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The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man

N. Jeremi Duru

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That Justice is a blind goddess
Is a thing to which we blacks are wise:
Her bandage hides two festering sores
That once perhaps were eyes.[1]
— Langston Hughes

INTRODUCTION

On August 23, 2002, a convicted rapist and murderer named Matias Reyes signed a sworn statement confessing to a rape with which he had not previously been connected.[2] After crossing paths in a New York correctional facility with Kharey Wise, who was serving time for the rape Reyes committed,[3] and who was having difficulty coping with incarceration,[4] Reyes began to feel guilty about Wise's imprisonment.[5]

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[1] Langston Hughes, *Justice*, *quoted in* MILTON MELTZER, LANGSTON HUGHES: A BIOGRAPHY 160 (1968). Hughes penned the poem in honor of the Scottsboro Boys, eight Alabama youths incarcerated in 1931 for a rape they did not commit. *See* Brent Pattison, *Minority Youth in Juvenile Correction Facilities: Cultural Differences and the Right to Treatment*, 16 LAW & INEQ. 573, 573 n.3 (1998).

[2] *See* Christine Haughney, *Central Park Rape Case Convictions in Question; Man with DNA Match Confessed, Attorneys Say*, WASH. POST., Sept. 6, 2002, at A3.

[3] See Karen Freifeld, *DA's Reversal in Jogger Case; Urges Judge to Vacate All Convictions in Central Park Attack*, N.Y. TIMES, Dec. 6, 2002, at A5.

[4] *See* Kevin Flynn & Jim Dwyer, *A Crime Revisited: The Suspect; 'I Just Had to Have Her,' a Rapist Told Lawyers*, N.Y. TIMES, Dec. 6, 2002, at B4.

Having decided to "do one thing right in [his] life," Reyes approached prison officials and admitted to committing the rape attributed to Wise.[6] He stated that on April 19, 1989, he raped a woman jogging in Central Park.[7]

On that day, a stock broker named Trisha Meili[8] embarked on her standard after-work jog.[9] She ran from her Manhattan apartment into Central Park and onto the Resevoir Path, a popular Central Park jogging route.[10] When she reached the northern reaches of the park, she was attacked, raped, severely beaten, and left to die alone in the dark.[11] Passers-by discovered her body three and a half hours later, and she was rushed to the hospital.[12] Miraculously, although her body temperature dropped to eighty-four degrees and she lost 75 percent of her blood, she survived.[13] That same evening, thirty or more young black and Latino teenagers were in the park, and some were involved in assaults on various park-goers.[14] Several of these teenagers were quickly rounded up and interrogated in connection with the rape.[15] Among those interrogated were fourteen-year-old Kevin Richardson, fourteen-year-old Raymond Santana, fifteen-year-old Yusef Salaam, fifteen-year-old Antron McCray, and sixteen-year-old Kharey Wise.[16] After interrogations which lasted as long as twenty-eight hours, each of the youngsters confessed to involvement in attacking and raping Meili.[17] None confessed to actually raping her, but each said he had held or hit

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5 *See* Ron Stodghill, *True Confession of the Central Park Rapist*, TIME, Dec. 16, 2002, at 65.

6 Alice McQuillan, *Jogger Case Confession*, N.Y. DAILY NEWS, Sept. 4, 2002, at 5.

7 *See* Sarah Baxter, *DNA Points to Single 'Wilding' Rapist*, SUNDAY TIMES (London), Sept. 8, 2002, at 27.

8 For years after the attack, Meili kept her identity from the public. In April of 2003, however, she published a book titled *I Am the Central Park Jogger*, in which she disclosed her identity.

9 *See* John Cassidy, *Taboo: Black Criminality Is a Forbidden Subject in Polite Circles, but It Underlies Much of the Racial Tension in the United States*, VANCOUVER SUN, July 28, 1990, at B3.

10 *See* David Firestone, *Central Park, April 19, 1989, Talking about the Night*, NEWSDAY (New York), Oct. 9, 1989, at 4.

11 *See* William Lother, *Chilling the Big Apple*, TORONTO STAR, Apr. 29, 1989, at A2.

12 *See* John J. Goldman, *Gang Assault on Woman Stuns N.Y.*, L.A. TIMES, Apr. 24, 1989, at 15.

13 *See* Jim Dwyer, *Likely U-Turn by Prosecutors in Jogger Case*, N.Y. TIMES, Oct. 12, 2002, at A1; *Jogger Trial Witness Rocks Defense Lawyer*, THE RECORD (Bergen County, New Jersey), Oct. 31, 1990, at A3.

14 *See* Tracy Connor, *Retracing Gruesome Trail of Mayhem & Violence*, N.Y. DAILY NEWS, Sept. 5, 2002, at 2.

15 *See* Robin Marantz Henig, *The 'Wilding' of Central Park; Complex Motivations Underlie Violent Group Actions*, WASH. POST, May 2, 1989, at Z6.

16 *See* Connor, *supra* note 14, at 2.

17 *See* Jim Dwyer, *Convict Says Jogger Was His Second*, N.Y. TIMES, Oct. 5, 2002, at B1. While Richardson, Santana, McCray, and Wise confessed on video tape, Salaam refused to confess on videotape or in a signed statement. He reportedly confessed verbally to one of the detectives interrogating him. *See* Jim Dwyer & Kevin Flynn, *New Light on Jogger's Rape Calls Evidence into Question*, N.Y. TIMES, Dec. 1, 2002, at A1.

her, and each blamed the actual rape on one or more of the others.[18] Although each of the defendants later maintained his innocence, insisting that the confessions were coerced, all five were convicted and sentenced to prison terms of between five and fifteen years.[19] The incident lives as one of the most racially divisive in recent American history, and until January 2001, the case was considered closed.

Reyes' confession, however, changed that. After Reyes confessed, authorities ordered DNA tests which revealed that semen and pubic hair found at the crime scene—unattributable to any of the five convicted of the rape—was Reyes'.[20] Manhattan District Attorney Robert Morgenthau immediately launched an investigation, scrutinizing both Reyes' confession and the 15,000 pages of testimony and evidence presented during the Central Park rape trial.[21] Morgenthau found that Reyes' confession accurately described the crime scene and the jogger's injuries, while the youths' confessions were inconsistent with each other and with the physical evidence.[22] Further, Morgenthau found that Reyes had confessed with precision to several other rapes for which he was never charged.[23] On December 5, 2002, upon concluding his investigation, Morgenthau filed with the court a fifty-eight-page recommendation that the convictions of the Central Park Five be vacated.[24] Just two weeks later, on December 19, 2002, New York State Supreme Court Justice Charles Tejada followed the recommendation and vacated the convictions.[25] Justice Tejada's order was issued too late to save the Central Park Five from their punishments, coming four months after Wise, the last of the Central Park Five serving his rape sentence, was released from prison.[26]

Despite the revelations suggesting the youths' innocence, some detectives, police officials, and members of the press remain convinced

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18 *See* Connor, *supra* note 14, at 2.

19 Antron McCray was convicted of first-degree rape and robbery and was sentenced to five to ten years. Kevin Richardson was convicted of second-degree attempted murder, first-degree sodomy, first-degree rape and first-degree robbery and was sentenced to five to ten years. Yusef Salaam was convicted of first-degree rape and robbery and was sentenced to five to fifteen years. Raymond Santana was convicted of first-degree rape and robbery and was sentenced to five to fifteen years. Kharey Wise was convicted of first-degree sexual abuse, first-degree assault and first-degree riot and was sentenced to five to fifteen years. *See* Larry Celona et al., *Detectives Blast Morgenthau Review*, N.Y. POST, Dec. 6, 2002, at 5.

20 *See* Karen Freifeld, *Convictions Tossed / Judge Clears Verdicts of Central Park 5*, NEWSDAY (New York), Dec. 20, 2002, at A3; Dwyer & Flynn, *supra* note 17, at A1.

21 *See* Josh Getlin, *D.A. Urges Convictions in Jogger Rape Be Overturned*, L.A. TIMES, Dec. 6, 2002, at A1.

22 *See id.*

23 *See id.*

24 *See* Barbara Ross & Robert Ingrassia, *Joy and Rage over Jogger 5*, N.Y. DAILY NEWS, Dec. 6, 2002, at 4.

25 *See* Samuel Maull, Associated Press, *Judge Throws Out Rape Convictions in 1989 Central Park Jogger Case*, ALAMEDA TIMES-STAR, Dec. 20, 2002.

26 *See* Ross & Ingrassia, *supra* note 24, at 4.

of the youths' involvement in the attack.[27] Few seriously argue that Reyes was not involved, as the evidence of his involvement is overwhelming.[28] Still, some officials insist that the youths participated, citing as support their confessions to other attacks in the park that night, as if such involvement would necessarily implicate them in the attack on the jogger.[29] Some insist that the youths attacked the jogger, but at a different time of the evening than did Reyes.[30] Others suggest that the youths participated in the rape along with Reyes.[31]

These arguments suffer under scrutiny, as the vacation of the convictions implies inaccuracy in the youths' confessions to the rape, and thus suggests the need to re-examine their confessions to other assaults in Central Park that night.[32] Even assuming, arguendo, that all of the youths were involved in other assaults that night,[33] their involvement in those assaults certainly does not translate into involvement in attacking Meili. Indeed, available evidence strongly indicates the youths' non-involvement in Meili's attack:

- The youths' involvement is largely premised on the argument that Reyes alone could not have inflicted the "head-to-toe" damage Meili suffered.[34] The theory relies on the youths having been primarily responsible for the beating that drained the majority of Meili's blood from her body, yet none of her blood

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27 *See* Timothy Sullivan, *Presumption of Uncertainty*, AM. LAW., Feb. 2003, at 51.

28 Aside from the aforementioned DNA evidence linking Reyes to the crime scene, in confessing, Reyes was able to describe the attack in such precise detail that the description of the attack followed the trail of blood investigators found thirteen years earlier. *See* Jim Dwyer, *One Trial, Two Conclusions: Police and Prosecutors May Never Agree on Who Began Attack on Park Jogger*, N.Y. TIMES, Feb. 2, 2003, at 32 [hereinafter Dwyer, *One Trial, Two Conclusions*]. Further, Meili's injuries were consistent with Reyes' habit of attacking his victims' eyes to prevent them from identifying him. *See* Kirk Makin, *Attackers Could Be Exonerated*, THE GLOBE AND MAIL (Toronto), Nov. 18, 2002, at A13. Meili was beaten badly around the eyes, causing one eye to burst through its socket. *See Dateline NBC* (NBC television broadcast, Apr. 6, 2003). Further still, two days before Meili's attack, a man attacked a different woman in the same area of the park. The victim's description of her assailant matched Reyes down to fresh stitches he had in his chin at the time. *See* Jim Dwyer, *Amid Focus on Youths in Jogger Case, a Rapist's Attacks Continued*, N.Y. TIMES, Dec. 4, 2002, at B2.

29 *See* E.R. Shipp, *Jogger 5 Aren't Racial Martyrs*, N.Y. DAILY NEWS, Oct. 22, 2002, at 41; *No Clean Slate for Jogger Five*, N.Y. DAILY NEWS, Dec. 4, 2002, at 32.

30 *See* Robert D. McFadden, *Boys' Guilt Likely in Rape of Jogger, Police Panel Says*, N.Y. TIMES, Jan. 28, 2003, at A21; Tom Hays, *5 May Have Been Innocent in New York Jogger Beating Case*, MIAMI HERALD, Oct. 17, 2002, at 22.

31 *See* McFadden, *supra* note 30, at A21; *New York's Nightmare Revisited*, CHI. TRIB., Sept. 14, 2002, at 24; Celona et al., *supra* note 19, at 5; Barbara Ross & Robert Ingrassia, *Account of Jogger Attack Dubious*, BRADENTON HERALD, Dec. 7, 2002, at 6.

32 *See* Kevin Flynn & Jim Dwyer, *Reconsidering Other Verdicts in Jogger Case*, N.Y. TIMES, Dec. 2, 2002, at B1.

33 Some of the youths have continued to admit complicity in the other assaults in Central Park that night. *See* Dwyer, *supra* note 17, at B1.

34 *See* Michael Daly, *A Timeline Full of Coincidence*, N.Y. DAILY NEWS, Dec. 4, 2002, at 6; Tracy Connor, *Say Gang Attacked Jogger: Med. Crew Finds Her Injuries, Reyes's Story Don't Jibe*, N.Y. DAILY NEWS, Oct. 27, 2002, at 3.

was found on any of the youths, their clothes, or their shoes.[35]

- The only item of physical evidence connecting the youths to the crime at the time of trial were strands of hair found on Richardson and believed to have come from Meili.[36] DNA analysis conducted in the aftermath of Reyes' confession reveals that the hair does not match Meili's.[37]
- Unlike Reyes, who was able to identify the location of the crime scene with precision thirteen years later, the youths, when confessing a day after the rape, claimed that the attack took place blocks from where it actually occurred.[38]
- The youths' descriptions of the crime were wildly inconsistent, differing with respect to every significant facet of the crime.[39]
- The path created when Meili was dragged into the woods was between sixteen and eighteen inches wide, a path "more consistent with a single attacker dragging an inert form than with a group," according to Nancy Ryan, Morgenthau's Chief of Trials.[40]
- Despite the leniency parole boards afford inmates who are contrite, none of the four youths whose prison records can be accessed[41] has admitted to the rape since the original confessions, costing each opportunities for early release.[42]

The substantial evidence indicating the Central Park defendants' non-involvement, Reyes' confession, and Judge Tejada's decision to

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35 *See* Leonard Levitt, *A Lot of Questions, Still No Answers*, NEWSDAY (New York), Oct. 21, 2002, at A12.

36 *See* Jim Dwyer & Susan Saulny, *Hair Evidence in Jogger Case is Discredited*, N.Y. TIMES, Oct. 25, 2002, at B1; Dwyer, *supra* note 13, at A1; Lynnell Hancock, *Wolf Pack: The Press and the Central Park Jogger*, COLUM. JOURNALISM REV., Jan. 2003, at 38.

37 *See* Dwyer & Saulny, *supra* note 36, at B1.

38 *See* Dwyer, *One Trial, Two Conclusions*, *supra* note 28, at 32.

39 *See id.*; Hancock, *supra* note 36, at 38. James Kindler, Chief Assistant District Attorney under Morgenthau, explains that:

> The accounts given by the defendants differed from one another on virtually every aspect of the crime: who initiated the attack; who knocked the victim down; who undressed her; who struck her; who held her down; who raped her; what weapons were used; and when, in the sequence of events that night, the rape occurred.

Dwyer, *One Trial, Two Conclusions*, *supra* note 28, at 32.

40 *See* Dwyer, *One Trial, Two Conclusions*, *supra* note 28, at 32. A New York Police Department report maintaining that there was no police misconduct during the initial rape investigation and insisting that the youths were involved in attacking Meili fails to comment on the size of the path. *See id.* One officer suggests that the youths avoided creating a large path by walking in a straight line or "pranc[ing] along beside." *Id.*

41 McCray served his entire sentence in a juvenile facility and, as such, his records are not accessible. *See* Jim Dwyer & Susan Saulny, *Youths' Denials in '89 Rape Case Cost Them Parole Chances*, N.Y. TIMES, Oct. 16, 2002, at B1.

42 *See id.* The only youth who even remotely suggested his involvement while in prison was the severely learning disabled Wise, and he did so in rambling, often unintelligible statements. When ultimately asked to admit to the rape before the parole board, he refused. The board cited Wise's failure to accept guilt when denying him parole on three occasions over six years. *See id.*

overturn the convictions force society to query how a case some considered "rock-solid"[43] could have resulted in the wrongful conviction and imprisonment of five teenagers. Journalists and commentators largely agree that the case was poorly handled. One newspaper enumerated the respects in which authorities erred in pursuing the prosecution: "Botched record-keeping. Mishandled evidence. Incomplete legwork by detectives. Faulty conclusions by zealous prosecutors. This is the legacy of the Central Park jogger case."[44] The Central Park case is certainly characterized by all of these things, but they do not tell the whole story. Exploration of American history, the place of black men in that history, and a similar case with a tragically similar outcome half a century earlier, reveal that the Central Park case was squarely about race and injustice. The true legacy of the Central Park case is the illumination of the festering existence of racial hatred and virulent stereotyping traceable to the days of chattel slavery. Indeed, the Central Park rape case has exposed the extent to which American society is only narrowly removed from its most shameful days.

This article seeks to explain the judicial travesty in the Central Park case by contextualizing it in view of the myth of the Bestial Black Man: a myth, deeply imbedded in American culture, that black men are animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape. An examination of the myth's foundations, its historical impact on the dispensation of extra-legal and legal punishment against black men, its stubborn perseverance in modern America, and the public discourse surrounding the apprehension of the Central Park Five indicate that the myth impacted the Central Park convictions.

Part I of this article explores the creation of the mythic Bestial Black Man. Part II traces the growth of the myth in Reconstruction and post-Reconstruction America and explores the extra-legal means employed to attack the black men perceived as personifying the myth. Part III examines the legal system's complicity in supporting and promoting the myth of the Bestial Black Man. Part IV explores the 1931 Scottsboro cases, in which nine young black men in rural Alabama were wrongly convicted of rape, and the way in which the mythic Bestial Black Man impacted the cases. Part V examines the legal revolution that occurred in the wake of the Scottsboro trials and in the following decades, as well as the persistence of the mythic Bestial Black Man in spite of the reforms spurred by that revolution. Part VI analyzes the Central Park case in view of the myth of the Bestial Black Man as expressed in America's history generally and in the Scottsboro

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[43] Mike Kelly, *Some Call This Justice*, THE RECORD (Bergen County, New Jersey), Dec. 8, 2002, at O1.

[44] *Id.*

cases in particular. This part further explores the extent to which the myth potentially impacted the Central Park convictions, despite a trial free of openly race-based prejudice. Part VII examines the consequences of allowing the Bestial Black Man myth to impact rape convictions. Finally, the piece concludes that society's examination and confrontation of the myth of the Bestial Black Man, rather than a regime of legal reforms, provides the best hope of eradicating the influence of the myth on the criminal justice system.

I. CREATION OF THE BESTIAL BLACK MAN

Black people have long labored under the stigma of savagery. Since the early days of substantive interaction between Africans and Europeans, blacks have been perceived as only narrowly removed from the animal kingdom.[45] The conception at the time of blacks as animalistic was pervasive, with European observers in Africa routinely referring to the blacks they encountered as brutish, bestial, or beastly.[46] Many commentators of the time believed that the line between blacks and animals was minimally existent if existent at all. Some believed that blacks were the offspring of apes, while others suggested that blacks produced apes through conception with a breed of unknown African animals.[47] Apes were not the only beasts the unions of blacks and animals were thought to have produced. As sixteenth-century political theorist Jean Bodin asserted, "promiscuous coition of men and animals took place, wherefore the regions of Africa produce for us so many monsters."[48] Alleged observations of such monsters served to support the theories. For instance, a Dutchman in Africa in the 1600's reported that he had seen a black man with a tail one foot in length.[49] Indeed, through at least the mid-seventeenth century, some in France referred to Africa as the land of "men with tails."[50] Joseph Conrad's 1902 novel, *Heart of Darkness*, provides perhaps America's most enduring image of blacks as sub-human:[51]

> "[T]here would be a glimpse of rush walls, of peaked grass roofs, a burst of yells, a whirl of black limbs, a mass of hands clapping, of

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45 *See* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812 28-29 (1968).

46 *See id.* at 28.

47 *See id.* at 30-31.

48 *Id.* at 31.

49 *See* D. Marvin Jones, *"We're All Stuck Here For A While": Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35, 73 (1998).

50 *Id.*

51 *See* Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in The Court Room*, 5 S. CAL. REV. L. & WOMEN'S STUD. 378, 453-54 (1996).

> feet stamping, of bodies swaying, of eyes rolling, under the droop of heavy and motionless foliage .... It was unearthly and the men were—No, they were not inhuman. Well, you know, that was the worst of it—this suspicion of their not being inhuman. It would come slowly to one. They howled and leaped, and spun, and made horrid faces .... Ugly."[52]

In addition to, and perhaps because of, their image as animalistic, blacks have long been perceived as extraordinarily sexually potent and unrestrained.[53] Indeed, "sexuality was what one expected of savages."[54] The perception of blacks as lewd dates to the Middle Ages.[55] Over time, various European observers described the black Africans' sexuality in various ways. Speaking of Africa, one sixteenth-century observer proclaimed, "there is no Nation under heaven more prone to Venery."[56] Another explained that black Africans were "very lecherous."[57] Others inferred lasciviousness from the alleged large size of black males' genitals, recording that they had "large Propogators" and were "furnisht with such members as are after a sort burthensome unto them."[58]

As a further matter, early European observers perceived blacks to be inherently criminal. Even blacks who appeared to be scrupulous and non-criminal were not to be trusted, as the criminality was thought to be too deeply ingrained.[59] As one observer remarked,

> it would be very surprising if upon a scrutiny into their Lives we should find any of them whose perverse Nature would not break out sometimes; for they indeed seem to be born and bred Villains: All sorts of Baseness having got such sure-footing in them, that 'tis impossible to lye concealed.[60]

Having been tagged as sexually potent animalistic criminals, blacks were subjected to chattel slavery in the new world. They did not, however, have the fortune of shedding the stereotypes upon introduction into slavery. On the contrary, the institution of slavery further entrenched the stereotypes. Indeed, the very existence of blacks as slaves reinforced the perception of their bestiality: "the slave is outside of culture and therefore is nonhuman; is deprived of freedom and

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52 JOSEPH CONRAD, HEART OF DARKNESS 108-09 (1903).

53 *See* JORDAN, *supra* note 45, at 33.

54 *Id.* at 33.

55 *See* SANDER GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS 79-81 (1985); Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*, 17 HARV. BLACKLETTER L.J. 57, 67 (2001).

56 JORDAN, *supra* note 45, at 33.

57 *Id.*

58 *Id.* at 34.

59 *See id.* at 26.

60 *Id.*

therefore is a beast."[61] Slavery enhanced the criminality stereotype as well. In fact, the assertion of the most basic human right, liberty, was, for the slave, criminal. Slaveholding America lived in constant fear of this assertion in the form of slave rebellion, resulting in close scrutiny of blacks' actions. Virginia's early slave codes are illustrative of statutory restrictions on blacks' movements and gatherings.

In 1680, the Virginia legislature decreed:

> [w]hereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence [be it] enacted that no Negro or slave may . . . go from his owner's plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on.[62]

Concerned that the 1680 legislation was not sufficiently restrictive, the Virginia legislature two years later decreed that "to prevent insurrections no master or overseer shall allow a Negro slave of another to remain on his plantation above four hours without leave of the slave's own master."[63] These Virginia slave codes served as a model for other states' enactments throughout slavery.[64]

As is evident from such legislation, states criminalized activities simply on the basis that a black person was involved.[65] Regimes such as these both justified and promoted the conception that "black people were to be mistrusted and feared, and that they were naturally criminal."[66] Consequently, "[i]n colonial and early national America color became associated with inherently criminal behavior in almost every area of the law."[67]

Just as the myth of black criminality persevered in slave-holding America, so too did the myth of the black man's supposed super-sexuality.[68] While the mythic unrestrained sexual potency of black men was prized by slaveholders hoping to mate the men with black women to produce more slaves, it was perceived as a dire threat to white women.[69] Considered in tandem with inherent criminality, and in the context of white society, the sexuality became seen as predatory. Indeed, "slavery define[d] Black men as sexual predators [and] created

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61 D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 462 (1993).

62 Act X, 1680; Guild, BLACK LAWS OF VIRGINIA 45 (1888).

63 Act III, 1682; Guild, BLACK LAWS OF VIRGINIA 46 (1888).

64 *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 39 (1978).

65 *See* Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2093 (1993).

66 *Id.*

67 *Id.*

68 *See* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 461-62 (1972).

69 *See* Darren L. Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 82-83 (1991).

[t]he image of the violent man, who is the rapist."[70]

In the minds of many whites, the very existence of the black man in America, conceived to be animalistic, sexually predatory, and criminal by nature, presented a ubiquitous threat of rape.[71] And the consequent conviction that black men would, whenever possible, rape white women, prompted the perception of all black men as impending rape threats.[72] Thus was born the myth of the Bestial Black Man in America.

Despite being slaves and thus having "no rights which the white man was bound to respect,"[73] having no mobility, and being legally shackled and beaten at will by owners, black men's sexuality was criminalized and fanatically feared. A black man was subject to fierce punishment and even death for merely "looking the wrong way at a white woman."[74] This, despite the extraordinary infrequency of slaves attacking white women. While the myth of the Bestial Black Man implied wanton rape on the part of blacks, reality never supported the myth.[75] As history scholar Angela Y. Davis writes, "[t]o be sure, there were some examples of Black men raping white women. But the number of actual rapes which occurred was minutely disproportionate to the allegations implied by the myth."[76] In fact, as Davis notes, during the four-plus years of the Civil War, not one rape of a white woman by a slave was reported.[77] Indeed, sexual assaults during slavery were overwhelmingly carried out by white slave masters against black female slaves.[78] Still, despite the lack of foundation for the position that black men were sexually charged criminal beasts, the myth flourished during

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70 Lisa A. Crooms, *Speaking Partial Truths And Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Collaboration Rule in the Interest of Black Liberation*, 40 HOW. L.J. 459, 475 (1997) (quoting Dorothy E. Roberts, *Rape, Violence and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 365 (1993) (internal quotation marks omitted)).

71 *See* Jones, *supra* note 49, at 73.

72 *See id.*

73 Dred Scott v. Sanford, 60 U.S. 393, 407 (1856). In this infamous Supreme Court decision, the Court denied Dred Scott's claim to freedom, and in doing so set forth the status of blacks in America: "[Blacks] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect . . ." *Id.*

74 Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 573 n.5 (1993).

75 *See* ANGELA Y. DAVIS, WOMEN, RACE & CLASS 188-89 (1983).

76 *Id.* at 188.

77 *See id.* at 188-89.

78 *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 34 (1997). Not infrequently, slave masters visited female slaves at night and forced them into sex. As slavery ended, the legacy of these rapes remained evident in the various hues of black people's skin. *See* Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 136 n.32 (1997) ("Because many Black women were sexually exploited and raped during slavery, most people of African ancestry in the Western Hemisphere have some white ancestry.").

slavery.[79]

In 1865, the Thirteenth Amendment to the United States Constitution legally abolished slavery.[80] And three years later, with the Fourteenth Amendment, Congress granted blacks equal protection under the law and endowed them with the rights and privileges to which all American citizens are entitled.[81] These Amendments to the Constitution, however, could not corral perspectives which slavery supported and promoted for centuries. Specifically, the Amendments were powerless to eradicate the myth of the Bestial Black Man. The perception of the black man as an animalistic predator, eager to rape white women, had grown too strong.

II. THE LYNCHING PHENOMENON

As slavery became a memory, the means of controlling blacks under the law were drastically reduced. This proved frightening to post-slavery America. Indeed, many held perspectives similar to those articulated in an 1861 article published by the *New Orleans Bee*:

> The black man in his own home is a barbarian and a beast.... When emancipated and removed from the crushing competition of a superior race, he demonstrates his utter incapacity for self-restraint, grows idle and thriftless, indulges his passions without the slightest check, descends step by step down to the original depths of his ignorant and savage instincts, and at length is debased to nearly the state which he is found in the wilds and jungles of Africa.[82]

Faced with the idea of living in a society in which blacks reverted to their "savage instincts," concerned whites sought to develop post-slavery means of controlling blacks. So, without the legal right to chain and beat blacks, to frighten and subjugate them, the institution of lynching gained hold. A lynching is a "killing done by several people acting in concert outside the legal process to punish a person perceived

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79 *See* DAVIS, *supra* note 75, at 188-89.

80 *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

81 *See* U.S. CONST. amend. XIV, § 1, stating that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

82 *The Relation between the Races*, NEW ORLEANS BEE, Mar. 16, 1861, at 16.

to have violated a law or custom."[83] While non-blacks have been lynched in our nation's history, blacks constitute the great majority of America's lynching victims.[84] Although a particular lynching targets a particular victim or set of victims, lynchings have served historically to terrorize and strike fear into all American blacks.[85] While lynchings are most famously characterized by a hanging, lynchings by stabbing, shooting, or burning are no less lynchings.[86] Contrary to popular belief, lynchings were not a problem only of the Deep South; mobs carried out lynchings across the country.[87] And in the years following slavery and into the twentieth century, lynchings became a part of American culture. As law professor Katheryn Russell explains, "Lynchings had many characteristics of a sporting event. Entire families, including children, participated. Families packed food, drink, and spirits for the event."[88] Further, the lynchings were spectacles often attended by large groups, sometimes thousands, many of whom enjoyed and took pride in the murders.[89]

To many, lynchings were a perfectly reasonable and necessary means of controlling semi-civilized blacks, who "had undergone a salutary civilizing process through enslavement that was tragically ended by emancipation."[90] Indeed, "the notion that the freed slaves were or would become lawless bands of savages served as popular justification for lynchings and anti-black riots, particularly when the link was made between black men as rapists and white Southern women as their victims."[91] The mythic Bestial Black Man and his unrestrained sexuality proved to be at the heart of the lynching phenomenon. In post-slavery America, there developed a wide-spread belief that "black men lusted after white women with such powerful longing that ordinary means of control were insufficient."[92] For instance, late-nineteenth

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83 KENNEDY, *supra* note 78, at 42.

84 *See id.*

85 *See generally id.*

86 *See, e.g.*, RALPH GINZBURG, 100 YEARS OF LYNCHING 9-19 (1962).

87 *See* Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557, 570 (2003).

88 KATHERYN RUSSELL, THE COLOR OF CRIME 21 (1998).

89 *See id.*; WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 8-9 (James Allen et al. eds., 2000); *see also id.* at photographs 25-26 (displaying a post card of a lynching victim's hanged and burnt body with a group of white men standing in the background, reading: "This is the barbecue we had last night. My picture is to the left with a cross over it. Your son Joe."); *id.* at photograph 32 (displaying a picture of two lynching victims in a frame alongside a ball of one of the victims' hair).

90 KENNEDY, *supra* note 78, at 45.

91 Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 13 n.45 (1997).

92 KENNEDY, *supra* note 78, at 45. *See also* NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN 142 (1994) ("By the late nineteenth century, large numbers of white Americans, particularly in the South, believed that black men had acquired an incorrigible desire to rape white women. This conviction grew so pervasive that rape

century author Phillip Alexander Bruce asserted that black men desire white women so strongly that they have no choice but to "gratify their lust at any cost and in spite of every obstacle."[93] As lynchings became tools of terrorism used to maintain control over blacks in post-slavery America, they continued to be justified as necessary to avenge attacks on white womanhood.[94] As one then-prominent Georgian journalist announced: "if it takes lynching to protect woman's dearest possession from drunken, ravening beasts, then I say lynch a thousand a week."[95]

In actuality, most lynching victims were not even accused of rape or sexual assault.[96] In fact, one study reveals that only 16.7% of the black men lynched between 1889 and 1929 were accused of rape and only 6.7% were accused of attempted rape.[97] Whether or not a rape had occurred, lynchings were generally justified as appropriately responsive to attacks on white womanhood and were motivated by a fear of the black man's mythic sexual savagery.[98] The lynchings' overwhelming focus on the black man's sexuality is reflected in the genital mutilation frequently suffered by victims.[99] Describing one horrific lynching, a member of the lynch mob explained that "[a]fter taking the nigger to the woods . . . they cut off his penis. He was made to eat it. Then they cut off his testicles and made him eat them and say he liked it."[100] Recorded lynchings in America number roughly 5,000.[101] The true lynching tally, however, is impossible to determine, as countless others have been implemented quietly and in isolated areas.[102]

The myth of the Bestial Black Man was not shared only by small pockets of ardent white supremacists. It resounded nationally, as evidenced by the production and popularity of D.W. Griffith's 1915 motion picture *Birth of A Nation*. Based on Thomas Dixon's 1905 novel, *The Clansman*, *Birth of a Nation* was rife with stereotypes of

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came to be referred to in white society as the 'new Negro crime'.").

93 KENNEDY, *supra* note 78, at 45.

94 *See* DAVIS, *supra* note 75, at 186.

95 GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940 234 (1998).

96 *See* DAVIS, *supra* note 75, at 189.

97 *See id.* (citing 1931 report published by the Southern Commission on the Study of Lynching).

98 *See* Arthur L. Rizer III, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845, 848 n.8 (2003).

99 *See* Taslitz, *supra* note 51, at 454; *see also* Jacqueline Dowd Hall, *The Mind That Burns in Each Body: Women, Rape, Racial Violence*, *in* POWERS OF DESIRE 329 (Snitow, Stansell, & Thompson, eds., 1983).

100 Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Sterotypes: The African-American Woman and The Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1028, n.107 (citing HOWARD KESTER, THE LYNCHING OF CLAUDE NEAL 2 (1934)).

101 *See* GINZBURG, *supra* note 86, at 253-270 (listing the names of approximately 5,000 individuals lynched between 1859 and 1962); WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA, *supra* note 89, at 12.

102 *See* WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA, *supra* note 89, at 12.

blacks as animal-like creatures[103] and black men specifically as single-minded sexual predators.[104] Indeed, the film served to further popularize the myth that "black men once freed from the constraints of slavery became insatiable sexual beasts ravaging white women."[105] The film's primary theme regards the mythic burgeoning threat of miscegenation between black men and white women in post-Reconstruction America.[106] In its climax, the "black beast rapist"[107] kidnaps a white woman with plans to sexually assault her, and is pursued by heroic members of the Ku Klux Klan.[108] Dixon, a friend of then-President Woodrow Wilson, arranged to have the film screened in the East Room of the White House, where President Wilson, members of his cabinet, and their families viewed it.[109] After watching the film, President Wilson revealed his familiarity and agreement with the stereotypes it proffered. He liked the film, stating that it "was like writing history with lightning," and further noting that "it is all so terribly true."[110]

Birth of A Nation was as reflective of the myth's existence in the public consciousness as it was promotive of the myth's continuance, in that it both justified and incited wanton violence against black men.[111] The film's impact, however, was not only acute, it was institutional. *Birth of A Nation* is widely credited with spurring the re-emergence of the Ku Klux Klan, which had become virtually non-existent in the first decade of the twentieth century.[112] In some cases, the Klan explicitly

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103 *See* Amber McGovern, *Neutralizing Media Bias Through the FCC*, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 217, 232 (2002).

104 *See* Jordan, *supra* note 87, at 595 n.221.

105 *See id.*; MACLEAN, *supra* note 92, at 12.

106 *See* Lisa Cardyn, *Sexualized Racism / Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 811 (2002).

107 *Id.*

108 *See* W. Lewis Burke, *Post-Reconstruction Justice: The Prosecution and Trial of Francis Lewis Cardozo*, 53 S.C.L. REV. 361, 364 (2002).

109 *See* Jordan, *supra* note 87, at 595 n.221.

110 *Id.*

111 *See* Greta McMorris, *Critical Race Theory, Cognitive Psychology, and the Social Meaning of Race: Why Individualism Will Not Solve Racism*, 67 UMKC L. REV. 695, 710 (1999); *see also* WILLIAM L. KATZ, THE INVISIBLE EMPIRE: THE KU KLUX KLAN IMPACT ON HISTORY 76 (1986), stating that:

> People not only believed everything they saw about the Ku Klux Klan but they might have been ready to fight for the Klan on the screen or off, had they been asked. With that kind of stimulation, they left theaters and returned home to the reality of a multiracial country.

Id.

112 *See* Cardyn, *supra* note 106, at 811; MACLEAN, *supra* note 92, at 12-13; CHESTER L. QUARLES, THE KU KLUX KLAN AND RELATED AMERICAN RACIALIST AND ANTISEMITIC ORGANIZATIONS 54 (1999); Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENVTL. L. 229, 233 (2000) (citing JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 325, 345-46 (5th ed. 1980) ("Largely spurred on by D.W.

relied on the film to spread its message of white supremacy by running newspaper advertisements for the organization directly next to advertisements for the film.[113] The new Ku Klux Klan, far stronger than the first, flaunted up to as many as five million dues-paying members by the mid 1920s, and is considered the most powerful race-hating organization in America's history.[114]

Lynchings conducted in the name of protecting white women from the mythic Bestial Black Man were never restricted to adults. Boys, barely into adolescence, suffered the terror as well. Most famously, fourteen-year-old Emmett Till met his demise at the hands of two white men claiming to avenge the degradation of one of their wives.[115] In 1955, Till, from Chicago, visited relatives who lived on the periphery of Money, Mississippi in the Mississippi Delta.[116] One evening during his visit Till was in a small grocery store and whistled in the vicinity of Carolyn Bryant, a white woman.[117] Four days later, the two white men entered the house in which Till was staying, dragged him out, and gruesomely killed him.[118] Till was found three days later in Mississippi's Tallahatchie River.[119] His body was tied with barbed wire to a seventy-five-pound cotton-gin fan and was barely recognizable.[120] "There was a bullet in the boy's skull, one eye was gouged out, and his forehead was crushed on one side."[121] The message was clear: any assertion of sexuality by a black man towards a white woman, no matter how minor, was grounds for death.

Griffith's racist film romanticizing the rise of the Klan, *Birth of a Nation*, the KKK had over 100,000 members by 1920.")).

113 *See* MACLEAN, *supra* note 92, at 13.

114 *See id.* at xi.

115 *See* JUAN WILLIAMS, EYES ON THE PRIZE 42-43 (1987).

116 *See The Murder of Emmett Till* (PBS television broadcast, Jan. 21, 2003).

117 *See id.* Significant debate surrounds the events occurring in the store that day. Some believe that, rather than whistling, Till passed a suggestive comment. *See, e.g.*, WILLIAMS, *supra* note 115, at 42-43 (stating that Till said "Bye, baby" to Bryant). Among those who believe Till whistled, there is debate as to the advertence of the whistle. *See* Rick Bragg, *Emmett Till's Long Shadow: A Crime That Refuses To Give Up Its Ghosts*, N.Y. TIMES, Dec. 1, 2002, 4 (Week in Review), at 1. While most historical treatments suggest Till purposely whistled at Bryant, Till's mother provides another theory. *See id.* She explains that Till contracted polio at five years old, leaving him with a severe stutter. *See id.* She tried different methods to relieve the child of his stutter, finally teaching him to whistle before speaking to reduce tension. *See id.* Mrs. Till believes that a tongue-tied Till may have been trying to say something as benign as good-bye when he emitted the whistle that led to his death. *See id.*

118 *See* WILLIAMS, *supra* note 115, at 42. Although it has long been held that two men killed Till, some evidence suggests that the murderous group was significantly larger. *See also* Bragg, *supra* note 117, at 1.

119 *See* WILLIAMS, *supra* note 115, at 43.

120 *See id.*

121 *Id.*

III. THE BESTIAL BLACK MAN ON TRIAL

As mobs executed lynchings throughout America, a modest movement against lynching gained steam. In the 1920s and 1930s, anti-lynching legislation was proposed in Congress.[122] The legislation was hotly debated, but ultimately did not pass.[123] Still, the specter of federal intervention, together with increased popular opposition to lynching, served to modestly chill the lynching epidemic,[124] meaning that more blacks accused of rape were able to reach the courtroom. A black rape suspect fortunate enough to survive until his day in court, however, did not often fair much better than one attacked and killed by mobs. Such a defendant was usually subjected to what law professor Randall Kennedy terms a "legal lynching."[125] A legal lynching, as Kennedy defines it, is: "an execution sanctioned by the forms of judicial process absent the substance of judicial fairness."[126] Legal lynchings occur when the threat of extra-legal lynching at the hands of violent mobs is so great that the legal system takes the place of the mob in an attempt to cloak the punishment with legitimacy.[127] Kennedy offers as an example the rural Mississippi rape trial of three black men—Issac Howard, Ernest McGhee, and Johnnie Jones:

> The courthouse where the trial took place was surrounded by barbed wire, machine guns, and more than three hundred National Guards equipped with gas masks and fixed bayonets. At one point during the trial of all three men, a mob of several thousand whites attempted to overcome the court's defenses. Against the backdrop of this intimidation, the jury deliberated only six minutes before returning the foreordained guilty verdict.[128]

As soon as the guilty verdict was handed down, the presiding judge sentenced the defendants to death by hanging.[129] In a move that revealed the transparency of the legal proceeding, the judge then ordered whites in the courtroom to calm mob members and explain that

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122 *See* Jordan, *supra* note 87, at 599.

123 *See id.*

124 *See* KENNEDY, *supra* note 78, at 59-60. Kennedy notes that 119 black people were lynched during the 1930's, thirty-one black people were lynched during the 1940's, and six black people were lynched during the 1950's. *See id.* at 60. These numbers, of course, reflect *recorded* lynchings only. The true numbers of lynchings occurring in each of these decades will never be known. *See* WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA, *supra* note 89, at 12.

125 KENNEDY, *supra* note 78, at 88.

126 *Id.*

127 *See id.* at 88-89

128 *Id.* at 89.

129 *See id.*

the men would be hanged.[130] He reasoned that any extra-legal lynchings would serve as support for the anti-lynching legislation on Capitol Hill, which could lead to its passage and the consequent destruction of "'one of the South's cherished possessions—the supremacy of the white race.'"[131] In courtrooms such as this one, "legal lynching" replaced extra-legal lynching as the primary weapon aimed at the mythical Bestial Black Man.

Even when not surrounded and threatened by murderous mobs, American courts have supported and promoted the concept that black men are prone to raping white women and, in doing so, have strengthened the myth of the Bestial Black Man. Courts have done so by the very rules employed in resolving criminal matters. A line of Alabama cases is particularly instructive. In 1908, the Alabama Supreme Court heard *Pumphrey v. State*,[132] an appeal from a conviction of "assault with intent to ravish."[133] The defendant was black and the alleged victim was white.[134] The appellate court focused on the factors the jury could legitimately consider in inferring intent.[135] Ultimately, the court affirmed the conviction,[136] and in doing so, announced a rule that would endure in Alabama law for decades. The Court found that "'social customs founded on race differences,' and the fact that [the alleged victim] was a white person and the defendant a negro" were properly considered in determining the defendant's intent regarding rape.[137] Alabama courts applied the *Pumphrey* rule for decades, paving the way for Alabama jury members to import racial stereotypes and myths, such as the myth of the Bestial Black Man, into their calculus regarding intention to rape. Indeed, in commenting on the rule's application in the 1953 case of *McQuirter v. State*,[138] Jennifer Wriggins writes, the customs founded on racial differences "which the jury was to consider included the assumption that Black men always and only want to rape white women . . . ."[139] Although Alabama courts have not applied the rule since *McQuirter*, it remains a valid part of Alabama common law. Notably, Alabama courts are not anomalous in the application of the rule the Alabama Supreme Court announced in *Pumphrey*. Indeed, the *Pumphrey* Court borrowed the rule directly

130 *See id.*
131 *Id.*
132 47 So. 156 (Ala. 1908).
133 *Id.* at 157.
134 *See id.*
135 *See id.*
136 *See id.* at 158.
137 *Id.*
138 63 So. 2d 388 (Ala. 1953).
139 Jennifer Wriggins, *Rape, Racism, and the Law*, *in* RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 217 (Patricia Searles & Ronald J. Berger, eds., 1995).

from Georgia law.[140]

In the absence of doctrine such as the *Pumphrey* rule serving to usher the myth of the Bestial Black Man into the courtroom, the myth has often crept into courts via lawyers' remarks based on, and promoting, the stereotype that black men are destined to rape. To illustrate this phenomenon, the late jurist and scholar Leon Higginbotham presents two cases in which courtroom comments clearly relying on stereotypes of the Bestial Black Man, and clearly aimed at frightening court members, went unchallenged by trial courts.[141]

In *Garner v. State*,[142] a Mississippi court tried a black man for raping a white woman. In closing, the prosecutor made the following statement: "Ah! It is nothing now days [sic] and not uncommon to pick up a paper and see where some brute has committed this crime .... You see it South, North, and East, where a brute of his race has committed this fiendish crime."[143] The defendant's attorney objected to the statement.[144] Despite the obvious prejudicial nature of the statement and the appeal to fears of the mythic Bestial Black Man, the trial court overruled the objection.[145] The defendant was later convicted of rape.[146]

In neighboring Arkansas some years later, a state court tried a black man for raping a black woman in the case of *Kindle v. State*.[147] In his summation, the prosecutor, at one point, seemed unconcerned with the victim's plight, instead implying that if not convicted, the defendant could go on to rape a white woman. In stating to the jury, "Gentlemen, you don't know that [the defendant] will rape the same color the next time,"[148] the prosecutor essentially asked the jury to convict the defendant, not for the rape of a black woman—the rape for which he stood trial—but to prevent the potential future rape of a white woman. Aside from relegating the black woman's rape to little more than a warning sign that the defendant might later commit an "important" rape, the comment presented jury members with the specter of the Bestial Black Man and implied that he might one day come for them and theirs. The defendant was convicted and the appellate court affirmed.[149]

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140 *See* Pumphrey v. State, 47 So. 156, 158 (1908) (citing Jackson v. State, 18 S.E. 132 (Ga. 1893) ("The doctrine of the court's charge to the jury that, upon the question of intention, social customs, founded on race differences, and the fact that the defendant was a negro and the girl was a white person, might be taken into consideration, is undoubtedly correct.")).

141 *See* A. LEON HIGGINBOTHAM, SHADES OF FREEDOM 144 (1996).

142 83 So. 83 (Miss. 1919).

143 *Id.* at 83.

144 *See id.*

145 *See id.*

146 *See id.* at 83-84. Notably, when the case reached the appellate court, the conviction was reversed. *See id.*

147 264 S.W. 856 (Ark. 1924).

148 *Id.* at 857.

149 *See id.*

America's preoccupation with, and detestation of, the mythic Bestial Black Man has been as present in sentencing as it has been in conviction. The grossly disproportionate number of black men executed for rape highlights the extent to which the judicial system has considered a black man's rape of a white women singularly appalling.[150] Since 1930, 455 men have been sentenced to death and executed for rape. Four hundred and five of these men have been black.[151] The race of the victim is not irrelevant. In the years between 1930 and 1967, the state executed 36 percent of black men convicted of raping white women, while executing a mere two percent of rape convicts when any other racial combination of convicted rapist and victim existed.[152] Notably, no rapist of any race has ever been sentenced to death for raping a black woman,[153] sending an unmistakable signal that rapes of white women have historically been deemed more tragic in America than rapes of black women.[154] In the midst of this climate of extra-legal lynchings and legal lynchings, of legal doctrines presuming the bestiality of black males and courts willing to accept racially prejudicial and inflammatory perspectives, nine black teenagers who would come to be known collectively as the Scottsboro Boys went on trial for their lives.

IV. THE SCOTTSBORO CASES

March 25, 1931, was a brisk but sunny day in Jackson County,

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150 In 1977, the Supreme Court found executions for rape to be unconstitutional. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977).

151 *See* Furman v. Georgia, 408 U.S. 238, 364 (1971) (Marshall, J., concurring) (noting that although some of the disparity may be due to higher crime rates among blacks, significant evidence indicates that discrimination is largely responsible).

152 *See* Wriggins, *supra* note 139, at 218.

153 *See* Ammons, *supra* note 100, at 1028 n.107.

154 The film adaptation of John Grisham's *A Time to Kill* presents a dramatic illustration of this point. The protagonist is a civil rights-era Mississippi lawyer defending a black man who admittedly killed the two white men who brutally raped his pre-adolescent daughter. In his summation, the defense lawyer seeks to justify his client's rage to the jury. Believing that the victimization of a black girl would not raise in the jurors the ire necessary for them to deem his client's crime justified, he asks them to pretend she is not black. He describes the horrific assault and then concludes: "Can you see her? A raped, beaten, broken body, soaked in their urine, soaked in their semen, soaked in her blood, left to die. Can you see her? I want you to picture that little girl. . . . Now imagine that she is white." A TIME TO KILL (Warner Brothers 1995).

Although the lawyer's summation in *A Time to Kill* is fictional, his premise is not far-fetched. Indeed, it is the precise premise under which the prosecutor in *Kindle v. State*, discussed above, argued that the defendant black man should be found guilty of raping a black woman. Like the fictional lawyer in *A Time to Kill*, the prosecutor in *Kindle* was unconvinced that jurors would see the rape of a black female as sufficiently tragic, and consequently asked the jurors to instead consider their feelings if the rape victim were white. *See* Kindle v. State, 264 S.W. 856, 857 (Ark. 1924).

Alabama.[155] Nine black teenagers, brothers Roy and Andy Wright, Haywood Patterson, Eugene Williams, Ozie Powell, Willie Roberson, Olen Montgomery, Charley Weems, and Clarence Norris, were riding the Alabama Great Southern[156] freight train running from Chattanooga to Memphis.[157] The youths ranged in age from thirteen to twenty.[158] Prior to that day, no ties bound the entire group. The Wright brothers, Paterson, and Williams knew each other and were traveling together.[159] Likewise, Powell and Roberson were friends, having met in Chatanooga.[160] Montgomery, Weems, and Norris were each traveling alone.[161] The previous day, two white women, Victoria Price and Ruby Bates, had been in Chattanooga looking for work.[162] They stayed the night and hopped the forty-two car long Chattanooga to Memphis freight back to Alabama the next day.[163] The events of March 25, 1931, would irrevocably tie the eleven together in American history.

As the train wound through northern Alabama on its way to Memphis, some subset of the nine young black men had an altercation with a group of white male teenagers.[164] After the dispute, all but one of the white teenagers either jumped or was thrown from the train near Stevenson, Alabama.[165] Not long thereafter, the group of whites approached an employee at the Stevenson train station and complained that they had been beaten and thrown from the train by a group of blacks.[166] Officials in Scottsboro, the next town along the tracks, heard of the incident a few minutes after the train passed through the station.[167] The Sheriff of Jackson County, the Alabama County containing Scottsboro, promptly ordered his Deputy Sheriff, Charlie Latham, to round up all blacks on the train and return them to Scottsboro.[168] Latham deputized every gun-owning man in Paint Rock, the city through which the train would next pass, and they waited for the train.[169]

When the train stopped, the group boarded and discovered the nine black youths as well as Price and Bates.[170] Latham secured the young

155 *See* DAN CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 3-4 (1979).
156 *See* HAYWOOD PATTERSON & CONRAD EARL, SCOTTSBORO BOY 4 (1950).
157 *See* CARTER, *supra* note 155, at 3.
158 *See id.* at 5-6.
159 *See id.* at 39.
160 *See id.* at 44.
161 *See id.* at 32, 33, 42.
162 *See id.* at 14.
163 *See id.*
164 *See* JAMES GOODMAN, STORIES OF SCOTTSBORO 3-4 (1994).
165 *See id.* at 4.
166 *See* CARTER, *supra* note 155, at 4.
167 *See id.*
168 *See id.* at 4-5.
169 *See id.* at 5.
170 *See id.*

men in the back of a truck,[171] and they were told that they would be charged with assault and attempted murder.[172] Not long thereafter, however, Bates told Latham that the group had raped her and her companion.[173] Upon news of the allegation, the young men were transformed from teenagers wanted in connection with a fight into monsters. Having been accused of rape, each of the Scottsboro Boys became the Bestial Black Man and hope of justice evaporated. The subsequent public discourse displayed characteristics indicating the public consciousness of the mythic Bestial Black Man yearning to rape; the same characteristics reflected in the public discourse surrounding apprehension of the Central Park Five some fifty years later. Specifically, the suspects were portrayed as sub-human, and in the absence of meaningful analysis as to innocence or guilt, the community rushed to judgment.

Based on Bates' allegation alone, the nine youths were condemned as guilty. The story of the rape spread with astounding celerity via telephone, telegraph, and traveling salesman.[174] Within hours, news had spread through town that the "black brutes" had chewed one of Ruby Bates' breasts from her chest.[175] As one onlooker noted, after Bates made her allegation, "it would have taken just a little leading for a wholesale lynching."[176] Fortunately for the nine, there was no such leading in Paint Rock. Not long after they reached Scottsboro, however, a mob had grown.[177] Hundreds of people assembled outside the small, weak jail in which the Scottsboro Boys were held.[178] Men, women, and children stood together, appalled and murderously angry.[179] Members of the crowd, having heard accounts of the train ride neither from Bates and Price nor from the Scottsboro Boys, had concluded the young men were guilty and were prepared to mete out fierce and lethal punishment. Cries of "Give 'em to us" and "Let those niggers out" resounded outside the jail as some of the detainees inside wept in anticipation of their deaths.[180] The authorities alternately threatened the crowd and pleaded with it to disperse, and by the early morning hours the immediate threat of lynching dissipated.[181] The Scottsboro Boys would live to see the courtroom.

That the trial would not be meaningful, however, became

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171 *See id.* at 6.
172 *See* PATTERSON & EARL, *supra* note 156, at 5.
173 *See* CARTER, *supra* note 155, at 6.
174 *See* GOODMAN, *supra* note 164, at 11.
175 CARTER, *supra* note 155, at 7.
176 *See id.* at 6.
177 *See id.* at 7-8.
178 *See id.*
179 *See id.*
180 *See id.* at 8.
181 *See id.* at 7-10.

increasingly clear as the savagery theme grew stronger. Not long after the Scottsboro Boys were apprehended, the *Chattanooga News* proclaimed, "[w]e still have savages abroad in the land, it seems."[182] Another local paper, the *Huntsville Daily Times*, insisted that the crime "savored of the jungle" and the "meanest of African corruption,"[183] and that the suspects were "beasts unfit to be called human."[184] And Willie Roberson, one of the accused youths, became widely known throughout the community as "that Ape nigger."[185]

The Scottsboro bar consisted of seven attorneys, and despite being ordered to take the case, all but one begged out of representing the defendants.[186] The one lawyer in town willing to represent the Scottsboro Boys, Milo Moody, was described at the time as a "doddering, extremely unreliable, senile individual who is losing whatever ability he once had."[187] Unaware that Moody expressed willingness to represent the defendants, and concerned about the charges against the young men, the black citizens of Chattanooga set out to raise sufficient money to entice an attorney from Chattanooga to assist the defendants.[188] Their collection was modest, however, and they aroused little interest. Finally, for a sum of $120, attorney Stephen Roddy, whose practice consisted largely of conducting real estate title searches, agreed to assist.[189] Roddy was widely known to be an alcoholic, had been hospitalized for his drinking several times, and was arrested for public drunkenness ten months prior.[190] Still, he was all the well-meaning black citizens of Chattanooga could afford. Armed with Moody and Roddy as their advocates, the Scottsboro Boys went to trial.

The trial began on April 6, 1931, with Roddy wobbling drunk through the hostile crowd which was restrained by members of the National Guard.[191] Upon initiation of the proceedings, however, Roddy refused to appear as counsel of record for the defendants, insisting that he was merely present on behalf of "people who are interested in them."[192] After an extended exchange between Roddy and the bench, Moody stood and said he would appear as counsel of record, and the trials commenced.[193]

The crowds surrounded the courthouse throughout the trials. Over

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182 *See id.* at 20.
183 *See id.*
184 *See* GOODMAN, *supra* note 164, at 13.
185 *See* CARTER, *supra* note 155, at 45.
186 *See id.* at 17-18.
187 *See id.* at 18.
188 *See id.* at 19.
189 *See id.*
190 *See id.*
191 *See id.* at 22.
192 *See id.*
193 *See id.* at 23.

the course of the following four days, in four separate trials before all white juries, eight of the nine teenagers were found guilty and sentenced to death.[194] A mistrial was declared in the case of thirteen-year-old Roy Wright, because, although the prosecution did not ask for Wright's execution, seven jury members insisted that Wright be put to death, resulting in a deadlock.[195] The trials were rife with inconsistencies, with Bates and Price telling different stories on different occasions. Price was the more emotive and dramatic of the two, drawing on preconceptions about black men in presenting a picture of "self-conscious sex-mad savages, Negroes . . . who were driven by a force much more frightening than instinct."[196]

Although the black community and numerous interested organizations, convinced that the trials were shams, continued to express grave doubts about the defendants' guilt, to many others, justice was served. Numerous appeals and retrials followed, but courts continued to find the defendants guilty. Finally, after years of deceit and complicity in the destruction of nine lives, Ruby Bates recanted, admitting that neither she nor Price was raped and that the entire story was a hoax. [197] Tragically, however, the admission did not result in the Scottsboro defendants' immediate release.[198] Many continued to languish in custody. All told, the Scottsboro Boys spent a combined 104 years in prison.[199] On June 9, 1950, Andy Wright, the last of the Scottsboro Boys to remain incarcerated, was released from prison on parole, nearly twenty years after the crisp spring day on the Chattanooga to Memphis freight.[200]

In retrospect, the Scottsboro cases are considered to have been legal travesties, with the outcomes resting on race and racial stereotypes rather than on evidence. Indeed, the cases are "perhaps the most notorious racial hoax case[s] in our history."[201] As Randall Kennedy writes, "The trials were parodies of due process. One trial judge openly disparaged counsel in front of the jury, blatantly favored the prosecution with evidentiary rulings, and when instructing the jury, initially ignored the possibility of acquittal by giving instructions only relating to a finding of guilt."[202] Specific incidents of courtroom racism were plentiful. For instance, jury selection was a farce.[203] The court

194 *See id.* at 37-48.

195 *See id.* at 48.

196 GOODMAN, *supra* note 164, at 22.

197 *See* Katheryn K. Russell, *The Racial Hoax as Crime: The Law of Affirmation*, 71 IND. L.J. 593, 598 (1996).

198 *See id.*

199 *See* Wriggins, *supra* note 139, at 217.

200 *See* CARTER, *supra* note 155, at 413.

201 Russell, *supra* note 197, at 598.

202 KENNEDY, *supra* note 78, at 100-01.

203 *See id.* at 101.

accepted whites on the jury despite admissions that they saw blacks as inferior.[204] And, in the face of "overwhelming evidence" that some blacks were inappropriately barred from being jurors, one judge summarily rejected the defense's protest to jury composition.[205] In another instance of blatant racial prejudice, the judge in one of the trials instructed the jury that when a black man is charged with raping a white woman, the law strongly presumes that the white woman would not possibly consent,[206] leading to the conclusion that a white woman would not stoop to intimacy with the inferior black and that sex between a black man and a white woman can consequently only be rape. Finally, in explicit reliance on community fears of the mythic Bestial Black Man, one prosecutor inquired of the jury: "How would you like to have your daughter on that train with nine negroes in a car?"[207] The court overruled defense counsel's objection to the prejudicial statement, and the prosecutor continued.[208]

The legal community's recognition of the trials as tragedies spurred beneficial rulings and reforms in the law. Most notably, in ruling on an appeal of one of the cases, *Powell v. Alabama*,[209] the United States Supreme Court handed down "the great grandfather of all right-to-counsel" decisions.[210] In that case, the Court considered the appeals of Scottsboro defendants Ozie Powell, Haywood Patterson, and Charley Weems. Although the defendants raised several assignments of error, the Court restricted its discussion to the defendants' assertion that they were unconstitutionally denied representation of counsel.[211] Noting that the defendants were never asked whether they had or wished to have counsel[212] and that by the morning of the trial the court had not clearly identified defendants' counsel,[213] the Supreme Court reversed the defendants' judgments. The Court famously held that "in a capital case, where a defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."[214]

Not long after, in *Gideon v. Wainwright*,[215] the Court endorsed

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204 *See id.*

205 *See id.*

206 *See id.*

207 Weems v. State, 182 So. 3, 4 (1938).

208 *See id.*

209 287 U.S. 45 (1932).

210 David I. Bruck, *Death Penalty and Indigent Representation*, 42 S. TEX. L. REV. 979, 1126 (2001).

211 *See Powell*, 287 U.S. at 50.

212 *See id.* at 52.

213 *See id.* at 53.

214 *Id.* at 71.

215 372 U.S. 335 (1963).

Powell and extended it to ensure the right to counsel for all felony defendants.[216] Another Scottsboro case which was heard by the Supreme Court, *Norris v. Alabama*,[217] considered the issue of jury exclusion based on race. Finding that the trial court should have granted defendant Norris' motion to quash his indictment, the court took the opportunity to reemphasize that the Fourteenth Amendment's equal protection clause does not condone state action excluding a black person, solely because of race, from the grand jury in a criminal prosecution.[218]

The impact of the Scottsboro cases, however, reached beyond the rulings the Supreme Court made in reviewing those cases. Indeed, the cases brought much-needed attention to the "travesty of southern justice."[219]

V. LEGAL REFORMS AND THE PERSISTENCE OF THE MYTHIC BESTIAL BLACK MAN

In the years following the Scottsboro tragedy, America experienced a movement theretofore unprecedented in the nation's history. Justice-minded people of all races challenged a presumption central to early American history—that people of African descent are inferior to people of European descent and are therefore entitled to fewer of America's coveted rights. The challenges were manifest in various forms. Some marched peacefully in protest of America's relegation of blacks to second-class citizenship. Others engaged in civil disobedience, sitting at lunch counters from which they were prohibited because of race and riding in portions of buses reserved for whites. Still others asserted their equality more forcefully, insisting on the observance of their human rights and defending themselves against attacks on those rights. The nation bled. And, eventually, the law shifted.

In 1954, the Supreme Court reexamined its segregationist "separate but equal" rule, established nearly sixty years prior. In *Brown v. Board of Education*,[220] the Supreme Court established that "separate educational facilities are inherently unequal,"[221] striking a fierce blow to institutionalized legal segregation upon which the entire Jim Crow

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216 *See id.* at 344.

217 294 U.S. 587 (1935).

218 *See id.* at 596.

219 Ann Juergens, *Lena Olive Smith: A Minnesota Civil Rights Pioneer*, 28 WM. MITCHELL L. REV. 397, 449 (2001).

220 347 U.S. 483 (1954).

221 *Id.* at 495.

system was based. In the years that followed, legal reforms directed at curing the nation's racial ills were plentiful. The Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 all contributed to the tide of legal change meant to secure for black Americans true equality of citizenship.[222] Then, in 1977, the Supreme Court found executions for rape unconstitutional,[223] eliminating America's most racially disproportionate use of the death penalty,[224] and ensuring that no other group of wrongly convicted young men would ever face state-sanctioned death for rape as the Scottsboro Boys did.

All of these reforms have provided meaningful progress toward racial equality in America. Their impact must not be understated. Still, these and other reforms are powerless to eradicate the deeply seeded presumptions about race upon which America was based from its inception. As such, their impact must also not be *over*stated. There is no question that despite progressive legislation and jurisprudence and the evolving perspectives of Americans, presumptions based on race endure and people continue to act on those presumptions.[225] To believe otherwise would be naïve. In his groundbreaking article exploring subtle racism, law professor Charles Lawrence explains that racism is deeply imbedded in our history and culture.[226] As he notes, "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about non-whites."[227]

Under a regime of laws designed to promote racial equality and discourage racial discrimination, however, racist presumptions and ideas are less likely to be expressed overtly. The absence or relative infrequency of *overt* racial discrimination and prejudice does not translate into the absence of racial discrimination and prejudice. As law professor Angela J. Davis explains, "when state actors openly expressed their racist views, it was easy to identify and label the invidious nature of their actions. But today, with some notable exceptions, most racist

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222 *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 463 (2001).

223 *See* Coker v. Georgia, 433 U.S. 584, 592 (1977).

224 *See* Carol S. Steiker, *Things Fall Apart but The Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1487 (2002). Despite *Coker's* elimination of death sentences for rape, the death penalty continues to be applied to blacks in disproportionately high numbers. *See* John H. Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 280 (2003).

225 *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L REV. 317, 330 (1987).

226 *See id.*

227 *Id.* at 322.

behavior is not openly expressed."[228] Further, deeply seeded prejudice often resides in the subconscious, meaning that even the person affected by it may be oblivious to its impact.[229] So, as Lawrence explains, "[i]n a society that no longer condones overt racist attitudes and behavior, many of these attitudes will be repressed and prevented from reaching awareness in an undisguised form."[230] Consequently, "well-intentioned people who would be appalled by the notion that they would be seen as behaving in a racist or discriminatory manner," may unconsciously engage in racism.[231] The consequence is a strain of racism no less virulent than overt racism, but certainly less visible.

In an America where racism is more often subtle than overt, and even when subtle, is often unconsciously expressed, the myth of the Bestial Black Man does not live in the forefront of American life as it once did. No reputable journalist in today's America would endorse lynching 1,000 black men a day to prevent rapes from occurring. Indeed, few Americans would openly endorse the lynchings of blacks for any reason. And it is difficult to imagine any person in today's America calmly admitting to participation in a lynching and then describing the victim being forced to eat his genitals. Although racially offensive movies occasionally spring forth from Hollywood, no Hollywood studio would produce a film such as *Birth of a Nation*, in which the heroic Ku Klux Klan seeks to save a damsel in distress from an animalistic black man. If such a film were produced, no President of our country would publicly endorse it. No judge would get away with sentencing three black men to death moments before asserting in open court that white supremacy is one of the South's most cherished possessions. And if the Alabama Supreme Court had occasion to revisit the *Pumphrey* rule it established in 1908, it would most certainly find that "social customs, founded on race differences, and the fact that [the alleged] victim was a white person and the defendant a negro,"[232] *are not* properly considered by a jury in determining intent to rape.

Like race-based presumptions generally, the myth of the Bestial Black Man is currently expressed more subtly than it had been through the first half of the twentieth century, and likely with little conscious connection to the origin and historical perpetuation of the myth. Its existence, however, is undeniable. Just as was the case in the early days of slavery, conceptions of black men as animalistic, inherently criminal, and intensely sexual abound.

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228 Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 33 (1998).

229 *See* Lawrence, *supra* note 225, at 356.

230 *Id.*

231 *Id.*

232 Pumphrey v. State, 47 So. 156, 158 (1908).

A. *The Modern Mythic Bestial Black Man*

The conception of blacks as uncivilized animals perseveres. And just as it did during times when explicit racism was more acceptable, these images have infiltrated the courts. Indeed, lawyers' in-court use of animal imagery to describe black men in the post-civil rights movement era has not been uncommon.[233] Lawyers have referred to black male defendants as "laughing hyenas out to kill someone," "vultures," "tigers," "mad dogs," and "animals in the jungle."[234]

No recent case is more famous in this regard than the trial of officers accused of using excessive force against Los Angeles motorist Rodney King. The case was replete with animal imagery and the suggestion that the brutalized King was sub-human. Most famously, King was described as emitting "a bear-like yell" and "groan[ing] like a wounded animal," as he was beaten.[235] Defense lawyers relied on references to King's sub-human strength and the images of animalism to suggest that the brutality the officers heaped on King was necessary to control him.[236] Although packaged more artfully than similar descriptions of black men in this nation's history, this description of King, as animalistically immune to traditional forms of restraint, was nothing more than "the old story of blacks as beasts and animals."[237]

The myth of inherent black criminality has remained just as stubbornly entrenched in American consciousness. As law professor Katheryn Russell explains in *The Color of Crime*, her groundbreaking book exploring the intersection of race and crime, "the picture that comes to mind when most of us think about crime is the picture of a young Black man."[238] Indeed, as recently as the 1970s, under the guise of testing for anemia, the United States government tested the blood of thousands of black youths for indications of innate violent criminality.[239] The perception is widespread and often subconscious. For instance, studies reveal that ambiguous behavior, when committed by a black person, is perceived as more threatening than similar

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233 *See* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1753 (1993); Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 136-37 (1997).

234 Howarth, *supra* note 233, at 136-37 & n.195.

235 *Id.*

236 *See* Vogelman, *supra* note 74, at 574.

237 Jones, *supra* note 61, at 493.

238 RUSSELL, *supra* note 88, at 3.

239 *See* Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting The Health Care System Ain't Always Easy: An African American Perspective of Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191, 199 (1996); Harriet A. Washington, *Tuskegee Experiment Was But One Medical Study That Exploited African-Americans Infamous Research*, BALT. SUN, Mar. 19, 1995, at 1F.

behavior committed by a white person.[240] The results from one University of California, Davis study are particularly telling. In that study, students were asked to observe arguments between two people in which one eventually pushed the other.[241] Different students were assigned to observe different mock altercations in which the people portraying the arguers were of different races.[242] Where the person who did the pushing was black and the recipient was white, 75% of observers considered the push to be "violent" behavior rather than an episode of "playing around."[243] In sharp contrast, when the pusher was white and the recipient was black, 17% of observers perceived the push as "violent."[244]

Cynthia Kwei Young Lee, in her incisive discussion of perceived black criminality, illustrated the real-world application of the California, Davis study by examining a 1995 fatal altercation in San Francisco between a black college student and a white construction worker.[245] In that case, Patrick Hourican, the white man, damaged the car of Louis Waldron, the black man, as he bicycled past.[246] Waldron chased Hourican down and asked that Hourican compensate him.[247] Hourican punched Waldron and left again.[248] Waldron again gave chase and when he reached Hourican again demanded compensation.[249] Hourican then allegedly directed a racial epithet toward Waldron.[250] Waldron responded with a punch. Hourican fell, hit his head, and died.[251] Waldron, who had never previously been arrested for, or charged with, any crime, was arrested and charged with first degree murder.[252] Outraged, his attorney asserted that if Waldron were white, he would not have been charged with anything, much less with first degree murder, in connection with the incident.[253] Recent San Francisco history supported the attorney's assertion.[254] Two months earlier, in a bar fight in the same jurisdiction, one white man delivered a single

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240 *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 404-06 (1996).

241 *See id.* at 405 (citing Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks*, 4 J. PERSONALITY & SOC. PSYCHOL. 590, 592 (1976)).

242 *See id.*

243 *See id.* at 405-06.

244 *See id.* at 406.

245 *See id.* at 406-08.

246 *See id.* at 406-07.

247 *See id.* at 407.

248 *See id.*

249 *See id.*

250 *See id.*

251 *See id.*

252 *See id.*

253 *See id.*

254 *See id.* at 407-08.

punch against another.[255] The latter fell and died.[256] The former was charged with no crime.[257]

The extent of perceived inherent criminality among blacks is further reflected by the ease with which the public accepts unfounded criminal allegations leveled at blacks and the intensity of the consequent reaction. After Charles Stuart called the Boston police in October of 1989 exclaiming that a black man shot and killed his pregnant wife, the city flew into a rage.[258] Authorities swooped into black neighborhoods and black men were accosted and strip-searched in the streets.[259] The terror abated several days later when authorities arrested a black man named William Bennett.[260] Bennett, of course, had nothing to do with the crime.[261] It later surfaced that an adulterous Stuart had previously plotted to kill his wife and on this occasion shot her in hopes of receiving life insurance benefits.[262]

Stuart is not alone in blaming a black man for his gruesome crime in hopes of escaping suspicion. In 1992, Jesse Anderson, a white man, claimed two black men ambushed him and his wife as they left a Milwaukee area restaurant, and that they stabbed and killed his wife.[263] In actuality, Anderson killed his wife and was later arrested and convicted for it.[264] In 1994, Susan Smith, a white South Carolinian woman, frantically alerted police that a black man had carjacked her and kidnapped her two young sons.[265] In the days following the report she pled on television for her children to be strong.[266] The case produced national and international concern.[267] A week and a half later, she confessed that she had strapped her children into the car herself and pushed it into a lake so that they would die.[268] In 1996, a white Marylander named Robert Harris claimed to police that a black man attacked him and his fiancée, shooting his fiancée to death.[269] Some days later Harris confessed to hiring a hit man to kill his fiancée so that

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255 *See id.* at 408.

256 *See id.*

257 *See id.*

258 *See* William Raspberry, *The Boston Case: Anger, Yes—but Towards Whom?*, WASH. POST, Jan. 8, 1990, at A15.

259 *See id.*

260 *See* Lee, *supra* note 240, at 408.

261 *See* Raspberry, *supra* note 258, at B1.

262 *See* Karen Tumulty, *Wife Killing Puts Boston in Worst Racial Crisis in Years*, L.A. TIMES, Jan. 10, 1990, at A1.

263 *See* Russell, *supra* note 197, at 596.

264 *See id.*

265 *See id.*

266 *See id.*

267 *See id.*

268 *See* Lee, *supra* note 240, at 408.

269 *See* Russell, *supra* note 197, at 596.

he could recover life insurance benefits.[270]

Whether they did so consciously or subconsciously, each of these individuals relied on the prevalence of the perception of the inherently criminal black man.[271] As Lee explains, the assailants chose to blame black men because they "knew that others would be most likely to believe their false claims if they attributed their crimes to Black men."[272]

Some suggest that the fear of black violence and the perception of black criminality is justified in light of studies, such as the Sentencing Project's 1995 report, indicating that blacks are over-represented in the criminal justice system.[273] While over-representation does exist, the same report revealed that "the majority of arrestees for violent offenses are white."[274] Indeed, as of the issuance of the Sentencing Project's report, black violent crime arrestees represented less than one percent of all blacks and less than two percent of all black males.[275] Although these numbers belie the myth that blacks are inherently criminal, the myth persists.

The perception of black men as intensely sexual persists as well. In her 1994 book on modern white perceptions of blacks, Rose Finkenstaedt explores the continued existence of the image of the black man as "an inexhaustible sex-machine with oversized genitals and a vast store of experience."[276] This conception continues to support presumptions of black men as prone to engage in unacceptable sexual behavior.[277] Considered in concert with the perception that blacks are inherently criminal, the stereotype of the super-sexed black man leads to the continued belief that black men tend to be sexually predatory. Certainly, this belief is expressed more subtly than it was during the days of forced segregation and frequent lynchings.[278] As a result, although fears of black male sexuality remain with us, they "have gone underground."[279] Consequently, black men charged with rape continue to face an uphill battle in asserting innocence. Indeed, despite decades of legal reforms there continues to be a public willingness "to believe

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270 *See id.*

271 *See* Lee, *supra* note 240, at 409-10.

272 *Id.* at 410.

273 *See* Marc Mauer & Tracy Huling, The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later (1995) (report summary), *at* http://sun.soci.niu.edu/~critcrim/prisons/marc1 (last visited Mar. 14, 2003).

274 *Id.* at 14.

275 *See* Lee, *supra* note 240, at 411-12.

276 ROSE L. H. FINKENSTAEDT, FACE TO FACE: BLACKS IN AMERICA: WHITE PERCEPTIONS AND BLACK REALITIES 159 (1994).

277 *See* Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 155 n.120 (2001).

278 *See* Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 41 (2000).

279 *Id.*

accusations [of sexually deviant behavior] against black men because of racist beliefs about their uncontrollable and 'animalistic' sexuality."[280]

It is clear, then, that the three salient characteristics of the mythic Bestial Black Man—animalism, inherent criminality, and unrestrained sexuality—survive in modern American life. As Jennifer Wriggins observes, "[t]he patterns that began in slavery and continued long afterwards have left a powerful legacy that manifests itself today in several ways."[281] The perseverance of the mythic Bestial Black Man is certainly one such manifestation.

VI. THE CENTRAL PARK FIVE

During an era in which race-based stereotypes exist but are often shielded from public view and/or expressed subconsciously, determining conclusively that stereotypes impact the criminal justice system in a particular case can be difficult. This is certainly the case with the Central Park Five. Their actual trials were notably light on explicit allusions to the mythic Bestial Black Man.[282] Unlike Rodney King, the Central Park Five were not repeatedly analogized to animals in open court. And unlike the Scottsboro trials, no prosecutor in the Central Park trials asked jury members to consider their daughters alone in a secluded area surrounded by the young black suspected rapists. To conclude, however, that the mythic Bestial Black Man played no role in the convictions because racial prejudice was not openly spewed in the courtroom would be to ignore professors Lawrence and Davis' aforementioned observations; in these times state actors tend not to openly express racist views and sometimes harbor racist views subconsciously rather than consciously.

While the courtroom was spared explicit expressions of racism and allusions to the mythic Bestial Black Man, the public forum was not. Those expressions in the public forum strongly suggest that the courtroom, although facially unstained by racial prejudice, felt its impact. Indeed, as Judge Higginbotham explained in *Shades of Freedom*, his exploration of race and its impact on the American legal process, "[c]ourts do not dispense justice in sterile isolation unaffected by the prevailing political, social, and moral attitudes and currents of the

280 Wells & Motley, *supra* note 277, at 155 n.120.

281 Wriggins, *supra* note 139, at 218.

282 Although the trials did not feature direct comparisons between the suspects and animals, other terms that connote otherness and induce fear, such as "projects," "inner city," "drug deals," and "gangs" were employed at trial. Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 8 n.22. While these terms certainly conjure racial images, they appeal less blatantly to the image of the Bestial Black Man.

broader society in which they operate."[283] Higginbotham does not stand alone in this belief. Indeed, he inherits it from, among others, two of America's most renowned legal thinkers, Charles Warren and Justice Oliver Wendell Holmes.[284] Noting that courts' decisions are unavoidably influenced by broader society, Warren wrote:

> The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by . . . environment and by the impact of history past and present . . . .[285]

Some years earlier, Justice Holmes espoused essentially the same position:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men . . . .[286]

Examining the public discourse preceding the Central Park cases, therefore, is crucial to understanding the extent to which the mythic Bestial Black Man may have impacted the judicial process. Analysis of that public discourse reveals chilling similarities to the public discourse in 1931 rural Alabama as the Scottsboro Boys were apprehended. Like the discourse surrounding the Scottsboro case, the discourse surrounding the Central Park case exhibited three central characteristics: the portrayal of the suspects as sub-human, lack of meaningful analysis, and a consequent rush to judgment.

A. *The Central Park Five: Tried Before Trial*

After the Central Park Five were detained and interrogated, police reported that the suspects confessed to the crime. Police further reported that in the wake of their grisly rape, the suspects were unimaginably callous. The suspects were reputed to be extremely smug and nonchalant,[287] laughing, joking, and showing no remorse.[288] As they remained in custody, they reputedly grew more jovial, whistling suggestively at a police woman[289] and singing the Tone Loc hip-hop

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283 HIGGINBOTHAM, *supra* note 141, at 130.

284 *See id.* at 130 n.13.

285 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 2 (1923).

286 OLIVER W. HOLMES, THE COMMON LAW 1 (1881).

287 *See* Paula Span & Howard Kurtz, *Aftermath of an Assault: New Yorkers Shocked by Vicious Attack*, WASH. POST, Apr. 27, 1989, at A1.

288 *See* Goldman, *supra* note 12, at 15.

289 *See id.*

song, "Wild Thing."[290] The confessions, together with the reported lack of remorse, prompted a familiar discourse.

From the moment the teenagers from East Harlem were reported to have confessed, the horrific attack was transmogrified in public discourse into an issue of race.[291] About this, the press coverage and attendant public outcry leave no mistake. Few commentators spoke of the barbarism of the crime. Instead, they spoke of the barbaric teenagers they were sure committed it. The allusions to the Central Park Five as animalistic savages were unmistakable. As an initial matter, "Wilding," the very term by which press reports and eventually the general public referred to the crime, connotes savagery. Although initial press reports suggested that youths themselves coined the term to describe rampages borne of the over-boiling of inner city angst, whether youths actually developed the term is questionable.[292] Whatever the term's origin, it took on greater meaning as it was used again and again to describe the attack.[293] Indeed, "[v]erbs like 'wilding' betrayed their speakers' deepest intuitions about the young Black men accused."[294] "Wilding" in conjunction with the attack implied more than boisterous and undisciplined behavior. It implied savagery.

The term "wilding" aside, the youths were alternately referred to as "wolf packs," "rat packs," "savages," and "animals."[295] While many publications implied that the youths were sub-human and animalistic, at least one went further, arguing that the youths were sub-animal. [296] The article argued that perhaps referring to the youths as wolves defamed wolves, because not even wolves attack for the thrill.[297] The perception of the youths as savage was epitomized by a *Newsday* article entitled, "Like Bambi in Hunting Season."[298] The article described the youths as sub-human creatures, spurred into action by primal forces. In

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290 *See* Connor, *supra* note 14, at 2.

291 *See* HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES 190 (1992).

292 *See* Daniel M. Filler, *Random Violence and the Transformation of the Juvenile Justice Debate*, 86 VA. L. REV. 1095, 1110-11 (2000) (reviewing JOEL BEST, RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS (1999)); JOEL BEST, *supra*, at 29-30.

293 *See* Hancock, *supra* note 36, at 38.

294 Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER J. 43, 62 (1992).

295 *See, e.g.*, *4 N.Y. Youths Charged in Vicious Rape Beating*, CHI. TRIB., Apr. 22, 1989, at C3; Goldman, *supra* note 12, at 15; *Wolf Packs Strike At Will*, SEATTLE TIMES, Apr. 25, at A2; Ronald Powers, *Friends of Suspects Shocked by 'Wilding'*, HOUSTON CHRON., Apr. 30, 1989, at 2; William Rasberry, *Our Missing Anger*, WASH. POST, May 1, 1989, at A9; Howard Kleinberg, *The Issues of Racism and Crime are Joined in Central Park Attack*, ATL. JOURNAL-CONST., May 6, at A21; David E. Pitt, *Teenagers' 'Wolf Pack' Violence*, SAN FRAN. CHRON., May 12, 1989, at B3; Deborah Cameron, *Brutal Attack That's Riveted A City*, SYDNEY MORNING HERALD, May 13, 1989, at 17.

296 *See* Cameron, *supra* note 295, at 17.

297 *See id.*

298 Dennis Hamill, *Like Bambi in Hunting Season*, NEWSDAY (New York), Apr. 21, 1989, at 4.

describing the crime, the *Newsday* article explained that the "wolf pack" exercised its "evil impulses under a full moon."[299] In folklore, a full moon prompts the mythical werewolf into untold savagery, from which he cannot escape; he has no choice, as attacking, maiming, and killing are his nature. *Newsday* suggested the same of the Central Park defendants, which it described as "the two-legged animals" in a headlong search to attack and degrade women's sexuality.[300]

Comparative analysis of the press coverage of two other horrific crimes committed in New York City in 1989 suggests that such animalistic descriptions are reserved for black men who are accused of attacking white women. On August 23, 1989, Yusef Hawkins, a sixteen-year-old black youth, wandered with three friends into the Bensonhurst section of Brooklyn in search of a used car he had seen advertised.[301] Believing Hawkins to be a man dating a white neighborhood girl, a group of up to thirty white youths attacked Hawkins and his friends with golf clubs, baseball bats and two-by-fours, ultimately shooting Hawkins to death.[302] The coverage of the crime, as brutal as it was, was notably devoid of references to the white youths as animals or savages.[303] Indeed, *Newsday*, which described the Central Park Five as a "wolf pack" and as a bunch of "two-legged animals" carrying out "evil impulses,"[304] described the Bensonhurst mob members as "young white men."[305] And the *New York Daily News*, which called the Central Park Five a "wolfpack,"[306] described the Bensonhurst mob members as a "gang of white teens"[307] and as "youths."[308]

Just two weeks after the Central Park rape, three black men attacked a black woman at knifepoint and forced her to the top of a four story Brooklyn building.[309] Each man raped and sodomized her and

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299 *Id.*

300 *Id.*

301 *See* Laurie Goodstein, *Youth Dies in Apparent Racial Attack in N.Y.*, WASH. POST, Aug. 25, 1989, at A1.

302 *See Ugly Lesson of Bensonhurst*, THE RECORD (Bergen County, New Jersey), Aug. 29, 1989, at B10.

303 *See* J. Clay Smith, Jr., *Lynching at Bensonhurst: A Bibliographic Essay*, 4 HOW. SCROLL 97 (2001). Smith's article presents a comprehensive bibliographic account of the Yusef Hawkins attack, a review of which reveals that the attackers were not portrayed as animals. *See id.*

304 Hamill, *supra* note 298, at 4.

305 Bob Drury, 5 *Whites Arrested in Killing*, NEWSDAY (New York), Aug. 26, 1989, at 7.

306 Mark Kriegel, *Wolfpack's Prey: Female Jogger Near Death After Attack by Roving Gang*, N.Y. DAILY NEWS, Apr. 21, 1989, at 1; Gene Mustain & Stuart Marques, *3 Faced Pack: Had Narrow Escapes*, N.Y. DAILY NEWS, Apr. 22, 1989, at 4.

307 Don Singleton, *White Gang Kills Black*, N.Y. DAILY NEWS, Aug. 25, 1989, at 2.

308 Stuart Marques, *Five Arrested in Race Slay*, N.Y. DAILY NEWS, Aug. 26, 1989, at 3.

309 *See* Robert D. McFadden, *2 Men Get Six to Eight Years for Rape in Brooklyn*, N.Y. TIMES, Oct. 2, 1990, at B1.

they then threw her off of the building to the ground fifty feet below.[310] In doing so, they shattered her pelvis, broke both of her ankles and legs, and caused her massive internal injuries—leaving her in critical condition.[311] She lay partially naked on the pavement where she landed moaning and crying until someone noticed her and called for help.[312] This rape commanded much less attention and produced much less outrage in the press than the Central Park rape, and the suspects were not vilified and animalized as were the Central Park Five.[313]

The references of animalism which filled national newspapers in the days and weeks following the Central Park attack created a picture of savagery no less virulent than that which accompanied the Scottsboro Boys prior to their trial and which has dogged black men—particularly those accused of attacking white women—throughout their history in America.

The familiar rush to judgment devoid of meaningful analysis quickly ensued. Speaking of the suspects, a woman who regularly jogs in Central Park expressed the views of many in stating that "[t]here is no punishment that is suitable for them. They are animals, no doubt about it."[314] Ed Koch, New York City's mayor at the time, was no more interested than others in deferring to the criminal justice system. Concluding that the youths were guilty, he himself evoked the savage imagery, calling the youths a "wolfpack," and asserting in the press that "eight or nine of them . . . engage[d] in a gang bang."[315]

Donald Trump went further yet. Less than two weeks after the attack, Trump essentially called publicly for the deaths of the Central Park Five.[316] Prompted by the attack, and at a price of roughly $85,000, Trump placed full-page advertisements in each of New York's four premier daily newspapers, calling for reintroduction of the death penalty.[317] In the advertisements, he railed against the Central Park Five and those cautioning against a rush to judgment.[318] "I want to hate [them]. They should be forced to suffer . . . . I am not looking to psychoanalyze them or understand them, I am looking to punish

310 *See id.*

311 *See id.*

312 *See Community Rallies to Support Victim of Brutal Brooklyn Rape*, CHI. TRIB., June 26, 1989, at 6.

313 *See* McFadden, *supra* note 309, at B1; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1268 (1991).

314 Goldman, *supra* note 12, at 15.

315 William Lowther, *Chilling the Big Apple*, TORONTO STAR, Apr. 29, 1989, at A2.

316 *See* Jimmy Breslin, *Between You and I*, NEWSDAY (New York), May 2, 1989, at 2.

317 *See* Ronald Powers, *Park Attack On Jogger Jars Suspects' Friends*, CHI. SUN-TIMES, Apr. 30, 1989, at 5.

318 *See* Breslin, *supra* note 316, at 2.

them."[319] Trump did not mention trial or establishment of guilt, even though when he published the advertisements no trial date had yet been set.

Perhaps the most frightening public call for blood came from Pat Buchanan. Buchanan, considering the fates of the suspects he termed "savages," roused the dreadful specter of lynching.[320] On May 13, 1989, he suggested that Central Park would be again safe for women if sixteen-year-old Kharey Wise was "tried, convicted, and hanged in Central Park by June 1."[321] While Buchanan would grant Wise a trial, Buchanan's trial would certainly not be meaningful. Although major felonies routinely take months and even years to adjudicate, so as to allow for comprehensive investigations, Buchanan suggested that investigation, trial, deliberation, sentencing, and execution all occur within twenty days. Further, he offered no possibility that trial may not lead to conviction. To Buchanan, the trial and conviction were formalities. Buchanan was apparently unconcerned with the unconstitutionality of executing rape convicts,[322] and skipped the question of executing a minor altogether. Although these aspects of Buchanan's statement are concerning, the most disturbing element is his suggestion that Wise die by hanging, the most enduring image of lynching that exists. Convinced that Wise committed the rape in Central Park, and having not allowed Wise to offer his defense, Buchanan wanted him killed as black men accused of raping white women have been for centuries. Buchanan essentially advocated for Wise's lynching.

The calls for blood were not limited to the public domain. At least one suspect's family received a death threat tinged with the racial animus that has accompanied so many others in this nation's history. When one of Yusef Salaam's family members answered the phone a few days after the attack, the caller blurted "We're going to kill you, nigger."[323] The caller had clearly concluded that Salaam was guilty and, with anger inflamed by race, he threatened death.

Even basic analysis may have slowed the rush to judgment, but the specter of the Bestial Black Man did not allow it. Commentators accepted that the teenagers were not influenced by the usual catalysts for violent attacks—drugs, alcohol, or desire for money.[324] As one paper explained, "[n]one of the routine explanations for urban crime

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319 *Id.*

320 *See* Cameron, *supra* note 295, at 17.

321 *Id.*

322 *See* Coker v. Georgia, 433 U.S. 584, 592 (1977).

323 Dennis Duggan, *Slumbering Demons Wake*, NEWSDAY (New York), Apr. 25, 1989, at 5.

324 *See, e.g.*, *Park Attack Defies Usual Explanations*, ST. PETERSBURG TIMES, Apr. 29, 1989, at 1A; Dick Williams, *New York Attack Points Up Need For Crime Crusade*, ATL. JOURNAL-CONST., Apr. 25, 1989, at A13.

seem[] to apply to this attack. This is not a case of crack dealers jostling for business, addicts stealing to feed their habits or veterans of the juvenile justice system adding to their rap sheets."[325] Even the then-spokesman for the Manhattan District attorney admitted, "[i]t wasn't robbery. Drugs [we]re not a factor .... No motive seems to emerge."[326] In the absence of any motive or catalyzing intoxicants, meaningful analysis into the youths' reputations would have made their involvement in the crime even more puzzling.

The stories published on the youths' reputations revealed that their reputations were at stark odds with their involvement in such a grisly, violent attack. While two of the suspects were considered by some in their neighborhoods to be troublemakers,[327] none of the five youths had criminal records prior to their arrests in the Central Park rape probe.[328] And none of them came from "backgrounds of poverty and drugs."[329] Indeed, most of the youths were members of solid, working-class families and were good students.[330] Richardson was an artist. He was an accomplished musician, who played the saxophone[331] and was learning to play the tuba.[332] In addition, he belonged to a dance troupe.[333] Antron McCray's classmates described him as "one of the most popular kids in school," and "a smart kid"[334] who was part of a Career Academy program.[335] One of Raymond Santana's teachers noted how pleasant he was in school, explaining that he was "goofy, silly, the class clown ... one of our nicest kids."[336] Wise apparently attended church services regularly at a local Pentecostal church, and Salaam was part of a Big Brother program[337] and was said to be "not aggressive, very easy-going."[338] Bernard Diamond, the principal at the school two of the suspects attended, explained, "I deal with kids in trouble; these were not kids in trouble .... They come from homes of parents who care ...."[339]

Those who dug deeply enough to reveal that the suspects did not fit

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325 *Park Attack Defies Usual Explanations*, *supra* note 324, at 1A.

326 *Id.*

327 *See* BENEDICT, *supra* note 291, at 206. Journalist Michael Cooper reported in the *Village Voice* that Kharey Wise and Kevin Richardson were known to have fought with other children and to have been disrespectful to adults. *See id.*

328 *See* Span & Kurtz, *supra* note 287, at A1.

329 *Id.*

330 *See id.*

331 *See id.*

332 *See* Duggan, *supra* note 323, at 5.

333 *See* Span & Kurtz, *supra* note 287, at A1.

334 *Prayers For Central Park Victim*, NEWSDAY (New York), Apr. 26, 1989, at 25.

335 *See* Span & Kurtz, *supra* note 287, at A1.

336 Henig, *supra* note 15, at Z6.

337 *See* Span & Kurtz, *supra* note 287, at A1.

338 Hancock, *supra* note 36, at 38.

339 Powers, *supra* note 317, at 5.

the profiles of brutal rapists and that they were uninfluenced by intoxicants or lust for money were forced to face the apparent incompatibility of the suspects and the crime for which they were suspected. As Alexandria, Virginia psychologist Stanton Samenow, who was interviewed by the *Washington Post* in the wake of the rape, made clear, "good kids" do not commit such vile crimes. "You don't get good kids, decent kids, responsible kids suddenly attacking someone with this much viciousness."[340] This incompatibility would force anyone who faced it to choose between two inferences: 1) despite their confessions, the youths may not have committed the crime; or 2) despite reputations that would suggest non-involvement in such a horrific crime, they did. Most, including Samenow himself drew the latter inference. "I'm willing to make a bet," he stated in the *Post*, "that if you looked at a video tape of the lives of each of these kids, this wouldn't be the first time they had done something like this."[341] As counterintuitive as it may seem, the suspects' reputations as generally good kids unmotivated by poverty, alcohol or drugs did not suggest their innocence of the crime. Rather, they made the youths even more frightening, because their reputations were deemed to present a normal façade under which lurked savagery. As one commentator expressed of the Central Park Five, "[i]nstead of the youngsters—in the words from 'West Side Story'—being 'depraved on account of they're deprived,' these boys were just depraved."[342]

As noted above, the public outrage and near universal condemnation of the youths was based solely on the suspects' confessions and their reported lack of remorse. At the time, the press and public had no other information bearing on the youths' guilt or innocence. Although the defendants and their advocates vehemently asserted that the confessions were untruthful and were coerced through intimidation and violence, few paid their claims any mind. Indeed, their assertions made them even more reprehensible to some. For instance, in the advertisements he placed in New York's major newspapers, Donald Trump announced that he found it "disgraceful" that the "criminals [were] already chanting police brutality."[343] So, although the press had access to tapes of the confessions,[344] commentators conducted little analysis of the coercion claims.

Under meaningful analysis, the claims of coercion would have received more significant attention. Coerced confessions from innocent

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340 Henig, *supra* note 15, at Z6.

341 *Id.*

342 Williams, *supra* note 324, at A13.

343 *Park Attack Prompts Trump to Demand Death Penalty*, THE RECORD (Bergen County, New Jersey), Apr. 30, 1989, at A24.

344 *See* Hancock, supra note 36, at 38.

suspects occur with relative frequency. Over the past twenty years, many defendants have confessed to crimes they did not commit and have been wrongfully convicted on the basis of those confessions.[345] In fact, nearly twenty-five percent of convicts later proven innocent by DNA evidence confessed to their crimes either in writing or on videotape.[346] As intuition would suggest, youths are particularly susceptible to confessing falsely under coercion.[347] Indeed, it is said that "[a] good cop can get a fifteen-year-old to say basically anything he wants."[348]

When the youths appeared before officers for interrogation, circumstantial evidence was stacked heavily against them. A woman suffered a grisly assault and rape in the upper reaches of Central Park.[349] Large groups of youths were in the same section of the park that evening.[350] Prior to the rape, several park-goers were harassed or assaulted in the northern area of the park.[351] Descriptions of the youths in the park matched those of the suspects.[352] Faced with these facts, it is not unrealistic to believe that investigators strongly suspected the Central Park Five were guilty of the rape. Such circumstances are ideal for coercion. Indeed, in conducting interrogations "[s]ometimes police become so certain of the suspect's guilt that they refuse to . . . consider the possibility that a suspect may be innocent."[353]

The coercion does not imply that police officers knowingly convinced suspects to lie. It simply implies that they convinced the suspects to adopt the truth as the authorities believed it to be. Under such circumstances, suspects sometimes confess to crimes they did not commit, because, as law professor Steven Drizen, explains, "the point of police interrogation is to bring a suspect's confidence that he can escape unharmed to the point that he is hopeless and then to motivate a suspect to think that confessing is in his best interest."[354]

Analyzed, the suspects' confessions are symptomatic of coercion. In seeking confessions, police sometimes convince suspects to state that they were part of a group that engaged in crime, but that their particular

345 *See* Welsh White, *False Confessions in Criminal Cases*, CRIM. JUST. (Winter 2003), at 5.

346 *See* Stevenson Swanson, *Convictions in '89 Jogger Rape Wrong*, CHI. TRIB., Dec. 6, 2002, at 1.

347 *See* Alexandra Perina, *I Confess*, PSYCH. TODAY, Mar. 1, 2003, at 11.

348 Hancock, *supra* note 36, at 38.

349 *See* Connor, *supra* note 14, at 2.

350 *See id.*

351 *See id.*

352 *See id.*

353 Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in The Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 440 (1998).

354 Swanson, *supra* note 346, at 1.

roles were minor or relatively insignificant.[355] The confessions of the Central Park Five reflect just such manipulation, with each of the defendants claiming minor roles in the attack while blaming others for the actual rape.[356] Further, the youths were told that if they said they were present at the crime scene they would be considered witnesses instead of defendants.[357] Indeed, "[they] were led to believe that if they confessed, they would be able to go home."[358]

Moreover, as addressed earlier in this article, the youths' confessions were inconsistent and contradictory as to virtually every aspect of the crime.[359] One set of inconsistencies in Kharey Wise's confession would seem particularly troubling. The videotape indicates that Assistant District Attorney Elizabeth Lederer led the severely learning disabled Wise into an admission consistent with the crime scene, and that Wise followed her lead to please her.[360] When first asked about the attack, Wise said Meili was punched.[361] After being prompted by Lederer, he changed his story and said that she was hit with a rock.[362] Upon, further prompting, he changed his story again, claiming she was hit with a brick.[363]

Upon entertaining even a mild doubt as to the confessions' veracity, one's perspective toward the suspects' reputed remorselessness and jovial behavior would have to change entirely. If the Central Park Five did not commit the crime and confessed under coercion, then the comments and behavior that exacerbated the perception that they were savages would certainly suffer under scrutiny. If one were to accept the possibility that the confessions were not veracious, one would have to accept the possibility that the reports of jovial behavior and remorselessness were not veracious, melting the savage image.

Assuming that the jovial behavior exhibiting remorselessness did occur, it was certainly cold-hearted and callous. Still, the jovial behavior takes on two different meanings depending on one's belief as to their guilt. The alleged whistles at the policewoman emitting from the lips of a rapist are unthinkably horrific and cruel. They suggest an absolute lack of respect for women as anything more than sexual objects

355 *See id.*

356 *See id.*

357 *See* Mary Mitchell, *N.Y. Jogger Case Runs Justice into the Ground*, CHI. SUN-TIMES, Sept. 19, 2002, at 14.

358 *Id.*

359 *See* Dwyer, *One Trial, Two Conclusions*, *supra* note 28, at 32; *see also supra* Introduction and note 39.

360 *See* Hancock, *supra* note 36, at 38; Barbara Ross & Robert Ingrassia, *Taped Confessions Reveal Grisly Details*, N.Y. DAILY NEWS, Oct. 11, 2002, at 6.

361 *See* Hancock, *supra* note 36, at 38.

362 *See id.*

363 *See id.*

to be violated and humiliated. Emitting from the lips of a teenage boy who never committed rape, the whistles are reprehensible and indefensible, but they do not indicate such depravity.

In the absence of meaningful analysis of the youths' guilt, a picture evolves of vicious men-children, with no respect for a woman's dignity or life; beasts with so little humanity that they could rape and beat a woman nearly to death, and not long afterwards laugh about it, then target another woman for degradation. This is the picture much of the press and public saw and accepted.

Notably, a few public voices cautioned against a rush to judgment. For instance, on Tuesday, April 25, 1989, in the midst of virulent public vilifications of the Central Park Five, *Newsday* published a piece in its Viewpoints section warning that "when emotions run high, reason and perspective are often the losers," and that "racist sentiments and stereotyping are as much the enemy of civilization as thugs."[364] The admonition, however, did not carry the day. Reason and perspective certainly lost as the State of New York prepared to try the Central Park Five.

B. *The Mythic Bestial Black Man's Infiltration of the Criminal Justice Mechanism*

As has been the case in much of America's past, in 1989 New York, black males accused of rape were perceived as savage monsters and condemned as guilty by the community in the absence of meaningful analysis. And, as has been the case for other black rape suspects, wrongful convictions followed. Without admissions from those involved in the convictions, however, there is no way to determine conclusively whether the criminal justice mechanism producing the convictions was infected with the prejudgment clearly exhibited in the preceding public discourse. This is because, as discussed above, racism and race-based stereotypes, once espoused openly in court, are less likely to be tolerated in the courtroom. Considering, however, this nation's history and the extent to which the myth of the Bestial Black Man has impacted the dispensation of justice in this society, to dismiss the possibility would be naïve.

As explored above, even as black men were imported into this nation as property, they carried with them a stereotype of being animalistic and sexually insatiable menaces. The stereotype only intensified during slavery and in the years following it, creating a

364 *His Eminence and Hizzoner: That horror in Central Park*, NEWSDAY (New York), Apr. 25, 1989, at 56.

perceived necessity for legal and extra-legal means of repressing black men. Consequently, there developed a pattern in America of executing black men—both outside of the criminal justice system and within—with little preceding analysis when rape was alleged. Indeed, as explored, courts have enforced rules at trial flatly handicapping the chances of establishing a black man's innocence of rape. Certainly, as compared with its once dominant place in American culture, pernicious and overt racism has receded into America's shadows. Still, as professors Charles Lawrence, Angela J. Davis, Cynthia Kwei Young Lee, and Rose Finkenstaedt, among others, argue—and as the reliance on black men as scapegoats in violent racial hoax crimes, studies revealing perceptions of black men as extra-aggressive, and the inordinate use of savage terminology in describing blacks accused of crimes support—racism in general, and the myth of the Bestial Black Man in particular, continues to fester.

Thus, although the trials of the Central Park Five were not peppered with explicit expressions of racism, given this country's history, the evidence of prevailing subconscious and subtly expressed racism, and the deeply race-influenced public discourse preceding the trials, we have little reason to believe the myth of the Bestial Black Man did not influence the Central Park convictions. Indeed, the mythic Bestial Black Man may have seeped into the criminal justice mechanism at any of several junctures.

1. Interrogation

The myth of the Bestial Black Man likely impacted the criminal justice system at the very outset of the case, when the suspects were interrogated and confessed. Shortly after Manhattan District Attorney Robert Morgenthau released his 2002 report recommending that the Central Park Five's convictions be vacated, New York police commissioner Raymond Kelly accurately noted that the report did not find that authorities had coerced confessions.[365] However, Reyes' confession and the presence of his semen and pubic hair at the crime scene together with the nature of the youths' confessions and the absence of any physical evidence linking the youths to the crime scene strongly suggest that the youths' confessions were untruthful and coerced. As explored above, any coercion likely resulted from the authorities' deep belief that the youths committed the crime, and that belief certainly may have been influenced by the myth of the Bestial

[365] *See* Leonard Levitt, *Rare Crack In Blue Wall*, NEWSDAY (New York), Dec. 7, 2002, at A12.

Black Man.

2. Pre-Trial Procedure

The myth may also have impacted the legal mechanism during pre-trial procedure. Although cases in New York courts are normally assigned to judges by random process, the Central Park rape case was not so assigned. Under normal circumstances, court administrators spin a wooden wheel which circulates the names of available judges and then blindly selects a name.[366] Administrators, however, side-stepped this procedure in the Central Park case, assigning the case directly to Judge Thomas B. Galligan, a judge known to hand down severe sentences.[367] Indeed, at the time Judge Galligan was selected to preside over the Central Park case, he had "the reputation of giving so many tough sentences that Rikers Island [was] sometimes jokingly called 'Galligan's Island.'"[368]

Defense attorney Alton Maddox protested the assignment, indicating that sources had informed him that Judge Milton Williams and Galligan conspired to manipulate the assignment in order to "railroad" the defendants.[369] Judge Williams denied the allegation, asserting instead that Galligan was selected because of his "good legal mind" and his light docket, but one of his fellow judges who asked not to be named opposed the non-random assignment, arguing that it gave the impression the court was "'finagling' the assignment of the sensitive case."[370] Despite the protest and the lack of consensus among judges, the case assignment stuck.

Perhaps influenced by the myth of the Bestial Black Man and thus convinced that the youths were guilty even before trial, administrators delivered the case to Judge Galligan in hopes of securing the most severe sentence possible.

3. The Jury

The myth may also have seeped into the criminal justice system through the jury box. Ultimately, the jury convicted the Central Park Five on weak evidence. Most strikingly, although samples of blood,

366 *See* Anthony M. DeStefano, *Row Over How Judge Chosen In Park Case*, NEWSDAY (New York), May 23, 1989, at 2.

367 *See id.*

368 *Id.*

369 *See id.*

370 *Id.*

hair, and saliva were taken from each of the defendants and tested in order to establish a link between the individuals and the crime, the tests failed to positively connect any of the defendants with the beating and rape.[371] This would seem surprising considering the gruesome and messy nature of the crime. As law professor Steven Drizen offered in retrospectively questioning the verdict, "it is often said that teenage boys can't make a peanut butter and jelly sandwich without leaving evidence .... How is it that [the suspects] can rape a young woman without leaving any evidence?"[372]

Further, the only evidence found on the youths that was arguably connected to the crime were the aforementioned strands of hair resembling Meili's on Richardson's clothes.[373] And testimony at trial revealed that the resemblance was not dispositive.[374]

In the absence of any stronger evidence against the youths, the prosecution's case rested primarily on the suspects' confessions, the hair found on Richardson, and the testimony of fifteen-year-old Jermaine Robinson, a previous co-defendant who pled guilty to robbing a different jogger in the park and testified against the Central Park Five in exchange for a light sentence.[375]

Perhaps, in the minds of the jurors, the presumption of savagery and criminality among the youths compensated for the lack of significant hard evidence. Considering the aforementioned impact of community perspectives on the dispensation of justice, this is certainly a possibility. Jurors are drawn from the general community, and thus their perspectives likely reflect, at least to some degree, prevailing perspectives of the community. While the voir dire process seeks to eliminate from jury service individuals with perspectives that might lead them to prejudge defendants, it is far from fail-safe. As an initial matter, jurors may simply mask prejudices so as to avoid exclusion. Further, considering the prevalence of subconscious racism in today's America, jurors may proclaim to harbor no race-based prejudices when, in fact, they harbor such prejudices subconsciously. In addition, even if a juror's perspectives do not reflect widespread community perspectives, studies reveal that powerful and incessant news coverage

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371 *See Tests Fail in Tying 6 to Jogger*, THE RECORD (Bergen County, New Jersey), Oct. 10, 1989, at A1.

372 Mitchell, *supra* note 357, at 14.

373 *See* Dwyer & Saulny, *supra* note 36, at B1.

374 *See id.* Nicholas Petraco, the officer with the New York Police Department's criminalistics division who testified regarding the hair, explained that the hair was "consistent with and similar to" Meili's, but did not say that it "matched." *Id.* He stopped short of proclaiming a match because technology at the time did not allow for sufficiently precise analysis. *See id.* As Petraco later asserted in explaining the contours of his testimony, "[y]ou could never say it 'matched.' It's ridiculous." *Id.* Prosecutor Elizabeth Lederer apparently did not share Petraco's concern, asserting in summation that the hairs found on Richardson "matched" Meili's. *Id.*

375 *See Tests Fail in Tying 6 to Jogger*, *supra* note 371; Dwyer & Saulny, *supra* note 36, at B1.

reflective of such perspectives could lead the juror to employ race-based biases.[376]

In light of the well-recognized connection between societal perspectives and dispensation of justice, it is certainly possible that jurors were impacted by the mythic Bestial Black Man as they judged the suspects guilty.

The influence of the mythic Bestial Black Man at these or other junctures can contribute to wrongful convictions, which, as explored below, can have disastrous and reverberating consequences.

VII. CONSEQUENCES OF WRONGFUL CONVICTION

The consequences of reliance on the myth of the Bestial Black Man and consequent rush to judgment are dire. Historically, for many black men, the consequence has been execution, perhaps the most unforgiving of all consequences. For others, such as the Scottsboro Boys, the primary consequences have been prolonged loss of liberty and slandered reputations. The consequences of wrongful convictions, however, run deeper still, both for the wrongfully convicted and for others. While all of the consequences of a wrongful conviction may be too extensive to enumerate, or too subtle to perceive, some consequences are frightfully evident. In addition to the consequences suffered by the wrongly convicted, consequences exist for the victim of the crime, and for potential future victims of the true assailant. Consequences of each sort flowed following the wrongful convictions in the Central Park case.

A. *The Wrongly Convicted*

On top of being incorrectly labeled a rapist and unjustly jailed, the wrongly convicted must adjust to the shame heaped upon one accused and convicted of a ghastly crime as well as the helplessness associated with a futile quest to assert innocence. In addition, the wrongly convicted are sent to fend for themselves in often inhumane penal institutions. America's prisons are plagued with violence and operate under an unforgiving regime of strong dominating weak.[377] Dominance is often asserted through male-on-male rape, a dehumanizing and

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[376] *See* John C. Watson, *Litigation Public Relations: The Lawyers' Duty To Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 86 (2002).

[377] *See* Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse In Prison: The Prison Subculture of Masculinity As A Backdrop For "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127, 128-29 (2002).

horrific experience for the victim.[378] Sexual assault convicts are often the most assiduously pursued victims of prison rape, making wrongly convicted rapists particularly vulnerable.[379] Aside from the physical and emotional pain of prison rape, the act carries with it a possible death sentence by way of HIV infection. American prisons have an HIV infection rate six times the rate outside prison walls,[380] making contraction through prison rape a significant possibility. When released, the wrongly convicted are certainly damaged. Whether they dominated or were dominated in prison, released prisoners almost universally find reintroduction into society daunting. With America's shift away from the rehabilitative model of incarceration,[381] a convict is unlikely to acquire skills that would aid him in becoming a contributing member of society when released. Rather, the convict often returns to society deeply scarred as a consequence of the incarceration. If the prisoner dominated in prison, it is hard for him to temper the aggression that was central to his survival while incarcerated. If the prisoner was dominated, it is possible that his spirit will never revive, leaving him a shell of the person who entered prison. In the alternative, he may seek to dominate people on the outside in an attempt to regain the self-esteem he felt he lost while incarcerated.[382]

Although none of the Central Park Five have spoken publicly about their experiences in prison, the young men certainly suffered many consequences of wrongful conviction. All of them have struggled under the stigma of being rapists and have had difficulty gaining employment once released.[383] After being released, one of the youths, Raymond Santana, resorted to selling drugs and was returned to jail. Even before trial, Wise was assaulted in prison and according to Reyes he did not fare much better as his sentence dragged on. Indeed, as noted above, Reyes' confession was sparked in part by Wise's plight. Wise's mother lamented that when Wise was finally released in August 2002, he was emotionally damaged.[384] Indeed, according to her, as of

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378 *See id.*

379 *See id.* at 174.

380 *See* Joan Petersilia, *When Prisoners return to Communities: Political, Economic and Social Consequences*, 65 JUN-FED. PROBATION 3 (2001).

381 *See* Richard D. Nobleman, Wilson v. Seiter*: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L.J. 275, 277-79 (1992); Jeremy Travis et al., *A Portrait of Prison Reentry*, URBAN INSTITUTE JUSTICE POLICY CENTER RESEARCH REPORT, Dec. 8, 2003, at 3.

382 *See ABC World News Now* (ABC television broadcast, Apr. 18, 2001). Michael Robtoy, a man who was raped while imprisoned as a teenager, murdered a gay man after his release, an action he believed would serve to regain his manhood. Asserting that those abused in prison are "time bombs," Robtoy explains "[t]hey may blank it out of their mind, push it back in their subconscious, but it's always going to be there, and it will come back to haunt you. I mean you, me, society itself." *Id.*

383 *See* Haughney, *supra* note 2, at A3.

384 *See* Ron Howell, *Call to 'Audit' Jog Probers Work*, NEWSDAY (New York), Dec. 8, 2002, at A19.

December of that year, he had not smiled since his release.[385] With few employment options available to Wise, Wise's mother made a public plea, asking that anybody in need of a person to mop floors consider hiring her son.[386]

McCray, Salaam, and Richardson have emerged with less noticeable scars and have been able to partially reconstruct their lives. McCray is a married father of three, has a steady job in a factory, and hopes to attend college.[387] Salaam, also a father, is pursuing his bachelor's degree in computer science.[388] Richardson, too, is pursuing a bachelor's degree, his in social services, while working as a night-watchman.[389]

Although some of the Central Park defendants have patched their lives together following their wrongful convictions and incarcerations, all were most certainly damaged by the experiences, perhaps irreversibly so. The cost to society of this damage remains untold.

B. *The Crime Victim*

The rush to judgment almost certainly damages the rape victim as well. Rape is a devastating experience for the victim, with long-term, and often permanent physical and psychological effects.[390] To the extent that a rape victim is able to gain any closure upon conviction of those charged with her rape, that closure may be shattered if it is discovered that the real rapist is someone other than the person or people convicted.

Miraculously, Trisha Meili was able to recover from the horrible attack and live her life.[391] She is now married and working at a non-profit organization in Connecticut.[392] Although she cannot remember the attack and she continues to suffer its physical effects, such as poor balance and eyesight and ineffective olfactory senses,[393] she has triumphed over her horrid experience and believes that having experienced what she did, she "can recover from anything."[394] As she

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385 *See id.*

386 *See id.*

387 *See* Jill Simolowe & Rebecca Paley, *A Radical Reversal After 13 Years*, PEOPLE, Dec. 23, 2002, at 93.

388 *See id.*

389 *See id.*

390 *See* Susan Puder, *Protecting the Rape Victim Through Mandatory Closure Statutes: Is It Constitutional?*, 32 N.Y. L. SCH. L. REV. 111 (1987).

391 *See* Baxter, *supra* note 7, at 27.

392 *See id.*; David M. Herszenhorn, *A Crime Revisited: The Victim; Leading Life In Private and Poised to Go Public*, N.Y. TIMES, Dec. 6, 2002, at B5.

393 *See* Baxter, *supra* note 7, at 27.

394 *Id.*

writes in her 2003 book recounting her recovery, "the attack, meant to take my life, gave me a deeper life, one richer and more meaningful than it might have been."[395] She has even been able to overcome any resentment she may have once felt toward the youths convicted of her rape.[396] However, having reached the stage at which she was able to write a book about her experience and was preparing to reveal her identity, she was forced to contend with the reality of Reyes' confession and with the consequent reintroduction of her story to the national and international media.[397] This proved devastating for Meili. Upon learning that Reyes confessed to the rape and that the Central Park Five had their convictions vacated, Meili was anguished: "I was living the horror as I had not lived it before, since I had been beaten into a coma the first time around."[398] She was "too stunned to respond" when she initially learned of Reyes' confession and then grew haunted by it.[399] She explains, "Reyes became real to me in a way that the five had not. I didn't want to see him in the papers or hear him talk on television . . . ."[400]

Reyes' confession caused Meili trauma, reopening what Meili believed was a closed chapter.[401] This trauma is a direct consequence of the wrongful convictions.

C. *Potential Future Victims*

Finally, by convicting innocents and closing a case, the judicial system leaves society to fend for itself against the real rapist. Realizing that others have been apprehended for his crime, and that authorities are not searching for him, the real rapist is free to unleash further terror on unsuspecting people. Because the alleged victims in the Scottsboro case were not actually victims and there was no rape, society in that instance was spared this consequence. Tragically, in the case of the Central Park rape, society was not. According to authorities, after the Central Park Five were arrested, Reyes continued to commit serious, violent crimes in New York City.[402] In the days between Meili's attack and Reyes' eventual arrest several months later, Reyes inflicted at least five rapes, beatings, and robberies on unsuspecting New Yorkers.[403] Among these

395 TRISHA MEILI, I AM THE CENTRAL PARK JOGGER 7 (2003).
396 *See id.*
397 *See id.* at 1.
398 *Id.* at 2.
399 *Id.* at 1-2.
400 *Id.* at 2.
401 *See id.* at 1-3.
402 *See New York's Nightmare Revisited, supra* note 31, at 24.
403 *See id.*

was the rape of a pregnant woman in the presence of her children.[404] Had officials stemmed the rush to judgment and investigated the possibility that someone other than the five teenagers upon whom they were focusing committed the Central Park rape, some or all of these victims may have been spared their attacks.[405]

CONCLUSION

History has taught us that the myth of the Bestial Black Man is not easily cordoned or defeated. Imbedded in American culture during slavery, the myth of the Bestial Black Man triumphed even as chattel slavery died. America's fear of, and desire to destroy, the mythic Bestial Black Man has endured as well, causing black men throughout this country, particularly those accused of raping white women, untold trouble and torture. In post-slavery America, the attack on the mythic Bestial Black Man came largely at the hands of lynch mob members. Black men accused of rape who managed to get to the courthouse frequently fell victim to "legal" lynchings in which proponents of extra-legal lynching explicitly or implicitly encouraged courts to convict the defendants and sentence them to death. In the absence of mobs, courts have employed presumptions suggesting the guilt of blacks accused of raping white woman and have stood silent as prosecutors have imported the myth of the Bestial Black Man into the courtroom. Although the reforms spurred by the Scottsboro case together with general reforms granting blacks the right to equality in various realms of life have certainly served to decrease the prevalence of the myth, it endures. Whether conscious or subconscious, the myth perseveres, gaining exposure, predictably, when black males face rape charges, as they did in the Central Park rape case.

Faced with the myth of the Bestial Black Man and its impact on the criminal justice system, talented lawyers and legal scholars may propose reforms designed to block the myth's access to the judicial mechanism. Indeed, to battle wrongful convictions influenced by race, one might recommend various reforms, such as mandating the videotaping of police interrogations,[406] mandating that juries contain

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404 *See id.*

405 *See* Leonard Greene, *Jogger Case: Victims All*, N.Y. POST, Dec. 9, 2002, at 31.

406 While confessions are regularly videotaped, the preceding interrogations are not, and were not in the cases of the Central Park Five. Recorded interrogations, however, can illuminate the extent to which confessions can be seen as truthful and reliable. If, for instance, a recording of Kharey Wise's interrogation revealed that detectives yelled and cursed in his face and beat him, as Wise alleged, *see* Ross and Ingrassia, *supra* note 360, at 6, the reliability of his confession would certainly be undermined. Without a videotape to support his allegation, however, Wise was seen as a rape suspect trying to deflect attention by inventing stories of his own

some persons of the defendant's race,[407] or holding prosecutors civilly or criminally liable for blatant prosecutorial racism.[408] While these and other similar reforms may serve to reduce the myth's impact on dispensation of justice, legal reforms alone are not the answer. Indeed, to focus on legal reforms alone as the solution is to ignore the genesis of the problem. The myth of the Bestial Black Man was born of misguided perception, unfounded fear, and a philosophy of superiority among the races; it was not born of law. And it persists despite the evaporation of the legal framework that once supported it. Law was not the myth's Alpha and will not be its Omega.

The substantial reforms following the Scottsboro tragedy did not protect the Central Park Five, so there is little reason to believe reforms instituted in the wake of the Central Park tragedy would necessarily protect the next group of black men falsely accused of rape.

Only when members of American society broadly confront the existence of the mythic Bestial Black Man will the myth begin to crumble. Until then, the myth will continue to persevere and by doing so will continue to discover entries into the criminal justice system.

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victimization. At times, not even the authorities conducting interrogations can agree on what occurs when the cameras are off, as evidenced by the materially conflicting accounts of Antron McCray's interrogation given by the investigators who interrogated him. *See* TIMOTHY SULLIVAN, UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS 161 (1992).

Only two states in the union—Minnesota and Alaska—currently mandate that police provide recordings of interrogations. *See* White, *supra* note 345, at 8. And, Alaska stands alone in excluding confessions when police fail to produce a recording of the preceding interrogation. *See id.*

407 Cornell Law School Professor Sherri Lynn Johnson first proposed such a reform in 1985, noting, based on numerous studies, that "jurors in criminal trials will tend to convict other-race defendants under circumstances in which they would acquit same-race defendants." Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1640 (1985). George Washington University Law Professor Paul Butler has taken the proposed reform a step further, suggesting that justice would more fully be served if black defendants appeared before majority black juries with authority to determine sentences. *See* Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 880 (1997).

408 In roughly forty percent of wrongful convictions, the prosecutor involved engaged in some level of misconduct. *See* Rizer, *supra* note 98, at 861-62. In response to this reality, and the concern that race-baiting contributes to this figure, some argue for piercing prosecutors' shields to civil and criminal liability in cases of blatant prosecutorial racism. *See id.* at 863.