight nonconsequential inconsistencies.[29] Because the victim can only rely upon her memory and current state of mind, she is at a disadvantage in relation to those who are able to compare the official record of her stories "word for word." The victim's version may give the appearance of dishonesty or insincerity when the defense uncovers her reluctance to tell her story. In this trial, the defense referred to the testimony of a friend who claimed that, upon calling to inquire if she "had been the one" who caused the controversy reported in the newspapers, the victim denied having been raped.[30] The defense attributed the victim's willingness to endure the trial to the support she received from a rape crisis center, insinuating that the center had "put her up to it." At one level, the attack on both her silence and her words reflects the defense's desire to reinforce her shame and undermine her strength; but as the woman presents her story in the trial forum, we fail to hear the "real" victim—whether "silent" or "talking"—and suspect that she has told her story in neither incarnation.

V. RAPE AND RACE

The defense's accusations of the victim's racial prejudice in the

28. *Id.* at 334.

29. This is a technique frequently used by the defense in rape trials. *See, e.g.*, Forrester, *Rape, Seduction and Psychoanalysis*, in RAPE 57 (S. Tomaselli & R. Porter eds. 1986).

30. The prosecutor, in his rebuttal, implied that, because the victim was from a small town in the Midwest, she would be embarrassed to admit that she was raped. The victim added that she had been advised that it would be better not to talk to anyone about the case.

Madison rape trial, as well as the cross-cutting sympathies within the black and feminist communities observing the trial, made it appear as if support of the victim was incompatible with concern about the racially biased treatment of the defendants. Yet one reason why this case raised conflicting and painful emotions for sympathetic observers was the orientation imposed by the conceptual framework of consent. A historical evaluation of the origins of the defense of nonconsent and its application in situations of racial hostility provide some insight into the apparent conflict between antiracist and antisexist interests.

Anna Clark's historical analysis of judicial opinions in rape cases found the origins of the defense of consent in early nineteenth century British legal practices. Although this change from eighteenth century judicial attitudes made it easier to convict rapists, it further limited the power of women to prove the validity of their claims and increased the authority of experts to define sexual crimes.[31] This trend was also coincident with a change in moral climate that placed great significance on women's chastity, making far more prevalent the notion that women's resistance to rape arose from their reluctance to surrender valuable property. Clark observes: "Judges' statements in rape cases reveal that what determined a woman's consent was . . . whether she had conducted herself as the sexual property of husband or father, or the common property of all men. If a woman acted too freely . . . her consent was assumed, or irrelevant."[32]

The underlying judicial logic of consent therefore encourages scrutiny of women's words, while privileging claims of violation of men's interests. In a repressive racial climate, such as the antebellum South, the prosecution of rape arose as a tool to selectively sanction blacks, affirming white male property interests and making the women's actual nonconsent an unquestionable assumption. The use of rape law evolved from a legacy of race relations in which threats to Southern white society's property and authority by rebellious blacks led to excessive counterreactions, and, in the case of rape, to the disproportionate use of the death penalty for black men.[33] This pattern of excessive punishment for interracial sexual assault[34] continued into the twentieth century, but such differential punishment of black defendants has gradually declined.

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31. A. CLARK, WOMEN'S SILENCE, MEN'S VIOLENCE: SEXUAL ASSAULT IN ENGLAND 1770-1845, at 69-74 (1987).

32. *Id.* at 71-72.

33. *See, e.g.*, J. SCHWENDINGER & H. SCHWENDINGER, RAPE AND INEQUALITY 107-10 (1983).

34. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842, 851 (1980).

The symbolic meaning of rape reflects and evokes the anxieties of racial and ethnic mixing that shape the image of the rapist and the crime of rape. The metaphor of racial violation (as opposed to sexual violation) not only has a historical legacy, but is reinforced by contemporary social arrangements that maintain the isolation between racial and ethnic groups. The myth of black violation has created the stage for repressive trials (i.e., the case of the "Scottsboro boys") and has produced the system of social control that employed lynching to restrain the freedom of Southern blacks. The tensions about rape within the contemporary black community have created a situation in which men and women fear the potential for the singling out of black men as perpetrators in the rape of white women, and black women, affected by the extraneous forces on their community, are likely to be discouraged from reporting intragroup rape.[35]

Yet the influence in contemporary society of both the legacy of racism and legal definitions of rape that require nonconsent further subjects the victim's claim in situations of interracial rape—or even intraracial nonstranger rape—to suspicion about the motives behind her accusation. With the demise of the white male's property or integrity claims to women's chastity, women have been forced to defend their chastity or character without being granted a similar claim in their own right. In the Madison trial, for example, the racial myths are transposed for the purposes of discrediting the woman's character.

Interracial trials may become controversial—particularly those involving gang rapes—because they reveal how racial inequality results in hostilities directed against individuals as members of a sexual or racial group. When rape trials manifest an overt racist dimension, they are likely to signify the threats that outsiders impose on the more established segments of society. An example of an anti-ethnic version of this theme is found in the response of the nonethnic community to a rape trial in New Bedford, Massachusetts in 1984 involving six Portuguese defendants.[36] The trial sparked resentment against the Portuguese community and the values associated with the immigrant population. One effect of the media attention on the ethnic issue (ironically, the rapes were intra-ethnic and the victim and rapists were members of the same community) was that much of the interest was focused both on the dynamics of the men in the bar

35. J. WILLIAMS & K. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 36-37 (1981).

36. Although there were six defendants, only four were convicted. Commonwealth v. Raposo, No. 12268 (Mass. Super. Ct. Mar. 22, 1984); Commonwealth v. Cordeiro, No. 12267 (Mass. Super. Ct. Mar. 22, 1984); Commonwealth v. Silvia, No. 12266 (Mass. Super. Ct. Mar. 17, 1984); Commonwealth v. Vieira, No. 12265 (Mass. Super. Ct. Mar. 17, 1984).

where the rape had occurred and the fear that the trial had become a means for the prosecutors to "gang-up" on the local immigrant population, rather than being focused on the vulnerability of a lone woman in a bar who had encountered gang violence.

The leaders of the feminist and antiracist social movements in contemporary America have, for the most part, steadfastly avoided open examination of the intersection of their interests. When the civil rights movement traded places in national attention with organized feminism in the late 1970's, radical black leaders, such as Eldridge Cleaver, aggravated tensions by advocating the raping of white women by black men as a symbolic affirmation of their power. As Paula Giddings points out in her sensitive recounting of this history, black women were slow at condemning these statements, partly because they had less urgency to acknowledge feminism when they had already created a place for themselves within the structure of the black family.[37] Yet black feminists have since criticized the images created by black chauvinism as perpetrating negative stereotypes of black women by suggesting that they were either the source of promiscuity of the race or objects of denigration.[38]

The convergence of women's and black issues may appear problematic because liberal politics encourages us to find a trade-off between the feminist interest in ensuring that offenders are punished (security) and antiracist claims that excessive state power is exercised against blacks (freedom). As discussed earlier in this essay, however, this is the same paradox that has confused the rape issue by posing it as a balancing of men's and women's interests. To the contrary, the myths created in a patriarchal and racist society reinforce each other: The cultural presupposition to view rape as a "violation of white women" has encouraged the silence about the more common occurrence of intraracial rape between nonstrangers.[39]

The cultural meaning of rape is rooted in a symbiosis of racism and sexism that has tolerated the acting out of male aggression against women and, in particular, black women. An important part of the task of deconstructing the consciousness of rape is revealing the linkages between the social mechanisms that empower violence against both racial groups and women.

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37. P. GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 310, 322-24 (1984).

38. *Id.* at 31.

39. C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 81-82 (1987).

VI. THE SYMBOLIC CONSTRUCTION OF RAPE

The reforms that have resulted from feminist political practices, including statutory modifications of the definitions of sexual assault, may have improved the treatment of victims in trials and increased the prosecutor's power to charge rapists, but have not challenged the legal language that reinforces existing definitions of rape. In essence, the reformers did not question the authority of criminal law, and in fact may have depended on society's image of the trial to defend themselves against the charge of vigilantism and to claim that their assertions about the prevalence of rape had a basis in verifiable fact. The reformers thus created a double-edged sword when they employed the rape trial to present women's truths about sexual violence. This allowed them to present only the "truths" that made sense within the context of legal discourse.

Beyond the legal rules guiding the presentation of evidence, the legal discourse imposes a framework for the discussion of rights. The trial tells a story about the responsibility of individuals and the role of social structure in shaping people's lives. Symbolic trials serve the function of dramatic morality plays that present a story about disturbing and often incomprehensible acts of brutality against isolated victims.[40] Even though these stories are controversial, they may characterize the event as a tragedy and thus relieve anxieties about the sources of violence and the legal system's ability to control it. In the telling of events, some "voices" are heard and others are excluded, and the whole story may be cast within a class, race, or sexist interpretation.

Contrary to the expectation of some activists that greater exposure of the sexist stereotyping within these trials would focus discontent, the symbolic trial may reinforce ideologies by communicating the conscious and unconscious perceptions that solidify the dominant world view.[41] The symbolic rape trial is an important moment at which the struggle over the meanings that define sexual roles is incarnated in a contest between real persons; rather than stimulate the creation of a new social consciousness, however, these trials may narrow dissent by facilitating the selective perception of social problems.

While the controversy is elevated to larger than life proportions, it is also constrained and narrowed by the setting of the celebrated trial. Once the political discourse within the trial is subjected to the media's reinterpretations, it may cut off the development of meaning

40. *See* T. ARNOLD, THE SYMBOLS OF GOVERNMENT 128-48 (1935).

41. For a discussion of the role of signifiers in creating ideologies, see R. WILLIAMS, THE SOCIOLOGY OF CULTURE 13, 29 (1981).

and impose fixed constructions on legal and factual events. The language of media reporting is similar to the language of advertising in that it employs "image lines" and "audience rousers" that create fixated structures of meaning.[42] Reports of rape trials are likely to perpetuate stereotypical images of crime as senseless violence that stems from either the evil or pathological personality of the perpetrator or the idiosyncratic characteristics of the victim. The impact of news reporting may often be to remind women of their vulnerability by implicitly offering warnings about what can happen to nonconforming or independent women.[43]

The intense politicization of the trial, rather than highlight power contests, may stifle the formation of conflict.[44] News reports, for example, will present the testimony at the trial in a selective fashion,[45] characterizing the defendants or victims using key phrases that either provoke sympathy for the offender or implicate the victim. Trial reporting often peaks public curiosity by hypothesizing about the *mens rea*, the state of mind that leads to the criminal act. Rather than sharpen the public perception of the power relationship that leads to the violent incident, this speculation encourages scrutiny of the character of the victim. On this basis, the public is likely to judge the "reasonableness" of the defendant's actions.

When rape becomes politically controversial, the symbolic message may affirm the institutional processes of criminal justice while creating the impression that the imperious nature of feminist politics has driven the system beyond the principles of neutrality and reasoned justice. For example, the Crowell-Dotson rape trial controversy in 1985,[46] in which the victim claimed, years later, that she had falsely accused the defendant in court, raised doubt in people's minds about the reliability of women's testimony and the severity of legal sanctions against rapists. This case fueled the myth that the lying woman should be society's primary concern by focusing public attention on the transposition of the roles of criminal and victim dramatically produced by the woman's alleged perjury. The publicity surrounding the retrial raised suspicion about the claims of the

42. H. MARCUSE, ONE DIMENSIONAL MAN 91 (1964).

43. S. VOUMVAKIS, NEW ACCOUNTS OF ATTACKS ON WOMEN: A COMPARISON OF THREE TORONTO NEWSPAPERS 22 (1984); Smart & Smart, *Accounting for Rape: Reality and Myth in Press Reporting*, in WOMEN, SEXUALITY AND SOCIAL CONTROL 91, 101-02 (C. Smart & B. Smart eds. 1978).

44. *See* M. EDELMAN, POLITICAL LANGUAGE 134 (1977).

45. Smart & Smart, *supra* note 43, at 96.

46. *E.g.*, *Recanting of a Rape Charge Fails to Free Convict*, N.Y. Times, Apr. 12, 1985, at A1, col. 2.

women's movement that rape is an underreported crime, and at the same time provided reassurance that the legal system will eventually serve the interests of justice.

Thus, the rape trial does not produce self-evident lessons about the abusive use of power against criminals or victims; these messages need to be interpreted. The images people hold about law as part of everyday life are often unconscious or unspoken, even though they may operate as important background assumptions about justice and personal identity. For example, at the heart of the feminist message about rape is the belief that all women share fears of potential attack, and abuse thereafter—fears that are reinforced by the law. But to understand how these fears become so deeply ingrained in society, we need to discover how these ideas are disseminated from legal practices. In the formal realm of the trial, the participants are intensely subjected to legal ways of thinking and acting. This experience leads to a two-sided construction of the victim and criminal not only as adversaries in the legal sense, but as individuals embedded within ideologies that grant their freedom of action and create their disempowerment.