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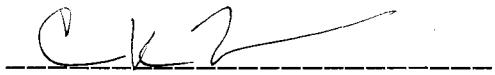
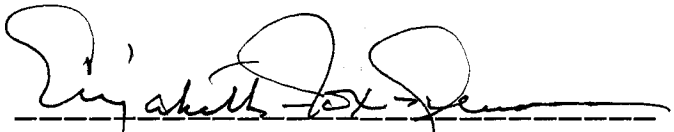


Christina Trent

Forgetting Rape:
Sexual Violence and Social Justice in America

By

Christina Trent
Doctor of Philosophy
Institute for Women's Studies



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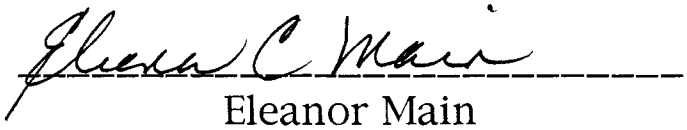

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Sexual Violence and Social Justice in America

By

Christina Trent
B. A., New College of the University of South Florida, 1988

Advisor: Elizabeth Fox-Genovese, Ph. D.

An Abstract of
A dissertation submitted to the faculty of the Graduate School of Emory University in partial fulfillment of the requirements for the degree of Doctor of Philosophy

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2005

In 1975, Susan Brownmiller transformed perceptions of rape with her revolutionary bestseller, *Against Our Will: Men, Women and Rape.* Brownmiller's dictum, that rape is oppressive, not sexual, rallied feminists to work for rape law reform. The anti-rape movement achieved some goals, particularly improvement of victim services, but prosecution rates did not increase significantly as rape rates soared. Despite the efforts of Brownmiller and others, rape never quite became accepted as an issue of urgent social justice among progressive activists. Instead, the historical association of charges of rape with racism and lynching has persisted, impacting both activism and public policy. Over the last thirty years, anti-rape activists have found themselves fighting on two fronts: against sexism entrenched in the justice system and against other progressives whose vision of legal reform focuses exclusively on defending the accused. Defense strategies continue to reinforce sexist stereotypes about rape victims, while representations of rape in the media and popular culture continue to pit victims of racism against victims of sexism in socially tragic ways. Susan Brownmiller described this intersection of race and rape as a "violent crossroads" in American life. *Forgetting Rape* is a meditation on some of the ways this "crossroads" has impacted the possibility of justice for victims of sex crime.

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Introduction

In 1975, Susan Brownmiller published the book that was supposed to change the way we view the act of rape. Brownmiller's book, *Against Our Will: Men, Women and Rape*,[1] was slightly ponderous, depressing to read, and heavy on historical and literary digression, in other words, not exactly a candidate for the bestseller lists. But the book did become a bestseller. Granted, this was the 1970's, the era of Germaine Greer and Erma Bombeck and *The Hite Report*, a time when the cultural argot didn't exclude the pouring-over of dense feminist texts between Donohue and the dinner hour. Still, the popular success of a 450-page book largely about the history of rape - in wartime, in Ancient Greece, in French Existentialist theorizing - suggests that Brownmiller had registered a significant cultural consciousness-raising, a thundering feminist "click."

In 1975, rape was still a crime that went almost entirely unpunished. While it was impossible to know how many women experienced rape in any year, fragmentary prosecution statistics demonstrate how very few victims in those years saw their attackers incarcerated for even brief periods of time. Linda Fairstein, the Manhattan sex-crime prosecutor-turned-author, observed that in 1969, only eighteen men were convicted of rape in New York City, out of more

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[1] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975).

than a thousand arrested for the crime.[2] Those thousand arrests, in turn, accounted for only a percentage of the rapes reported to the police that year. Considering that even the most conservative estimates by criminologists placed the number of unreported rapes at 200% the number reported,[3] it is fair to hypothesize that, at the very least, 2,000 women were raped in New York City in 1969,[4] and eighteen of those women received justice.

Even before Brownmiller published her book, feminists had begun to challenge the many ways women were discouraged from pursuing rape charges. Activists in several states set up "rape crisis" centers to offer palliative care to victims and lobbied state legislatures to overturn laws requiring rape victims to provide additional witnesses to corroborate the crime, an unique requirement in the criminal justice system and one that was largely responsible for the failure of rape prosecutions.[5]

Against Our Will emerged from this feminist anti-rape movement. In the book, Brownmiller extensively illustrates the feminist complaint that society does not take the crime of rape seriously because of the existence

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[2] Linda Fairstein, *Sexual Violence: Our War Against Rape* (New York: William Morrow and Company, 1993), p. 14 - 15.
[3] President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society," 1967, cited in Leroy G. Schultz, ed., *Rape Victimology* (Springfield: Thomas Books, 1975), vii.
[4] These statistics reflect conceptions of rape prior to the emergence of the concept of "date rape."
[5] For an excellent summary of feminist anti-rape organizing since the 1970's, see Maria Bevacqua, *Rape on the Public Agenda: Feminism and the Politics of Sexual Assault* (Boston: Northeastern University Press, 2000), p. 26 - 65.

of deep-rooted suspicions that women lie about being raped. Through 458 pages of historicizing and theorizing, which bear the unmistakable stamp of her education at the feet of communist historian Herbert Aptheker,[6] Brownmiller traces strains of disbelief of rape victims, from the Biblical story of Potiphar's wife to headlines taken from her morning newspaper. However, despite the success of the book, which in 1975 was credited with popularizing feminist theories of sexual assault, Brownmiller was also attacked within feminist and other leftist political circles because she dared to challenge leftist activists' narrow view that rape charges levied by a white woman against a black man are always reactionary, racist and untrue.[7]

In the chapter "A Question of Race," Brownmiller recounts her political education by Communist leftists in the 1960's and her gradual realization that the same activists who railed against rape as a "political act of subjugation" imposed by white men on oppressed black women simultaneously viewed the phenomenon of black-on-white rape as nothing more than a racist myth.[8] Brownmiller's outrage grew as she realized that among her political peers:

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[6] For example, there are not one, but three separate "introductions": "A Personal Statement," "The Mass Psychology of Rape: An Introduction," and "In the Beginning Was the Law." However, it must also be said that *Against Our Will*, unlike much of the cultural theorizing that followed it, equally bears the stamp of Brownmiller's training as a journalist: thirty years hence, the book is both compelling and readable.

[7] For Brownmiller's discussion of rape and race, see "A Question of Race," *Against Our Will*, pp. 230 - 282.

[8] Brownmiller, *Against Our Will*, p. 231.

> White-on-white rape was merely "criminal" and had no part in their Marxist canon. Black-on-black rape was ignored. And black-on-white rape, about which the rest of the country was phobic, was discussed . . . as if it never existed except as a spurious charge that "the state" employed to persecute black men.[9]

Brownmiller carefully acknowledges the historical role charges of rape played in the legacy of lynching and the subjugation of black men; only after this discussion does she propose that confronting rape would now require moving beyond narrowly racial perspectives of the crime. "History is never 'behind' us, and we must never forget how the white man has used the rape of 'his' women as an excuse to act against black men," she writes, "[b]ut today, the incidence of actual rape . . . must be understood as a control mechanism[10] against the freedom, mobility and aspirations of all women, black and white."[11]

Yet despite her efforts to tread carefully on what she named "the crossroads of racism and sexism . . . a violent meeting place,"[12] Brownmiller's discussion of race and rape was immediately denounced as racist, both by feminist activists and by the leftist intellectuals who

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[9] Ibid.

[10] "Control mechanism," or, one might simply say, "a crime." Much has been made of Brownmiller's dialectical critique of rape as a "tool" of male oppression, "the ultimate physical threat by which all men keep all women in a state of psychological intimidation," an argument that, in some ways, conflicts with her critique of leftists' views of sex crime. In evaluating her writings on rape, I find such sweeping rhetorical assertions about "all men" to be both occasional and peripheral to her many, and more important, insights.

[11] Ibid, p. 281 - 282.

[12] Ibid.

dominated academia and publishing in 1975.[13] The charge of racism was not unexpected; much of the chapter on race is dedicated to asserting her awareness of the sensitivity of these issues, particularly the subject of black men's own culpability, from the 1960's onward, in contributing to "the mythified spectre of the black man as rapist." Referring to both this phenomenon and to the entire welter of radical and reactionary mythologies regarding interracial rape, each denying different types of interracial sexual violence, Brownmiller pleads, "[t]here is no use pretending it doesn't exist."[14] Americans might move beyond the violent "crossroads of racism and sexism," but only if they were willing to release white, female victims of interracial rape from the burdens of racial history.

Thirty years after the publication of *Against Our Will*, many feminist scholars and activists have, instead, elected to "pretend" that it is Brownmiller's arguments that do not exist. Despite the centrality and historical significance of her analysis of rape, Susan Brownmiller's work has been literally excised from the feminist canon. While attending the Institute for Women's Studies at Emory University, I was assigned Angela Davis' essay demonizing Susan Brownmiller on three occasions,[15] yet I was never assigned Brownmiller's book or even the book's race chapter to read

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[13] For an account of the firestorm of criticism unleashed against her by her colleagues in the Left, see Susan Brownmiller, *In Our Time; Memoir of a Revolution* (New York: Random House, 1999) 244 -258.

[14] Brownmiller, *Against Our Will*, 281 - 282.

[15] Angela Davis, "Rape, Race and the Myth of the Black Beast Rapist," in *Women, Race and Class* (New York: Random House, 1981), 172 - 201.

in conjunction with Davis' criticism of it. Upon examining other schools' feminist studies syllabi and speaking to academic and political colleagues, I believe that intentional avoidance of Brownmiller's work is the status quo.

Brownmiller herself has become a racist chimera; she is repeatedly summoned as a symbol of racial insensitivity, even as her writing is not engaged in an intellectual manner. In both academic and activist feminist circles, accusations of insensitivity on the part of white feminists toward black victims of sex crime[16] and toward the historical use of rape charges by white supremacists often constitute the extent to which rape is discussed at all. This refusal to otherwise confront the phenomenon of rape, coupled with conservatives' identification of rape as a feminist issue, leaves real victims of sex crime in the precarious position of not having anyone "speaking for them" in the many forums in which public policy is construed and public opinions are molded.

In 1975, Susan Brownmiller attempted to directly confront the violent "crossroads of racism and sexism," to see the consequences, not only of the role rape charges have played in lynching, but also of the role, however inadvertent, that anti-lynching and anti-racism efforts have played in denying the prevalence and harm of real rapes. This

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[16] Ironically, the first rape victims feminist activists rallied behind were, intentionally, women of color: Joan Little, a black woman, Inez Garcia, a Hispanic, and Yvonne Wanrow, a Native American. See Brownmiller, *In Our Time*, pp. 216 - 222.

dissertation will confront this territory once again, with the same intention Brownmiller demonstrated thirty years ago: to make sense of the often-contradictory stories that have emerged in America at the crossroads of lynching and rape. To put it another way, this dissertation examines both the persistence and the transformation of stereotypes regarding black male criminality and white female victimization in order to discern the effects these myths have had on public policy and public perceptions of crime.

While many scholars have examined the literary and historical roots of interracial rape and lynching in post-Reconstruction and early twentieth-century America,[17] I will focus on the years following World War II, specifically a period I call the "post-lynching era." While recognizing that the Lynching Era is generally agreed to lie between 1882 and 1930, after which time incidents of lynching grew rare, I date the "post-lynching era" from 1964 because of the significance of two watershed events that occurred in that year: the passage of the Civil Rights Act on June 15 and the murder of James Chaney, Andrew Goodman and Michael Schwerner, six days later, on June 21. One event was a portent for the future; the

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[17]For the historical record on rape and lynching, see Jacquelyn Dowd Hall, *Revolt Against Chivalry: Jessie Daniel Ames and the Women's Campaign Against Lynching* (New York, Columbia University Press, 1979) and Nancy MacLean, "Gender and Sexual Politics in the Making of Reactionary Populism," *The Journal of American History* (December, 1991), 917-948. For analyses of literary and historical lynchings, see Trudier Harris, *Exorcising Blackness: Historical and Literary Lynching and Burning Rituals* (Indiana, Indiana University Press, 1984), and Sandra Gunning, *Race, Rape and Lynching: The Red Record of American Literature, 1890-1912* (New York, Oxford University Press, 1996).

other reached back to a tragic past, but both brought the subject and history of lynching into focus with a new intensity.

At the beginning of the post-lynching era, when Americans began waking up to the reality of this tragic past, they rediscovered an easy explanation for the existence of white racism in the southern "rape complex," a term coined by historian W. J. Cash to describe the alleged tendency of a certain class and temperament of southern lady to incite lynching by wrongly accusing black men of raping them.[18] Despite the fact that the majority of lynchings had nothing to do with allegations of rape and that some southern white women who said black men had raped them surely were telling the truth, by the early 1960's, the seductive notion that *racism was a white woman screaming rape* offered a desperately needed explanation and cultural palliative in the face of increasingly unsettling tableaux of black youngsters cut down by fire hoses, black matrons harassed by police and black churches bombed down onto the heads of beribboned choirgirls.

For whites who had previously imagined themselves benign citizens of a benign status quo, the visceral wake-up call of the early civil rights years demanded a scapegoat. Two scapegoats were found where they are usually found, among sexually suspect women, where the half-dressed,

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[18] Wilbur Joseph Cash, *The Mind of the South* (New York: Alfred A Knopf, 1941).

incest-scarred, "white-trash" and the histrionic, never-wed, heavily powdered "Miss Annie" stood available to absorb the sins of white racism.

I am not denying the existence of southern white women who lied about rape, nor am I denying the existence of deeply held, socially corrosive suspicions of black sexual aggression. I am suggesting that by the early 1960's, the *white woman screaming rape* had become the symbol for a broad range of racial sins, many of which had nothing to do with rape charges, real or false. I am also suggesting that this particular shorthand for white racism was potent then, and remains so now, for two distinct but intertwined reasons: first, because the notion that women lie about rape (and are generally untrustworthy in all sexual matters) is deeply embedded in western culture, and second, because rape is and always has been more titillating than, say, economic conflict. The *white woman screaming rape* became a potent symbol in the 60's for the same reasons that the "black beast rapist" was a potent symbol in 1915: both stereotypes distilled complex social anxieties into simple, recognizable, melodramatic images that were (and remain today) particularly good for evoking strong emotions from a crowd.

I am further suggesting that, while the image of the black male as "beast rapist" has been vigorously challenged since its inception, the image of the *white woman screaming rape* reigns curiously unfettered. The stereotype of the "black beast rapist" emerged after the Civil War and

found its most popular expression in the 1915 film *Birth of a Nation,*[19] which features a black ex-slave who stalks a white virgin to her death, a freeborn mulatto who wishes to marry the white heroine and a female mulatto who creates political mayhem by manipulating the "unnatural" desires of the heroine's father. *Birth of a Nation* was applauded in southern capitols, in northern cities, and in Woodrow Wilson's White House, but its racial themes were also loudly and immediately denounced. A reviewer writing in *The New Republic* branded the film "spiritual assassination" that "degrades the censors that passed it and the white race that endures it." "To present the members of the race as woman-chasers and foul fiends," observed another in the *New York Globe*, "is a cruel distortion of history." Jane Addams condemned the film's "pernicious caricature of the Negro race."[20]

In 1915, a year when 65 people were lynched in the South, reformers carried on a vigorous program to counter the notion that black men were "beasts" who couldn't wait to get their hands on white virgins. Notably, many of these reformers delivered their message without resorting to the types of ugly insinuations about white female sexuality and sexual desire that characterized later anti-lynching and anti-racism

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[19] D. W. Griffith (director), *The Birth of A Nation*, Los Angeles: Epoch Producing Corporation, 1915.

[20]Francis Hackett, "Brotherly Love," *The New Republic* 7 (March 20, 1915): 185; Anon., "Capitalizing Race Hatred," *New York Globe* (April 6, 1915); Jane Addams, *New York Evening Post* (March 13, 1915) quoted in Robert Lang, ed., *The Birth of a Nation.* Rutgers Films in Print. (New Brunswick, Rutgers University Press, 1994), 159 - 165.

campaigns orchestrated by the Communist party, the New Liberals, and social agitators from Norman Mailer, to Eldridge Cleaver, to Al Sharpton. Progressive Era anti-lynching reformers such as Ida B. Wells and Jessie Daniel Ames shared an understanding that a great deal of what passed for chivalry and honoring white womanhood operated as a two-edged sword for the women who were being "protected," and they bore surprisingly few illusions about rape as a form of power.

A similar critique has rarely been ventured of the prejudice underlying images of the *white woman screaming rape.* If the apogee of the black beast rapist appeared in 1915, in *Birth of a Nation*, the apogee of the *white woman screaming rape* appeared in 1962, in Mayella Violet Ewell (Collin Wilcox), the white-trash (she literally lives in the town dump), incest-scarred child-woman at the dark center of the film version of Harper Lee's classic novel, *To Kill a Mockingbird.*[21] When Atticus Finch (Gregory Peck) intones that Mayella is the real rapist, for she has tried to seduce a black man, and when caught, cried rape; and when Mayella, in turn, tries to invoke a lynch mob, there is no question on which side justice lies.

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[21] Robert Mulligan (director), *To Kill a Mockingbird*, Hollywood: Universal Films, 1962.

To Kill A Mockingbird is a beloved film,[22] and so it should be, but in the character of Mayella Ewell, it creates a scapegoat as potent as the figure of Gus (Walter Long), the "black beast rapist" before her. As the 1960's unfolded, the southern white female characters that followed Mayella onto the screen only grew more mind-numbingly evil and sexually dangerous. By the time Susan Brownmiller and other feminists began to agitate for legal rights and protections for victims of rape in the early 1970's, this proliferation of images of *white women screaming rape* only complicated the formidable challenge of attempting to convince the public that any rape victim could be trusted.[23]

Interracial rape stories referencing the history of lynching continue to affect all victims of violent crime. From the Progressive Era onward, opposition to lynching engendered a broad critique of the criminal justice system, which in turn inspired generations of anti-establishment and anti-authoritarian activists, many of whom rejected the very notion of enforcement of criminal laws. As Susan Brownmiller observes in her memoir of the feminist movement, the only "accepted liberal thrust" regarding crime has been "making arrests and convictions more difficult

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[22] I am referring here to the film version of Harper Lee's novel. Lee's novel presents a far more nuanced and sympathetic portrait of Mayella Ewell. Harper Lee, *To Kill a Mockingbird* (New York: J. B. Lippincott Company, 1960).

[23] Some victims even turned on themselves. Brownmiller recounts stories of white, liberal women rape victims who agonized over reporting a rape by a black man. "I just can't throw off history," said one, "I feel like I'm being used to pay off old debts to men falsely accused in the South of raping white women. Even my friends were reluctant to see me press charges." Brownmiller, *Against Our Will*, p. 280.

in order to safeguard defendants' rights."[24] By reinforcing notions that criminal defendants are often the real victims and putative victims are prone to lying, the stereotype of the *white woman screaming rape* impacts the public's willingness to confront a broad range of violent crimes.

Interracial rape is, therefore, not the subject of this dissertation, nor will interracial assault be the only, or even the predominant, type of sex crime I will address. While stories of interracial assault loom large in the cultural imagination, my argument is that they serve as a distraction from the real social justice issues and personal losses arising from sex crimes. I am seeking to develop a clearer picture of the prevalence of rape and legal and cultural barriers to prosecuting rapes. Racial storytelling is one formidable and foundational barrier to rape prosecution, but it is not the only one, and, in the final analysis, I am arguing against the significance of race in rape cases.

A word on statistics: although this is not a work of statistical analysis, I am attempting to demonstrate that rapes continue to be "under-prosecuted" despite the legal reforms of the 1970's. For evidence, essentially, of prosecutions that are quantified nowhere, I turn to the picture of unsolved crimes and serial offending that is just now emerging from new DNA databases in the states. I also look to the work of journalists who have conducted analyses of rape case "unfounding" on

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[24] Brownmiller, *In Our Time*, p. 217.

city beats. Journalists who go looking for rape cases that were inappropriately "shelved" and forgotten routinely find ample evidence of the practice. This widespread phenomenon deserves more attention, and if I have a statistical point to make, it is this: thanks to the routine dismissal of rape reports, the statistics we have long used to determine the safety of neighborhoods, the effectiveness of law enforcement, and the likelihood that offenders will re-offend appear to grossly underestimate the true prevalence of sex crime.

I developed the ideas expressed here over the span of the fifteen years I spent lobbying for rape law reform in Florida and Georgia, working in rape crisis and other service provision positions for victims of crime, and working with feminist and progressive political organizations. I participated in the Georgia movement to pass hate crimes legislation and held a place at that table until I began to question the status and meaning of "gender-bias" hate crimes. I lobbied for the establishment and funding of Georgia's DNA database. My academic research, however, consists of media analysis. For the past decade, I have tracked news coverage of rape cases, rape law, rape law enforcement, rape activism, crime victims, jury behavior, sensational cases, and the ways that journalists represent these subjects. I make no claims to statistical expertise. However, my background in social movements has given me ample opportunities for

studying the mechanisms of social justice activism and its impact on public opinions and policies.

These mechanisms, I believe, very much include popular films and novels that depict social problems. The entertainment industry undoubtedly affects the public's opinion of hot-button issues like the death penalty, the role of jurors, and other workings of the criminal justice system. Recently, for example, prosecutors have begun to complain that jurors are refusing to return guilty verdicts in cases in which there is no DNA evidence to offer, no matter how irrelevant such evidence would be.[25] The jury system itself is a locus of much popular mythologizing that I will attempt to penetrate, again, in the interest of seeing the phenomenon of denial of sex crime more clearly.

Chapters 1 and 2 examine these imaginative mechanisms of rape denial in one social justice movement by tracing the extraordinary re-imaginings of the Leo Frank case that have occurred over the ninety years since Frank was murdered. Chapter 1 sets up the conflict between Frank's supporters and those who believed he was guilty of the crime of killing Mary Phagan. The chapter ends with the transformation of Mary Phagan into the "real predator" in the Frank case in a 1937 film that additionally represented Frank as a virile freedom fighter. Subsequent imaginative representations of conflict between the nearly dead Frank and the already-

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[25] See Katie McDevitt, "'CSI Effect' Turns Jurors into Instant Experts," *East Valley Tribune*, 1 July 2005.

dead Phagan are the subject of Chapter 2. The consistency with which Mary Phagan is depicted as a racial threat and sexual deviant through all of these stories indicates an elemental dismissiveness toward victims of "ordinary" sex crimes within justice narratives that emphasize the plight of the accused and victims of racist violence.

In Chapter 3, I will use media coverage of the 1964 murder and rape of Kitty Genovese to argue that the search for socially based "root causes" for crime that dominated the sociology and public policy of that era relied heavily upon the minimization and denial of the experiences of victims of crime. The *New York Times'* coverage of the Genovese murder, in particular, was guided by such denial. The chapter ends by contrasting the coded, covert, racial rhetoric of the 1964 Genovese case with the overt, divisive, racial rhetoric surrounding the 1999 Central Park Jogger case.

Chapter 4 confronts the resistance to granting rights to crime victims, or even a voice to them, within the justice system and within imaginative works depicting crime and punishment. I turn to a film that literally and metaphorically silences real victims' voices: *Dead Man Walking.* By comparing the crimes committed by the real killers upon whom the fictional "Matthew Poncelet" is based to the representation of those crimes in the film, I will show how anti-death penalty activists appropriate, yet obscure, the suffering of murder victims in order to create an image of the humanity of their killers.

Chapters 5 and 6 trace the growth of The Innocence Project, another social movement that appropriates the experience of sex crime victims and casts many of them as intentional or inadvertent racists in order to foster doubts regarding the accuracy and fairness of any sex crime prosecution. Through the example of convicted rapist Benjamin LaGuer, Chapter 5 details how "innocence imprisoned" cases follow a script that demeans crime victims and valorizes even demonstrably guilty, violent sex criminals. Chapter 6 follows the Innocence Project to Georgia, where the Project's founders explicitly cast the cases they choose in the terms of the southern "rape complex" and exploit socially fraught images of *white women screaming rape.*

Chapter 7 begins where Chapter 2 ended, with the Leo Frank case, this time incarnated as a founding story of the hate crimes movement. I will describe my efforts to document the ways that hate crime laws re-inscribe political and group power into the decision-making processes that steer the justice system, and, specifically, how the imagery of the hate crimes movement pits some social groups against others. I will also discuss the special plight of female victims of crime, and rape victims in particular, within a social movement that relies on the iconography of lynching to articulate its vision of justice and injustice.

In the conclusion, I will return to Mary Phagan once more to demonstrate the ways her "erased" experience of sexual assault and

murder continue to typify the experience of other victims of similar assaults. If, in this dissertation, I revert too readily from the quantitative to the qualitative, and even to the anecdotal, it is because there is simply no other way I can imagine to count and account for the vast numbers of sex crime victims who have been forgotten. This willful "forgetting," I will argue, indicates insidious forms of denial within the very social justice movements that purport to bear witness to social wrongs. Thirty years after Susan Brownmiller aptly identified the "violent crossroads" of racism and sexism, little has been done, short of repeatedly killing the messenger, to confront this American tragedy.

Chapter 1: Mary Phagan in "The Leo Frank Story"

On April 26, 1913, a young, white factory worker named Mary Phagan boarded a trolley in northwest Atlanta and traveled downtown to the National Pencil Factory to collect her pay. Early the next morning, the 13-year-old's body was discovered in a pile of trash in the factory's basement. The cord that strangled her was pulled so tightly that it cut the skin of her throat. Her face was beaten, and her undergarments were ripped and bloody, indicating a violent sexual assault.

Soon thereafter, Leo Frank, a Jewish man from New York and also Mary's supervisor at the pencil factory, was arrested for the murder. Four months later, in a trial marked by mutual animosities between the North and the South and marred by anti-Semitism, Frank was found guilty of Mary Phagan's murder and sentenced to die. An international public outcry on Frank's behalf convinced Georgia Governor John M. Slaton to commute his sentence to life in prison, and Frank's supporters held out hope that eventually he would either be acquitted or pardoned and released. But on August 16, 1915, a group of men kidnapped Frank from the prison in which he was being held and hanged him from a tree a short distance from Mary's own grave.

Mary Phagan and Leo Frank thus died in exactly the same way. Both were strangled -- one with a rope, one with a cord. Both met their deaths

accompanied by no one who loved them, in the presence of only their killers. Phagan and Frank shared this terror, and they also shared, to what extent cannot be known, a penultimate humiliation of sexual assault, for although Frank was not castrated, lynch mobs evoke a sexual danger every bit as terrifying as the signs of abuse left on Mary Phagan's body. All of this ought to equate Leo and Mary when they are remembered: twin, innocent victims of intertwined crimes. But it does not.

Instead, Leo Frank is memorialized in an extraordinarily broad range of texts[1] as a martyr of anti-Semitic hatred and lynching, and Mary Phagan is remembered, when she is remembered by name at all, not as the innocent victim of a similarly heinous crime but as "that girl" who incited violence against Leo Frank. Since at least 1937, when the long-dead child was transformed on-screen into a fully mature and sexually provocative "loose woman,"[2] blame for both Frank's persecution and his lynching has been increasingly laid at Mary Phagan's feet.

In the ninety years since Leo Frank was murdered, the narrative of his lynching has become "The Leo Frank Story," an oft-repeated tale of

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[1] Leo Frank's lynching is the subject of six books of non-fiction, several dissertations and book chapters, five novels, three movies, several plays, a segment of NBC's *Profiles in Courage*, a television miniseries, a radio serial and scores of newspaper articles. In 1998, it was even transformed, for a brief but much discussed run, into the unlikely form of a Broadway musical. Since the time of Frank's death, not a decade has passed without the release of some new study or fictional rendering of the Leo Frank case. For a list of newspaper articles and works published on the Phagan/Frank case, see Graydon Boyd Leake III, "The Case of Mary Phagan and Leo Frank, 1913 - 1986: Seventy-three Years of Fact, Fiction and Opinion," Master's Thesis, Georgia State University, 1990.

[2] Mervyn LeRoy (director), *They Won't Forget*, Burbank: Warner Brothers Pictures, Inc., 1937.

American injustice. As a result, Frank has achieved a unique status: he is the only victim of a lynching that occurred during the Lynching Era (1882 - 1930) who is now routinely recalled by name.[3] However, as subsequent generations of film-makers, novelists, historians and social advocates struggled with the endless complexities of the Leo Frank case, complexities which included, in addition to anti-Semitism, tensions over the exploitation of workers in the South, urbanization and crime, segregation, lynch law and the rise of the Yellow Press, these writers and artists repeatedly turned to the figure of Phagan to distill a memorable symbol for all the malevolent forces that led to Frank's death. This sexual scapegoating of Mary Phagan and, by extension, the entire class of white, poor, southern females, has frequently been as prejudiced and crude as, and even in striking ways identical to, the anti-Semitism directed at Leo Frank before his death. But unlike the slurs directed at Frank, the contemptuous sexual stereotypes heaped upon Mary Phagan over the ninety years since they died seemingly trouble no one. Instead, this stereotypical imagery has simply become an integral part of telling Leo Frank's story.

From the moment Mary Phagan's body was discovered, she, and

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[3] Frank's death, along with the murders of Emmett Till, James Chaney, Andrew Goodman and Michael Schwerner, are often used to illustrate the entire bloody history of lynching in America. Of the four, only Frank was killed during the Lynching Era itself, when lynching was a common phenomenon. Till was killed in 1955; Chaney, Goodman and Schwerner were killed in 1964.

soon Frank too, became symbols for a staggering array of identities and causes of the Progressive Era South. Phagan was the daughter of a displaced farm family living in poverty, a child-laborer forced into dangerous and demeaning factory work for subsistence wages, and a "flower" of threatened white southern womanhood dying in a struggle to preserve her honor. Depending on the audience, Frank was either an alien, elitist, northern-born industrialist exploiting southern poverty or the noble "American Dreyfus" martyred by a bad brew of anti-Semitism, southern backwardness and "Judge Lynch." Folk ballads were written in memory of Phagan; editorials and letters to Congress were written in defense of Frank. The outpouring of emotion in and around Atlanta by those who passionately believed in Frank's guilt was matched by an outpouring from people from around the world who passionately believed in his innocence.

By the time Frank went on trial, all parties involved in the case were fluently engaging the stereotypical themes of the southern rape complex. Mary Phagan had been posthumously transformed in the public's imagination from a rather robust factory girl to a symbol of white female chastity sacrificing her life to preserve her virginity. At the unveiling of a monument at her grave, Phagan was referred to as, "that sainted little girl . . . [who] gave up her young life rather than surrender that Christian

attribute - the crown, glory and honor of true womanhood."[4]

The third important figure in the Leo Frank case was Jim Conley, a black janitor at the pencil factory and the probable real killer of Phagan. Conley cannily saved his own life by testifying against Frank and providing the prosecution with testimony that the factory manager possessed abnormal sexual desires.[5] While Leo Frank was formally charged only with killing Phagan, not raping her, Conley's allegations of Frank's sexual aggression and sexual abnormality were central to the state's case. Through Conley's testimony, Frank became a sort of "black beast rapist" in the eyes of the public. Conley told jurors he had acted as the lookout for Frank's assignations, that he witnessed Frank's unnatural sex habits, and that he helped his boss dispose of Mary Phagan's body after Frank had killed her. Tom Watson, the future senator and agrarian populist, echoed Conley's accusations, writing in his newspaper that Jews like Frank "have an utter contempt for law, and a ravenous appetite for . . . the racial novelty of the girl of the uncircumcised." Watson famously observed that Leo Frank possessed "bulging, satyr eyes" and "protruding fearfully sensual lips."[6] For an audience well schooled in racial

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[4] Leonard Dinnerstein, *The Leo Frank Case* (Georgia: University of Georgia Press, 1966), 136.

[5] For the most complete record of Conley's trial testimony, see Steve Oney, *And the Dead Shall Rise: The Murder of Mary Phagan and the Lynching of Leo Frank* (New York: Pantheon Books, 2003), 238 - 257.

[6] C. Vann Woodward, *Tom Watson, Agrarian Rebel* (1938; reprint, Savannah: The Beehive Press, 1973), 379 - 380.

stereotypes, Watson's words evoked the very image of the "black beast rapist."

As Frank's opponents attempted to make connections between blacks and Jews, his supporters appealed to notions of white supremacy, upper class solidarity, and black lecherousness in their efforts to undermine Jim Conley's testimony. The pro-Frank *New York Times* called it "mysterious" that white Atlanta jurors would believe "a dissolute negro of known criminal tendencies" over the word of "a white man of upright life and spotless record."[7] Frank's lawyer, Reuben Arnold, additionally attempted to solicit testimony from the Fulton County medical examiner to the effect that Phagan's hymen might not have been intact before her assault and murder, thereby insinuating that the girl had been sexually active. "Her hymen was not intact, and I was not able to say when it was ruptured," Dr. J.W. Hurt testified.[8]

Arnold surely knew that to question Phagan's virginity was to risk a potentially violent backlash, not only in the minds of jurors, but on the streets surrounding the courthouse, where restive crowds gathered to hear the news of the trial each day. That the lawyer was willing to take this substantial risk reveals how very much Phagan's sexual reputation mattered and how fragile such a reputation could be. Within a belief

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[7] Oney, *Dead Shall Rise*, 450.
[8] Ibid., 236.

system that declared Mary's chastity a cherished "heirloom" of the South, the significance of that chastity could cut both ways. If the girl's body could not live up to public assertions that she had died defending her honor, then even the fact of her murder might make a less compelling social cause. Although the racial conventions of the southern rape complex were a powerful force shaping public opinion of the trial, they were not the only force at work. Every woman, dead or alive, black or white, would be judged in the courtroom on the basis of her sexual reputation.[9]

While historians tend to see the significance of the Frank case in terms of the social tensions it exacerbated in 1913 and the social movements it mobilized since then, there are other, less pragmatic, and also more lurid reasons why the case attracted attention in 1913 and has remained such an appealing story to tell. The sex-murder of an attractive young victim certainly inspired prurient curiosity, in addition to outrage, after the discovery of Phagan's body, and the pitting of the wealthy and cultured Leo Frank against the dissolute, though undeniably intelligent,

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[9] Debate over whether Mary Phagan was "really raped" continues today, although contemporary understanding of sexual assault should have ended this discussion long ago. In any case less polarized than the Leo Frank case, the bite marks, stripping, and use of Phagan's underclothes as ligature would have by now provided evidence enough, by contemporary standards, to name this a sexual assault, whether or not definitive proof of sexual penetration could be uncovered. Nevertheless, the debate continues. When Steve Oney published his account of the Frank case in 2003, journalist Steve Weinberg, for example, asserted that there was "not even certainty that the murderer sexually assaulted Phagan," just as historian Leonard Dinnerstein had asserted thirty-three years earlier. Steve Weinberg, "A Definitive Retelling of a Case Without Conclusion," *Atlanta Journal and Constitution*, 5 October 2003. Dinnerstein, *Leo Frank Case*, 185.

Jim Conley stirred interest beyond the southern black, white, and Jewish communities that felt a direct stake in Frank's innocence or guilt. Rumors of Frank's sexual deviancy, his upper-class status, and the novelty of a black man testifying about the sexual habits of a white man (and a factory janitor testifying about the sexual habits of a wealthy employer) further fueled interest in the case. But for most of the last ninety years, prurient fascination has been focused on the figure of Mary Phagan alone, while both Conley and Frank are viewed in hindsight as victims of the prejudices of their time.

In reality, Mary Phagan was a factory girl whose mundane job consisted of crimping metal eraser-holders onto pencils. Few details exist about her actual life.[10] She was pretty, and that fact has been used over the past ninety years to justify an extraordinary range of aspersions cast upon her character. She was female and white and poor and the victim of a sex-tinged murder in the Jim Crow South, and that has been enough to justify portrayals of the girl as a "white trash" troublemaker. The excoriation of Mary Phagan, which began in earnest with the release of two films in the 1930's, has persisted through all the extraordinary social changes that marked the twentieth century: the Great Depression, two world wars, the Holocaust, the civil rights movement, "sexual liberation,"

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[10] An interesting account of the Phagan family, written by Phagan's grandniece, contains a few details of the girl's life. Mary Phagan, *The Murder of Little Mary Phagan* (New Jersey: New Horizon Press, 1987).

the feminist movement, the rise of the New South, and even the multiculturalist movement that promised, on its surface, to find value in every folk by-way. It is now baggage for the twenty-first century and shows no signs of abating.

A particular irony of this century-long scapegoating of a thirteen-year old murder victim is that it is done in the name of bearing witness to the century-old sin of the scapegoating of Leo Frank. If it was wrong in 1915 to convict Frank for murder on the stereotypical grounds that Jewish men possess unnaturally perverse sexual habits, then how can it have been acceptable for the last ninety years to implicate the already-dead Mary Phagan in the chain of events leading up to Frank's death, on no other grounds but that poor southern white women are themselves unnaturally oversexed and sexually deceptive? It would always have been possible to narrate the harm done to Leo Frank without revealing Mary Phagan as the story's real pervert. But this has rarely been done. Generations of authors have chosen, instead, to use Mary's allegedly careless sexuality to heighten Frank's suffering. If Mary Phagan had been a girl of loose morals, such thinking goes, then she only got what was coming to her in that factory basement, and Leo Frank is not only the only real victim of the tale; he is also the victim of Mary's own sexual excesses. This is still how Leo and Mary are bound together today: he as an innocent victim and important martyr, she as not quite an innocent and not quite a

victim, as not much of anything, much less anyone, possessed of a respectable humanity; in the story of Leo Frank, she is trapped in salaciousness.

Some might argue that Phagan deserves such a fate because a nascent Klan group named themselves, "The Knights of Mary Phagan," declared fealty to her "lost honor" and laid a marble slab across her grave. But, for the most part, the filmmakers and novelists who depict Phagan as a sexual menace don't even seem compelled to explain the blurring of the line between the Klan and Mary Phagan. The girl simply is, if not actually evil, then a dumb signifier for Klan violence, irreducible from the uses made of her after her death. In this view, there is no need to separate the murdered girl from the marble slab the Klan laid across her grave. In this view, it also makes sense to imagine Mary Phagan reaching from beneath that slab to tighten her own hands around Frank's throat, and not one, but two prominent authors, David Mamet and Alfred Uhry, have chosen in recent years to depict Mary Phagan as a malicious presence or ominous ghost, haunting Leo Frank, delivering false testimony from beyond the grave and inciting the mob that strangled him.

In recent decades, as the Frank case has been repeatedly "re-discovered" as an important founding story of the civil rights movement, these representations of Phagan have only grown worse; the starry-eyed strumpet who comes to no good end in Mervyn LeRoy's, *They Won't Forget*

(1937), becomes an incest-scarred nymphomaniac working a prostitution racket in the factory basement in *Members of the Tribe,* a 1977 novel by civil rights historian Richard Kluger. Despite imagining Phagan as a prostitute and incest victim who "enjoyed the sensation" of being raped by her step-father, Kluger was praised for writing a novel that opposes America's tendency to "seek scapegoats when a dark hour arrives."[11] In 1997, when playwright David Mamet stripped Mary Phagan of even more of her humanity, incanting the girl as an "unclean" gynecological stench drifting into Leo Frank's nostrils,[12] he was also praised for creating a bracing cerebral exploration of the persecution of Leo Frank. In retellings of the Leo Frank story, no sexual shaming of Phagan is too extreme.

The representation of Mary Phagan as the "real" sexual villain in the Leo Frank story, a story that is nothing less than one of the central justice tales of the twentieth century, raises troubling questions about the ways justice movements recycle the very prejudices they claim to be opposing. This is the problem with "The Leo Frank Story"; it is a myth system founded to disprove another myth system, and it only displaces it, a zero-sum game where there need not be one. If Mary Phagan could be seen as a fellow victim and equal to Frank, if comprehending Frank's victimization had not, for ninety years, been predicated upon denying Phagan's, then

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[11] Richard Kluger, *Members of the Tribe* (Garden City: Doubleday & Company, Inc., 1977). Quotation on book jacket.

[12] David Mamet, *The Old Religion* (United States: Faber and Faber, 1997), 79.

the spell would be broken by now, and the "never forget" cries rallied by all interested parties might have long-ago been laid to rest. Phagan might still be remembered salaciously, for behind the southern "rape complex" lies older ways of slanting the truth about victims of rape. She would not, however, be the racial demon, the "unclean" whore, dancing onto the public stage from the recesses of Alfred Uhry and David Mamet's imaginations.

At the heart of this unwillingness to let go of negative images of Mary Phagan lies the uncomfortable reality that Phagan's murderer was most probably the man who accused Leo Frank and whose testimony sealed his fate, a black man who also, most probably, was a brutal, serial assailant of both black and white women. Little doubt exists today that Jim Conley, who admitted to writing the "murder notes" found under Mary Phagan's body, killed Phagan and helped frame Frank; even Conley's lawyer, a prescient advocate for blacks' civil rights, acknowledged that he firmly believed his client was guilty of the crime.[13] Little doubt has ever existed that Conley was Phagan's killer, and ninety years of scrutinizing the historical record, scrutiny that occasionally included acknowledgement of his crimes against black women,[14] has only reinforced this conclusion. But so strong has been the desire to reject not

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[13] Oney, *Dead Shall Rise*, 436 - 438.
[14] Ibid., 612.

only the act of, but also every motivation for lynching, that scholars and authors approaching the Leo Frank case have often been loath to acknowledge that Frank's innocence points to Jim Conley's guilt, that to exonerate the Jewish man is to implicate the black one.

"Who killed Mary Phagan?" is thus a question that nobody wishes to answer, because the answer complicates a simple morality tale of bloodthirsty southern whites, on the one side, pitted against valiant, persecuted minorities on the other. To tell the whole story -- that the black man who fingered Frank was the real killer and might have hung in his place -- is to upset a delicate ecology between blacks and Jews, an identificatory ritual of Jewish men with black men in a brotherhood that, however uneasy, has contributed a great deal to the groundwork of civil rights. So instead of telling this story, novelists and playwrights who approach the Frank case indulge in mythmaking, replacing the black killer with a white one from Phagan's social background,[15] minimizing the role Conley played in implicating Leo Frank, emphasizing the perceived unreliability of the testimony by other factory girls who accused Frank of

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[15] Oscar Micheaux pinned the blame for Phagan's death on her boyfriend in his 1935 film, *Murder in Harlem*, thus essentially making it an incident of "domestic violence." Ward Greene posited a vague "third man" theory in his 1936 novel, *Death in the Deep South*, which was then picked up by Mervyn LeRoy in *They Won't Forget*, his 1937 film about the Frank case. Richard Kluger returned to the domestic violence theme in *Members of the Tribe*, in which not only Phagan's stepfather, but also another older man from her hometown, abuses her. Thus is responsibility for Phagan's death laid at the feet of "Mary's People," and, occasionally, Mary herself. Oscar Micheaux (director), *Murder in Harlem*, New York: Micheaux Pictures Corporation, 1935 (not extant); Ward Greene, *Death in the Deep South* (New York: Stackpole, 1936); Kluger, *Members of the Tribe*, 453 - 456.

harassing them, or, most effectively, simply blaming the whole mess on Phagan herself. Had Mary Phagan survived being attacked, she might be remembered (and easily dismissed) as just another southern white woman lying about rape. But even the inconvenient fact of the girl's violent demise has not prevented blame from being attached to her; the image of deceptive white womanhood is so potent that, even though murdered, Mary Phagan remains the ideal scapegoat for all that transpired in the Leo Frank case.

In 1937, the first prurient reworking of Mary Phagan to reach broad audiences appeared on-screen in the Warner Brothers film, *They Won't Forget.* [16] Gone is the thirteen-year old factory worker whose job consisted of crimping erasers onto pencils and whose last meal of cabbage and biscuits was extracted from her stomach and held aloft in the courtroom for the jury to see. Instead, in the movie, "Mary Clay," (played by Lana Turner) is a fully matured, shapely college co-ed in a skintight sweater, slit skirt and stiletto heels, part sexpot, part Andy Hardy sidekick. Instead of laboring in a dusty factory, Mary Clay attends "business classes" with other pearl-necklace wearing young women on an ivy-covered college campus and passes the hours before her murder flirting with every man she sees. Instead of Phagan meeting her death in the factory where she went to collect her ten-cent an hour pay, Mary Clay returns to her

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[16] Oscar Micheaux's *Murder in Harlem* (1935) had a limited release.

"campus" after-hours to retrieve a lipstick. At the entrance to the classroom building where she will die, in a scene played for both sexual tension and laughter, Clay tells her ogling headmaster that she must go back into the building to retrieve her "vanity case." "I just don't feel dressed without my lipstick, " she coos to him. She climbs a staircase and enters a classroom. Her last moment on-screen is comprised of a sexy close-up shot of her fingers twisting a lipstick tube. Thanks to the Production Code, the audience, which was doubtlessly familiar with Phagan's real fate, had to imagine the rest.

The film also contains a long tracking shot featuring Mary strolling from the soda fountain to her death. Played for sex appeal and shot mainly below the actress' chin and waist, the explicit shot incited wolf-whistles from theatergoers. Years later, Lana Turner would recall feeling shame as the opening-night audience whistled at the sight of her body. "[Mary] was enough to start a reaction leading up to a murder all right," she said. That was exactly what the film's producer and director, Mervyn LeRoy, had intended. "It was very important that the girl in our story have what they call 'flesh impact.' She had to make it look like it was a sex murder. . . . I figured that a tight sweater on a beautiful young girl would convey to the audience everything we couldn't say outright," he said. [17]

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[17] For Turner and LeRoy's comments, see Deborah Looney, "They Won't Forget," Turner Classic Movies, http://www.turnerclassicmovies.com/ThisMonth/Article/ (accessed June 5, 2005).

The film takes on its tone of moral seriousness only after the bad-girl's violent demise. It is highly doubtful that anyone would have thought to wolf-whistle during the chilling scene in which the Leo Frank character is kidnapped and hanged. Already, by 1937, two completely disparate scripts drove Mary Phagan's and Leo Frank's stories; hers is the story of a bad-girl come to no good end, and her death is inevitable because bad girls die that way. His is the story of a good man brought down by prejudice, the failure of other good people to act to save him, and the mere existence of the sexually careless Mary.

This schism is one of the things that make *They Won't Forget* both interesting and incoherent. The movie is actually two different movies grafted together, a brief murder mystery featuring Mary Clay followed by a solemn and protracted courtroom drama about Leo Frank (here, "Richard Hale," played by Edward Norris). The courtroom drama, which begins after Mary Clay twists her lipstick tube and dies, seems to have been filmed in an entirely different moral universe, as well as on another movie set. After Clay's highly stylized, suspenseful demise, *They Won't Forget* takes on the flattened appearance of a documentary or an historical re-enactment, complete with long, serious speeches, still shots of newspaper clippings, and even set frames of Clay's mother and brother that resemble Walker Evans' photographic record of extreme southern poverty.

The latter do not make much sense: how could Mary Clay live in such conditions and even own high heels and "vanity cases," let alone attend a "business college"? The southern poverty vignettes, which are designed to extend sympathy to "Mary's People," the poor southern factory laborers whose resentment of northern industrialists like Frank was grounded in more than ethnic parochialism, explicitly exclude Mary herself. She does not even possess the virtues of poverty that afflict her own family. Mary's People may be poor laborers; the entire South may still be buckling under the weight of deprivation, but Clay lives like a debutante, further proof of the essential wickedness of her soul.

Poverty, in fact, is so virtuous that even the Leo Frank character, Richard Hale, is made to appear impoverished. Filmed at a time when Americans were still suffering the effects of the Depression, when richness was perceived as the opposite of a virtue, the Leo Frank character in the film, Richard Hale, lacks both Frank's wealth and his connections. He is pictured as a friendless, impoverished schoolteacher who is too poor to pay rent, let alone hire a lawyer to help in his defense against the charge of killing Clay. Instead of being Mary Clay's employer, he is also reduced to a position of servitude in relation to her, enduring the flirtations and jabs of the college girls who clearly dominate him.

Thus does producer and director Mervyn LeRoy (who also directed the social realism classic, *I am a Fugitive from a Chain Gang*) erase, in one

anti-historical plot twist, all the economic and class tensions that played an important role in the Leo Frank trial, including southerners' anxieties about the exploitation of child factory labor and resentments aroused by the belief that Frank's wealthy supporters had bought him special influence in the courts. The subject of child labor is eliminated by casting a fully mature Lana Turner to portray the girl, and, furthermore, by portraying Clay as a co-ed, not a factory employee. Richard Hale's low social standing and "friendlessness" is reinforced through plot inventions that occasionally clash with those storylines conforming more closely to reality; at one point, though he can't scrape together enough money for rent, Hale is nonetheless described as being tied to some shadowy bloc of "northern influence."

LeRoy did not linger over the absurdities created by his screenplay. In a manner that foreshadows other remembrances of the Frank case, he picks and chooses from among the speeches and sentiments of the actual trial to construct a singular vision emphasizing Leo Frank's absolute virtue. Richard Hale is not explicitly a Jew, but he is surely an outsider, a stranger in a strange land, and the man who stands alone against injustice, all the standard tropes of Hollywood heroism, circa 1937. Left out is the Leo Frank whose supporters hired detectives who matched the prosecution in rounding up and intimidating poor and working-class witnesses. Also left out is the Leo Frank who was willing to summon race prejudice to

bolster his defense.

In the concluding remarks in the real trial, Ruben Arnold, Frank's defense attorney, argued that it must have been a black man, not a Jew, who committed the crime that was perpetrated on Mary Phagan's body: "Why, negroes rob and ravish every day in the most peculiar and shocking way. But Frank's race don't (sic) kill. They are not a violent race," Arnold argued.[18] On the movie screen, Richard Hale delivers a very different message about racism when he, at the climax of the courtroom scene, seizes his own defense to argue that the "three witnesses" against him are named "hatred, fear and prejudice." Thus is Leo Frank rehabilitated, in the figure of Richard Hale, from an opera-loving member of an elite who shared the ordinary race prejudice of his age into a courageous freedom fighter who defended all racial minorities.

Aiding the racial rehabilitation of Frank is the absence, in the film, of any character specifically representing Jim Conley. In *They Won't Forget*, Conley doesn't exist. The black factory worker pictured in the film, Tump Redwine (Clinton Rosemond), is based mainly on Newt Lee, another black employee and night watchman at the pencil factory. Lee was the man who found Mary Phagan's body, and while he reasonably feared the indiscriminate power of the white man's law, he was not seriously considered a suspect. In the film, the character of Tump

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[18] Olen, *Dead Shall Rise*, 319 - 320.

Redwine resembles Lee in both his demeanor and the limited role he plays in the trial. As Mary Clay's dilemma is played for prurient kicks, Tump Redwine's is played for prurient laughs; the watchman first appears in his cellar staring wide-eyed at a bawdy periodical titled "Parisian Nights." Redwine weeps while asserting his innocence, both in and out of the courtroom, as Lee did, and like Lee, he does not implicate Richard Hale. The absence of a Jim Conley character enabled LeRoy to bypass several uncomfortable racial themes.

What is left of the many threads of conflict in the Phagan/Frank case is a superannuated story about tensions between the "North-land" and the "South-land" and the introduction of Mary Phagan as the southern belle whose empty-headed sexuality derails the reunification of North and South, and even human progress in general. Mary Clay does not appear on-screen for long, but in her brief appearance, she wreaks enough havoc to literally divide a city, a nation, and to "start a reaction that led up to a murder, all right," as Lana Turner phrased it.

In 1937, when *They Won't Forget* was playing in movie theaters, the nation was also watching the drawn-out trials, in Scottsboro, Alabama, of nine black men accused of raping two white women. The various trials and appeals on behalf of the "Scottsboro Boys" had begun in 1931 and showed no sign of ending any time soon. As was the case with Leo Frank's trial, many outside of Alabama believed that "The Boys" were being

railroaded by an unjust southern legal system and victimized by lying, deceptive white southern women.[19]

The Scottsboro Trials, like the Leo Frank case, attracted international attention. Meanwhile, a stream of unforgettable characters, which emerged from the imagination of William Faulkner and others, was feeding the public's appetite for psychopathic southern belles. Some of these early fictive belles possess qualities that redeem and humanize them even after pride and willfulness have taken their toll: think Scarlet O'Hara saving the farm from starvation, or Julie Marsden (Bette Davis) in *Jezebel* sailing off to the fatal "quarantine island" to nurse the fever-stricken Preston Dillard (Henry Fonda). Marsden casts aside the world of duels and sexual intrigue to die in lowly service. "Help me make myself clean as you are clean," she begs one woman she had wronged, as she climbs onto the guarded death-cart overflowing with feverish, expiring men.[20]

More often that not, however, even immanent fatality is not enough

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[19] While the former is true, the two women who were held forth as rape victims had actually been taken into custody with the "Boys" after a fight broke out among white and black gangs of transients riding a train. One of the women, Ruby Bates, publicly denied she had been raped and joined in defense efforts. The other woman, Victoria Price, who was imprisoned and facing prostitution charges, stuck to the story of the rape, which had originally been alleged by the white men who had jumped off the train after fighting; she thus saved herself from possible incarceration. Despite her tenuous social status and the fact that she did not initiate the charges against the "Scottsboro Boys," Price has been held forth as a powerful "mastermind" in the persecution of the Scottsboro Boys. For an account of the case that assigns much blame to Price and oddly emphasizes her status as a "whore," see Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Baton Rouge: Louisiana State University Press, 1969).

[20] David O. Selznick (producer), *Gone With the Wind*, Hollywood: Metro-Goldwyn Mayer, 1939; William Wyler (director), *Jezebel*, Hollywood: Warner Studios, 1938.

to redeem the southern belle's thoroughly rotten soul. Despite all her lying, cheating, and man stealing, *Jezebel*'s Julie Marsden occupied a moral high ground for filmic southern belles. Two years later, in *The Letter*, a 1940 noir film set on a Singapore rubber plantation (an exotic variation on the southern type) Leslie Crosbie (Davis) shoots her lover, Geoffrey Hammond (David Newell), then denies she was having an affair with him and claims he was actually raping her when she fired the shots.[21] The racist colonial authorities side naturally with the white woman over the dead man, whose reputation and racial identity has been compromised by his marriage to a mixed-race, Eurasian wife. When evidence surfaces to implicate her, Crosbie forces her attorney to pay a bribe to destroy the evidence, simultaneously compromising the attorney's principles and wrecking her own husband's fortune. She escapes punishment in the colonial court, only to be stabbed to death by the mysterious Eurasian, who "solves" everyone's problems by eliminating the destructive, deceptive southern belle.

The Letter thus depicts every leitmotif of southern belle-hood: Leslie Crosbie is calculating, emotionless and dishonest. Beyond merely being selfish, however, it is as if she possesses no civilized emotions at all, merely primal drives and deep sexual appetites, not unlike those of the "black beast rapist," type that became entrenched via *Birth of a Nation.*

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[21] William Wyler, *The Letter*, Hollywood: Warner Studios, 1940.

The belle, however, being female and white, is more dangerous than any "black beast," for such sexuality in the vessel of white womanhood is socially powerful, in addition to being primal. There can be little wonder that it inevitably leads to a bad end.

In *Jezebel*, Julie Marsden virtually infects Preston Dillard on-screen, as she tries to seduce him in the mosquito-filled garden: "Can you hear 'em," she croons, "the night noises - the mockingbird and the magnolia. See the moss hangin' from the moonlight . . . we're both in your blood." In this extraordinary scene of seduction, Marsden is the South, and mere contact alone constitutes exposure to toxic poison. When Marsden says, "[r]emember how the fever mist smells in the bottoms, rank and rotten, but you trust that too," the audience understands that Dillard is a dead man; everything and everyone a belle touches is destroyed.

This destruction is never merely sexual. In all of these films, the main thing that is destroyed is a brotherhood, between the North and the South in films set in the period of civil war and reunification of the states, between blacks and Jews in the Leo Frank case, and, later, between blacks and whites attempting to move past the hostilities and injuries wrought by white supremacy and segregation. In the 1942 drama, *In This Our Life*, Bette Davis, again, as Stanley "Stan" Timberlake Kingsmill, steals her sister's husband, drives him to suicide, returns for her sister's betrothed and tries to frame his black law clerk for a hit-and-run murder she

committed herself.[22] In what is otherwise a family romance, the subplot involving Stan's racist act seems out of place. But it underscores the belle's role, not only in victimizing blacks, but also in destroying good alliances between whites and blacks. In *Jezebel*, set at the eve of civil war, Fonda's character tries to make his southern brethren understand that war will bring shattering defeat to their city and that the north's ways of conduct, be they medical or commercial, are superior to southern ways. Before the wisdom of his message is absorbed, he is trapped and dying, and New Orleans literally and apocalyptically burns with fever, as canons fire impotently to "blow" the plague away.

In 1938, *Jezebel*'s apocalyptic ending, with its rumors of war, must have resonated with audiences watching hostilities ominously flaring in Europe. But the main struggle, endlessly enacted in these North/South plots, is an American story of modernism being imposed on the South. Modernism not only brought technological change, altering relations between blacks and whites, and an evolution in agricultural and factory economies; it also implied new relationships between men and women within and outside marriage, and new, sometimes threatening changes in women's public roles.[23] The southern belle, like the South itself, proved to be a uniquely flexible symbol for all of these anxieties, in part, because

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[22] John Huston, *In This Our Life*, Hollywood: Warner Studios, 1942.

[23] Elizabeth Fox-Genovese, "The Anxiety of History: The Southern Confrontation with Modernity," *Southern Cultures* (Special Issue 1993): 65 - 82.

she had become so sexually charged, sexuality being always dangerous, whether flaunted or repressed. Bette Davis' Julie Marsden charges forward, rebelling against debutante culture by insisting on dressing in red (a color worn only by prostitutes), but she also harkens back to the South's "old ways" by impelling a deadly duel in defense of her honor; whether breaking conventions or enforcing them, her actions prove equally deadly. So too with the parade of belles who crash cars, incite lynching, wither crops, drive men to suicide and cause their own murders. In an age of progress, they embody the fragmentation of social relations that modernism brings, and they also embody all that is toxic about looking back nostalgically.

Chapter 2: Leo Frank in the "Post-Lynching Era"

Between the waning years of the Lynching Era, when malevolent southern belles populated the nation's psyche and movie screens, and 1967, when Leo Frank was "rediscovered" by historian Leonard Dinnerstein, the intervening impact of the Holocaust and televised images of the violent resistance mounted against the civil rights movement would shrink some conventions for telling The Leo Frank Story. Foremost, discussion of class conflict in the context of the Frank case would come to be seen as too condemnatory of Frank and too sympathetic toward those responsible for lynching him. Also, after the Holocaust, no filmmaker would ever decide to strip Frank of his Jewishness and make him a generic victim of generalized hatred, as Mervyn LeRoy did in 1937. In addition to remaining a symbol for the violence of lynching during the Progressive Era, Frank's murder came to be seen as an historical portent for the subsequent murder of millions of Jews throughout Europe and as a reminder of the existence of a particularly American strain of anti-Semitism. Thus, the anti-Semitic aspects of Frank's trial quite naturally grew in prominence in remembrances of the case, and the class conflict theme, with its implicit criticism of wealthy businessmen who were also Jewish, faded.

The civil rights movement affected the telling of The Leo Frank

Story in other ways. The 1960's had begun as a time of cooperation between Jewish and black organizations as they pursued the shared goal of overturning segregation. The 1964 Mississippi murder of two Jewish civil rights activists, along with a black activist, seemed to illuminate the special relationship many Jews felt with blacks on the grounds of a shared experience of discrimination and shared political activism that stretched back to early anti-lynching efforts. But as the 1960's progressed, and black activists began to move out of the New Left and into Black Power and other separationist groups, this identification of Jews with blacks began to be seen, by some, as a co-opting of the black experience of discrimination, rather than a sign of cooperation between the two groups.

From 1964 onward, which I call the post-lynching era, it might seem that revisiting the Leo Frank case would not be a good way to seek common ground between Jews and blacks. Frank's racism, and the racism articulated on his behalf in the courtroom, his status as one of the only Jewish men lynched during a time when some 3,500 blacks died anonymous deaths by lynching, and the conundrum presented by the black Jim Conley (that to see Frank as innocent is to also see Conley as guilty of both killing Mary Phagan and of implicating Frank) would all seem to conspire against the notion of using the Leo Frank case to memorialize a special historical brotherhood between black men and Jewish men.

On the other hand, conspiring for the story's potential to serve as a site that would bring both black and Jewish men together is the image of Mary Phagan the racial trouble-maker, informed by the vision of Mayella Ewell, the sex-hungry, "white trash," incest-scarred accuser who screams in Atticus Finch's face, and causes Tom Robinson's murder by lying about rape in the iconic 1962 film, *To Kill a Mockingbird.* By simply existing, in so terrible a form, Mayella provided the perfect justification for refusing to see any plight of any poor whites in the South, including the murder of Phagan, as anything but deserved. Mayella's face, close-up, unhinged, and screaming, instantly became a potent symbol for all the evils of racial oppression visited upon blacks, perhaps even more of a symbol for the face of racism than images of actual Klansmen, whose faces, after all, are often concealed by their hoods.[1]

Beginning in the 1960's, the face of Mayella legitimated a specific myth that gained force during the civil rights era, that it was lower class, rural-dwelling white southerners, in particular, who took out their rage on innocent black men. The same movie, after all, that gave the world Mayella Ewell also gave it Atticus Finch, and in literally dozens of other movies that appeared throughout the 1960's and 1970's, it is exclusively

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[1] It is no coincidence that news photographers would often focus in on white women, not white men, when taking photos of protestors trying to block blacks from entering high schools or sitting at lunch counters: although memoirs of the civil rights years feature many stories of white women who supported blacks' rights, sometimes courageously, I cannot think of one news photo from that time period that rendered those types of white women similarly visible.

the "white trash" segment of white society that hates blacks and foments race trouble, while middle-class and upper-class white southern men, townspeople, and, most especially, lawyers, work alongside black people to purge society of such racist "white trash."[2]

This is a myth so beloved that no amount of correction to the historical record, as, for example, emerges from studies showing that Klan Klaverns often were solidly middle and upper class, seems to affect it.[3] The Atticus Finch figure, the lone white man of special talent and insight who redeems certain classes of white southerners, simply is a compelling and indispensable part of stories told about lynching, both fictional and non-fictional ones, in the post-lynching era.

Thus, in 1977, when Dan T. Carter's book about the Scottsboro trials was turned into a film, it was titled *Judge Horton and the Scottsboro Boys,* and in it the long, convoluted legal history of the Scottsboro case was simplified into a battle between the "good" Judge James Horton and the "evil" Victoria Price, who, notwithstanding her being a homeless prostitute

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[2] Many of these films are so-called "B-Movies," produced on small budgets, often outside the confines and conventions of Hollywood filmmaking. Many are difficult to obtain; I will therefore simply list their titles here. See for example, *The Respectful Prostitute* (1952), an inter-racial rape movie set in the American South and based on a play by Jean Paul Sartre; *Bayou* (1957), re-released as *Poor White Trash* in 1961; *The Defiant Ones* (1958); *I Spit on your Grave/J'irai Cracher Sur Vos Tombes* (1959); *The Young One/Joven, La* (1960); *My Baby is a Black/Laches Vivent D'Espoir, Les* (1961); *Sanctuary* (1961); *The Intruder/I Hate Your Guts* (1962); *Murder in Mississippi* (1965); *The Black Klansman* (1966); *Dutchman* (1966); *Shanty Tramp* (1967); *In the Heat of the Night* (1967); *Johnny Firecloud* (1975); *Mandingo* (1975).

[3] See, for example, Nancy MacLean's study of the Klan in Athens, Georgia. Nancy MacLean, *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan* (New York: Oxford University Press, 1994).

trying to escape from the police at the time she was detained with the "Boys," is nevertheless shown manipulating multiple judges and jurors into wantonly persecuting the black men. The centrality of Price's character in the miniseries enables the other white characters, including jurors and judges, to be seen as distanced from the taint of the racial persecution of the Scottsboro defendants.[4] In 1988, a similar lone white male hero was created for the Leo Frank Story as well. In the miniseries, *The Murder of Mary Phagan*, Jack Lemmon stars as Georgia Governor John Slaton, and the film highlights Slaton's courage in commuting Frank's sentence from death to life in prison, rather than emphasizing other aspects of the case.[5]

In 1996, director John Singleton also created such a hero for the movie *Rosewood*, in which Jon Voight plays the role of the eccentric yet noble white man who lives among blacks in Rosewood, Florida, a town that was burned by a racist mob in 1923.[6] In each of these lynching stories, the white male hero offers audiences someone white to identify with, and the white female victim or alleged victim gives them someone to hate, who, nonetheless, lies far enough outside the pale of ordinary white society that her existence doesn't threaten to condemn whites entirely.

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[4] Fiedler Cook (director), *Judge Horton and the Scottsboro Boys*, Monticello, Georgia: National Broadcasting Company, 1976. Television miniseries.

[5] Billy Hale (director), *The Murder of Mary Phagan*, National Broadcast Company, 1987. Television miniseries.

[6] John Singleton (director), *Rosewood*, Lake County, Florida: Warner Brothers, 1996.

In an essay he wrote about the filming of *Rosewood*, John Singleton speaks openly about the emotional uses of such characters. "Sometimes I felt that Jon Voight was uncomfortable playing an early twentieth-century white man with a superior attitude," Singleton said, "and [I] also felt that the unease was testimony to how strong of character he is."[7] Of the woman chosen to play the slattern white woman, what Singleton admired was quite different: "She simply embodied the character of Fannie -- she just had that trouble-maker look -- and it's always great as a director to find a perfect instrument of your vision of a character."[8] His words echo Mervyn LeRoy's estimation of "Mary Clay" sixty years earlier.

Even when the historical record doesn't include an evil white woman who lies about rape and a decent and modest white man who stands against every injustice, in the post-lynching era it has been easy and compelling to invent such characters and thus remake history in the liberal, heroic mold. But while the white, liberal, heroic story of lynching is as stylized as the *Birth of a Nation*, it is not viewed, as *Nation* is, as racial allegory or as allegory at all, but rather as a higher truth than any historical record it is supplanting. By positing these sometimes wildly inventive stories as essentially true, their proponents only seem to open the door to even more invention. Thus the murder and sexual assault

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[7] John Singleton, "Like Judgment Day," published in Michael D"Orso, *Like Judgment Day: The Ruin and Redemption of a Town Called Rosewood* (New York: Boulevard Books, 1996), xxviii.

[8] Ibid., xxiv.

victim, Mary Phagan, who might have been sexually active at the time of her death, according to the unconfirmed insinuations of one coroner, is transformed into a fictional entity of suspicion, first as a prostitute, then as a ghost, and finally, as a literal vessel of false testimony, testimony delivered by Phagan's ghost in Frank's courtroom. Her rape is erased, and she is made to "haunt" Leo Frank, and it still is possible for Alfred Uhry to say, "I didn't make up anything in Leo Frank; it was just a question of what to use," and it is almost impossible to dispute his words.[9]

In 1977, civil rights historian Richard Kluger, who had previously written books about desegregation and Brown v. Board of Education, created just such a white, male hero to narrate *Members of the Tribe*, his Leo Frank novel. "Seth Adler" is a young Jewish man from New York who travels to Savannah in 1878 seeking work to support his mother after his father dies trying to free the slaves. Around his neck, Seth wears his father's Congressional Medal of Honor: "I have worn the medallion around my neck on a slender chain for all thirty-five years that I have lived in the Southland," he says on the eve of "Noah Berg's" (Leo Frank's) trial (p. 15). The trial itself, in which Seth serves as defense counsel (but without the racist taint of Frank's real lawyer, Ruben Arnold) is imagined as a reunification of all the Jews who fought on opposing sides of the Civil War, in the face of a common enemy. "Jean Dugan" (Mary Phagan) here serves

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[9] Rohan Preston, "History on 'Parade'; Alfred Uhry's Story of Prejudice and Violence is Gleaned Partly From Family Lore," *Minneapolis Star Tribune,* 30 July, 2000, sec. F, p. 4.

the purpose of reminding all Jews that "there gnaws within the soul of every non-Jew in every land the ingredients of a pogromist" (16). Thus the girl comes to symbolize not only the American horror visited on Frank, but a sort of trans-historical, transnational anti-Semitism.

Seth Adler, in contrast, is not only an exemplary Jewish man, but also an exemplary American citizen; like an enlightened, Semitic incarnation of Forrest Gump, he plays a central role in so many important historical events that the book seems to unfold as wish fulfillment. Significantly, the first wish that is fulfilled for Seth is his wish to bond with a black man, and immediately upon Seth's arrival in Savannah, "Plato Layne" appears at his side and carries his bag from the pier, not for money but for friendship, and the two grow to be inseparable. Seth soon becomes, in his only slightly ironic sense of himself, "two steps from qualifying as a young Lincoln," addressing his black workers as "mister" and "ma'am" and allowing them to use the white's toilets, though only "when no whites were around." He teaches them hygiene and medical skills that do not yet exist in the backward South, and the simple southern blacks, in turn, beg Seth to speak Hebrew to them and delight when he fills his pockets with pennies and cartwheels until the pennies fall out (72 - 73). Much of the book is occupied with this continual bonding of black man and Jew until the Mary Phagan character, Jean Dugan, gets killed in a sexual misadventure, an event that destroys Seth and Plato's brotherly

bond.

The death of Jean Dugan, which is precipitated in the novel by her extreme promiscuity, is imagined by Richard Kluger not only as an event that temporally pits Jew against black, but, also, as the destruction of an idealized, Edenic realm wherein Jewish and black men live in perfect harmony, until, that is, the slattern gentile girl intrudes. Kluger must have known that this was a rather wistful view of black/Jewish relations in 1977, but in his novel he clings to it, harkening back to simpler, prelapsarian political alliances. The nostalgic desire to cling to this particular wish fulfillment may go a long way toward explaining why he invents as characters not one, but two sexually deviant gentile women characters, for whom he then devises particularly grotesque punishments meant to be perceived as nothing more than their just dues. Even before Jean Dugan drives a wedge between the Jewish and black communities, "Amanda Baxter," a bisexual, sex-obsessed, upper-class gentile nearly destroys Seth's other important, yet tenuous, group membership: his relationship with other Jews and his identification with Judaism itself.

This may seem a high order to impel, but Amanda Baxter is, of course, no ordinary white woman. She is "[e]minently nubile, with a body ripely rounded but a hellion's tongue . . . an already convicted Jezebel in the eyes of every wife," Seth tells us (128). Despite her laundry list of idiosyncratic behaviors, which includes bicycle riding, bisexual sex, radical

egalitarianism, herbalism bordering on witchcraft, and an unladylike affection for the accumulation of power and wealth, she is also a passionate believer in Jesus Christ, and when she and Seth fall in love, she demands that he accept Christ as his savior before she allows him to bed her. Seth refuses and marries a Jewish woman who barely merits any description beyond her name, Ruth Lazarus. Amanda persists, nonetheless, as a sexual temptation until she finally seduces him, and then, for good measure, his faceless wife Ruth as well, thus keeping up a decade-and-a-half long schedule of unapologetic eroticism with the two while at the same time inventing Coca-Cola ("Jubilee" here) and keeping company with other "strapping seminal vessel[s] (sic) . . . generally of foreign extraction and registry" (136).

Unholy as it may seem, according to the narrator, Amanda's eroticism is tied to her Christianity, and, unorthodox as her other activities may seem, to her sublimated anti-Semitism and racism as well. When Seth discovers his wife in bed with Amanda and ends both affairs, Amanda reacts by banning Jews from her progressive school, where Ruth had previously enjoyed teaching. She hangs "a small but quite black and unmistakable crucifix added onto the painted sign . . . thereby designating it an academy exclusively for Christian youth," and otherwise transforms from free spirit to reactionary on other race matters as well. Seth, for his part "never hated her afterwards, just trusted all the world less, save for

Ruth" (181).

Thus do Seth and Ruth learn the novel's vital lesson, that even this most radically progressive, humanistic, southern white gentile woman cannot help but regress to the instinctual, beastly prejudices of her kind. They resolve to cleave to each other, and to other Jews, and above all to resist ecumenical seductions like Amanda, whose affairs with the two of them was also, apparently, a fifteen-year effort to seduce them away from their faith. "What had threatened to become a searing disaster for us," Seth informs the reader, "then, turned into a binding moment of revelation and understanding. We have replayed it at odd and lengthy intervals in the years that followed, marveling at our mutual blindness" (180 -1).

Both the language and plot Kluger employs here are familiar: blindness falls away, the real intention of the sexually insatiable beast is revealed, and salvation lies in clinging to your own kind. This is D. W. Griffith's *Birth of a Nation,* with Amanda in the role of the uncontrollable "beast rapist," Gus. Like Gus, Amanda represents not only a sexual threat, but also a threat to notions of ethnic purity, as well as a danger to the ideal body politic. Just as Gus' sin lies in rising above his racial place in the upside-down world of Reconstruction, Amanda is likewise both socially and sexually transgressive. While it appears, at first, that she is working toward the same righteous society as Seth is, the instinctual cruelty of her

kind rears up to reveal all her efforts toward social egalitarianism as mendacious. Her "progressive" school, her religious beliefs: all of these crumble, and the beast is revealed. Once this lie is visible, Seth can only curse his blindness and separate himself in order to preserve what he represents: all that is good in the fractured southern world. Yet, if this is not lesson enough for him, what occurs next is the lynching of Noah Berg, a plot also under-girded by yet another "white flower of Jesus-craving girlhood."

The first half of *Members of the Tribe* is thus an entirely symbolic enactment of the quasi-historical narration of the Leo Frank case that occupies the novel's second half. Seth Adler both identifies completely with Noah Berg's persecution and survives his own "persecution" at the hands of Amanda, who is seeking to both un-man him and strip him of his Judaism. He is both victim and victor, and both of these, in the modern social justice novel, simply signify white, liberal, male virilities of different sorts. By inventing Seth Adler, Richard Kluger is able to turn the story of the lynching of a frail, effeminate Jewish clerk into the story of the survival of a virile Jewish liberal hero, and this, too, is like *Birth of a Nation*, with its spectacle of white southern men being prostrated by war and Reconstruction then rising up to reclaim all of their powers and to use them to restore their collective vision of justice to the land. By the end of *Members of the Tribe*, the Mickve Israel temple in Savannah has gone back

to performing its services in Hebrew; Seth's "coreligionist," Louis Brandeis has ascended to the Supreme Court, and just in case Amanda is not degraded enough yet, Seth beats her, one last time, by blocking her unpatriotic efforts to acquire officially restricted sugar supplies during the war effort. Finally, his sons and relatives serve admirably in several more wars, while her people sink into alcoholism and decay in the South.

After all of this gun running, lesbianism, and soda-empire building, the demise of Jean Dugan and the trial and lynching of Noah Berg almost seem mere novelistic afterthoughts. Amanda Baxter's vivid malfeasances would seem to leave little room for anyone else to misbehave. Half of the way through the novel, however, Dugan turns up dead, and from that moment on, the clearly fictional account of Seth Adler yields to "history," and conforms to the contours of the Leo Frank case:

> And then, in that hot summer when not much else was going on, all of Georgia seemed to descend on Savannah and started salivating at the thought of tying a rope around a Jew neck for what had been done to a white flower of Jesus-craving girlhood (264).

This is how Adler describes his first encounter with the Dugan case. Not long after, he (of course, it is him) uncovers evidence that "the dead girl might not have been quite so virginal as reflexively described in the press." Another girl at the factory, Adler learns, "speculated that Jean may have been molested by her stepfather - perhaps it had been no more than a pawed breast, perhaps something worse" (264). Thus, from the

moment she appears, Jean Dugan is a walking compendium of southern social ills, but most particularly incest. Noah Berg, in contrast, hews closely to the historical descriptions of Frank. He "would not expectorate on a dung heap," is Adler's unfortunate description of the clerk's fastidious ways (373).

Unfortunately, in the end, Jean Dugan's innate perversity "does her in," in a crime of passion committed by one of the several older men she is "dating." The man who kills her is one of "Jean's People," a white laborer named Joseph Dettwiler. Dettwiler becomes enamored of the much-younger girl when he discovers that she actually takes pleasure in the incestuous relationship forced upon her by her stepfather. Soon, Dettwiler is sleeping with her as well, and when the insatiable Jean moves on to yet more men, he strangles her in a jealous rage (454 - 456). Thus is the entire community of poor, white laborers implicated in the events that lead up to Noah Berg's lynching. The incest and child-rape allegedly endemic to the community of poor whites, and Jean Dugan's perverse enjoyment of it, are painted as the real causes of Noah Berg's hanging.

Members of the Tribe ends, as it began, with rumination over whether Jews are or are not part of America. Seth Adler's son, David, makes a list of the many things Jews have contributed to America, as "scholars, scientists, physicians, composers, painters, writers, entertainers, merchants, and manufacturers" (466). However, he notes, "Few that I

know of were ardent supporters in the national crime in Vietnam; none that I know of was involved in Watergate. So much for thin-lipped Calvin Coolidge and the Jewish diseasing of the Nordic races" (466). The message is not that this "diseasing" does not exist; southern racists were simply accusing the wrong parties. In *Members of the Tribe*, the role of "diseasing" is explicitly left to both Amanda Baxter and Jean Dugan. The unveiling of the already-dead Dugan is the second such unveiling of a treacherous southern belle in the novel.

After Kluger published his novel in 1977, scholarly studies and fictional representations of Frank underwent a small revival. With the advent of the hate crimes movement in the 1990's, the pace of this production accelerated dramatically. This movement's emphatic message, that lynching is not a thing of the past, brought new opportunities and new ways to publicly memorialize Leo Frank: he is now recalled, in speeches and at other public events, alongside Matthew Shepard, Emmett Till and James Byrd Jr. as one of the small pantheon of people "murdered by hate." Since 1996, the year that President Clinton held a nationwide teleconference on hate crime, three major new works on Leo Frank have appeared: playwright David Mamet's *The Old Religion* (1997), a book-length monologue from the perspective of Frank in his jail cell; *Parade* (1998), Alfred Uhry's musical based on the love letters Frank exchanged with his wife, Lucille, while he was incarcerated; and in 2003, Steve Oney's

long-awaited, exhaustive new history of the Frank trial, *And the Dead Shall Rise: the Murder of Mary Phagan and the Lynching of Leo Frank.*[10]

Perhaps the more significant development in Frank remembrance occurred as the hate crimes movement shifted its attention from contemporary crimes to "teaching tolerance" through remembrance of select historical victims of hate. Pedagogical tolerance curricula featuring Frank's trial and lynching proliferated in classrooms and on-line, creating new audiences schooled in The Leo Frank Story.

In his 2000 study of black/Jewish relations in the Leo Frank case, Jeffrey Melnick compared this recent proliferation of accounts of Frank's story to the intensive output of pro-and anti-Frank sentiments in 1914 and 1915. He observed that at the end of the twentieth century, stories being told about Frank seemed to have grown as hagiographical as the 1914 folksongs written about Mary Phagan's "virgin sacrifice." "In 1999," Melnick writes, "to approach Leo Frank is to visit a shrine."[11] The "teaching tolerance" movement overtly frames the Frank story in these terms, as a sort of pedagogical passion play. Students are encouraged to contemplate Frank's suffering, then to take action to "combat hate" wherever it exists, including in their communities, their schools, their

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[10] David Mamet, *The Old Religion* (New York: Faber and Faber, 1997); Alfred Uhry (playwright). Jason Robert Brown (music and lyrics). *Parade.* New York, BMG Entertainment, 1999. Cast Recording.

[11] Jeffrey Melnick, *Black-Jewish Relations on Trial: Leo Frank and Jim Conley in the New South* (Jackson: University Press of Mississippi, 2000) 3 - 4.

homes and finally, in their own deepest, most unconscious thoughts.[12]

But what is the status of Mary Phagan in these re-enactments of Leo Frank's lynching? Ordinarily, in historical studies of Leo Frank, Phagan is described as the "catalyst" for Frank's story, which is what Leonard Dinnerstein called her in 1966.[13] Clearly, there is something dehumanizing about describing the girl in the manner, but this reduction of a human life to an insensible thing is also the way she is described in hate crime curricula, if she is described at all. Her name sometimes appears only to explain the naming of "The Knights of Mary Phagan." Otherwise, in a movement dedicated to "remembering," Mary Phagan is distinctly forgotten.

Whether Phagan is remembered as a victim or as a post-mortem inspiration for the formation of the second-wave Klan is not even a question of importance in David Mamet's *The Old Religion*, for Mamet is preoccupied, solely and inexorably, with the inner life Leo Frank. While Mamet's Frank does not otherwise much resemble the shy and cultured clerk ordinarily represented in hate crime curricula, his single-minded contemplation of Frank's subjectivity, which is so extreme that it diminishes all those around Frank to racial and sexual ciphers, is strangely

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[12]Tolerance curricula use descriptions of lynching to illustrate moral lessons about prejudice. Details of historical lynchings are recounted, then students are encouraged to "do something" about hate: organize a club, raise funds, monitor incidents or contact elected officials. Most of all, they are urged to be vigilant. For curriculum content, see http://www.tolerance.org/teach/index.jsp/.

[13] Dinnerstein, *Leo Frank Case*, 1.

reminiscent of the intensive identification with select crime victims demanded by the curricula itself.

In his 1987 novel, David Mamet offers up a hybrid Leo Frank: part Leo Frank, part, undoubtedly, David Mamet. Could Frank really have been so fastidious that he would try to calculate the effects of southern humidity on the lifespan of a crate of typing ribbons, yet, simultaneously, be able to look at his maid and think: "Lord. Look at her fat black ass" (p. 35)? Mamet's Leo is not so much human as a walking conundrum of rumination about Judaism. By embodying this intense subjectivity in the doomed figure of the soon-to-be murdered Leo Frank, Mamet seems to be suggesting that nothing has changed or would ever change for American Jews, an echo of the words written on Frank's gravestone -- "semper idem" -- always the same.

By freezing history and consciousness at the moment of Frank's impending victimization, Mamet stultifies it, and by making one man an eternal victim, he also necessarily makes all others eternal offenders, unable and unwilling to stop the endless perpetration of a crime always already in progress. Mary Phagan, in particular, is frozen this way. She becomes "an odor of uncleanliness" blowing in the manager's nose, irritating and disgusting him, but also hinting of the dark future to come (p. 79).

Mamet is known for petulantly railing against the reductionism of

identity politics while reducing some of his characters, female ones in particular, to cawing monsters of fairy-tale dimensions. In this, *The Old Religion* is familiar ground for the author of *Oleanna*, another cautionary tale of a wide-ranging intellectual victimized by a sexually baffled cipher of a girl. But *Oleanna*, based as it may be on the author's own impressions of his life, is nevertheless a work of fiction; with *The Old Religion*, Mamet claims the historical territory of the Leo Frank Story and imprints it with his own jaundiced view of Mary Phagan. Phagan, here, is part ghost, part menace, and entirely impure. While it is hard to imagine dehumanizing the historic Mary Phagan any more than was already done by casting her as the tight-skirted bombshell "asking for trouble" in *They Won't Forget,* or as the incest-scarred nymphomaniac of *Members of the Tribe*, Mamet actually heaps more contempt on the girl, turning her into a mere gynecological odor -- one that signals the Jewish man's inevitable demise.

Only a few brief interludes interrupt Frank's extreme cultural and psychological isolation in the novella, and these moments correspond to the twin concerns, besides Frank himself, that appear in other Leo Frank stories: relations within the Jewish community and the black-Jewish coalition. One invented moment of black-Jewish union occurs when Frank, watching a black servant serve drinks, tries to imagine what it would be like to be black himself. Black men labor, Frank muses, and nobody sees or appreciates that labor. The lonely accountant sees it, though, and

through quantifying its worth, he fleetingly sees the other man (p. 31). Likewise, in a scene with his wife, Frank recognizes that his role as the "head" of their small family dictates that he ought to allow her to buy a piece of furniture she desires. Through quantifying the degree of her desire, he briefly sees her, as well (p. 47). A couch, a soul, a serving tray laden with drinks; these aren't deep insights, or even very humane, let alone progressive ones, but they appear in stark contrast to the inability of Mamet's Leo Frank to even see Mary Phagan when she is standing right before him.

The Old Religion was published in 1997, a year in which President Bill Clinton's campaign to pass federal hate crimes legislation would have made virtually any other remembrance of the Leo Frank lynching a popular item. But Mamet's separationist (nobody called it racist) sentiment clashed with the national tone of racial "reconciliation," which was becoming a social movement in its own right, as well as a particular political activity enacted through speeches and rituals memorializing past racial events. It might be argued that Mamet, with his raw contempt for southern whites, and his valorization of minority over "majority" culture, actually tapped into a current that unfortunately coexisted with the candlelight vigils and speeches promoting "reconciliation" and denouncing "hatred." But nobody made such observations.

A few years later, Alfred Uhry would offer a Leo Frank Story more

suited to the zeitgeist of reconciliation. As in Uhry's other "gentle" southern remembrances, however, the white, southern, female characters in this story would prove uniquely resistant to the panorama of social progress that is happily embraced by others. While Uhry seems, in many ways, to be the aesthetic and ideological opposite of David Mamet, the two men's visions, as far as Mary Phagan is concerned, are eerily alike.

With the musical, *Parade*, which opened on Broadway in 1998, playwright Alfred Uhry tried to bring the story of Leo Frank to new audiences, and he offered those audiences a new Leo Frank, Frank the romantic awakened through crisis to heightened possibilities of loving his wife and even of embracing the South. In interviews conducted before *Parade* opened on a New York stage, Uhry stressed that he was a southerner himself, raised in Atlanta in the same small community of wealthy Jews that Frank had married into ninety years earlier. Uhry's great-uncle owned the pencil factory where Leo Frank and Mary Phagan worked.

If David Mamet's Leo Frank echoes a belatedly Sixties, intellectual, separationist zeal, Uhry would draw on his own southern roots to counter Mamet's somewhat myopic vision with a Leo Frank for the Nineties, the era of capital-R Reconciliation:

> I try very hard for a fair portrayal of white Southern Christians. There's an inscription on Mary Phagan's gravestone [in a Marietta cemetery], and we use it in a song: "Her heroism is an heirloom . . . among the old red hills of

> Georgia." ... I get choked up reading it because I'm not only a Jew, I'm also a Southerner.[14]

As *Parade* moved into development, Uhry spoke frequently to reporters about his intense feelings for his native South: "I'm writing about noble people, tragic figures. What breaks my heart is that their genuine pain and love for Georgia was manipulated by a few evil men."[15] In writing *Parade*, he said, it was not his intent to demonize white, Christian southerners, not even all of those who participated in Frank's lynching. "It's important to me that the angry whites don't come across as idiot rednecks," he said. In the same interview, he spoke nostalgically of his own Confederate ancestor, "a blockade runner, just like Rhett Butler." He spoke, too, of the many deprivations ordinary southerners experienced in the years following the Civil War. "Their land was raped and looted. Families were forced off farms and had to send their kids to work in factories." [16] The musical *Parade,* he said, would give a voice to all of these historical tragedies and tragic figures.

But before the musical opened, Uhry's conciliatory message was subsumed by another, as he and others speculated over whether the musical's themes would ignite anti-Semitic backlash among Atlanta's

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[14]Dan Hulbert, "Striking the Right Note; Playwright Alfred Uhry Goes Back 85 Years into Atlanta History With a Broadway Musical About Mary Phagan's Death and Leo Frank's Lynching," *Atlanta Journal and Constitution*, 1 November 1998, sec. Arts, p. 1.

[15] Ibid.

[16] Dan Hulbert, "Uhry's Atlanta Tragedy; Playwright's new Musical Recalls Notorious 1915 Lynching of Leo Frank," *Atlanta Journal and Constitution*, 22 October 1997.

Christian whites. "There's some apprehension in the Jewish community as to whether it might rekindle anti-Semitism," said Jewish community leader and former Atlanta mayor Sam Massell.[17] A feature story in the *Jerusalem Post* stated: "[a] test of Atlanta's tolerance will come next spring when a native son revives the Frank case."[18]

Uhry's own sense of the complexity of his position as a southerner and an outsider to the South was picked up and echoed by theater critics: "Alfred Uhry has come to this gleaming Canadian city of ethnic harmony to work on a musical drama about murder, bigotry, sex, lies and politics in a bygone Atlanta," drama critic Dan Hulbert wrote from Toronto.[19] "Loving the South," despite her obvious historical faults, became one of the two main themes of these interviews, the other being, ironically, that despite this love and the passage of nearly a century, Atlanta's Jewish community needed to remain vigilant lest Uhry's play ignite sublimated Southern anti-Semitism.

Uhry himself announced that he was relieved the musical would be opening in New York, not Atlanta, because in Atlanta "[t]he skin is still raw on these wounds -- not everyone agrees that Leo Frank was innocent of the

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[17] Dan Hulbert, "Mixed Emotions Greet Uhry's 'Parade,'" *Atlanta Journal and Constitution*, 1 November 1988, sec. Arts, p. 4.

[18] Marilyn Henry, "Despite Mixed History, Atlanta's Jewry Thrives," *The Jerusalem Post*, 18 November 1999, p. 5.

[19] Hulbert, "Uhry's Atlanta Tragedy."

murder of Mary Phagan."[20] What, exactly, might happen if *Parade* were shown in Atlanta was left unspoken, but Uhry and others pointed to the recent murder of Matthew Shepard in speaking about the dangers of being anything less than vigilant. "From the guy dragged behind a truck in Texas to the gay kid killed in Wyoming, there's a remaining legacy of bigotry that still hangs over this country," Uhry said.[21] "Based on current prejudices and our current judicial system, *Parade* shows that things haven't changed," said David Jecmen, the musical's director.[22] When asked her opinion of the musical, Atlanta author Melissa Fay Greene observed: "There's such a rise in hate crimes right now."[23] Jeff Edgerton, another native Atlantan who played a Confederate soldier, described *Parade* as a mirror held up to the audience, saying: "This could be you. Don't let this happen again. Don't be this prejudiced. Don't be this bigoted."[24]

"This" thing that must not happen again refers, of course, only to the murder of Leo Frank, not to the rape and killing of Mary Phagan. For,

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[20] When *Parade* closed after two months and was re-opened in Atlanta in a jump-start effort to return to a New York stage, he took a different tact, saying he was no longer concerned if the descendents of the "few evil men" in Atlanta who incited Frank's lynching "get riled up" over the musical. Asked about Uhry's comments, Tom Watson Brown, an Atlanta lawyer and descendent of one of the play's "evil men," replied that he simply would not be seeing the show. "Why, to enjoy the music? I think not," Brown stated. Dan Hulbert, "Mixed Emotions."

[21] Preston, "History on 'Parade.'"

[22] Julie E. Washington, ""'Parade' Steps Off," *Cleveland Plain Dealer*, 16 August 2002.

[23] Hulbert, "Mixed Emotions."

[24] Kathy Janich, "Homecoming 'Parade' Energizes Edgerton," *Atlanta Journal and Constitution*, 13 June 2000.

despite Uhry's claim that "everybody is a victim in this story," the killing of Mary, the character of Mary herself, and the entire class of poor white female factory laborers to which she belongs, are treated much as they are in other Frank tales: with suspicion and even contempt. True to his word that he believes "everybody is a victim," Uhry creates sympathetic images of Confederate soldiers and poor white southerners, and he turns Jim Conley into an heroic spokesperson for racial parity. But Mary Phagan and the other white factory girls are not relieved of their roles as virulent symbols of prejudice and mob violence.

Instead, in a musical designed to emphasize the "love story" between Leo and Lucille Frank, Phagan appears as an eerie wraith that repeatedly forces the two apart. In one scene, the dead girl confronts Frank in his office, interrupting him while he is singing his first, hesitant duet with Lucille. At the end of the musical, she interrupts them in their last moments on-stage together, as Lucille sings a paean to her eternal love for Frank: "Mr. Frank?" Phagan says. "What is it?" Leo Frank replies. "And you're stroking my hair/And you're finally free" sings the loving Lucille. "Happy Memorial Day," says Phagan, and the audience knows that Lucille, actually, is alone.

It is difficult to imagine a less sympathetic Mary Phagan. It is not difficult, however, to believe that *Parade*'s working title was "The Devil and Little Mary." While Uhry mostly resists making the girl into a sexual

predator, as others do, he nonetheless represents her in a way that strips her of her humanity, and she becomes not just a voice from the grave, but a vindictive one. Quite simply, in a story Uhry claims to have written with the explicit purpose of humanizing all those involved in the tragedy of Leo Frank, Mary Phagan is not human. Ironically, in the process of imbuing The Leo Frank Story with modern conceptions of individuality and romantic love, Uhry seems to have discovered entirely new ways to banish Mary Phagan to a less-human realm.

Uhry simultaneously "rehabilitates" Jim Conley, and these two departures from the historical record go hand in hand. "I didn't make up anything in Leo Frank; it was just a question of what to use," Uhry asserted, but onstage, white factory girls, including Mary Phagan, deliver the testimony about Leo Frank's alleged sexual assignations with other women that Jim Conley actually delivered at the 1913 trial.[25] Uhry's script also deflects questions of Conley's guilt for the crime of killing Mary Phagan. "We don't say that Conley did it," Uhry told one critic, while acknowledging, "certainly there's strong evidence that he did."[26] In 1937, director Mervyn LeRoy simply omitted Jim Conley from the story; in 1998, Uhry not only unburdens him of the onerous task of accusing Frank of sexual deviance, but the playwright also makes him a sort of nascent

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[25] Preston, "History on Parade." For Jim Conley's testimony, see Oney, *Dead Shall Rise*, 238 - 257, especially 244 - 248.

[26] Hulbert, "Striking the Right Note."

spokesperson for civil rights, and more astonishingly, a defender of black womanhood.

The real Jim Conley brutalized and shot at his common-law wife and also beat at least one other black woman seriously enough for the crime to come to the attention of authorities.[27] Yet Uhry and songwriter Jason Robert Brown present Conley as a man who would readily come to black women's defense. In the song, "A Rumblin' and A Rollin'," Conley sings:

> I can tell you this, as a matter of fact,
> That the local hotels wouldn't be so packed
> If a little black girl had gotten attacked

Thus is Mary Phagan pitted against all the "little black girls" who were victims of similar crimes, through pieties invented for and placed in the mouth of a man who victimized women regardless of their race.

"I understand the rage," is what Uhry said, on several occasions, when he was asked to explain why he left out all the evidence establishing Conley's guilt. "Jim Conley was treated like a dog all his life. Perhaps here was this girl with a dollar in her pay envelope, walking through an empty factory, so he took it and he killed her. I don't condone the murder, but I understand the rage."[28] In another interview, Uhry said: "He hated white people, and who wouldn't? It's no excuse for murder, but the hate is

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[27] Oney, *Dead Shall Rise*, pp. 120, 612.
[28] Hulbert, "Uhry's Atlanta Tragedy."

understandable."[29] Whether we are to also understand the hate that inspired the violent rape of the dying girl, or the hate that inspired Conley's abuse of black women, is left unspoken.

In *Parade*, Conley appears in three scenes: in "That's What He Said," he offers a highly edited version of his courtroom testimony; in "A Rumblin' And A Rollin'," he sings with respectable members of the black community, and in "Blues: Feel the Rain Fall," he leads a chain gang in song. Each of these scenes is designed to emphasize his solidarity with other black characters and to imbue him with characteristics of noble suffering. When, quite improbably, the governor of Georgia appears before the chain-gang, seeking from Conley the truth about who killed Mary Phagan, the black convict replies back, with wry, Robesonesque intimacy: "You ever been on a chain gang, governor?" The other black men, laboring in chains under a hot Georgia sun, echo Conley. It is a moving scene, which references clearly the raw racial injustices of the era.

Uhry leaves out a critical fact regarding Conley's sense of racial brotherhood, however. Before Conley accused Leo Frank, he hid two notes under the girl's body, both of which implicated another black man. One note described Phagan's assailant as a "night witch"; the other described a "long tall . . . long sleam (sic) tall negro." Both notes pointed away from Conley and toward Newt Lee, the tall, slender night watchman who

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[29] Hulbert, "Striking the Right Note."

discovered Phagan's body and was originally accused of the crime. These "Night Witch" notes, which Conley eventually admitted writing, became not only the trial's most important evidence, but also the strongest historical proof that Leo Frank was innocent and Jim Conley guilty of being Mary Phagan's real killer.[30]

Uhry avoids the subject of Conley's accusation of another black man simply by eliminating any mention of the notes, an understandably central feature of other retellings of the story. He then casts Conley as Newt Lee's ally in the song "A Rumblin' and a Rollin,'" in which Lee and Conley, along with two domestic servants, seemingly Leo Frank's cook and her husband, sing a number portending Frank's lynching and bemoaning the relative lack of interest in the lynching of black men. Yet, Frank's real cook, Minola McKnight, fiercely defended her employer's innocence, and Jim Conley was more than willing to let Newt Lee hang.

By conflating black characters' stories and firmly subsuming other black characters to Jim Conley's racial "leadership" in opposing white supremacy, Uhry rescues Conley from the singular taint of his own guilty actions. By simultaneously presenting Conley's viciousness as just a logical response to racist conditions, he equates the other black characters with Conley at his worst. This rescue and rehabilitation of Conley comes at a high price for the rest of the black community. Minola McKnight,

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[30] For the discovery of the notes and Conley's confession, see Oney, pp. 19 - 21, 118 - 127.

Newt Lee, and others, who avoided the dissolute Jim Conley, might very well object to being represented this way.

Uhry's depiction of Conley extracts an equally high price from the white factory girls, including Phagan, who "perform" Conley's courtroom testimony, in lieu of Conley himself, in two concurrent songs: "Frankie's Testimony," and the musical's main number, "The Factory Girls/Come Up To My Office." Critics universally praised "Come Up To My Office"; many described it as the one musical number in which the story comes alive. Before it begins, the song "Frankie's Testimony" ends with the appearance of Mary Phagan, who sings a vague indictment of Leo Frank:

> He calls my name,
> I turn my head,
> He got no words to say.
> His eyes get big,
> my face gets red,
> And I want to run away . . .

Phagan's words are taken up and echoed by three invented factory girls called to testify against Frank: "Iola Stover," "Monteen," and "Essie." The courtroom dims dramatically as the girls accuse Leo Frank of leering at them as they labor under his watchful eye. Unexpectedly, Frank himself is swept up in their remonstrative striptease, coming to life and spinning around the girls like some demon Nutcracker, ogling and singing:

> Why don'tcha come up to my office?
> I got a bottle of wine and the cork ain't popped!

This "bad" Frank busses the girls and proffers booze, chicken, biscuits and

lovemaking before collapsing back into uptight starchiness in the brightening courtroom. Lest any theater fan doubt that the girls are doing anything but lying through their teeth, an odd liner note is appended to Frank's lyrics in the cast recording, telling the viewer that Frank is merely "appearing in [the girls'] collective 'memory.'"

In an otherwise dour review, Ben Brantley praises the factory girls scene for its intensity and drama, observing of the girls: "you have no doubt that they have been coached to lie."[31] Another reviewer admiringly wrote, "Uhry's book has an uncanny ability to weave in and out of characters' heads, making fantasy co-exist with reality."[32] "The burst of theatrical fantasy comes like a flash of lightning," wrote Vince Canby, unconsciously or consciously referencing *Birth of a Nation.*[33]

But the scene of Frank plying young women with liquor and food, which Uhry attributes to the girls' collective false memories, are from Conley's testimony, not the testimony of any white factory girl. In reality, one white woman, Daisy Hopkins, testified that she had not gone to Frank's office for drinks, as Conley said she had. She was not a worker in the factory, and she said Conley was lying about her and Frank.[34]

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[31] Ben Brantley, "Martyr's Requiem Invokes Justice," *The New York Times*, 18 December 1988, sec. E, p. 1.
[32] Dan Hulbert, "A Poignant, Powerful 'Parade'; Uhry's Take on Atlanta Lynching is a Musical With Nerve," *Atlanta Journal and Constitution*, 18 December 1998.
[33] Vince Canby, Pedigree Versus Play: The Mystery of 'Parade'," *The New York Times*, 27 December 1998.
[34] Oney, p. 265.

Another white woman, Monteen Stover, offered testimony about a time clock, but not about Frank's sexual behavior. Several girls testified briefly that Frank's character was either "good" or "bad" toward his employees, but the story of Frank entertaining in his office was Conley's alone.[35] Mary Phagan, it should go without saying, was dead long before the trial; she could not have "testified" against Leo Frank.

This delivering of Phagan's "testimony," however, is the scene for which Alfred Uhry is praised and the otherwise forgettable "Parade" is remembered. For critics reviewing the show, whether or not the girls really accused Frank of inviting them into his office seems entirely besides the point; the musical number is compelling, and the idea that white, southern, female factory laborers would lie is simply natural, "doubtless," and "uncanny," like "lightning" illuminating an otherwise cloudy moral landscape. "Parade" is only, after all, a musical. It is also the latest installment in a justice story that excludes the white factory girls, and their type, from being counted into justice movements of the late twentieth century, including the "hate crimes" and "reconciliation" movements, on the grounds that their group's former actions, such as lying about Frank, have excluded them from such consideration.

In 1996, the Georgia Board of Pardons and Paroles, at the behest of

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[35] For Monteen Stover's testimony, see Oney, pp. 227 -228. For positive testimony about Frank's character, see Oney, pp. 292 - 293. For negative testimony about Frank's character, see Oney, pp. 308 - 310.

representatives from Atlanta's tight-knit Jewish community, decreed that the state of Georgia had failed to protect Leo Frank's constitutional right to safety while he was being held at the Milledgeville prison farm. The decree was less than what many had hoped for, which was a full pardon and declaration of Frank's innocence. But the Board's decision was still celebrated as a victory and publicly construed as a symbolic pardon for Frank, and this "pardon" has also turned into a social movement, to re-open old lynching and civil rights era cases and solve them, or at least declare publicly that the victims of historical acts of racial violence are not forgotten.

Mary Phagan's descendants also approached the Pardons and Paroles Board, asking that Frank's "pardon" be accompanied by an equally symbolic re-opening of Mary Phagan's murder case. They were laughed out of the building, to put it politely. Although Phagan's family has never been associated with the Klan and have, over the years, rejected overtures by white supremacists wishing to memorialize Mary Phagan, the name Phagan is still tainted by its imaginative association with such groups.

Thus, Phagan's descendants, and Mary Phagan herself, remain in a limbo, between actual racists and a recalcitrant society that views them as racists, and, furthermore, does not view Phagan's death as possessed of a larger social meaning, as Frank's death very clearly is viewed. Mary Phagan may have been killed because someone wanted the $1.20 in her

purse, or she may indeed have died "defending her honor." In either case, her death is seen as eminently random, signifying nothing. "Mary's People," the poor white factory laborers and subsistence farmers, have come out on the wrong side of history. The few among them who elected to hang Leo Frank and mobilize the Klan certainly deserve that fate. But Mary Phagan does not. A photograph of Phagan reveals a smiling girl with large flowers stylishly encircling her face. Such a girl could not have desired martyrdom over life.

But the definition affixed to her in death by Klansmen persists, even as its meaning and everything else has changed, which raises the question: how is it that we have rejected the Klan, and all it stands for, but still accept its definitions of raped and murdered southern women? "I didn't make up anything," Uhry said. Perhaps the point is that he didn't need to: The Leo Frank Story has always represented Mary Phagan in exactly the same way.

Chapter 3: Kitty Genovese and the Jogger

The transformation of Mary Phagan from crime victim to sexual aggressor in fictional remembrances and tributes to Leo Frank signifies a more general fate of white victims of interracial rape in the post-lynching era: whether fictional characters or real women (or, for the unfortunate Mary Phagan, both), social erasure and sexual blame attach easily to them. That this is a fate shared by most victims of rape, including black women, might not be immediately apparent, for the relationship between black and white victims of sex crime has always been complex and fraught in ways that discouraged seeing similarities between them. This conflict has persisted, even after the rape law reforms of the 1970's, when feminists encouraged more victims of all races to come forward and demanded higher levels of responsiveness from police and the courts. Since then, focusing on allegations of difference between the way black and white victims are treated by police and the courts is always preferable to confronting the newly-persistent, uncomfortable question: "Why are so many women and children victims of rape?"

The argument, or perhaps more appropriately, the complaint, that white rape victims receive a disproportionately large share of resources from the justice system, to the detriment of minority women, is uttered so reflexively that little or no proof seems to be required to substantiate the

claim.[1] Nevertheless, to put it quite simply, there is no proof that it is true now, or that it has been true in recent decades. Instead, what appears to be true, but may not be proven until DNA technology clarifies the picture, is that despite the widespread reform of rape law protocols that occurred in the early 1970's, vast numbers of sex crime victims of all races have been denied justice since that time.[2]

While it is also true that the handful of victims who are elevated to celebrity status in the national media are almost without exception white females, this type of attention cannot be described as a simple desire for justice for the Nicoles, Lacies, JonBenets, or any other dead white females who live on only in supermarket tabloids or in re-runs on Court TV. Prurience plays as large a role as anything else in the public's curiosity about such victims. Yet the racial complaint of bias remains, often uttered by black rape victims themselves. Among the ways white rape victims may

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[1] See, for example, an editorial by Cynthia Tucker in which she argues that campaign ads referring to Willie Horton not only raised unreasonable fears about rapes of white women but obscured the rapes of black women as well: "The ad contained subliminal messages that were racist, suggesting that the old stereotypes apply: a) black men rape white women and conversely, b) black women have little to fear." Tucker fails to note that Horton did, in fact, rape white women. Instead, her argument - that black women are sexually victimized in large numbers and need more protection from lax enforcement of rape laws - was based not on presenting Horton as an example of one such rapist who benefited from leniency but on blaming hysterical white victims for the neglect of black ones. Cynthia Tucker, "Bush Must Take Action Now to Curb Violent Crime Against Women," Editorial, *Atlanta Journal and Constitution*, 18 August 1999. Merely saying the words, "Willie Horton" has become political shorthand for making accusations of racism, shorthand that reduces Horton's victims to culpable symbols of racist political activism against blacks.

[2] Doubtlessly, the vast majority of rape victims were denied justice before that time: there is no way to reconstruct reliable estimates for these millions of crimes. For example, in 1969, there were 1,000 arrests for rape in New York City yielding 18 convictions. See Fairstein, *Sexual Violence*, 7 - 18.

be ritualistically debased, complaining about them, rather than blaming the actual assailants, when sexual victimizations are committed against black women and girls, is particularly tragic.

Despite racial politics and historical themes that drive black and white rape victims apart, they both currently share a common fate, that of being mere bystanders (or worse, suspects) in the great American drama of "innocence accused" or "wrongful imprisonment of innocent men," or its logical endgame: "guilty but still victimized, hip, cool and misunderstood." Taken together, these dramas dominate in the imaginative realm of crime and punishment to such a degree that little room is left there for comprehending real, or even fictional, crime victims' lives.

For those accused of crimes, the legacy of lynching appears to have had the effect of endowing defendants with the possibility of being perceived as victims of injustice. What precisely is fair for criminal defendants, and criminal defendants alone, therefore, has long been the sole focus of criminologists, legal scholars and the court system itself. Of course, criminologists study criminals; there is no other way to comprehend crime. But somewhere along the way, the desire to rehabilitate offenders, redress racial wrongs, and "de-institutionalize" the justice system completely eclipsed what was supposed to be the other goal of criminological study: finding ways to protect other people from the

effects of crime. By the 1960's, within the vast literature of criminology, not only the victims, but also the community and the public, faded into inconsequence as social scientists studied the criminal mind, the criminal soul, rehabilitation and alternatives to incarceration.

The cornerstone of much of this scholarship was the search for "root causes" of criminal behavior. Historians and sociologists blamed slavery, the government's treatment of Native Americans, the history of lynching, the nuclear arms race, and the war in Vietnam for causing the violent street crime that exploded in American cities during the decade of the Sixties. "We must recognize that the destructive impulse is in us and that it springs from some dark intolerable tension in our history and our institutions," Arthur Schlesinger Jr. writes in "*Violence: America in the Sixties*," an influential essay published in the wake of Martin Luther King's assassination. "We began, after all, as a people who killed red men and enslaved black men." Thus, the "we" Schlesinger chose to blame for the increase in armed robberies, rapes and murders was everyone, with the possible exception of those who, unfortunately but incontrovertibly, did commit the crimes in question. "The terrible things we do to our own people, the terrible things we do to other people - we cannot take the easy

course and blame these things on anyone but ourselves," Schlesinger writes.[3]

It would be a mistake to underestimate the influence such ideas had on shaping the criminal justice system at the historical moment when crime was becoming a daily presence in millions of Americans' lives. The "blame anybody but the criminal" mantra became a central justification for both shortening prison sentences and, perhaps more importantly, resisting the expansion of the police force and the judiciary, even as violent crimes rates exploded in city ghettoes, subways, parks and sidewalks. As Schlesinger himself noted, gun crime increased an astonishing 77% between 1964 and 1968 alone. In 1969, the National Commission on the Causes and Prevention of Violence estimated that the rate of violent crime had risen a full 100% in the previous ten years.[4]

Undoubtedly, much of the willingness to choose to forgo prosecuting criminals in the face of such numbers was mere practicality, or fatigue, on the part of criminal justice officials who were overwhelmed at every level of law enforcement. Although it is commonplace to hear complaints about vast increases in incarceration rates, from the perspective of victimization, no part of the criminal justice system, from the Supreme Court down to municipal venues, has actually grown at a rate

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[3] Arthur Schlesinger Jr., *Violence: America in the Sixties* (New York: Signet Broadside, 1968), 31.

[4] Schlesinger, *Violence*, 41. Hugh Davis Graham, ed., *Violence: The Crisis of American Confidence* (Baltimore: Johns Hopkins Press, 1971), xxiv.

comparable even to the nation's population growth, let alone at a rate adequate to meeting the needs created by the rolling waves of crime that began in the early 1960's. What is perceived by most as a relatively recent phenomenon, the problem of hopelessly overcrowded dockets, has actually been the status quo for several decades. In 1970, former Chief Justice Earl Warren complained that over the previous sixteen years, a period of soaring crime and exploding litigation, only eleven employees were added to the Supreme Court itself, "all of whom were stenographic, clerical, or housekeeping."[5] Twenty-six years later, in 1996, Judge Harold Rothwax described his New York City courtroom as "bargain-basement" and "paralyzed" by overwhelming caseloads:

> Because of the volume, we don't arrest everybody we can. Many of the people who are arrested in less serious cases are given desk appearances. We let them go and give them a date to come back. A large percentage of them never come back, and warrants are issued. There are 500,000 open warrants at this time in New York City.[6]

Criminologist Gary LaFree has described the inability to cope with high rates of crime as a loss of legitimacy for institutions like the courts and the criminal justice system in total. LaFree's astute analysis of the last fifty years of crime bears contemplation:

> From the end of World War II until the early 1990s, the number of crimes committed in the streets of America skyrocketed. Murder rates doubled; rape rates quadrupled;

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[5] Graham, *Violence*, 41.
[6] Harold J. Rothwax, *Guilty: The Collapse of Criminal Justice* (New York: Random House, 1996), 25.

> robbery and burglary rates quintupled. By the early 1990s, nearly 25,000 Americans were being murdered each year. In just two years, more Americans were murdered than were killed in the Vietnam War; in twelve years more were murdered than died during World War II.[7]

Since the 1960's, crime rates have risen so rapidly and remained so high for so long that, at least for the lawyers and victims who enter the criminal justice system, a permanent sense of shell shock (LaFree's loss of legitimacy) has set in.

For offenders, however, these numbers had a very different meaning. As crime rates in the 1960's soared beyond levels that could be addressed with anything more than selective triage, the likelihood of serving time for committing any particular offense plummeted. In 1968, President Lyndon Johnson convened the National Commission on the Causes and Prevention of Violence. The immediate cause for creating the commission was the back-to-back assassinations of Martin Luther King Jr. and Robert F. Kennedy and the rioting that engulfed urban areas following those crimes. But when commission members released their first reports, their attention had shifted to the statistically urgent problems caused by soaring numbers of unsolved street crimes.

In 1970, Commission Chairman Milton S. Eisenhower described the problem of street crime this way:

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[7] Gary LaFree, *Losing Legitimacy: Street Crime and the Decline of Social Institutions in America* (Boulder: Westview Press, 1998), 1.

> There remains one very obvious reason for mounting crime in our society: the increasing failure of law enforcement agencies to cope with it. . . . Probably 10 million serious crimes were committed in the United States last year. About half those crimes were never reported to the Federal Bureau of Investigation. Only 12 percent of those 10 million crimes resulted in the arrest of anyone. Only 6 percent resulted in the conviction of anyone, and this 6 percent included many pleas to lesser offenses. Only 1 1/2 percent resulted in the incarceration of anyone.[8]

Upon seeing the Commission's statistics, attorney Lloyd Cutler famously remarked: "[i]t would be hard to argue that crime does not pay."[9] These numbers were alarming then, and they remain so now: they represent not only chaos at the social level, but also untold numbers of personal experiences of crime victimization. Although these calculations included estimates of unreported crimes and offenses not traditionally counted as "violent," such as burglary and vehicle theft, by 1970 it was apparent that violent crime was dramatically altering life in America, especially the lives of minorities living in the inner cities.

What is perhaps most remarkable, however, is that even reliable estimates that ninety-eight and a half percent of serious crimes went unpunished did nothing to alter widely-held convictions that the real problem with the criminal justice system was the problem of innocent men going to prison for crimes they did not commit. In this period, even as

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[8] Graham, *Violence*, xxvii.
[9] Ibid.

Schlesinger and others agonized over crime, most professional observers reserved their sympathies for criminals trapped in the system and blamed society for their tendency to harm others. The victims themselves, who were experiencing those ninety-eight-and-a-half percent of unpunished crimes, along with the other one-and-a-half percent of punished ones, remained stubbornly invisible as other debates raged on.

The social "invisibility" experienced by crime victims was even more pronounced when the crime was rape. At the outset of the post-lynching era, public sensitivity was high to the suffering that had been inflicted upon the black community, and black men in particular, in the name of white victims of interracial rape. With memories of Emmett Till being revived by the discovery of the bodies of three dead Civil Rights workers in Philadelphia, Mississippi, and with the voice of the despicable, "white trash" Mayella Ewell crying out for racial vengeance from the nation's movie screens, it was racial sensitivity, not rape itself, that primarily occupied journalists when they were confronted with sex crimes committed by black defendants, whether or not the victims were also black.

I am not proposing that the experience of white victims and black victims of rape were identical in 1964, or even that they are identical today; what I am proposing is that both black and white victims of rape shared a specific burden, a product of the legacy of lynching, when their

assailants were black men. In the social upheaval that characterized the early 1960's, interracial rapes of white women and intra-racial rapes of black women both unleashed a sort of schizophrenic social response, particularly from journalists who saw themselves at the vanguard of the civil rights movement. To see a black man being accused of rape was to see a potential victim of the most explosive sort of American injustice. In order to avoid "repeating the mistakes of the past," journalists, and others, simply chose to look away when evidence of guilt incontrovertibly pointed to a rape defendant who was black. In the process of "turning away," however, the fact, the tragedy, and the prevalence of rape was hidden and denied.

Kew Gardens, 1964

The case of Kitty Genovese is only the most famous example of this type of denial. Genovese was raped and murdered three months before the disappearance of James Chaney, Andrew Goodman, and Michael Schwerner in Mississippi. In the immediate aftermath of her death, and for the forty years since she was murdered, she has been represented and remembered as a victim of several social ills: alienation, public apathy, the refusal of bystanders to take responsibility for their fellows, even the hypnotic influence of images of violence on television. Genovese is not remembered, however, as either a victim of rape, or more directly, a

victim of rape at the hands of Walter Moseley, a serial rapist and killer of women who is still, today, agitating for release from prison. The story of Genovese's rape, which offers a real and urgent answer to questions that have been posed and misinterpreted even since 1964, has been subsumed by other stories, including the story of "root causes" of crimes, which simultaneously excuses Walter Moseley and implicates others - nearly everyone except Moseley, but especially her neighbors, and even Kitty Genovese herself, in Genovese's death.

In 1964, when Kitty Genovese was raped and stabbed to death outside of her apartment building in Queens, crime rates throughout the city were exploding. Genovese's murder did not become part of a story about the rising tide of violent street crime, however. From the beginning, journalists, and later social scientists, blamed Genovese's neighbors, not the killer himself, for the murder, on the grounds that these "seemingly normal" people ignored the woman's cries for help. Some in the neighborhood argued, to little avail, that they were being singled out inappropriately for blame for a crime they did not commit, but forty years hence, hindsight demonstrates that the journalists and social scientists clearly have won these interpretive battles. Kitty's old neighbors, the notorious and stigmatized "thirty-eight witnesses" have scattered; few would care to admit to being one of those people who "let" Kitty die. The Genovese case is, instead, enshrined in psychology textbooks and regularly

taught in classrooms, not as a story about a woman who was raped (the rape is frequently not mentioned) and stabbed to death, or as a story about her misogynistic killer, but as a cautionary tale about social disintegration that assigns culpability to everyone except Walter Moseley.

A. M. Rosenthal, the former executive editor of the *New York Times*, has written, on several occasions, that the Genovese case inspired him to speak out for human rights and define the *Times* as the paper of record for confronting human rights violations everywhere:

> After my involvement as an editor in the Genovese story, it became the rocket that fired me into decades of writing about human rights horrors of all kinds, everywhere - the horrors of a political gulag in the Soviet Urals, the unending variety of tortures in Communist Chinese Camps, the massacres of Christians in the Sudan by bullet and starvation.[10]

Everywhere, it would seem, but Kew Gardens itself, the white, working-class neighborhood where Genovese died, for, ironically, the *Times* certainly cannot be said to routinely view the murder of white women or any other crime victims[11] as violations of human rights. Instead, in its pages, in the classic style of "root causes" journalism, crime is most frequently treated as a "social problem," and the perpetrators are often represented as victims themselves. If Genovese's death was really seen by

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[10] A. M. Rosenthal, "Why We Crusade for Human Rights," Editorial, *New York Daily News*, 12 July 2002.

[11] One exception is victims of so-called "hate crimes," which I will discuss in Chapter 6.

Rosenthal as a violation of her human rights, then this was a fairly unique occurrence.

The *Times*, Rosenthal admitted in 1999, in a new introduction to his 1964 book, *Thirty-Eight Witnesses*, was not considered "a great crime newspaper." In the original book, he noted that the Genovese case would not have received much attention beyond the four-paragraph death notice had the other story, of the silent witnesses, not captured his attention. Common street crime was not the type of human drama the *Times* prided itself in offering, unless, as Rosenthal wrote, the crime occurred "on Park Avenue or Madison Avenue," and thus threatened the wealthy, or if the story implicated racial prejudice or conflict. If Genovese "had been a white woman killed in Harlem," Rosenthal baldly observed, "then the tension of the integration story would have provided her with a larger obituary."[12] Kitty Genovese thus fell within a specifically excluded subcategory, between the culture of white affluence on one side, and the moral drama of integration on the other.

Furthermore, Genovese was a white woman raped and murdered by a black man who, by his own admission, was out "hunting" a white woman to torture. That part of the story could not be reported, Rosenthal went on to explain, because it was the policy of the *Times* to not mention an assailant's race: "[w]here the fact that a man is a Negro is directly relevant

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[12] A.M. Rosenthal, *Thirty-Eight Witnesses: The Kitty Genovese Case* (New York: McGraw-Hill, 1964; California: University of California Press, 1999), 6 - 7.

to the story we print the fact. Where it is not, we do not."[13] So, apparently, if Genovese had been killed in Harlem, the *Times* would have revealed her assailant's race because it would have been a story about the "tensions" of integration, not murder, but because she was killed in a white neighborhood, on principle the *Times* would omit the detail that her killer was black.

In 1964, the *Times* also did not report that Genovese was raped, and throughout the entire book Rosenthal wrote on the case at that time, he carefully avoided any mention of sex crime as well, including the other sex crimes committed by Genovese's murderer, Winston Moseley. In 1999, when Rosenthal reissued his book with a new introduction, he did include material about Moseley's extensive, horrifying, and apparently remorseless confession to acts of sexual violence, including necrophilia, which he performed on Genovese and other women he slaughtered. But strangely, in an extended meditation on his earlier extended meditation of the reporter's role in exposing abuses of human rights, Rosenthal never, to this day, seems to have noticed that his earlier suppression of the story of rape was the opposite of witnessing a human rights abuse; it was, instead, an act of denying and minimizing what happened to Kitty Genovese and other women.

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[13] Rosenthal, *Thirty-Eight Witnesses* (new introduction), xiv.

In his new introduction, Rosenthal does document key parts of Moseley's confession:

> I decided, well, perhaps I'd rape her now that she was dead so I took off all her clothes. . . . Then I decided it was too cold out in the snow so I rolled her up the steps. . . . committed that cunnilingus. . . . took the scarf that she had on and put that . . . on her genital organs and set fire to her.[14]

This was Moseley in 1964 describing a crime he had committed two weeks before he killed Genovese. In a similar sequence of events, Moseley caught sight of Genovese while out "hunting" white women. He attacked her, slit her throat, and raped her dying body. Would A. M. Rosenthal have written about this in 1964 if Moseley had been a white rapist attacking white women? Probably not. Would he have written about it if Moseley had been a white man "hunting" black women? Undoubtedly. It might have become one of the great stories of the civil rights generation.

Would he have written about it if the black Moseley had been "hunting" black women? Moseley's previous victims, including the black women murdered and raped and set on fire by him, were simply called, as Genovese was, female victims of murder. They were not identified in the *Times* by their race, nor were the rapes revealed in print. In 1999, Rosenthal apologized for the oversight, as he sees it, of not caring as much for those black victims as he "cared" about Kitty Genovese. "When

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[14] Ibid., xvi.

someday I read this remembrance of the Genovese case in print," he wrote in 1999, "I do not want to have to ask myself why I turned away from another murdered woman [Anna May Johnson] because she was no great news story, not even worth the four paragraphs Catherine Genovese was awarded the day after her death."[15]

In 1964, speaking of Genovese receiving only four paragraphs, instead of front page coverage, Rosenthal had been more sanguine:

> I can find no philosophic excuse for giving the murder of a middle-class Queens woman less attention than the murder of a Park Avenue broker (sic) but journalistically no apologies are offered - news is not philosophy or theology but what certain human beings, reporters and editors, know will have interest and meaning to other human beings, readers.[16]

Between 1964 and 1999, the amount of attention paid to black female victims of rape, in comparison to white ones, certainly become a newsworthy subject to the *Times*, raised again and again in the coverage of the Central Park Jogger case and other crimes. But the question of addressing rape itself as a human rights violation remains less clear than Rosenthal seems to believe. Was the Kitty Genovese case ever really "about" Kitty Genovese at all, even in 1999? Rosenthal admits in his 1999 introduction that the "witnesses," not Genovese, were what fueled the interest in the case in 1964. He has apologized for many things, including

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[15] Ibid.
[16] Rosenthal, *Thirty-Eight Witnesses*, 7.

the relative neglect of Moseley's black victims, and in an offhanded way, he apologized for the *Times*' decision to publish an op-ed by Moseley in 1977 in which the killer argued that, among other accomplishments, the college degree that he gained in prison qualified him to be freed on parole and given another chance to become an "asset to society."[17]

But despite Rosenthal's soul-searching, and despite the claims he makes about seeing Genovese as a victim of a human rights violation like "the degradation of a race, children hungering," his claim to see her victimization rings false, for it depends on seeing "The Thirty-Eight," and not Winston Moseley, as the true villains of the story, as well as on seeing past Kitty Genovese's fraught status as a white victim of interracial rape. In 1964, Rosenthal barely mentioned Moseley, except to say that he was still "an innocent man in the eyes of the law." That Rosenthal could know what he knew then about Moseley's confession and reduce his judgment of him to such a legalism, in passing, in an eighty-page screed attacking Genovese's neighbors, reveals a bias deeply rooted and lugubriously exercised.

In *Thirty-Eight Witnesses*, Rosenthal does not stop at blaming the residents of Kew Gardens for virtually single-handedly causing Kitty

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[17] In addition to raping and killing Genovese, Johnson, and possibly other women, Moseley escaped from prison in 1968, raped another woman and held three people hostage before being re-captured. His 1977 and subsequent requests for parole were denied: he is eligible for parole again in January 2006. "Winston Moseley is still in prison, planning another appeal to become a social asset," Rosenthal wryly observed. Rosenthal, *Thirty-Eight Witnesses* (new introduction), xxiv.

Genovese's death; he blames them for apathy in the face of injustice wherever it occurs on the globe: children starving in Bangladesh, gulags in China. Of course, he pays some service to the idea that such apathy is part of the human condition and not limited to thirty-eight people in Kew Gardens. But he turns them into symbols of such apathy, nevertheless, just as later, ironically, the same type of people as those living in Kew Gardens would be blamed for abandoning the entire city to crime via "white flight." Crime itself never enters the picture.

This is not to suggest that several of the people who heard Kitty Genovese's cries for help and even witnessed Moseley's first attack on her did not deserve to be blamed for failing to save the dying woman. But the parts of the story that Rosenthal, and the *Times*, chose to leave out in 1964, and the part that he left out again, or failed to see, in 1999, are precisely the parts that have to do with what Genovese really suffered, and why she was chosen, and why people really didn't help her, and thus why she died. Despite the passage of thirty-four years between Rosenthal's first book and his revised one, it seems that neither a truly clear picture of Kitty Genovese's death, nor the real story of Kew Gardens, are apparent.

Kitty Genovese's neighbors told the reporters and psychologists who descended on them after they "became" the story that they didn't help Genovese because they were afraid, either afraid of the police or afraid of going outside to stop a fight. Several also said they didn't bother to call

the police because it was a woman fighting with a man, perhaps a "lover's quarrel," or a husband disciplining his spouse. In other words, many of them didn't call the police because any woman outside at 3 a.m. was automatically suspected of "deserving" whatever she was "getting." And a few said that there were always fights among drunks emerging from the bars. This was not, as psychologists, and especially the *New York Times* would portray it, the picture of a cohort too numbed to care about their fellow man. At their worst, it was the picture of people passing judgment on a young woman being raped because she was on the streets at three in the morning.

The residents of Kew gardens were also people under siege, if not by actual crimes, then fear of the tidal wave of street crime that was rolling out of the ghettoes and threatening to flood their lives as well. In as profound an act of political correctness as any that would come later, the *Times* simply refused to acknowledge that fear of crime by working-class and middle-class whites was anything other than a racist chimera, even with the body of Kitty Genovese lying in full view. White flight, which affected Kew Gardens but not Park Avenue, was then a particular bane of the *Times* and remains so today. In 1964, the thirty-eight witnesses would be blamed for ignoring crime; forever after, they would be blamed for fleeing it. "Kitty's People," like "Mary's People" before them, could always

be blamed, by the better-protected and more mobile activist classes, no matter how they reacted to crime in their midst.

In the introduction to Rosenthal's original book, *Times* president and publisher Arthur Ochs Sulzberger wrote, "It is often forgotten - I think sometimes by ourselves - that we are above all a community newspaper." The story of the thirty-eight witnesses, he went on to say, "tells something about our city. But more important, it tells something about each one of us."[18]

But this sentiment simply wasn't reflected in the way the *Times* or any other newspapers told the story. The thirty-eight witnesses became very specific scapegoats for a crime committed by a criminal whom the *Times* and others ignored in the interest of racial sensitivity. Because the actual criminal was so obscured, Genovese's dying was laid, whole cloth, at their feet. Because soaring crime rates were similarly obscured, also in the interest of racial sensitivity, the behavior of the thirty-eight, which arose from fear in addition to apathy, was reduced to a superannuated story of people capable of vicious neglect. And, because Kitty Genovese was a part of this community, in addition to being a victim of murder and rape, certain facts of her victimization were easier to overlook, in the so-called interest of making grand statements about "everyone" being responsible for beggars in India or victims of the gulags. The specific details that

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[18] Rosenthal, *Thirty-Eight Witnesses* (original introduction), xxxii.

defined Genovese's suffering, her killer's motives, what he did to her body, were not only ignored by her neighbors who failed to come to her aid. They have been systematically deflected ever since, even within a narrative that is supposed to be about both witnessing and accounting for injustice.

Central Park, 1989

The 1990 pillorying of Trisha Meili, better known as the Central Park Jogger, offers an unusually explicit, recent example of the ease with which white sex crime victims may still be pinned down, ostensibly, in the story of a lynching. In comparison to the story of Kitty Genovese, it also reveals the consequences of several decades of the reinforcement of a type of political correctness that allows, and even encourages, anger to be directed at white female victims of crime. Yet, while the rage directed at the Jogger may have arisen from a specifically racial politics, the relative lack of outrage against Sharpton and others who relentlessly attacked her revealed a deep cultural willingness to overlook the experience of all victims of rape, including black victims of sex crimes.

After being raped and nearly beaten to death in Central Park on April 19, 1989, Meili emerged from a coma to find herself accused by

some black activists of being the "real rapist" in the attack.[19] Throughout 1990, as the "Jogger" trials progressed, civil rights activists Al Sharpton and Alton Maddox organized near-riots outside the courthouse where Meili testified. Protestors shouted the words, "whore," "slut," "bitch," and "white devil," epithets that meant to allude both to Meili and to the white, female prosecutors of the case.

It wasn't just a handful of rabble-rousers, however, who endorsed these extremely negative views of the Jogger. Along with Sharpton, both the attorneys for the defendants and some members of New York's traditionally black newspapers and radio stations also accused Meili of dishonesty regarding her own sexual assault. In poor, majority-black urban boroughs, rumors circulated that the Jogger had really gone to Central Park to find "rough sex" with young black men on the night she was attacked. Some questioned whether an assault had really occurred at all and whether the brain injuries Meili suffered were real. She was further accused of possessing a perverse racist streak that drove her to not

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[19] In December 2002, a New York State judge overturned the convictions of the five "Jogger defendants" on the grounds that the one sample of DNA obtained from the crime had recently been identified as belonging to convicted murderer and serial rapist Matias Reyes, and, once identified, Reyes claimed he had acted alone. I strongly concur with the many authorities that believe neither Reyes' recent "confession" nor the claim that identifying him alters in any way the evidence presented in the original trials. See Chapter 4 for a more detailed discussion of the voiding of the "jogger" convictions.

only seek out young black men for sex but then to accuse them, wrongly, of rape.[20]

The "Jogger," as she was known until 2003, was simultaneously the subject of a great outpouring of support and affection from ordinary people and from political leaders and opinion-makers who saw her as a symbol of the city's survival in the face of violent crime.[21] In contrast, Sharpton, Maddox, and the protestors they summoned occupied a radical, if undeniably powerful, fringe in the polarized racial politics of the early 1990's. Thus, it is tempting to relegate their attack of the jogger to the realm of extremism, where it surely belongs. Yet to do this would obscure the more sophisticated and oblique ways in which white victims of rape were implicated then and continue to be implicated today.

The abuse of the Jogger reveals just how much white female victims of crime have been made available as scapegoats for racial tensions and other social ills beyond their control, or for that matter, their moral responsibility. Any white female crime victim, but especially a victim of rape, is susceptible to the charge that attention paid to her case, by the

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[20] Meili was in a coma throughout the time the defendants were caught, confessed to, and charged with the crime. For a summary of accusations that Meili was a drug addict, whore, and sexual thrill-seeker, see Ian Ball, "Jogger's Bonfire of Profanities," *The Sunday Telegraph Limited*, 29 July 1990, International section, p. 18. For a summary of the racial accusations, see Joan Didion, "New York: Sentimental Journeys," *New York Review of Books*, 17 January 1991.

[21] Meili "came out" as the Jogger when she published a book about her experience of recovery from the brain injury she received during the assault in Central Park. The *Amsterdam Times* and other black news outlets had revealed her identity in 1989, but the mainstream press had not. Trisha Meili, *I Am the Central Park Jogger: A Story of Hope and Possibility* (New York: Scribner, 2003).

media or the justice system, is attention that has otherwise been wrenched away from some similarly abused, non-white, woman or child. Unlike the more reckless accusations levied by Al Sharpton about the Jogger's sexual predilections, his message that the Jogger was receiving an inordinate share of the city's "protection," in the form of police and prosecutorial power, was well-received, and saying it lent him credibility, even when he illustrated the point by bringing Tawana Brawley out of hiding to thank the protestors who were screaming slurs and threats at Trisha Meili outside the courtroom.

Comparisons of the Jogger case to rapes of minority women that received "less attention" were widespread; many cited the rape and attempted murder of a Brooklyn woman, who was assaulted on a rooftop and dropped fifty feet down an air shaft on the same week the Jogger was assaulted. In a feature story in the *New York Review of Books*, Joan Didion summoned, in her word, "narratives" ranging from the planting of Central Park in the nineteenth century to trial coverage in the black *Amsterdam Times* in order to cast her own image of the jogger as a symbol of white self-interest and lack of concern for black victims of similar crimes. In each case, the message was the same: white women who are raped are guilty, if nothing else, of still enjoying the degree, if not the exactly the

same type, of special protection accorded to white women who accused black men of raping them during the Lynching Era.[22]

This type of blame is not what is usually meant when one speaks of "blaming the victim" for a rape, and it would seem to not apply to black victims of sex crimes. But in the forty years since the residents of Kew Gardens were blamed for Kitty Genovese's murder, cultural tendencies to excuse the behavior of, and also not incarcerate, even the worst criminals, those who rape, torture and murder their victims, have only grown stronger. Because of the legacy of lynching, white female victims of inter-racial sex crimes are singled out for special types of contempt, but all crime victims have suffered as a consequence of our failure to look beyond the "root causes" of criminal behavior toward solutions that would actually remove criminals from the streets. In 1964, Kitty's Genovese's neighbors were blamed for not caring enough while a woman was slaughtered, screaming, in an alley; in 1990, many were blamed for caring too much about the rape of the white Central Park Jogger. This is the opposite of progress. It also begs a question that might be useful to articulate at this juncture: how little attention paid to protecting rape victims, particularly white ones, and punishing criminals, is little enough?

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[22] See Robert D. McFadden, "2 Men Get 6 to 18 Years for Rape in Brooklyn," *New York Times*, 2 Oct. 1990, sec. B, p. 1. Here and elsewhere, *The Times* explicitly drew distinctions between the media's treatment of the white jogger and the black air shaft rape victim, but McFadden does not explore the fact that the assailants in the air shaft case received longer prison sentences than the jogger's assailants, even though both victims' injuries were, in his own word, "comparable."

Chapter 4: Victims' Rights and Victims' Deaths

The idea that prisons are overflowing with innocent men looms particularly large in the American imagination and in American pedagogy, where stories of the wrongly accused and convicted (along with the rightfully convicted, yet still somehow wronged), are so ubiquitous as to be a cornerstone of secular moral education. From *Les Miserables* to *Billy Budd, The Trial, The Crucible, The Stranger, Twelve Angry Men* and, of course, *To Kill a Mockingbird*, American youth are inculcated early and often with images of corrupt prosecutors of the law and heroic, innocent, wrongly incarcerated convicts. A high school or even college student could easily matriculate without ever having read a work of fiction in which the upholders of the law get it right.

There are, of course, countless detective novels, television dramas and true-crime shows that offer different perspectives on crime and punishment. But these stories aren't the type found on college-prep reading lists. Novels and shows with law-and-order themes, or those told from victims' perspectives, are disdained as entertainment, genre fiction or reactionary pabulum. The emotions they evoke are deemed vengeful or, worse, middlebrow. It's one thing to be Morris Dees, choked up at a law school podium, recalling the tears that streamed down his face as he watched Atticus Finch striding into a courtroom to free the innocent; it is

another thing entirely to admit that you got choked up watching *America's Most Wanted* last Saturday night when they finally caught that guy who raped and killed the little girl in Florida.

In other words, while there certainly are strong feelings felt and strong words spoken about protecting children and others from violent criminals, these feelings and words simply do not translate into moral imperatives to defend victims' rights, insomuch as they have any rights at all. There is no such thing as a "Guilty Project" staffed by earnest law students who work long into the night on behalf of victims whose cases were mothballed without investigation or prosecution. Civil rights leaders and activist nuns don't hold press conferences to pressure reluctant prosecutors to proceed in a case. Even when a particularly prolific serial sex criminal comes to light, now most likely exposed by his own DNA, there is almost never interest expressed in reviving old cases or otherwise taking stock of his prior run-ins with the law, except for the types of interest that may best be labeled prurient.[1] Americans simply are not in

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[1] Recent examples of prolific serial offenders in the news include Coral Eugene Watts, Michael Ross, Joseph P. Smith, Paul Durousseau, Derrick Todd Lee, John Jamelske and Fletcher A. Worrell, who has been linked to 25 rapes with extant DNA. One example of a serial offender who repeatedly avoided long incarcerations is Andrew Lee Harris. In 1971, Andrew Lee Harris asked the Nebraska state court to declare him a sexual psychopath after he was charged with two rapes. He was committed and released, and since then he has been arrested for rape, released, charged, convicted and released several more times, including twice when DNA identified his semen at murder-rape scenes. In 2002, with two untried murder cases still pending, he was committed to a psychiatric facility in an effort to prevent him from being released from another short sentence, but with the A.C.L.U. fighting such commitments, it is unclear how long this current psychiatric incarceration will last. Over the 32 years of his adult criminal career, Harris repeatedly gained reduced sentences or early release, and the terms of earlier plea bargains have prevented him from

the habit of seeing the turning-away of victims of crime as a matter of injustice.

Sustaining such a value system is a task of two parts: wrongful convictions must be kept forever in the public eye, and the multitudes of crime victims denied justice must be removed from it, quite literally, by erasing them. Our canonical fictions perform this task with enormous efficiency. Justice denied to the innocent convict makes for a dramatic and compelling tale. It has a beginning, middle, and end: the heroic defense attorney challenges authority, frees the convict (or memorializes his suffering) and strikes a blow for the little guy in the eternal struggle between state power and individual rights. This is a story that appeals to liberals and libertarians alike. It feeds Americans' innate distrust of government and invokes the ethic of individual rights.

In contrast, justice denied to a victim of crime is a non-event, a story without a hero, or an ending. When justice is denied to crime victims, it is denied behind closed doors, without records to trace, in ways

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being considered a habitual sex offender. He is only one of scores of serial offenders with similar, decades-long criminal histories who are finally facing the possibility of long sentences because of truth-in-sentencing laws and DNA: the prevalence of such cases is as yet unknown. Some states and the Department of Justice are tracking examples of "preventable crimes" and the outcomes of cases involving DNA database matches, but such research has only recently begun. Journalists following individual cases remain at this time the most reliable recorders of serial offenders' lengthy interactions with the justice system. Anecdote still trumps statistics. See Angie Brunkow, "Rapist's Prison Time At Issue After Arrest: Some Say Nebraska's 'Good-Time' Law Freed Andrew Lee Harris Accused in Deaths of Two Women, Too Early," *Omaha World-Herald*, 26 Oct. 2000; Chris Burbach, "Harris Had Three Decades of Trouble," *Omaha World-Herald*, 29 Oct. 2000; Dave Morantz, "'They Need to Throw Away the Key'; Two Women Can't Shake Memories of Their Encounters With Andrew Lee Harris," *Omaha World-Herald*, 29 Oct. 2000.

too nebulous to perceive. Police reports disappear or aren't filed in the first place; rape kits dematerialize; victims don't know that their cases have been abandoned. There is often no public record of the state's decision to prosecute or not prosecute or accept a plea for a lesser crime, and there are no legal avenues for appeal. Even under the best circumstances, the victim is reduced to a witness to the crime that occurred at the site of his or her own body because, technically, crimes are prosecuted as attacks against society, rather than against victims. The solution to the problem of not protecting victims is more government, more courts, more prisons and the public's willingness to put even more people away behind bars. In terms of narrative possibilities, it is not an inspiring story. In terms of political reality, it is not a likely one.

Thus, to be a crime victim in America is to live in a strangely paradoxical state. Crime stories are everywhere, occupying enormous portions of television entertainment and television news and the hybrid entertainment/news shows; popular movies are saturated with images of crime; low-culture and highbrow and alternative films and music are saturated likewise; bestsellers and canonical texts alike are, most frequently, stories about crime. Yet real victims live in the shadows of this orgy of images, while the most common story of what happens to them – that they silently fall through the cracks of the justice system and disappear – is not a story anybody is telling.

The key word here is "silent." The idea that victims' voices, their experience of a crime, are a danger themselves in need of controlling is as ancient as the story of the Furies stalking Aeschylus and as fresh as the latest editorial fulminating over the dangers of allowing victim impact statements to be read during sentencing, lest their presence and words "infect" the otherwise pristine courtroom air.

Legal scholars oppose so-called "victim's rights" laws on a variety of grounds, but it seems that no argument presented to the public against allowing victims to speak during sentencing is complete without colorful references to the dangers of mob rule, hysteria, bloodthirstiness or vengeance.[2] In a tone typical of opponents of such rights, syndicated columnist Tom Teepen called the bipartisan victim's rights amendment presented in 2000 "easy demagoguery." "You can't be sure this monster won't walk again," he warned.[3] For many, a direct line exists between lynch mobs mobilizing and allowing crime victims to speak about their losses during sentencing, or even technical rules permitting victims to be notified when a convict is released from prison. The metaphor that

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[2] The novelist James Ellroy, whose mother was raped and murdered in an unsolved crime when he was ten, memorably describes victim impact statements as "psychological cleansing . . . passed by morons hooked on daytime TV." His dislike of the process actually comprises one of the least hostile criticisms of such laws, based as it is on personal distaste, not paranoid visions of Big Brother. James Ellroy, *My Dark Places* (New York: Random House, 1996), 378. For a summary of arguments for and against such laws, see Steve Twist, "Point/Counterpoint on the Crime Victims' Rights Amendment: Responses to Key Objections Raised by Opponents," National Victims' Constitutional Amendment Passage Committee Report, July 17, 2003, http://www.nvcap.org/ (accessed June 5, 2005).

[3] Tom Teepen, "Constitution Survives Meddling Politicians," Editorial, *Atlanta Journal and Constitution*, 2 May 2000.

victims are mere witnesses to crimes committed against society, at the site of their bodies, is elevated to an unimpeachable principle with unthinking ease. Coupled with the easy sentimentality that extends to the accused, it thrusts victims into a limbo that is, itself, hardly metaphorical.

While the elision of victims is an observable phenomenon in movies and fictional accounts of crime, real experiences of this limbo are rarely articulated. Syndicated columnist and novelist Dominick Dunne, who watched his daughter's murderer get off with a mere three-year incarceration, is an exception to this rule, but Dunne has also long been derided for his emotional and partisan advocacy on the part of victims of crime. It would seem that even the father of a murder victim is expected to carefully guard not only his emotions, but also whether he says anything at all about his experience of crime.

The experience of Dunne, whose transformation from society writer into victim's advocate dates from 1983, when he signed the paperwork for his strangled daughter's organs to be harvested from her ("Her heart was sent to San Francisco," he wrote with restraint), offers an unusually vivid picture of the routine indignities and legal silencing imposed on crime victims in the name of justice for the accused.[4] Dunne's wife, Lenny Griffin Dunne, was nearly banned from the courtroom during the trial of her daughter's killer because, the defense argued, her use of a wheelchair

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[4] Dominick Dunne, *Fatal Charms and Other Tales of Today* (New York: Bantam, 1987).

would arouse prejudicial sympathies. As is routine, potential jurors who were crime victims themselves or had a crime victim in their families could be legitimately excluded from the juror pool on those grounds.[5] Also: "[i]f any member of the Dunne family cries, cries out, rolls his eyes, exclaims in any way, he will be asked to leave the courtroom," the judge told the Dunne family. A former girlfriend of the defendant arrived to testify that he had beaten her to the point of hospitalization twice, punctured her lung and broke her nose, but the judge deemed her testimony prejudicial and would not allow it. Friends of Dunne's daughter, and her own mother, stood ready to testify to previous, severe beatings, but this testimony was disallowed as hearsay. With time served already and the parole terms then automatically granted, John Sweeney received two and a half years for one charge of voluntary manslaughter and one charge of misdemeanor assault, for the murder and one previous beating of Dominique Dunne.

In his essay about the trial of his daughter's killer, Dunne painted what was then, to Americans, a still unfamiliar picture of judicial incompetence and bias favoring criminal defendants in criminal courtrooms. The picture was so extreme that Dunne is viewed as something of an unreliable witness merely for expressing outrage about it; his decision, arising from his daughter's case, to continue witnessing and

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[5] So-called peremptory challenges on the grounds of prior experience as a crime victim are legal: it is not legal to exclude potential jurors on the grounds of sex or race.

recording criminal trials is viewed as more psychological tic than moral mission, particularly in contrast to those whose morality drives them to try to overturn criminal sentences and free convicts from death row. Dunne enacts his career as a crime victim's advocate with admittedly theatrical flourish. But even barring the two-tone shirts and anecdotes about lunches at Elaine's, it is still doubtful that his cause would ever be viewed with the seriousness accorded to anti-death penalty advocate Sister Helen Prejean. Not even a terribly murdered daughter can give Dominick Dunne the type of accessory that lends weight to an American story about justice: an innocent defendant, or at least an interesting, remorseful, albeit guilty one.

This should not surprise. After all, there is even a formula for measuring the expendability of future crime victims relative to the danger of convicting the wrongly accused. Although, logically, this is a nonsense comparison (no court has actually ever been asked to choose between imprisoning the demonstrably innocent and freeing the actually guilty), it is revered as the highest principle of Western criminal law; schoolchildren and lawyers recite it unblinkingly. "It is better to allow ninety-nine guilty men to go free than to convict one innocent," the saying goes, although, as Alexander Volokh observes in his essay, "*n* Guilty Men," the "one hundred

guilty men" is sometimes ten, or fifty, or even one thousand.[6] The fact that we so enshrine the idea of simply "letting" guilty men go free, be it ten or one thousand of them, speaks volumes about the status of crime victims and future victims of crime in our judicial system. According to this maxim, victims do matter a great deal, so long as they are victims of wrongful accusation, but the other ten or fifty or one thousand or ten thousand present and future victims of crime itself matter not at all. These victims, the saying goes, may and should be sacrificed in the name of ensuring fairness for every person who faces criminal charges.

Between 1969 and 1975, six of the seven Best Picture Oscar winning films were paeans to criminality, mainly told from the criminal's point of view, as were many acclaimed non-Oscar winners including *Bonnie and Clyde* (1967), *A Clockwork Orange* (1971), *Straw Dogs* (1972), *Frenzy* (1972), *Badlands* (1973), *Dog Day Afternoon* (1975), and *Taxi Driver* (1976).[7] Not every criminal character in these films is depicted sympathetically, and few are innocents incarcerated (a theme which gained centrality in the 1990's). However, taken together, these movies indicate a widespread cultural fascination with the criminal mind, a

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[6] Alexander Volokh, "*n* Guilty Men," *University of Pennsylvania Law Review*, 146, no. 2 (1997).

[7] Oscar Winners for Best Picture: 1969, *Midnight Cowboy*; 1970, *Patton*; 1971, *The French Connection*; 1972, *The Godfather I*; 1973, *The Sting*; 1974, *The Godfather II*; 1975, *One Flew Over the Cuckoo's Nest.* Only *Patton* is not a film about criminals' lives.

fascination that easily bleeds over into approbation and even admiration for the cool rebelliousness of our reified, celluloid anti-heroes.

On the streets, the chic Bernadine Dohrn and other members of the Weather Underground were blowing up armored car deliverymen and posing for pictures like rock stars. On-screen, R. P. McMurphy (Jack Nicholson) in *One Flew Over the Cuckoo's Nest* and Alexander "Alex" de Large (Malcolm McDowell) in *Clockwork Orange* raged against conformist states trying to deprive them of free will: in McMurphy's case, his will to engage in sex acts with minors, in Alex's, his will to slash, bash, and rape everyone who crosses his path while he enjoyed his other true love, classical music.[8] *Cuckoo's Nest* joined Arthur Miller's *The Crucible* as popular theater for decrying the dangers of state power. *Clockwork Orange* was pulled from London cinemas after the film spawned numerous copycat assaults, but the assaults didn't stop and the film lost nothing of its popularity; instead, incidents like the 1973 gang rape of a young girl in Lancashire by men singing "Singing in the Rain," became mere anecdotes in the Seventies' decade of outlaw chic.[9]

Some of the presumptions that anchor the plots of these movies, that state power is an omnipresent threat, that law and order is a mere disguise for fascism and mind control, are very old themes. What was new

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[8] Milos Forman (director), *One Flew Over the Cuckoo's Nest*, Burbank: United Artists, 1975. Stanley Kubrick (director), *A Clockwork Orange*, Hollywood: Warner Brothers, 1971.
[9] Tim Durks, "A Clockwork Orange," *Filmsite*, http://www.filmsite.org/cloc.html (accessed June 5, 2005).

in the early 1970's was the obvious pleasure taken in depicting violence itself, the way depictions of very personal acts of violence were routinely legitimated as rebellion against "the system" or "the man," and a profound fixation on the idea that incarceration itself is always a misuse of state power, whether or not the incarcerated is rightfully or wrongfully detained.[10]

Over the span of one decade in cinema, the tragedy of *To Kill A Mockingbird*'s Tom Robinson, wrongfully imprisoned for rape because of the color of his skin and murdered trying to scale a prison fence to gain his "just" freedom, was replaced by dramas of other hero-convicts whose innocence or guilt was far less important than escape itself. In *Cuckoo's Nest*, the emasculated, racially victimized Chief Bromden escapes both the asylum and his keeper, Nurse Ratched, by shattering a reinforced glass window, a legendary moment in America film history. Why was Bromden there? Was he a convict under commitment for a crime? Such questions didn't matter.

In *Clockwork Orange*, murderer and rapist Alex regains his psychological freedom and appetite for harming others after a former victim deprograms the impulse conditioning that is preventing him from

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[10] It should surprise no one that "the man" is often a woman, such as Nurse Ratched in *Cuckoo's Nest*, who is despicableness embodied in unusually pale skin and rubbery, gynecological sexuality; when McMurphy attacks her, he is striking out at mother, tease, and fascist, and the audience is encouraged to cheer for every blow.

enjoying both classical music and crushing skulls. Victims exist in these films, if at all, as odd props highlighting the aesthetics of the criminal soul. All that is learned of the statutory rape conviction that landed McMurphy in the asylum is that the girl "was fifteen years old going on thirty-five" and that she herself practically raped him. The graphic rape/murder in *Clockwork Orange* is rendered as something halfway between a ballet and a fashion shoot: the victim is posed in a variety of beautiful poses. Even her terror is sexy and elegant, a reflection of Alex's taste literally reflected in his eyes. The audience, too, sees rape through the assailant's eyes. Critics, for their part, saw this as one of the film's most compelling innovations.

Making the decision to show horrific crimes exclusively from the perspective of the assailant, or, in effect, encouraging the viewer to identify with the exclusive humanity of the assailant himself, has been named, by literary critic Roger Shattuck, the "empathy-sincerity plea." Shattuck developed the idea of the plea in an attempt to comprehend his students' perplexing, overwhelmingly positive responses to the murderer, Meursault, in Albert Camus' *The Stranger.* [11] Camus encourages absolute identification with a killer's point of view of his crimes, Shattuck observes, and the "appeal" of this "empathetic knowledge" encourages his students to abdicate their perspective for the killers' own. Shattuck might have

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[11] Albert Camus, *The Stranger*, trans. Matthew Ward (1942; reprint, New York: Alfred A Knopf, 1988).

been speaking about the popular reception of *Clockwork Orange, Bonnie and Clyde, Dog Day Afternoon* or any of the other highly acclaimed anti-hero films of the early 1970's:

> Our empathy for another person can be stretched very far. We can venture too close and lose our perspective on humanity. Once we understand another life by entering it, by seeing it from inside, we may both pardon and forgive a criminal action. We may not even recognize it as criminal. We are all guilty in some way. How can we ever judge anyone else, punish anyone else?[12]

What Shattuck calls a misreading of the monstrous behavior of Camus' killer is hard to distinguish from the "root causes" school of criminology that strove to explain (and justify and even excuse) criminal behavior by pointing to the history of other oppressions. "We are all guilty," Shattuck writes, in imitation of his students, "How can we ever judge [or] punish anyone else?" *Clockwork Orange* pushes this viewpoint to an extreme by choreographing cinematic rape to look like rapturous scene from Swan Lake and emphasizing the aesthetic longings of the main thug, Alex. *Cuckoo's Nest* creates a jailer of such pornographic excess that no crime justifies incarceration in Ratched's literally emasculating, locked ward.

By the 1970's, the dictate by Atticus Finch, to reach justice by "walking in another man's shoes" had been perverted into Shattuck's "empathy-sincerity plea"; the shoes offered up in these fictions belong

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[12] Roger Shattuck, *Forbidden Knowledge: From Prometheus to Pornography* (New York: St. Martin's Press, 1996), 156, 162.

almost exclusively to violent anti-heroes. In order to enter these imaginative works at all, the reader or viewer must find some empathetic connection with murderers or rapists. The ultimate answer offered by the cinema of the 1970's to Shattuck's students' question, "How can we ever judge [or] punish anyone," is: "Punish them for what? There are no victims here."

In the early 1970's, when anti-hero chic dominated movie theaters and bestseller's lists, it must still have been possible to imagine that burgeoning crime rates might reverse themselves soon, that conditions in urban streets and elsewhere might stabilize, and that the crisis created by street violence would pass. But over the next two decades, high violent crime rates not only persisted but also grew worse, and unprecedented levels of violence became endemic. Yet even this onslaught failed to shift attention from dramas about wrongly convicted men and anti-heroes to other types of justice stories. Nor did new social movements addressing prisoners and crime offer more comprehension or compassion for the high price such crime extracts from victims.

Instead, attention remained focused on the experiences of convicted men, through the activism of the Innocence Project, which I will discuss in chapters four and five, and in the anti-death penalty movement, which began to place extraordinary demands on victims' families long after trials had ended. In each of these new movements, the narrative terms of the

southern rape complex molded the ways both criminals and their victims were seen. This was true regardless of whether the key actors were black or white or the crimes interracial or intra-racial ones; even white assailants of white victims might access reserves of sympathy simply on the grounds of being convicted of a crime. The automatic assumption, that to stand accused is to somehow become a potential victim of unbridled state power, fuelled by vindictive and vengeful victims and their families, also remained the status quo in critically applauded filmmaking, wherein, again, there was little more sympathetic subjectivity or representation of victims' experiences in films about crime than there had been in previous decades.

In 1980, Robert Lee Willie, a white man from St. Tammany Parish, Louisiana, went on his final crime spree before being captured and sentenced to death. Willie and his accomplice, Joe Vaccaro, kidnapped 18-year old Faith Hathaway, and over the course of several hours they raped her, beat her, cut off her fingers, stabbed her and slit her throat. The men left Hathaway's body in a deserted gravel pit, carefully arranged, so that when deputy sheriff Mike Varnado found her, she was nude, spread-eagled, her arms above her head and her neck "cocked back" to emphasize the hole where her throat had been. Speaking on *Frontline,* Varnado recalled that her wide-open mouth and gaping neck wound made it look as

if she was crying for help. "Faith was screaming," a shaken Varnado said.[13]

Before Hathaway's body was discovered, Willie and Vaccaro had already kidnapped another young woman, sixteen-year old Debbie Cuevas and her boyfriend, Mark Brewster. They held the couple captive for two days, torturing Brewster with cigarettes, stabbing him, and forcing him to watch as they similarly tortured Cuevas and raped her. Then they tied Brewster to a tree, shot him in the head, and made plans to burn the young woman to death in the trunk of their car. Finally, they released her, but only after repeatedly taunting her with aborted promises of release. Miraculously, Mark Brewster survived being tortured and shot, but he lost much of his brain function and is now confined to a wheelchair.

Robert Lee Willie was executed in 1984. In death, he has been transformed through the writing and activism of his "spiritual advisor," Sister Helen Prejean, and through actor Tim Robbins' filmmaking, from a serial rapist and killer into a symbol of forgiveness, love and humanity.[14] In 1983, Prejean wrote a memoir about her relationship with Willie and another serial rapist and death row inmate, Patrick Sonnier; in 1985, her

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[13] Ben Loeterman (producer), "Angel on Death Row," *Frontline*, 9 April 1996. http://pbs.org/wgbh/pages/frontline/angel/angelscript.html (accessed June 5, 2005).

[14] Prejean has also suggested that he was the victim of an unjust conviction on the grounds that she believes it was Vacarro, not Willie, who inflicted the fatal wound in Hathaway's throat.

memoir was turned into the film, *Dead Man Walking*, which depicts Sister Helen counseling a fictional inmate based primarily on Willie, but also on Sonnier.[15] Thanks to the transformation, in the film, of Robert Lee Willie into the fictional "Matthew Poncelet," Willie is remembered, today, not as the person who slit open Faith Hathaway's throat while raping her, but as a hurting, vulnerable child-man struggling with his feelings in the face of imminent execution. Willie's journey from torturer and killer to penitent, which by all accounts other than Prejean's did not occur, even at the moment of his execution,[16] has become a rallying image for those fighting for the rights of prisoners facing execution and a much-repeated anecdote arguing for the possibility of grace touching even the most hardened of human hearts.

Sister Helen Prejean, who left a wealthy New Orleans community to serve her vocation in the most violent housing projects in that city, deserves great admiration for her decades-long commitment to the poor, and the film *Dead Man Walking*, which was nominated for several Oscars, deserves credit for reviving and broadening the appeal of the anti-death penalty movement. But the film does not, as director Tim Robbins has

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[15] John Kilik, Tim Robbins, Rudd Simmons (producers). *Dead Man Walking* Hollywood: Polygram Filmed Entertainment, 1995.

[16] In the film, *Dead Man Walking*, the character "Matthew Poncelet" winks at Sister Helen Prejean prior to his death, just as Robert Lee Willie winked at Prejean prior to his execution. Prejean has explained Willie's wink, as a pre-arranged sign of his acceptance of forgiveness. But victims' family members also attending Willie's execution report that his demeanor and the wink itself were belligerent and unrepentant, a final slap in their faces. See "Angel on Death Row": "The Interviews."

claimed, offer an accurate or even balanced portrayal of the real killers or of the horror of the crimes they committed. Nor is it, as both Robbins and Prejean have claimed, an apolitical film designed to show both sides of the death penalty debate. Instead, Robbins goes to great lengths to obscure and minimize the violence committed by Robert Lee Willie and Joe Vaccaro, and he also invents, in Matthew Poncelet, a character far more sympathetic and infinitely more remorseful than either Willie or Vaccaro appear to have ever been.

With the plot's focus on the redemptive relationship between the fictional Poncelet and the real Sister Prejean, the victims and their families are placed in the discomfiting position of playing the villains of the piece. Claims of objectivity notwithstanding, Robbins as much as acknowledged this when he told the Australian *Herald Sun* that the film was about "the capacity of the heart to hold hatred and also to hold forgiveness," for he was talking, not about the killers, but about the ways the families and the nun, respectively, responded to that violence. Sister Prejean herself, who described *Dead Man Walking* as "plowing the soil" between disparate points of view, has also labeled real victims' families "collaborators" and has prayed aloud in the death chamber for God to "forgive" those present, including victim's families. In an ongoing feud, Elizabeth Harvey, Faith Hathaway's mother, said that *Dead Man Walking* had "crucified" her family, and Sister Prejean responded: "I thought I would die when I heard

her say (sic) - I had a chill. It was similar to the way I felt in the execution chamber you know you feel cold."[17]

Crucifixion on the one hand, execution on the other: despite its commercial and other successes, in real life, *Dead Man Walking* has not produced anything resembling the rapprochement depicted in the film between Sister Prejean and the victims' families. After the film was released, the Harveys began attending every execution at the Louisiana State Penitentiary at Angola where their daughter's killer was executed. Sister Prejean sees their actions as a psychological miring down into vengeance, or "choos[ing] to keep bringing it up," referring to their daughter's death. But Elizabeth Harvey told *Frontline* that she sees her vigil in the same terms as Prejean's witnessing for the condemned man: "I go to Angola because the victim cannot be there and the news media, our society, doesn't remember any longer who that victim was."[18]

Figuring out "who the victim was" is indeed the central question in *Dead Man Walking*, not only because the only victim whose suffering is graphically and extensively displayed is Matthew Poncelet, but also because the film's emphasis on the death penalty as an injustice arising from poverty and racism, not from crime itself, implicitly and politically places much of the blame for Poncelet's suffering directly upon the middle- and working-class, law-and-order types from which he selects his

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[17] Loeterman, "Angel on Death Row."
[18] Ibid.

victims. In scenes featuring Sister Prejean listening to the radio or watching television, undeniably fascistic images or voices of politicians thundering messages of law-and-order interrupt her reveries about Poncelet or her interactions with the minority children among whom she lives. The message is not a subtle one: crime is not the problem; exaggerated fears of crime that fuel the demand for extreme punishments such as the death penalty are the real source of societal violence. We are back, then, in Schlesinger's world of "root causes." Elsewhere, Prejean has expanded on this theme:

> Actually the public (not by accident) has an exaggerated perception of the risk of felon-type murders . . . The risk varies, of course, according to one's neighborhood - inner-city residents have *good* reason to fear felon-type murders - but nationwide, according to 1989 statistics, a very small percentage, 2.0 persons per 100,000, die of felony-type murders each year . . . strokes cause eleven times more deaths.[19]

It might be argued that the likelihood of dying in the death chamber, of course, is even less statistically significant.

Illuminating the minutiae of Poncelet's suffering, and by extension, Sister Prejean's assumption of his burden, is the precise purpose of the film. The execution scene in particular is filmed in brightly lit detail; Prejean and Poncelet appear in a sequence of alternating reaction shots that captures every fleeting expression of their faces. In promotional

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[19] Sister Helen Prejean, C.S.J., "Would Jesus Pull the Switch?" *Salt of the Earth*, Claretian Publications, 1997.

materials coyly titled "Dead Set on the Facts," Tim Robbins describes the "courage" of his actors and crew, who, "striving for authenticity," subjected themselves to four days of filming in the real Louisiana State Penitentiary in Angola. "The execution room is totally white," production designer Richard Hoover said, "the only white thing in the movie - pure white. The curtains, the phones, the air conditioners are all elements we found in existing execution chambers. We didn't make *any* of this up."[20]

But what *was* made up, and further, choreographed, obscured, and ritualized, were the scenes of the murders and rapes committed by the fictional Poncelet and his fictional partner. The scenes of murder and rape are displayed in shadowy fragments that show audiences only brief, dream-like flashes of violence being inflicted upon parts of the victims' bodies. Only rare frames include glimpses of the victims' whole bodies, and even fewer, their faces. Why, it might be asked, was it so vital for Tim Robbins to get the details of the death chamber correct while so substantially altering and largely concealing the record of the real crimes? The effect is to make the victims seem as animalistic and as primitive as their attackers at the moment of assault, to literally present them as the outcome of the actions being perpetrated upon them. They are visually and metaphorically dismembered.

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[20]John Kilik, Tim Robbins, Rudd Simmons (producers). *Dead Man Walking*, Hollywood: Polygram Filmed Entertainment, 1995. DVD Promotions Materials.

If the theme of *Dead Man Walking* is about bringing human perspective and identity back into lives that have become thoroughly inhuman, then the crime victims themselves are quite certainly excluded from this theme. In stark contrast to the film's treatment of Poncelet, who is humanized extensively over long scenes in which he counsels his siblings, discusses scripture with Sister Prejean, and attempts to comfort his mother, his victims are never even shown as whole beings, even as corpses dressed for their funerals, or simply as people living their lives before the attacks. Like the real assailants before them, the filmmakers literally abandon the crime victims in the woods and the gorges where they died, and foliage, shadows, and the brevity of the camera shots obscure even the depiction of them in these places. Clearly, it is not their humanity that is at stake here.

Against a backdrop devoid of any opportunity to empathize with either the victims or their families, the state's decision to execute is made to appear as both arbitrary and perverse, as class-based and unjust, just as Sister Helen claims it to be. With the several crimes committed by Robert Lee Willie, Patrick Sonnier, and their accomplices reduced to only two murders presented only in strobe-lit, almost balletic grace, there is only an absence where any visual "argument" for executing Poncelet might be expected to exist. The victims are not even shown in states of terror, as is Poncelet prior to his dying, because they are shown already dead, a naked

arm here, a bloated leg there, or in briefly displayed, two-dimensional photographs. In the death chamber, they appear even more briefly as ghosts, wavering into view as the life leaves Poncelet's body. Because the effect is so unexpected, and because their faces lack expression, it is impossible to tell whether these are vengeful ghosts, savoring the execution, or forgiving ghosts, welcoming Poncelet to a state of grace, the two choices posited by Tim Robbins and Sister Prejean. This ambiguity only seems to further separate the dead, adolescent victims from their literally fractured humanity; even in the representation of their afterlife, as portrayed by the filmmakers, the victims are never allowed the possibility of independent moral expression. This scene eerily echoes the ghostly appearances of the already-dead and emotionally deadened Mary Phagan in both David Mamet's and Alfred Uhry's retellings of the Leo Frank story. The ghosts' complacent "silence" also both refutes and recalls the silent "scream" of Faith Hathaway as observed by the traumatized deputy sheriff who found her body, although in order to know this distressing detail of Hathaway's death, one would need to look beyond the limited information offered by the film.

The real Robert Lee Willie left two victims alive, although Tim Robbins made the decision to exclude both of them from the film, one of whom remains literally voiceless, robbed by Willie and Vaccaro of his ability, even, to speak. That leaves Debbie Cuevas, who was sixteen when

she was kidnapped, raped, tortured and nearly murdered by Willie, a story she survived to tell. Cuevas was angered when she discovered that Sister Helen Prejean had written about Willie's assault of her without even attempting to obtain her account of the ordeal. "I felt that if she was going to write a book and bring up things that happened that only I would know, that she should have asked me," the young woman reasonably noted.[21]

Cuevas also objected to Sister Prejean's frequent assertions that Willie could not be the person who cut Faith Hathaway's throat because Willie had insisted to the nun that his accomplice, Joe Vaccaro, was the ringleader in the crimes they committed together, and Willie was only a follower in the path of the other man's homicidal lead. On *Frontline*, Prejean reiterated her belief, even after he failed a lie-detector test, that Willie was innocent of the crime of murdering Hathaway: "[h]e was very insistent on that lie detector test and bitter(sic) disappointed that it didn't show what he evidently wanted to show his mother," she said, "I tended to believe him just by the level of his disappointment."[22] Cuevas countered that she would have told the nun that Willie was the leader in the attack against her and her boyfriend, that he shot her boyfriend in the head and raped her, if only the nun had asked for her version of events. To this, Prejean astonishingly responded: "Yeah, well, he was the leader in the

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[21] Loeterman, "Angel on Death Row."
[22] Ibid.

sense of through the whole thing (sic) and that she experienced - that Joe Vaccaro did what he said. What [Willie] did in the end was he let her go. That he didn't kill her."[23]

Sister Prejean's remorse for failing to contact Debbie Cuevas prior to writing her book may be sincere, but the intensity of her identification with Willie's versions of events, even in the face of conflicting evidence presented by an actual victim, suggests the deep faith that she and others in her movement possess, that convicts are the only type of "victims" who have a meaningful story to tell. In the film, the problem of Debbie Cuevas as a victim whose claims challenge Willie's (Poncelet's) is resolved by simply erasing Cuevas' violated, sixteen-year old self from the story, completely and utterly.

The absence of Cuevas the rape victim and trauma survivor from *Dead Man Walking* also allows Sister Prejean to assume the role as the one visible woman who is sexually threatened, and then, ultimately, not molested by Poncelet himself. This trope, the plot device of taming the rapist, is another way that Prejean's powers of redemption and Poncelet's latent goodness are demonstrated, a demonstration that would undoubtedly have faltered, had the screenplay included not only an actual victim of rape, but any mention to the film's audience of Willie's actual behavior towards Cuevas in the courtroom, where he "threw her a kiss" as

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[23] Ibid.

she left the witness stand after testifying about being sodomized and raped by him. The absence of Cuevas from the film enables an affection to blossom between Prejean and Poncelet that would seem grotesque in any film that included the living victim's real experience of him. Without Cuevas, and with other scenes of rape reduced to but a few blurry seconds of fragmented shots, filmed in the woods in nearly total darkness, Sister Prejean's expressions of affection for Poncelet, in brightly lit and institutionally controlled spaces, are simultaneously both safer and more seamlessly intimate; when the two discuss sex and love, there is no other inconveniently injured female body to literally divide them. In the absence of Poncelet's female victims, Prejean and another nun are even able to find hilarity in the irony of burying a rapist beside a nun who had, in life, placed an unusually high value on her chastity. "Celestine . . . is going to lie next to a man for all eternity," they gasp, laughing. "I'll be the face of love to you," Prejean tells Poncelet, as the execution nears. After the real Willie was executed, Prejean told a reporter that he lived on "inside of her."

Of course, these expressions of love by Sister Prejean are grounded in the language of redemption and her spiritual vocation. But in the film, this chaste love seems, at the very least, to hint at eroticized tensions, including the tension created by Sister Helen's willfully embarking upon a relationship with a man who has committed inconceivable acts of sexual

brutality against other women. Without this tension, the film would doubtlessly be a less compelling story: it is difficult to imagine such a dramatic exchange taking place before the backdrop of a fatal gas station hold-up, for example.

It is troubling that sexual tension with a rapist and murderer comprises no small portion of the films' dramatic force. The narrative of the celibate, yet beautiful woman entering the world of the rapist and emerging sexually unscathed also subtly, but unfortunately, implicates his other female victims in their own assaults; this is a price Prejean and Robbins are both willing to impose on those other women, in order to create a compelling narrative for the rescue of Poncelet's soul. The insinuation of passionate tension between the murderer and the nun hints at a distressing explanation for the tendency of Prejean and other anti-death penalty activists to select rapist/killers as the most common objects of their activism: how much does the drama of such risky relationships enhance the activists' goals of attracting audiences, in order to proselytize them? How much does the condemnation and suspicions routinely directed at victims of rape, even dead ones, aid their cause of creating empathy for men on death row?

As with the Leo Frank story, the story of Sister Helen Prejean's spiritual advising of death row prisoners has been turned into a "social

problem" opera.[24] The opera is also titled *Dead Man Walking*, and major plot elements, such as Sister Prejean's gradual acceptance of her role, the gradual acceptance of Prejean's ministry by some of the victims' parents, and the convicted man's claims of innocence, remain the same from screen to stage. However, the opera is different from the film in two risky and significant ways: the killer, his victims, and their families are based on real people, not composites, and instead of re-telling the story of the fictional Poncelet or revisiting real killers Patrick Sonnier or Robert Lee Willie, Sister Prejean and the opera's creators picked yet another rapist-murderer whom Prejean had counseled, Joseph De Rocher, as the condemned man. Along with his brother, DeRocher raped and murdered a teenaged couple in Louisiana.

The opera features music gleaned from American spirituals and Elvis Presley songs; in one of its reported "light touches," the nun and convict bond, in fact, over their mutual love of Elvis songs.[25] It also features a set with a "death table" resembling a cross, but it does not, as one critic observed, feature any solo numbers or operatic "motifs" focusing on either the victims or their families.[26] Such criticism was rare; most critics praised the "mythic" and "classically tragic" elements of the

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[24] Jake Heggie (composer) and Terrence McNally (playwright), *Dead Man Walking*, 2001.
[25] Ronald Blum, "'Dead Man Walking' Given New York Premiere," *Associated Press Arts and Entertainment Reviews*, 15 September 2002.
[26] Truman C. Wang, "Opera Pacific Brings New Life to *Dead Man*," *Opera Review*, 18 April 2002.

story. Pittsburgh Opera musical director John Mauceri called *Dead Man Walking,* "a rescue opera in which a woman's love saves a man." At the opera's climax, De Rocher blames a woman as well, revealing to Sister Prejean that his need to rape and kill arose from being humiliated by a woman whom he once loved. With this secret revealed, he is able to accept his guilt and die with Sister Prejean's blessing.[27]

For a time, it seemed that Sister Helen Prejean might bring a new, more inclusive perspective to the anti-death penalty movement, a movement that has never hesitated to literally deny the experiences of crime victims in its efforts to save the lives of convicted felons on death row. Prejean promised crime victims' families that, quite simply, she would attempt to witness and acknowledge their pain as well. In 1988, she wrote:

> On the anvil of [victims] pain, I forge[d] a new commitment to expend my energies for victims' families as well as death row inmates. Now I work on a task-force to see that victims' families get state-allotted funds for counseling, unemployment compensation, funeral expenses. . . . I now know that really bad things can happen to really good people. But surely, in 1988 we who purport to be the most civilized of societies can find a way to incapacitate dangerous criminals without imitating their tragic, violent behavior.[28]

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[27] Mark Kanny, ""Pittsburgh Opera Takes a Stroll Down Death Row," *Pittsburgh Tribune-Review,* 2 June 2004.

[28] Helen Prejean, "Crime Victims on the Anvil of Pain," Op-Ed, *St. Petersburg Times,* 15 May 1988.

By 1996, however, she had apparently ceased to work with victims[29] and was applying her energies to free incarcerated men, not only from death row, but also from prison, by proving their "innocence."

Several of Prejean's new clients have had their sentences upheld, some many times over. One, Joseph O'Dell, has engaged in actions from prison that seem designed to systematically commemorate the crimes he already committed. O'Dell's record of murder, kidnapping, robbery and rape dates back to 1954 and includes assaults on the anniversary of other crimes and sex assaults during which he told victims he would continue to rape them after they had died. His appeals were ornate: he demanded to take the bar exam from prison, to have his sperm frozen and his girlfriend artificially inseminated, to donate his organs, and to have his corpse stuffed by a taxidermist and displayed.[30] The mother of one of his victims told reporters that she was re-living her daughter's death with each fresh appearance by O'Dell on television, a common complaint by victims that would seem especially compelling in this case, given his ability to attract the press: "they always put in the whole sordid thing - everything he did to her. She's murdered again every time we see it in the paper because every detail is brought back." The victim's sister added:

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[29] A director of victim services for the State of Louisiana in New Orleans said he had never heard of Sister Prejean working with their agency. Phone conversation, June 24, 2005.
[30] Mike Mather, "Anger in Virginia Beach; 'System Failed' In Giving Convicted Killer Second Chance, Detective Says," *The Virginia-Pilot*, 18 December 1996.

> You know how they say there are five stages of grief? We may get to a certain stage or a certain point, and then we have to go back to court . . . You go through the anger and the hatred and the depression and you're finally getting to acceptance, and you have to start all over again.[31]

Although, the state had won a strong case against O'Dell, and survivors of earlier attacks attested to O'Dell's guilt, Prejean mounted an intense media campaign to "prove his innocence," using DNA. "When a citizen like Mr. O'Dell feels that he cannot get justice in the courts, he has no choice but to take his case to the people and to the governor through . . . the media," she announced, acknowledging that her status as the famous activist featured in *Dead Man Walking* would keep the case in the news.[32] DNA testing did reaffirm O'Dell's guilt, but not before he had become, like Prejean and thanks to her efforts, an international celebrity.

On movie screens and video store boxes and posters advertising the film, *Dead Man Walking*, "Matthew Poncelet" stares out, not the face of a conscienceless felon, but rather a face etched with hope for rescue, an impression enhanced by the "angel on death row," Sister Helen Prejean, pictured beside him, guiding Poncelet to better things. This scene, which has become iconic, is one of prayerful witnessing: the witnessing of the fictional Poncelet's walk to death by the real Sister Prejean, whose belief in God's mercy is not in question. To question a part is to question the

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[31] Laura Lafay, "For Victim's Family, Stages of Grief Never End; First He Took Her Life; Now Her Memory," *The Roanoke Times and World News*, 16 March 1997.
[32] Justin Pope, "Death Penalty Foe Seeks to Help O'Dell; Prejean Suggests Question of Innocence," *Richmond Times Dispatch*, 25 July 1996.

whole; how could one question Poncelet's remorse without questioning Sister Prejean's faith in its potential to exist? And who, among those who do not lack a conscience, would even wish to do that?

Clearly, this conundrum gives the film, *Dead Man Walking,* its extraordinary power. Yet, any opportunity for audiences to empathize with or feel empathy for the victims of Sonnier, Willie, and others is simply and literally excised from the story. Sister Helen's witnessing, which ought to encompass all people, instead guides viewers to experience empathy with criminals alone. The question the film asks is not: "Should this man die for what he has done?" but "Can you forgive him as she has done?"

The danger, as Roger Shattuck has observed, may be an excess of walking in some shoes. Absolute identification with such dangerous people leaves others, victims, in a perpetual state of danger, and also perpetually reliving the crime. The proliferation of ghost-victims in books and movies hostile to crime victims' experience may be telling us more than even the writers and filmmakers wish to say. The crime victim's limbo, of watching eternal appeals, of standing outside due process, of being the opposite of "represented," of simply not being manifest in the story, may be a true limbo, in every sense of the word, not just a legal one.

Chapter 5: Making "Innocence" Visible

In 1987, a serial rapist in Orlando, Florida named Tommie Lee Andrews became the first person in the United States to be convicted of a crime on the basis of DNA. The twenty-four year old Andrews came to the attention of police when they caught him lurking around houses in a neighborhood where several women had been raped and stabbed. A test developed in England and already being used in the United States to establish paternity was applied forensically to "fingerprint" his DNA, the genetic material in the young man's blood. Identical DNA was found in genetic evidence collected in rape kits from some of the rapes committed in the neighborhood where he was caught.

Andrews was charged with four rapes and was considered a suspect in at least a dozen others. In his first rape trial, jurors failed to reach a verdict; they reported that they were uncertain about how to react to this new use of DNA technology. For the second trial, the prosecution flew in an M.I.T. geneticist who testified that the chance that someone other than Andrews possessed the same DNA as was found at the rape scene was one in a billion. Andrews was pronounced guilty. A new era in rape prosecutions had begun.

The Andrews case was revolutionary, but this was a quiet revolution, one noticed mainly by prosecutors, defense attorneys and their clients.

Even before jurors sent Andrews to prison, prosecutors from several states were flooding the Lifecodes DNA laboratory in New York with evidence for testing. But it was criminals themselves who appear to have most quickly absorbed the lesson of DNA's courtroom potential. In December 1987, shortly after the conviction of Tommie Lee Andrews, the *St. Petersburg Times* reported: "[m]ost of the 150 defendants tested by Lifecodes in criminal cases since January pleaded guilty when confronted with the results." Still, the Andrews case received scant media attention outside northern Florida, where the rapes had occurred.[1]

What the public and press were watching in 1987, with unusually baited breath, was the highly publicized unraveling of another rape case, this one based on a rare but exciting occurrence: a victim recanting. In March 1995, Cathleen Crowell approached authorities with a shocking story: she said she had been lying eight years earlier when she reported being kidnapped and raped by three men. Crowell explained that she picked Gary Dotson's picture at random out of a mug-shot book at the police station and lied throughout Dotson's trial and conviction. She had fabricated the rape, she said, to cover up a possible pregnancy. Now she was a born-again Christian and wanted to confess in order to get Dotson

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[1] Pat Meisol, "DNA Test Gains Stature in Courtroom: Orlando Rape Conviction May Encourage Increased Use of Genetic 'Fingerprinting,'" *St. Petersburg Times*, 27 Dec. 1987, sec. B, p. 1. Only the *St. Petersburg Times* reported Andrews' first conviction; two months later, the *New York Times* and the *St. Louis Post-Dispatch* covered his second conviction in stories about forensic DNA. The *New York Times* also ran a front-page feature about DNA convictions. See Kirk Johnson, "'Fingerprinting' Tests become a Factor in Courts," *New York Times*, 7 Feb. 1988, sec. 1, p. 1.

released. The Cook County State's Attorney's Office dug in its heels and argued that Crowell's recantation was the real lie. A judge agreed that her original testimony was overall more believable than her new claim that no crime had occurred.[2]

The Dotson/Crowell case was eccentric, extreme, and irresistible to reporters. It featured a photogenic, rough-living high-school dropout, unrepentant prosecutors, distant judges, and especially, a possibly unstable and previously promiscuous alleged victim of rape who had pretended to be a virgin in the courtroom and was now willing to expose salacious details of her "good girl gone bad" story to repent for sending an innocent man to do hard time in prison. Reporters arrived from around the world in such numbers to cover the case that the Illinois Supreme Court had to move their hearings to an auditorium, where giant images of Crowell's semen-stained underwear were projected onto a screen for the amused crowd to see. The governor of Illinois stepped in to personally preside over clemency hearings that (happily, for him) overshadowed a stunning public health scandal in his administration, the largest salmonella outbreak in U.S. history.

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[2] For a useful, if occasionally scornful, summary of Gary Dotson's several appeals and media responses to the case, see Rob Warden, "The Rape That Wasn't: The First DNA Exoneration in Illinois," *Center on Wrongful Convictions*, Northwestern University School of Law, 8 Sept. 2003 http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Dotson.htm/ (accessed June 5, 2005).

Crowell's story seemed to confirm what defense attorneys had been saying for years: women who cry rape cannot be trusted, and prosecutors will put a man away with little or no compelling evidence of guilt. Ergo the international press, *Donohue*, the cover of *Newsweek*, movie and book offers, a traveling Dotson/Crowell media tour, and, as Ellen Goodman succinctly observed, "more space and air time than any of the other 186,000 rapes of the last 12 months."[3] Some of the intensity of the press coverage was likely due to the escalating shenanigans of the governor and others who could not resist the temptation to insert themselves into the case. But at the center of this perfect media storm was the story that looms so large in the American imagination but is rarely available to be played out in real life, the story of a woman who sent an innocent man to jail by lying about being raped.

Cathleen Crowell apologized to Gary Dotson on every major network, on talk shows, at press conferences, and in her book, *Forgive Me*, which sold more than 60,000 copies by the end of 1985 (profits from the book went to Dotson). The born-again woman whose semen-stained underpants became an international joke did not seem to mind the exposure; instead, she began a brief career on the Christian lecture circuit,

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[3] Ellen Goodman, "Rape - After Webb and Dotson," Editorial, *The Washington Post*, 18 May 1985, sec. A, p. 18.

touring the country with her message of guilt and remorse.[4] Meanwhile, the governor released Dotson on parole, but authorities rejected, in the face of public resistance, Dotson's appeals for total exoneration. Dotson had alcohol-fuelled scrapes with the law and was jailed twice for violating parole, but he had become a genuine folk hero, and in August 1988, when a new type of DNA test conclusively proved that the semen on Crowell's infamous underwear could not be his, he was hailed in international headlines once again.

The media's fascination with Gary Dotson's DNA acquittal and its indifference to Tommie Lee Andrews' DNA conviction established a pattern that has only grown more emphatic over the past sixteen years. No matter how many thousands of shelved and forgotten crimes are solved by DNA, no matter how many serial rapists are interrupted in the midst of prolific careers, the notion that DNA is making visible thousands of individual crime victims who were denied justice for years or decades simply does not compute as evidence of a larger injustice. These newly-solved cases are quantified in stories about rape kit backlogs or the new reach of DNA databases, but the only type of victims made visible by DNA who have captured the media's attention and the public's imagination are

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[4] Fox Butterfield, "'Old-Fashioned Faith' in Rape Case," *New York Times*, 30 May 1985, sec. A, p. 14.

the victims of wrongful incarceration. For these men,[5] each DNA exoneration offers poignant reinforcement of a familiar story nurtured by Americans' deep anxieties about state corruption and false rape charges, especially false rape charges levied by white women against black men. The thousands of rape victims whose unsolved cases were solved by DNA, and the millions of others whose unsolved cases were not, have no similar narrative to define what has happened to them. These cases remain, in a way, apprehended only numerically: X rape kits in a crime lab or Y hits on the federal database. There is nothing else on which to hang their stories.

The Innocence Project

Criminal defense attorneys Peter Neufeld and Barry Scheck founded the Innocence Project of the Benjamin N. Cardozo School of Law in 1992. The admirable goal of the Project was to gain acquittals for convicts who had been convicted of crimes they did not commit, but Scheck, Neufeld and others quickly realized that DNA technology offered them and their clients more than just another forensic tool. It offered a way to transform the unpopular image of convicts "gaming the system" through endless appeals, technical advantages granted to defendants, irrelevant or minor procedural errors, or simply raw legal trickery. Any competent defense

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[5] According to the Innocence Project, as of June 2005, 155 men and one woman have been exonerated by DNA evidence. Innocence Project, http://www.innocenceproject.org.html/ (accessed June 1, 2005).

attorney might be able to accomplish the goal of freeing his client on a variety of appeals of the sausage-making sort, such as arguing that jurors should not have been shown color photographs of a murder victim.[6] But even when such appeals prevailed in the courts, they did nothing to inspire widespread public sympathy for defendants, nor did they sow doubts in the legitimacy of the trial process, except in ways that certainly did not benefit the defense.

The iconography of DNA promised to play out before the public in a very different way; instead of lawyerly evasions by lawyers themselves, scientists seeking the "truth" of a case would find it under the microscope's cold, objective eye. With DNA technology as their focus, Neufeld and Scheck limited the Innocence Project to cases where "post-conviction DNA testing of evidence can yield conclusive proof of innocence."[7] In other words, in order to become an Innocence Project client, physical evidence from the crime would need to exist, and that evidence would also need to have not yet been subjected to DNA testing.[8]

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[6] For a summary of appeals involving photographs of victims, see J.H. Crabbe, "Admissibility in Evidence of Colored Photographs," 53 *American Law Reports* 2d (1102). For a successful appeal reducing death to life in prison, in part because jurors were shown "inflammatory" color slides of an 11-year old rape victim's nearly-severed head, see *Driskell v. State*, 659 P.2d 343 (Okl.Cr. 1983). When death penalty opponents speak of "hundreds" of people being released from death row or "thousands" of cases overturned on appeal, they are including cases like these along with smaller numbers of exculpations based on subsequent findings of innocence.

[7] For a statement of guidelines, see The Innocence Project, http://www.innocenceproject.org.html/.

[8] Scheck and Neufeld have generally upheld these prerequisites, but they made an exception in counting the five "Central Park Jogger" defendants as exonerated by DNA; at

The guidelines guaranteed that most of the Innocence Project's clients would be men convicted for sex-murders and rapes that occurred prior to the mid 1990's, when pretrial DNA testing of such evidence was becoming routine, but not so long ago that physical samples had degraded or simply hadn't been collected in the first place.[9] The guidelines also meant that the Innocence Project would not be taking on rape cases involving disputes over the victim's consent. "Stranger" rapes and sex murders thus became the most common crimes that fit the Project's restrictions, while the murky territories of "date rape" and "no means no" would be avoided entirely. Although Neufeld and Scheck would be challenging rape convictions, their plan held out some possibility that they would not do so by exploiting old assumptions about women lying about rape. On the other hand, they were doubtlessly expecting to uncover more Cathleen Crowells, women who not only fabricated a rape charge against a total stranger but also carried the lie all the way through

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trial, the five had already been excluded as the source of the one DNA sample taken from the rape.

[9] By as early as 1980, collecting "rape kit" samples from victims was on the way to becoming routine; other testable physical evidence also existed from many earlier crimes, particularly murders (which are never officially "closed" until solved) and some rapes. But it was not until 1992, when the FBI established CODIS, the Combined DNA Index System Database, that all jurisdictions were encouraged to uniformly preserve evidence from all rapes. Efforts for full cooperation from a few states are ongoing. Even today, it isn't uncommon to hear of rape kits being lost or discarded through negligence or intentionally as a part of "unfounding" a reported sex crime that was not believed by the police. For CODIS records, including participating states, see Department of Justice, http://www.fbi.gov/hq/lab/codis/ (accessed May 29, 2005).

the trial and conviction of an innocent man.[10] But with identification issues as their focus, at the very least the Innocence Project would cast a net beyond victim culpability to highlight the actions of prosecutors and police at least as much as, if not more than the actions of victims alone.

The Innocence Project was designed not only to draw attention to the individual cases being appealed but also to publicize larger issues of injustice and prosecutorial over-reach, as Neufeld and Scheck defined them. Despite the effect of Project advocacy in the individual lives of the men they have freed, this redefining of public perceptions of the criminal justice system stands as the Project's greatest victory. By 2004, the intense publicity accompanying exonerations was beginning to impact public opinion: in the eyes of some prosecutors, by chipping away at jurors' willingness to find defendants "guilty beyond a reasonable doubt." In that year, the Death Penalty Information Center announced that news of death row exonerations and concerns about wrongful convictions were causing growing numbers of jurors to refuse to hand down sentences of death.[11]

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[10] In this, they would be disappointed. None of the Innocence Project's acquittals to date have involved women lying about being raped.

[11] How many of the people released from death row are actually innocent (or are released at all, as opposed to having their sentences commuted to life or remanded for retrial) is deeply contested: while the anti-death penalty Death Penalty Information Center claims 116 "innocents released" since 1973, judges and prosecutors dispute their interpretation of many of these cases. Joshua Marquis, co-chairman of the Capital Litigation Committee of the National District Attorneys Association, cites 30, not 116, indisputably innocent people released after serving some time on death row, and Judge Jed S. Rakoff of the Federal District Court of New York, who analyzed the Center's numbers, said 32 innocent people had been freed. See Death Penalty Information Center, "Innocence and the Crisis in the American Death Penalty," 17 Sept. 2004, http://www.deathpenaltyinfo.org; Adam Liptak, "Fewer Death Sentences Being Imposed in U.S.," *New York Time*s, 15 September 2004. For

They credited concerns about wrongful conviction as the main source of changing public attitudes toward capitol punishment. In non-capital cases, which rely heavily on plea bargains, it is more difficult to track changes in juror attitudes, but there is little doubt that the concern over wrongful convictions weighs heavily in the public's imagination.

Before DNA, one segment of American society believed that the courts were intrinsically unfair to defendants of crime and another segment of American society did not, though many in the latter cohort would no doubt accede that there was unfairness in the historical past and certainly some isolated cases of unjust prosecution today. Thirteen years and 156 acquittals later, the Innocence Project has succeeded in radically refocusing the public's attention, away from the problem of criminals getting away with crimes and toward the question of innocents behind bars.

Yet, although they would argue otherwise, the Innocence Project did not enact this profound cultural shift by making a compelling case that significant numbers of innocent men ever were or still are languishing in prison for crimes they did not commit. Tragic as each individual wrongful incarceration may be, and as shocking as they appear in their totality, 156

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an example of one case widely misrepresented as exoneration, see Joshua Marquis, "The Myth of Innocence," *National Review Online*, 27 Jan. 2005 http://nationalreview.com (accessed June 5, 2005).

acquittals stretching back over twenty-seven[12] of the bloodiest years on America's streets (or even ten times that number) simply does not indicate systematic or widespread or even occasional convictions of innocent men when placed in the context of the half-million murders and two million *reported* rapes that occurred during those years.[13]

Neufeld and Scheck, of course, do not see their numbers this way. They have repeatedly argued that the cases they uncover represent only the tip of an iceberg of scores of innocent men who have been and continue to be convicted for murders and rapes they did not commit. Only the absence of testable DNA, they argue, stands between freedom and incarceration for tens or possibly hundreds of thousands of innocent men. They assert that because 25% to 30% of prime suspects in crimes have been proven to be innocent by DNA, some similar percentage of men may be serving time in cases where DNA didn't exist to acquit them.

This "prime suspect" number arises from one study conducted in the early days of forensic DNA testing. Jim Dwyer, the co-author with

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[12] The earliest conviction later overturned by the Innocence Project originated in 1978, when a man twice convicted and imprisoned for rape, David Gray, was accused of another assault, the rape and attempted murder of a 58-year old woman who had met him three days before the assault. Gray came to the victim's home to see a motorcycle her son was selling. The victim later identified Gray as her attacker. In 1998, the Innocence Project gained Gray's release on the grounds that semen found on the victim's bed sheets was not his. The victim was deceased by that time, and prosecutors continue to insist that the presence of another man's semen in the victim's bed does not rule out Gray as the suspect. For the Innocence Project's description of the case, see Innocence Project website, David Gray Case. For mention of Gray's other rapes, see "Man Who Spent 20 Years in Prison Filed Wrongful Conviction Lawsuit." *The Associated Press State and Local Wire* 7 July 2000.

[13] United States. Federal Bureau of Investigation. *Uniform Crime Reports.*

Scheck and Neufeld of *Actual Innocence,* an account of the Innocence Project, explains it this way:

> Today, DNA tests are used before trial. Of the first 18,000 results at the FBI and other crime laboratories, at *least* 5,000 prime suspects were excluded before their cases were tried. Overall, more than 25% of the prime suspects could not be implicated because many, if not most, were innocent.[14]

Here, Dwyer (as well as Neufeld and Scheck) equate being a suspect with being charged, prosecuted and convicted. But the experiences of crime victims whose cases were shelved, either because there was not enough evidence to convict a known suspect, or because that suspect was convicted for another crime, indicates otherwise. There is no way to know how many rape cases over the past twenty-seven years ended this way, just as there is no way to know how many of those 18,000 "prime suspect" cases submitted for DNA screening would have gone forward without DNA, but there is certainly no reason to believe that all, or most, or even many of them would have proceeded to trial in the absence of additional evidence, let alone all the way to a conviction.[15]

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[14] Barry Scheck, Peter Neufeld, Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted* (New York: Doubleday, 2000), xv.

[15] The Innocence Project's own case files contain surprisingly few examples of rape cases that proceeded solely on an identification by a victim, and in many of those instances, such as the David Gray case, the victim knew or had seen the assailant in some context prior to the crime. But arguments set forth by the Project about the fallibility of eyewitness identification exclusively emphasize mug shot and line-up identification, creating a strong impression of victims (particularly "white" ones) randomly selecting strangers' photographs from a book or pulling complete strangers out of line-ups. Academicians and journalists have followed the Project's lead. One controversial study released in 2004 by Samuel R. Gross, of the University of Michigan's School of Law, relied heavily on the Innocence Project's case profiles to draw conclusions about eyewitness errors, conclusions

Before pre-conviction DNA testing became the norm, the typical stranger rape case was closed and shelved without resolution, sometimes declared "solved," sometimes merely consigned to administrative limbo. Only the existence of evidence such as a positive I.D. of a perpetrator caught at that scene or at the scene of a similar crime, or knowledge of a local suspect with prior sex crimes, would convince prosecutors to proceed in investigating a case. Dwyer himself acknowledges that of the 5,000 "prime suspects" excluded by their DNA, some were facing other types of evidence that might still prove their guilt.[16]

The other factor complicating the Project's use of "prime suspect" data is the idiosyncrasies of gang rape. During rapes committed by more than one person, it is not uncommon for one or more of the participants to fail to leave DNA evidence. Such rapes have turned out to comprise an

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that largely ignore identifications by peers and co-defendants in gang rape cases, as well as instances in which the victim's "identification" is bolstered by her actually knowing the accused. Gross' report was widely cited by journalists, who used it, for example, to make claims such as: "90% of false convictions in the rape cases involved misidentification by witnesses" (a charge that failed to note the percentage of the cases included in the study that were gang rapes in which co-defendants performed the "identifications"). Nevertheless, Martin Dykman of the *St. Petersburg Times* Editorial Board used the Michigan report to publish a list of types of evidence he advised jurors to ignore, including eyewitnesses, jailhouse snitches, co-defendants and confessions made by those accused of crimes. However, Joshua Marquis, district attorney for Clatsop County, Oregon questioned the accuracy of any of the study's conclusions on the grounds that the author had combined cases of actual exoneration with many others overturned for lack of evidence or problems with evidence, not absolute confirmation of innocence. Samuel R. Gross, "Exonerations in the United States 1989 - 2003," University of Michigan School of Law, 19 April 2004, www.law.umich.edu/facultyBioPage/facultybiopagenew.asp?uniqname=srgross (accessed June 5, 2005). For "90%" argument and Marquis' rebuttal, see Adam Liptak, "Study Suspects Thousands of False Convictions," *The New York Times,* 19 April 2004. Martin Dyckman, "Jurors, Heed This Advice," Editorial, *St. Petersburg Times* 29 August 2004.

[16] It is difficult to account for, let alone count, rape cases that have been "unfounded," shelved, or declared, "solved" without resolution.

unusually high percentage of the Innocence Project's cases, raising more questions, not only about Neufeld and Scheck's "tip of the iceberg theories" of widespread wrongful incarcerations but also about the "actual innocence" of some in even that small pool of men and the limits of DNA's ability to serve as a simple magic truth-revealing tool.[17]

Yet, in the imaginative universe of the Innocence Project, this "prime suspect" number and other statistics relating to suspect testing get repeated as evidence of thousands of still-imprisoned, innocent men and thousands more in peril of future wrongful incarcerations.[18] The same would probably be true if DNA testing had revealed just one wrongfully incarcerated man behind bars. Describing the 5,000 "prime suspects" whose DNA failed to match the evidence, Dwyer writes: "[f]or this unseen legion of innocent suspects, only the genetic tests halted their forced march from wrongly accused to wrongly convicted."[19] The death camp imagery cannot be accidental. "We think they'll be hundreds and hundreds exonerated in the next few years," Peter Neufeld said in 2000.

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[17] For descriptions of specific gang rapes, see Peggy Reeves Sanday, *Fraternity Gang Rape: Sex, Brotherhood and Privilege on Campus* (New York, New York University Press, 1990); Bernard Lefkowitz, *Our Guys: The Glen Ridge Rape and the Secret Life of the Perfect Suburb* (New York: Vintage Books, 1997); Nathan McCall, *Makes Me Wanna Holler: A Young Black Man in America* (New York, Random House, 1994), 39-49. For characteristics of gang rapes, see Sarah Ullman, "A Comparison of Gang and Individual Rape Incidents," *Violence and Victims* 14 no. 2 (Summer 1999): 123-133; Louise E. Porter, Laurence J. Allison, "A Partially Ordered Scale of Influence in Violent Group Behavior: An Example From Gang Rape," *Small Group Research* 32 no. 4 (August 2001): 475-497.

[18] See, for example, the University of Michigan study.

[19] What may actually be extraordinary about the "FBI's first 18,000" DNA tests is that nearly 75% of them turned out to positively confirm the suspect's involvement in the crime.

Interestingly, just a few years earlier, he had been talking of "thousands" of exonerations.[20]

But for the most part, statistics of any type are carefully avoided in the Innocence Project's narration of wrongful convictions. This cannot be surprising, given that the experience of even 155 wrongly convicted men[21] pales, statistically at least, alongside 500,000 dead victims of murder and two million victims of reported rapes. Rather than draw attention to such numbers, the Project relies on the emotional power of the Blackstonian ethos that it is "far, far better" to release any number of guilty men than to imprison even one innocent: given the unanswerability of this saying, in the abstract, it is difficult for those who wish to challenge even the Innocence Project's wildest projections to summon crime victimization statistics alongside these stories of wrongful imprisonment. Even conservative commentators have avoided engaging Neufeld and Scheck.

Yet their raw numbers beg context. In 1987, the year that yielded the largest number of DNA acquittals, seventeen men who would later be acquitted were found guilty for crimes they did not commit.[22] In the same

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[20] Peter J. Boyer, "DNA On Trial; The Test is Irrefutable, So Why Doesn't it Always Work?" *The New Yorker,* 17 Jan. 2000.

[21] And one woman.

[22] Several of these later-acquitted men may not have been "actually innocent," however. Leonard Callace's DNA did not match the sample retrieved from the victim's pants, but there had been two assailants; the victim identified him, and the second assailant was never identified to test his DNA. Jerry Watkins was suspected of molesting eleven-year old Peggy Altes and another relative before the girl disappeared and was found murdered. While semen found on the girl was not Watkins', evidence pointed to more than one man being involved in the crime. Calvin Washington's innocence is even more doubtful. The

year, there were more than 20,000 murders and 91,000 reported rapes. Seventeen wrongful convictions originating in 1987, twelve in 1989, five in 1992, and none since 1999: it need not take away from the tragedy of any single wrongful incarceration to argue that the revelation offered by DNA is not, as Scheck and Neufeld argue, evidence of widespread, systematic incarceration of innocents, but rather, evidence that the justice system has done a remarkably good job of preventing wrongful convictions from occurring all along.

Nor do these numbers support Barry Scheck and Peter Neufeld's assertions that scores of innocent men remain imprisoned and risk imprisonment in the future. There has not been a single DNA acquittal of any person convicted after 1999, the year when the federal DNA database was implemented by a majority of the states. Out of the 156 cases overturned by DNA, only 11 involved convictions that occurred after 1993, when testing was becoming routine in many states. These numbers suggest that DNA testing has all but solved the problem of wrongful convictions in stranger rapes and rape/murders.[23]

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semen left on a victim who had been brutally beaten, raped, murdered and robbed was not Washington's, but he sold items from her house that night and was caught by police the next day in possession of the victim's car. Nevertheless, Washington was exonerated on the grounds of DNA. Douglas Echols and Samuel Scott lived in the house where a woman was brought and gang raped. I will discuss their case in more detail later in the chapter.

[23] Unfortunately for victims, it may also indicate that prosecutors are simply not trying cases that cannot be backed up by firm DNA identification of the assailant, no matter how much other strong evidence exists. Rapists are also growing more adept at obliterating traces of DNA, forcing their victims to shower or douche post-rape, and in several horrific instances, assailants have doused their victims' genitals with accelerants or acids and set

Nevertheless, Scheck and Neufeld forge ahead, deriving from their set of 156 cases a template of "causes for wrongful convictions" that is now widely disseminated and widely cited. They have turned these individual stories into something that sounds like a science. "False confession," for example, has become a hot subject for feature stories, academic reports and television news magazines. Many of these articles and reports cull the same handful of Innocence Project case histories and insinuate whole universes of men who confessed to crimes they did not commit.[24] A media enamored of any storyline involving wrongful conviction uncritically reports similar Innocence Project "in-house" research on eyewitness unreliability, prosecutorial misconduct and "bad defense lawyers."

Few question the validity of extrapolating a few cases into widespread corruption. Nor do they wonder at the absence of statistics or even paired anecdotes challenging the Project's findings with research findings on viable eyewitness identifications, truthful confessions or prosecutorial diligence. Instead, the drama of "innocents accused" trumps

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them on fire. In 1997, a serial offender named Patrick Sykes lured a nine-year old girl to the roof of her housing project, beat her, raped her and poured roach killer into her eyes and down her throat. "Girl X," as she is known, is now blind, mute and restricted to a wheelchair. See Mike Robinson, "Ex-con Found Guilty in Girl X Case, Could Get 120 Years," *The Associated Press State and Local Wire*, 5 April 2001.

[24] For example, see Peter Brooks, "The Truth About Confessions," *New York Times*, 1 September 2002; Dykman, "Jurors, Heed This Advice." Major television news magazines have carried "false confession" stories, and the "science" of false confession (as distinct from coerced confession) is now widely discussed in law school classes and other legal forums.

any effort to conceptualize or evaluate Project data within broader criminological inquiries. The story of innocents accused, it would seem, is self-evident, and evidence enough to justify casting a jaundiced eye on the criminal justice system in total, even if, as Scheck and Neufeld must know, many of the 156 are not truly innocent in the first place.

The question of the actual innocence of the Innocence Project's "Actually Innocent" clients is another that most observers choose to forgo. They are aided in their silence by the Project's case file system, which offers narrative cohesion between random tragedies and injustices and edits out troubling details. These case files are a credit to the marketing skills of Neufeld and Scheck, and they are irresistibly available to journalists seeking to put human faces on stories of justice and injustice. The profiles also comprise the main "data" Scheck and Neufeld use to craft arguments about wrongful confessions, the unreliability of witnesses, and the untrustworthiness of legal institutions. Yet each profile is a personal story first, beginning with the act of brutality committed against the victim of crime and ending with the acquitted man triumphantly returning to society.

The victim's position in this hagiography of suffering is an odd one. Featured as evidence of an injustice committed against somebody else, the crime victims in the case files exist in a strange sort of limbo, as mere catalysts for the only important narrative: wrongful incarceration,

wrongful punishment, and wrongful retribution. Subtly, that which each victim suffered becomes merely an armature of the acquitted man's tragedy, and thus the prosecutor's rational lament (Why not have an axiom about freeing the innocent but convicting the guilty?) is deflected yet again.[25]

In 2003, this peculiar sublimation of the victim became coffee-table art with the publication of Taryn Smith's, *The Innocents*, which featured Smith's photographs of exonerated ex-convicts at the site of the crimes for which they had been convicted.[26] In one composition, a man stands in front of a grove of trees where an abducted woman was raped. Another photograph features an exonerated man staring through the window of a building in which a rape took place. In a third example, the exonerated man stands illuminated by headlights near the ditch where a young girl's body was dumped. The absence of the victims from these most intimate of sites, the places where they suffered, and often where they died, hints at erasure, quite literally, of the victims themselves. In some photographs, the men look angry, both echoing and amplifying the violence directed at the victims at those sites, suggesting a new sort of socially sanctioned revenge or vengefulness. But even the photographs that show the ex-convicts in postures of courage or compassion still somehow obliterate the

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[25] For a sweeping review of thoughts on Blackstone's maxim, one that stretches back to Genesis and forward to O.J. Simpson, see Volokh, "*n* Guilty Men."
[26] Taryn Smith, *The Innocents* (New York: Umbrage Editions, 2003).

victims, transforming them from similarly wronged people into the mere evidence of somebody else's suffering.

None of the art critics or reviewers who wrote about the book seemed to notice anything odd about Smith's decision to photograph the men (and one woman) in this disturbing way. Reviewers instead praised Smith for having the courage to bear witness to "the hell many of these innocents confront every day." "Courage" is a common theme in this social movement, focused on the drama of law students and others setting aside opportunities to make money and subjecting themselves to the "horrors" of injustice in order to save poor, minority defendants, while "vengeful" and "hysterical" are words commonly used to describe advocates for victims' rights.[27] The *Village Voice* called Smith's photographs "beyond criticism," for their singular horror: "it's a wonder anyone escapes alive, much less with their humanity intact," the reviewer

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[27] See, for example, *Reversal of Fortune*, in which real-life defense attorney Alan Dershowitz tells his students that they will have to defend unsavory rich men like Klaus Von Bulow in order to obtain the resources to help the inner-city kids who are society's real victims. For a humorous take on the law professor/law-student as savior, see *Legally Blonde*, in which ditzy Elle Woods rescues sorority sister Brooke Windham from wrongful conviction by using her superior knowledge of hair perming techniques. Barbet Schroeder (director), *Reversal of Fortune*, Warner Studios, 1990; Marc Platt (producer), *Legally Blonde*, Metro-Goldyn-Mayer, 2001. See also *Emory Magazine*'s story about Emory students' involvement in the Georgia Innocence Project, the financial sacrifices they make, and how the work affects them when, frequently, clients turn out to be guilty after all. "Your heart can get broken in every single case," law student Jason Costa says. Paige P. Parvin, "Guilty Until Proven Innocent," *Emory Magazine* 81, no. 1 (Spring 2005): 40-47. For a typical characterization of victim's rights advocates as "overwrought" and "demagogues," see Tom Teepen, "Constitution Survives Meddling Politicians," Editorial, *Atlanta Journal and Constitution*, 2 May 2000, sec. A, p. 13.

added, clearly not referring to the crime victims themselves, many of whom had, indeed, died in those places.[28]

Only one victim is featured in *The Innocents*, and her presence is succinctly not intended to represent actual crime victimization but to further the book's, and the Innocence Project's, implication that unreliable, white, crime victims are the main cause of wrongful incarceration. Jennifer Thompson, the rape victim pictured, has taken a page from Cathleen Crowell and embarked on a virtual career of apologizing for identifying the wrong man for a rape committed against her in 1984.[29] She now works with the Innocence Project and tours with the man originally convicted of raping her, Ronald Cotton. She lobbies for compensation for acquitted prisoners and speaks out against trusting eyewitness identification of criminals. Hers' is a one-person argument, encouraging jurors to distrust whatever crime victims will tell them. In 1997, PBS's *Frontline* dramatized her experience in an investigative feature titled, "What Jennifer Saw," using the story of Thompson's rape to

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[28] Sara Catania, "In Justice for All," *L.A. Weekly*, 16 May 2003, p. 32; Vince Aletti, "Crime and Punishment," *Village Voice*, 17 June 2003, p. 59. The publication of Smith's book also offered opportunities for writers such as Catania to ruminate about the innocent men behind bars: "How many other men and women locked up in our prisons are innocent?" she asked, "It's not hard to imagine the book ten years from now chronicling the next generation of abuse."

[29] Unlike Crowell, Thompson's error was not malicious, and she was really raped.

question the accuracy of all eyewitness identifications, particularly cross-racial ones.[30]

By repeatedly and penitently telling her story, "Jennifer" has become the Innocence Project's one visible victim of crime. She offers to counsel other victims who "put away the wrong men," though it is not clear that any have taken her up on her offer. In her interviews and appearances, Thompson talks about her remorse, and Ronald Cotton talks about forgiving her. In *The Innocents*, the two pose by a river, Cotton's arm around Thompson, "incongruously" as one reviewer put it:

> His jaw is set, as if in anger or defiance. . . . The woman, whose blond head meets his shoulder, folds her arms tightly across her chest. Deep, vertical creases run from nose to forehead and press outward from her frowning mouth. Her eyes appear perpetually sad.[31]

Thompson's blondness, her "perfectness" and her eternal sorrow, not at being raped, but at testifying against the wrong man, punctuate each re-telling of her story. A typical article begins:

> Jennifer Thompson was the perfect student, perfect daughter, and perfect homecoming queen. And when her perfect world was ripped apart, the petite blonde with the dark, expressive eyes became something she could never have imagined.[32]

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[30] Ben Loeterman (producer), "What Jennifer Saw," *Frontline*, PBS, Boston, 25 February 1997.
[31] Cantania, "In Justice for All," p. 32.
[32] Helen O'Neill, "'Perfect Witness' Makes Peace With Man She Mistakenly Accused," *Atlanta Journal and Constitution*, 24 September 2000, sec. C, p. 11.

Not, as one might suspect, a rape victim, but instead, as the article continues, "the perfect witness." Thompson's rape is not important: it is not what has made her the center of attention at law schools and press conferences, that is, her shame, her blondness, and her willingness to plead guilty to hurting a black man. As the London newspaper, *The Independent,* put it: "The role of the innocent and the guilty are shuffled, and both ended up victims."[33] The rape itself is repeatedly glossed over.

Also glossed over is Ronald Cotton's prior rape conviction that resulted in his picture being included in the very mug shots "Jennifer saw." Doubtlessly, that conviction was the other reason, perhaps the largest reason, that led prosecutors to proceed in charging Cotton with Thompson's rape once the "perfect witness" picked out his face from the mug shot book. But this is not a story anybody chooses to dwell upon. Cotton's prior record is not what is featured in "What Jennifer Saw," or in most articles concerning the Thompson/Cotton case.

Instead, *The Boston Globe* attributed Cotton's conviction exclusively to "misidentification, racial prejudice and institutional blindness." In an op-ed in *The New York Times*, Thompson wrote movingly of her own "limitations as a human being" without once mentioning Cotton's criminal record. Instead, she argued for the need to return to old standards of corroboration in rape cases. "One witness is not enough, especially when

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[33]Morgan Falconer, "The Picture of Innocence; When Justice Goes Awry, People can Spend Years in Prison for Crimes," *The Independent*, 28 June 2004, pp. 12, 13.

her story is contradicted by other good people," Thompson wrote, simultaneously misrepresenting her own case and arguing for setting aside thirty years of progress for other rape victims who had fought corroboration requirements because, in reality, they were too often used to imply that a woman had agreed to a sex act, no matter how violent.[34]

The *Chattanooga Times Free Press* acknowledged in passing that Cotton was "a man with a violent criminal record" and even noted, at the end of a long story about Thompson's feelings of guilt, that his previous record included felony breaking and entering and attempted rape. But the focus of this story, too, was Cotton's "incredible" forgiveness. "It wasn't circumstantial evidence that brought Ronald Cotton down. It was Jennifer Thompson," wrote Associated Press writer Helen O'Neill. Syndicated columnist Cynthia Tucker invoked Cotton, without mentioning his record, in a challenge to then-presidential candidate Al Gore to lower the numbers of incarcerated black men. "This is no plea, by the way, for thugs or gangbangers," Tucker added, "Black robbers, rapists, and murderers represent a greater threat to their own communities than anybody else."[35]

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[34]Michael Blowen, "'Frontline' Examines how DNA Changes the Justice System," *The Boston Globe*, 25 February 1997, section E, p. 6. Jennifer Thompson, "I Was Certain, But I Was Wrong," *New York Times*, 18 June 2000, sec. 4, p. 15.

[35]Matthew Eisley, "Victim Gets Forgiveness From Man Falsely Accused of Rape," *Chattanooga Times Free Press*, 14 January 2001, sec. A, p. 4. Cynthia Tucker, "Candidates Mum on Anti-Black Bias in Justice System," *Atlanta Journal and Constitution*, 1 October 2000, sec. G, p. 10.

There is no simple way to know, nor should one wish to, whether Cotton's prior attempted rape was committed in "his own" black community or against a Hispanic or white woman, information that apparently would alter Tucker's opinion of, or perhaps willingness to mention, that crime. But it is clear from these and other media reports that Jennifer Thompson's whiteness, her endlessly touted blondeness, along with her willingness to endlessly derogate herself, is what makes her the sole valuable and indeed "perfect" victim in the eyes of the Innocence Project.

The problem with Jennifer Thompson's story (or its promise, if you are Barry Scheck or Peter Neufeld) is that her blondness can so easily be made to matter more than Ronald Cotton's prior criminal record for rape. I am a white woman, a blond woman, she tells us, and so I picked the wrong black man from a line-up, and for no other reason than that, he went to prison for a crime he did not commit. This is the story as Jennifer sees it, and what it leaves out is Ronald Cotton's culpability for ending up in that line-up, his culpability for being a known violent rapist. In other Innocence Project case histories, the ones with less cooperative victims, where there is no Jennifer to assume responsibility, the victim often gets subtly blamed in her absence, or the prosecutor gets blamed, or everyone save the accused gets blamed; the conviction is simply something that emerged from the culture of an historically racist nation, or else from the

carelessness of the prosecutors. Wrongful convictions may be ascribed to an indifferent fate or deliberate malice but never to the logical consequence of possessing a criminal history.

By emphasizing some cases and selectively editing the presentation of others, the Innocence Project profiles also downplay the prevalence of cases in which wrongful convictions arise from intentional misinformation provided by crime partners, relatives and friends, rather than misidentification by strangers. For example, Clyde Charles was convicted and sent to prison for raping a woman and beating her head with a pipe. He was picked up near the crime scene and identified by the victim, but it was actually his brother who had committed the crime and remained silent while Charles went to prison. Frederick Daye was caught in the victim's stolen car; his accomplice implicated him, and he had an impressive prior record, but in his Innocence Profile and other articles featuring Daye's story, victim misidentification alone is blamed for his incarceration.[36] These types of "misidentifications" simply do not support the Project's efforts to depict clients as victims of societal forces.

Like Cathleen Crowell before her, Jennifer Thompson has turned an almost evangelical message of shame and remorse into a message of redemption. But while Crowell's redemption remained deeply personal and grounded in religious belief (she tried to proselytize Kerry Kotler on

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[36] For Clyde Charles and Frederick Daye, see the Innocent Project website, http://www.innocenceproject.org.html/. Case Profiles.

several occasions, a move he rejected), Thompson has come out as one of the strongest and most articulate proponents of the Innocence Project's mission to create a science of wrongful convictions, promulgated through the legal establishment and in law schools particularly. This science contains within it the seeds of a new scientific racism, this one directed at white women. If Thompson, "perfect" as she is, could make a mistake she now recognizes to be grounded in racial naivety and misunderstanding, if not "hidden" prejudice, what of all the other white victims of rape who don't even bring to the role her open mind and pure intentions? It is urgent, she tells audiences, to distrust such victims and reject their identifications of men.

Neufeld and Scheck do acknowledge that other factors play a role in some wrongful convictions. But in contrast to the "Mistaken Identity" and "False Confessions" sections of the Project's "Report on Causes and Remedies," the "Snitches" section is brief; it doesn't offer numbers, and it offers the mistaken impression that jailhouse acquaintances, rather than friends and co-defendants of the accused, are the people doing the most "snitching." Accusations by people other than the victim are never the subject of feature stories or the focus of scholarly reports. What gets counted and published on front pages and reproduced in written reports and spoken about from podiums in law schools is the fallacy of witness

identification, the number of men misidentified in a line-up, a mug shot book or a police sketch. These are the numbers, and Jennifer is their face.

If, instead, the Project's "Report on Causes and Remedies" were to take prior records and the lifestyles of offenders into account, its recommendations for preventing wrongful convictions might look more like this: don't break the law and end up in a mug shot book. Don't associate with men who pick up hitchhikers and rape them; don't joyride in stolen cars where crimes might have occurred. Don't take drugs and black out for days in places where criminals congregate. Don't get caught sneaking into strange women's apartments. Don't fence rape victims' cars, clothes or jewelry. Don't commit one rape: you're more likely to be charged with another.

There is no simple way to estimate the percentage of the Innocence Project's 156 clients who have prior records for rape, particularly because juvenile records are routinely sealed. Some, like Kerry Kotler and Paul Kordonowy, are back in prison for committing additional sex assaults that were reported by the media. Some, like Ronnie Bullock and David Gray, have easily accessible prior rape convictions. Other commonalities in the case files suggest that the Project and its 156 acquittals are not quite what they seem; the high number of gang rapes, for example, suggests that in at least some of these cases, DNA may not reveal innocence so much as expose a dynamic of group assault. Instead of mistaken I.D. and "false

confessions," most suspicions that result in conviction seem to arise from the convicts' own records, the actions of their relatives, co-conspirators, friends and cellmates, and in some cases, "actual guilt" that does not leave behind a residue of DNA. In other words, a criminal community turns in on itself.

Peter Neufeld and Barry Scheck would call this "blaming the victim." But the victim being blamed since DNA technology surfaced (besides Jennifer Thompson, who blames herself) is never the person serving time behind bars. Instead, when DNA "countdowns to freedom" invoke a circus-like atmosphere, it is distinctly the crime victim on trial, especially when the interracial rape plot may be evoked.

The Benjamin LaGuer Case: A City Turns on a Victim of Crime

As of May 2005, although DNA had confirmed guilt in thousands of post-conviction appeals, only one story about a victim being vindicated by a DNA test had received any attention from the press. And the story, in that case, still wasn't about the victim at all. She had long ago disappeared under a fog of accusations of racism levied against her by some of Boston's most prominent civic leaders, accusations that would not be withdrawn even after DNA evidence proved that the right man was serving time for her rape.

On July 13, 1983, police were called to the apartment of a 59-year old woman in Leominster, Massachusetts. They found her lying naked on the floor, bound with telephone cords that had disappeared underneath the skin swelling on her wrists. "We had to cut each strand of phone wire so we didn't cut her," recalled Dean Mazzarella, then a rookie cop, now mayor of Leominster. "The thing I'll never forget is the smell," he said, adding, "There's still nothing I've come in contact with that's been that bad."[37] Mazzarella went back to the police station so badly shaken that he told his chief he was resigning the force. The woman survived the beating and a protracted sexual assault that lasted for over eight hours, broke bones in her face, and triggered a heart attack that complicated, but did not prevent, her recovery. She identified her neighbor, twenty-year old Benjamin LaGuer, as the man who had raped her. LaGuer was subsequently convicted and sentenced to life in prison. In 2002, DNA tests confirmed LaGuer was the source of the semen specimen found in the rape kit samples taken after the crime.[38]

Open and shut, or so it would seem, but nothing short of acquittal or death is ever final in the criminal courts, not even DNA evidence. Now in the twenty-first year of incarceration, LaGuer, who had worked his way through almost a dozen rejected appeals before the DNA test results, is

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[37] Matthew Bruun, "Conte Says DNA Match Proves Guilt," *Worchester Telegram & Gazette, Inc.*, 27 March 2002, sec. A, p. 1.
[38] Ibid.

still claiming he will prevail and ultimately be declared an innocent man. He has been aided throughout his incarceration by a Who's Who of intellectual, academic and legal supporters, most prominently Boston University President John Silber, but also author and linguist Noam Chomsky, novelists William Styron and Alex Theroux, Harvard professors Charles Ogletree and Henry Louis Gates, a small army of Boston-based elected officials, Holocaust survivor Elie Weisel and nearly two dozen lawyers, including, at various times, U. S. District Court Judge Nancy Gertner, Supreme Judicial Court Justice Robert Cordy, Georgetown Law School professor Abbe Smith, New England School of Law Professor David Siegal, and James C. Rehnquist, son of the Supreme Court Chief Justice. Rehnquist filed LaGuer's latest appeal in June 2005.[39]

Benjamin LaGuer's supporters adopted the name "The Benjy Brigade," and their influence, spurred on by LaGuer's own energetic self-promotion, made him one of the most recognizable "innocents imprisoned" by the time DNA testing convinced many, though not all of them, that he wasn't innocent at all. In 1986, the first of dozens of news stories documenting the progress of LaGuer's many appeals appeared as a four-part story in the *Leominster-Fitchburg Sentinel-Enterprise*; this was followed by stories in larger publications, particularly the *Boston Globe*

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[39] For supporters, see for example, Theo Emory, "From Behind Prison Walls, Convicted Rapist Campaigns to Clear His Name," *The Associated Press State and Local Wire*, 23 February 2002. For attorneys' latest appeals, see Matthew Bruun, "Rapist Loses Another Bid for a New Trial," *Worchester Telegram & Gazette Inc*, 20 December 2004.

and *Boston Magazine*, but also in *Esquire Magazine* and the *New York Times*. In 2000, Barbara Walters profiled LaGuer on her newsmagazine, *20/20*. At the time his DNA test was matched to the victim's rape kit, he was being filmed for a documentary called "Last Chance DNA."[40]

LaGuer's status as a celebrity prisoner and his jailhouse writing brought other types of recognition over the years, including a Magna Cum Laude degree from Boston University's Prison Education Program, an offer to attend the university's prestigious graduate creative writing program upon his release from prison, and a 1998 PEN award for his memoir, *A Man Who Loves His Mother Loves Women*. In addition to this "feminist" tract, LaGuer offered his many fans a look at his masculine side with the essay "Quarantined Behind Stone and Steel," which was included in the 2004, best-selling collection of men's writing, *The Bastard on the Couch*. In this essay, which was accepted for publication after his DNA was matched to sperm in the victim's rape kit, LaGuer calls the judge who sent him to prison a "Pontius Pilate" and adds, "[m]y masculinity was like Jimi Hendrix's guitar on acid." Echoing Norman Mailer, who twenty years earlier disastrously advocated to parole convicted killer-turned author Jack Abbott, Boston University President John Silber told one reporter that

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[40] Although she was "shaken" by the news of LaGuer's guilt, documentary producer Patricia Alvarado went ahead with the production. They ended the documentary with footage describing the outcome of LaGuer's DNA test but decided not to allow him to respond to the test results on film. Pamela H. Sacks, "A Study in Contrasts; *Last Chance DNA* Examines Testing That Frees Some - But Not All - Inmates," *Worchester Telegram & Gazette*, 14 May 2002, sec. C, p. 1.

prison had turned LaGuer from "an ignorant boy into a highly educated, highly talented young writer who can express himself with remarkable ability."[41]

Unlike Abbott, however, LaGuer is no natural writer. PEN grants and degrees aside, his ability to draw in supporters appears to arise almost exclusively from his intense promotion of the idea that he is a victim of a racist conspiracy, misidentified by a mentally unstable and racist rape victim, condemned to prison by racist jurors and kept in prison by racist, vindictive authorities who could not admit that they had made a mistake. Frequently, LaGuer refers to himself as a victim of lynching. For many of the journalists, academicians and lawyers who took up his cause, that metaphorical lynching is clearly the only conceivable starting point for his self-proclaimed narrative of racial injustice.

Ideally, in order to adhere to the conventions of this story, the rape victim would not be a victim at all. Yet there was the literal problem of the elderly woman herself, who had been found naked, bound with phone wire and beaten so severely her facial bones were shattered. Given the extent of these injuries, even LaGuer's most vehement supporters did not venture so far as to suggest that a rape had not really occurred, although LaGuer claimed this in 2002after semen samples taken directly from the

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[41] For a list of LaGuer's degrees and awards, see "Testimonials," "Quarantined Behind Stone and Steel," and "Timeline (1978 - 2004)" http://benlaguer.com/. For John Silber's testimony, see Adrian Walker, "The Evidence Needs Review," *The Boston Globe*, 9 April 2001, sec. B, p. 1.

victim's pubic hair was identified as his own.[42] The injuries to the victim were simply too horrendous and too easily verifiable to discount, so in the various profiles of LaGuer's prison life and the long, narrative descriptions repeating details of his appeals, journalists who had adopted his cause simply excluded any description of the crime itself. Their accounts even erased the victim rhetorically, freezing her at the moment in time when she appeared at LaGuer's trial. Strangely, many sources, but particularly the *Boston Globe*, went beyond this erasure of the woman as a victim by also asserting that the victim had died "a few years" after the crime, when actually she lived sixteen years longer, dying in 1999 at the age of seventy-five.

The implication, without spelling out her injuries and therefore risking any residue of sympathy that might attach to her, was that the woman had never really recovered, either physically or mentally, and not only could not have been a reliable witness at the 1984 trial, but was also unavailable afterwards to defend her identification of LaGuer. Reporters covering LaGuer's appeals repeated defense arguments that the woman was too mentally unstable to speak, that she was a schizophrenic who suffered from hallucinations and had always been entirely incapable of identifying an assailant, even one who remained in her presence and

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[42] "DNA Testing Links Convicted Rapist to Scene," *The Associated Press State and Local Wire*, 23 March 2003.

tortured her for eight hours.[43] Family members disputed claims about the victim's mental incapacity, but over the years, their statements were rarely included in any of the dozens of news stories and feature articles written about LaGuer's appeals. The woman's military service during World War II and her job as a nurse were not mentioned until DNA re-confirmed LaGuer's guilt in 2002.[44]

In the *Boston Globe*, the victim was never described as a person with wartime military service in her past, although LaGuer's stint in the army, which ended when he was caught selling drugs, was frequently and approvingly cited, and the circumstances of his discharge were described as a "general" or "generally honorable." The victim was merely "white," or a schizophrenic, or, "a diagnosed schizophrenic who was heavily medicated for pain when she identified LaGuer in a photo lineup." She was also the woman who had "fingered" LaGuer, or pulled his photo out of a handful of mug shots while recovering from surgery, or picked him from a picture line-up, all of which subtly suggested that she was making a risky, cross-racial identification of a man who was a stranger to her. Few articles failed to emphasize her race, though many failed to mention that she knew LaGuer because he was the son of her next door neighbor, had

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[43] The victim's alleged mental incapacity was never explored in the context of what it might have been like for a schizophrenic to endure an eight-hour assault.

[44] For example, in 2001, Boston Globe writer Adrian Walker wrote that the victim testified against LaGuer and "died a few years later," Walker, "Evidence Needs Review." For family members disputing victim's incapacity, and for description of victim's wartime service, see Mathew Bruin, "LaGuer Victim's Family Speaks Out; DNA Test Supports Conviction," *Worchester Telegraph & Gazette, Inc.*, 28 March 2002, sec. A, p. 1.

moved in with his father the week before the crime, and had argued with the victim in their shared apartment hallway.

LaGuer is sometimes described in print as a Hispanic, sometimes as black. In his "Prison Letter from Ben LaGuer," which is posted on BenLaguer.com, a website maintained by Eric Goldscheider, a fierce LaGuer partisan and former freelancer for the *New York Times*, LaGuer describes himself as an "Afro-Puerto-Rican." Over the years, much has been made of a story that the victim was unable to distinguish photographs of black men from photographs of Hispanic men while on the witness stand, presumably under hostile cross-examination by the defense. LaGuer's supporters have maintained that her confusion on the witness stand was proof that there was no way the victim could reliably identify LaGuer as her attacker. Even though, by both birth and appearance, LaGuer is both Hispanic and black, what was really at stake was the victim's whiteness, which could simply be held forth as proof of her racial insensitivity, or worse.

While the victim's severe injuries, her age and even her alleged mental incapacity shielded her from more direct accusations of racism, LaGuer and his supporters, particularly John Silber, found ways to press the race issue while avoiding the appearance of attacking an infirm crime victim. In one *Boston Globe* story, "Ben LaGuer's 10-year Fight for Freedom," LaGuer attributed the charges of rape to his unwillingness to behave with appropriate subservience to whites. Channeling LaGuer's

recollections into third-person prose, the reporter delivered them as a classic narrative of racial rebellion:

> He learned a lesson as a teenager in Puerto Rico, where he served champagne and lunch to well-heeled Americans. They would ask him, "the boy," to remove their soiled china and, ever polite, if he were doing well. "Marvelous," he would tell them without a pause, smiling as he scraped their garbage." He was lying. He knew the value of obsequiousness. [45]

LaGuer sought and received approbation for fostering this image of the wise racial minority beating the white world at its own games. "I think the courts have underestimated Ben," said Robert Tuck, another of his attorneys, "[t]hey thought that he would be playing basketball for 15 years. But Ben has never walked into the gym." Stories about LaGuer's education, his attitude, his supporters, and his efforts to be released relentlessly shifted the focus away from the fact that a crime had been committed at all.

LaGuer's supporters also sometimes argued that righting perceived racial injustice ultimately trumped the question of whether he had committed the rape. As Howard Manley wrote in the *Boston Globe* 1994:

> Dozens of politicians and civil rights groups in the Boston area have listened over the years, ranging from state Sen. Dianne Wilkerson to Rev. Eugene Rivers, from the Anti-Defamation League to the Nation of Islam, from the Gay and Lesbian Bar Association to the Criminal Justice Institute of Harvard Law School. They have championed his cause while moving beyond the question of his guilt or innocence. They

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[45] Howard Manley, "Ben Laguer's 10-year Fight for Freedom," *The Boston Globe*, 27 February 1994, City Weekly sec., p. 1.

> talk about a larger issue: ridding the court system of prejudice.[46]

"LaGuer is not just a guy trying to get out of jail," said Robert L. Hernandez of the Massachusetts Association of Hispanic Attorneys, "A gross injustice occurred that just taints the whole system."[47]

In 2001, before the results of DNA testing of evidence from the crime scene were released, John Silber stepped forward again to make his case in the media that Benjamin LaGuer should be freed from prison irregardless of what the DNA revealed. "Even if you assume he was guilty - which I do not - he has been rehabilitated to any degree that rehabilitation can be measured," Silber told reporters.[48] As excitement mounted that DNA evidence might soon set LaGuer free, news coverage complimentary of him accelerated. "Here is a guy who put [Boston University Chancellor] John Silber and [MIT Linguist] Noam Chomsky in the same boat, two people who can't normally agree that one plus one makes two," gushed radio journalist Christopher Lydon.[49] Barry Scheck weighed in, saying he was "optimistic" that DNA testing being done by his colleague, Dr. Edward T. Blake, would reveal LaGuer's innocence. But on

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[46] Ibid.
[47] Ibid.
[48] Walker, "Evidence Needs Review," p. B1.
[49] David Arnold, "A Lifer's Protests Now Come to Light; DNA Results Due Soon in Long-Contested Rape Case," *The Boston Globe*, 22 January 2002, sec. B, p. 1.

March 23, 2003, Blake announced that traces of semen taken from the victim's pubic hair were undoubtedly LaGuer's.

Among Boston's elite, who had stood by Benjamin LaGuer and vocally condemned his white victim, the white jurors and the white judges who ruled against his many appeals, shock turned to anger, not at LaGuer for committing the rape, but at LaGuer for deceiving them. For these reporters, the DNA results turned them into victims, the only victims many of them were able to perceive. Several members of the "Benjy Brigade," issued emotional reports of their responses to the news. "I put the covers over my head, and for the next six hours, I just couldn't get out of bed," said reporter John Strahinich. "It was a good ten minutes of being absolutely stunned, then frankly, it was kind of heartbreaking," said Sean Flynn. Neither Finn nor Strahinich hypothesized in print about the impact of this news on the real victim's family or offered apologies for depicting the victim in such negative ways. Most Benjy Brigaders, who had been eager to celebrate LaGuer's innocence in print, simply retreated into silence, opting to not cover the test results at all. *Worchester Magazine* publisher Alan Fletcher, a long-time LaGuer supporter, observed, "I think the media is going away in droves."[50]

Not one of the non-journalist activists who had supported LaGuer over the decades came forward to apologize to the victim's family for

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[50] Mark Jurkowitz, "The Media; Shock Waves and a Turnaround Press That Once Stood by LaGuer is 'Going Away in Droves,'" *The Boston Globe*, 22 May 2002, sec. E, p. 1.

doubting her, and of the hundreds of journalists who had communicated with LaGuer and covered the case, only Dianne Williamson of the *Worchester Telegram & Gazette* actually apologized in print for doubting the woman's testimony. Williamson's apology revealed the astonishing latitude LaGuer was granted to communicate his story to the media and to remain in the public eye:

> [B]eginning in 1994, I have spoken to him, on average, once a week. . . . It is little consolation that I never expressed a belief that Mr. LaGuer was innocent, only that he deserved a new trial and the speedy DNA testing he pushed for. Still, the implication was there in time and effort spent on Mr. LaGuer, as it was in countless newspapers, magazines and television news shows. By the sheer breadth of coverage, we were telling people that the story was noteworthy and that Mr. LaGuer deserved our attention. . . . I cannot imagine what it has been like for [the family] to open the newspaper and see his name again and again, to have heard his articulate pleas for justice and his emotional evocation of Job.[51]

The revelation of LaGuer's DNA results compelled a few journalists, from among the hundreds who wrote about him, to once again review the facts from his original trial. They discovered long-forgotten and glossed-over details that supported his guilt, such as the existence of unexplained wounds on LaGuer's back when he was arrested and the fact that he had actually confessed to mixing another inmate's saliva into his own in order to muddle test results that figured prominently in later appeals. Years earlier, LaGuer had claimed that he was acting on bad advice from a

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[51] Dianne Williamson, "Media Fell for Tactics of LaGuer; Many Were Beguiled by Convicted Rapist," *Worchester Telegram & Gazette, Inc.*, 2 April 2002, sec. B, p. 1.

lawyer when he intentionally altered his sample. Yet the lawyer story and the story of his wounds had seemingly been forgotten, or perhaps selectively overlooked, by journalists who chose instead to focus on the purported racial elements of his case. The inconclusive forensics resulting from LaGuer's deception had been mentioned, not as proof of the convict's willingness to game the system, but of the weakness of the state's case against him.[52]

A few supporters continued to hypothesize that LaGuer had been framed. But Dr. Edward T. Blake, who performed the DNA testing, was highly respected by defense attorneys, including Barry Scheck and Peter Neufeld. Blake had helped free or acquit numerous convicts, and when he argued for the authenticity of evidence, both sides believed him. Blake not only matched LaGuer's DNA; he also explained how the type, condition and location of the sample would have been nearly impossible to fake. Even John Silber accepted Blake's findings and refuted LaGuer's new efforts to claim he was framed. "Do I believe it?" Silber said of LaGuer's new charges, "No, I don't believe it."[53]

But Silber also announced that he still supported releasing LaGuer, despite the crime, despite the convict's refusal to acknowledge guilt, even

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[52] Matthew Bruun distinguished himself as a thorough and objective observer. See "Juror Sure LaGuer is Guilty; Convict Charges Evidence Rigging," *Worchester Telegram and Gazette, Inc.*, 26 March 2002, section A, p. 1. Laguer's website posts an extensive letter, "Errors in the Ben LaGuer DNA Analysis." It was last updated May 12, 2005.

[53] For Blake's explanation of the reliability of his methods and Silber's response to them, see Matthew Bruun, "DNA Findings Difficult to Rebut; Doctor Rejects LaGuer Claims," *Worchester Telegram &Gazette, Inc.*, 31 March 2002, sec. B, p. 1.

despite the fact that Laguer had threatened the victim on her deathbed, posing as a priest and somehow reaching her by telephone from prison to "absolve" her of sending the wrong man to jail. Convicts seeking to be paroled are commonly asked by parole boards to acknowledge their guilt. But Silber argued that LaGuer had grown to actually believe in his own innocence; so, therefore, he was not actually lying. "I think he can be quite sincere in saying he didn't do it," Silber said. "I still believe that's a psychological misconception on his part." Despite everything, LaGuer was a changed man, Silber argued:

> I think he's a perfectly good example of a screwed-up kid who was on drugs and making every mistake you can imagine. . . . He is certainly a well-rehabilitated person. He's remarkably well-disciplined, and I think he's a fine person.[54]

A year after the DNA results, LaGuer was up for parole again, and Silber was back by his side asking for his release, along with Noam Chomsky, William Styron, the Nation of Islam's Don Muhammad and the director of Boston University's creative writing department, Leslie Epstein. Having to admit guilt, in order to be freed, Silber argued, was leaving LaGuer in a "Catch-22."[55] He might well have been speaking for LaGuer's supporters. After years of referring to LaGuer's rape victim as a racist and mentally disturbed woman who could not distinguish between fiction and fact,

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[54] Matthew Bruun, "Silber Defends Aiding LaGuer; Rapist Called Rehabilitated," *Worchester Telegram & Gazette, Inc.*, 29 March 2002, sec. A, p. 1.
[55] Dave Wedge, "Silber Backs Rapist; But Victim's Daughter Battles Bid for Parole," *The Boston Herald*, 13 June 2003, p. 3.

these influential men appeared to be appealing for Benjamin LaGuer's release on practically the same grounds, that he was blinded by race and unable to distinguish between fiction and fact. The new myth of interracial rape, that any white woman who accuses a minority man of raping her must be evil, lying, crazy, or all of these, was proving to be virtually impenetrable in both Boston's front pages and courtrooms.

In the end, DNA didn't really matter. The victim had been completely excised, separated from discussion of LaGuer's guilt or innocence or the crime itself. She was residual, faceless and nameless, without history or identity beyond "white victim of rape charge against black man." She had become the white racial enemy in a drama played out by LaGuer and his undeniably powerful network who dominated Boston's intellectual, legal, journalist and political circles.

The Benjamin LaGuer case, not LaGuer's self-promotion itself, but the enthusiastic reception it received, sent a troubling message to victims of rape in Boston. The extraordinary outpouring of support for LaGuer, even after his guilt in an horrific assault was confirmed by DNA, suggested that the Innocence Project was gaining ground in its ephemeral goals: to cast doubt on the possibility of ever proving any rape beyond a reasonable doubt, and to re-cast all men (but especially minorities) accused of sex crimes in a sympathetic light. LaGuer's guilt, even proven, was minimized by the inherent drama of his decades-long appeals, so

much so that DNA testing itself, once looked upon as LaGuer's savior, could just as easily be viewed as irrelevant when the outcome of the test failed to conform to the story of innocence accused.

Chapter 6: The Other Side of DNA

By the end of 1998, the Innocence Project had freed 47 men. Meanwhile, in the less-observed world of DNA convictions, a Justice Department commission estimated that evidence kits collected from 180,000 unsolved rapes had not yet even been tested; overworked crime labs in the states were too busy concentrating on the influx of new cases to revisit crimes that were two or three years old. Every kit contained a sample that might register a "hit" on the growing federal Combined DNA Index System (CODIS), a database of samples taken in the states from sex offenders and other convicted felons. As 1999 began, the federal government set out to lower rape kit backlogs by granting money to states that would agree to update their labs and contribute samples to the CODIS registry. Five years later, however, Congress would have to authorize another billion dollars to address the ongoing backlog problem in many states. By 2002, more than half of all CODIS "hits" to date, in which a sample from one crime scene matches a sample taken from another crime, had still come from only four states: Virginia, Florida, New York and Illinois.[1]

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[1] For a good general summary of rape kit backlogs, CODIS expansion and uneven database growth, see Richard Willing, "DNA's Success in Crime-Fighting Spread Unevenly," *USA Today*, 6 October 2002, sec. A, p. 1.

It wasn't that police and prosecutors didn't want to use DNA to solve sex crimes; exactly the opposite was true. Increased DNA testing didn't just mean spending money at the state crime lab, though; it also meant investigating and prosecuting many thousands of rape cases that previously would have been shelved as soon as the victim walked out of the hospital or police station, and that meant hiring more sex crime detectives and possibly even more prosecutors to handle higher caseloads of sex crimes. Although rapes constitute only a fraction of all crimes and a small portion of even violent crime, DNA databasing promised to dramatically increase caseloads for the specialized units that had been set up to address sexual violence in large cities.[2]

It also meant changing a culture in which even most "stranger rape" investigations were closed as soon as a likely suspect was caught in any circumstances and sent away for even a brief prison sentence. One of the more ominous revelations emerging from CODIS and the established databases in the states was the identification of many felons who had cycled through the justice system without ever being charged with a sex crime, yet were now being identified as serial rapists by their DNA. What was being made visible was fragmentary, but frightening. In Florida alone, 58% of all rapists identified by DNA in the database had served time only

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[2] For a summary of forensic applications of DNA and the status of federal infrastructure to implement forensic goals, see Elizabeth Joyce, "Pursuing the Power of DNA: Forensic DNA's Impact on Crime Victims and their Advocates," National Center for Victims of Crime, *Networks* (Winter/Spring 2003): 1 - 7.

for burglary. These numbers, at least anecdotally, point to unknown numbers of rapes pled down or otherwise shed from the justice system with no resolution.[3] In 2000, 48,000 of the 90,000 rapes reported by states to the FBI were officially not solved, and by no means did all of the "solved" cases result in arrests or prosecutions, but only the identification of a suspect by the victim or the police.[4]

48,000 unsolved rapes in one year, or even one-tenth of that number, would seem to constitute a public safety emergency. But emergencies only exist insomuch as they are made visible. Once the states were encouraged, through federal funding, to test rape kits that had been gathering dust, it seemed possible, at least, that an urgent new picture of sex crimes might emerge. But this picture was hopelessly in conflict with the stories of wrongly convicted men, and the same journalists who reported eagerly on every man released through DNA testing, simply ignored the mounting numbers of CODIS hits in their states.

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[3] Since 1996, several prosecutors and detectives have told me that it is common practice to accept a burglary plea in a rape case "just to get the guy off the streets" and because trying rape cases, even seemingly solid ones, is too risky. For Florida burglary/rape cases, see "State Nearly Done Analyzing Backlogged DNA evidence," *Associated Press*, 6 July 2003.
[4] United States. Department of Justice, Bureau of Justice Statistics. UCR. For an explanation of the difference between crimes "solved," crimes "cleared," and crime "unfounding" see Craig R. McCoy, "How We Got That Story: The Buried Rapes," *Columbia Journalism Review* (January/February 2000). See also Olea Benson, Mark Fazlollah, Michael Matza and Craig R. McCoy, "How to Examine How a Police Department Handles Rape Cases," *2000 IRE National Conference* http://home.earthlink.net/~cassidyny/police_tips.htm (accessed June 5, 2005).

Thanks largely to an activist Lieutenant Governor who took an interest in building a state DNA database,[5] and also to its status as a southern state deeply implicated in the history of segregation and lynching, Georgia offers an unusually clear example of the interplay of messages of innocence, guilt, and race that emerge when DNA technology is applied to rape.

In 1999, the Innocence Project announced that they had secured their first DNA exoneration in Georgia. Calvin Johnson had served sixteen years of a life sentence for rape before a DNA test proved his innocence. The story made national news, where it was presented as a "typical" case of the southern brand of injustice served up to black defendants in cases of interracial rape.

In fact, it made national news precisely because of the race angle. The *New York Times* depicted Johnson as a religious man rescued from the racist justice system of the "Deep South" by the efforts of Barry Scheck and Peter Neufeld. Because of his race, David Firestone wrote, Johnson was "more than just the latest of sixty-one prisoners" exonerated:

> In many ways, his journey into prison was as dramatic as his hasty exit, revealing the racial underpinnings of so many convictions in Georgia and the rest of the Deep South, and raising questions about how many other prisoners might also

[5] Lieutenant Governor Mark Taylor has sponsored numerous bills to expand and fund the state's DNA database. Jack Warner, "DNA Testing Puts State in Lead of Fighting Crime," *Atlanta Journal and Constitution*, 3 December 2000, section D, p. 3.

> have lost their liberty on the basis of thin witness identifications.[6]

Stephen Bright of the Southern Center for Human Rights told the *Times* that Johnson's case was "part of the legacy of a court system in Georgia that has excluded, and still excludes, African-Americans from participation." "What worries you," he added, "is there's no telling how many people there are in the Georgia prison system convicted by all-white juries who didn't have any DNA evidence."[7]

The *New York Daily News* put the race issue even more bluntly: "Man Proves Racist Court's Guilt," their headline read. In the story that followed, Jim Dwyer asserted that the Johnson case "will occupy its very own shelf in the history of race and its enduring ability to warp truth and justice." Few journalists failed to highlight the all-white jury, the white victims, and that Jonesboro, where Johnson had been convicted, was the actual setting for *Gone With the Wind.* "Clayton County [in 1983] was a redneck, racist county," Johnson's lawyer told the media.[8]

Like Gary Dotson before him, reporters from around the world approached Calvin Johnson for interviews. He appeared on television and on Johnny Cochran's radio show. He traveled to Uganda as a Christian

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[6] David Firestone, "DNA Test Brings Freedom, 16 Years After Conviction," *New York Times*, 16 June 1999, sec. A, p. 22.
[7] Ibid.
[8] Jim Dwyer, "Freed After 16-Year Error Cleared in Rape, Man Proves Racist Court's Guilt," *Daily News* (New York), 17 June 1999, p. 8. For the lawyer's remarks, see Bill Torpy, "Wrongly Convicted, Free Man Rejoins Life After 16 Years," *Cox News Service*, 19 June 1999.

missionary, offering his message of "forgiveness," just as Cathleen Crowell had traveled across America with her evangelical message of remorse for lying about rape. Johnson also joined the Innocence Project's Board of Directors and helped found the Georgia Innocence Project, one of dozens of chapters springing up around the country. The Project featured Johnson's story prominently in their literature and talked about him to the press. He became their "race angle" case, representing, they said, all the other black men sitting in prison because they didn't have the DNA to prove their innocence. Jim Dwyer expanded his news coverage of Johnson's case into the "Race" chapter of *Actual Innocence.* The chapter begins with a description of Margaret Mitchell listening as a child to "tales of the antebellum South" and of the "numbing" June heat in Jonesboro: "The flags of the Confederacy dangled, limp in the dead air," Dwyer wrote.[9]

In Calvin Johnson, the Innocence Project found a seemingly perfect example of a black man who had been railroaded into prison for the rapes of white women, rapes that he did not commit, or, similarly, as Peter Neufeld put it, "a fabulous model for the lingering legacy of slavery." In addition to being convicted by an all-white jury in Jonesboro for one rape, he had been acquitted of another rape charge, on largely the same evidence, by a mixed-race jury in mostly-black Fulton County. Johnson is

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[9] Dwyer, *Actual Innocence,* 193 - 210.

articulate and handsome, with a middle-class background and a college education. If he could be sentenced to prison for rape, Neufeld and Scheck tell audiences, then no black man anywhere, but particularly in the "Deep South," is safe.

But Calvin Johnson isn't just any black man. What is never mentioned in the Innocence Project literature, in the law school classrooms, in the *New York Times* coverage of his release, or in any of the published materials extrapolating his experiences into statistical arguments about jury make-up, cross-racial identification and false convictions, is that Johnson had a previous arrest, in 1981, for breaking into a woman's house and raping her.[10] Four nights after that rape, Johnson was caught in another woman's apartment in the same neighborhood; he had broken in through a sliding-glass door and police found him inside, wearing gloves and no underwear and carrying a knife. The rape victim had told police that her rapist was not wearing underwear; she identified Johnson from a photo line-up, and the neighbor who called the police additionally reported that she and a friend had both seen a man who matched Johnson's description standing naked behind the

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[10] David Firestone wrote only that Johnson had been included in the photo line-up "because he matched the general description of the suspect and had a 1981 burglary conviction." Firestone, "DNA Test Brings Freedom."

apartment complex the night before he was arrested. A fourth woman reported escaping from a similar assault in her house.[11]

In 1981, this rape prosecution, along with other charges including aggravated sodomy, burglary, and carrying a concealed weapon, fell to Paul Howard, the black Fulton County District Attorney who would unsuccessfully try Johnson for rape again in 1984. Howard still believes Johnson was guilty, but he dropped the first rape charge, as Peter Boyer reported in *The New Yorker,* because after the victim picked Johnson out of a photographic line-up, Howard's investigator made the mistake of taking her to Johnson's cell to see if she also recognized his voice. Although this one-on-one contact occurred after the victim had picked Johnson out of a photo array, it would still hopelessly taint any rape prosecution.

After the rape and robbery charges were dropped, Johnson was offered a plea bargain for the other crimes, including being caught in a woman's apartment with a concealed weapon. The plea was very stiff for the crimes charged: Paul Howard said later that the length of the sentence reflected his belief that Johnson had also committed the rapes. Despite its severity, Johnson accepted the plea and received twelve years, eight in prison, and thanks to prison overcrowding and the generous "gain time"

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[11] For an extensive analysis of Johnson's prior crimes, see Peter J. Boyer, "DNA On Trial: The Test is Irrefutable, So Why Doesn't It Always Work?" *The New Yorker,* 17 January 2000. For analysis by a local reporter familiar with Paul Howard and other figures central to the case, see Torpy, "Wrongly Convicted."

standards of the 1980's, he was out of prison in only fifteen months. A few months later, the next set of rapes would begin, and Johnson, who was known to the police as a man who had been picked up in a strange woman's apartment and who had avoided rape charges only because of a technicality, was arrested and charged with rape once again.[12]

This is a very different story than the one held forth by the Innocence Project to explain Johnson's prior record and the motives of the police in charging him. In Johnson's Innocence Project profile, the previous rape charge is noted and briefly described as "dead-docketed by the prosecutor after Johnson plead (sic) guilty to a robbery [actually, the burglary charge]." Unless a reader knew about the circumstances of this charge, they would not know it took place in a woman's apartment after Johnson had broken into it. Nor would they know about the other evidence that convinced prosecutors he was guilty of other rapes and had escaped conviction only on a technicality involved in the line-ups.[13]

In *Actual Innocence*, Jim Dwyer depicts Johnson's previous brushes with the law as a consequence of his being arrested for buying a small amount of marijuana. The need to hire legal counsel for the marijuana case, Dwyer contends, left Johnson desperate for money. Not wishing to ask his father for money for a lawyer, Dwyer writes, he made a major mistake: "His actual brain never entered the picture, apparently. He broke

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[12] Boyer, "The Test is Irrefutable."
[13] See Innocence Project website, http://www.innocenceproject.org.html/.

into a house, was arrested for burglary, and was charged with possession of a concealed weapon, a pocketknife he used at work."[14] Dwyer turns a grotesque account of the sodomy, rape and assault of several women into a morality tale about a man who is too proud to ask his father for help in fighting a minor drug charge. The rape charge is described in this way: "A white woman was raped in her apartment, and Johnson briefly was identified as the attacker; but the charges were dropped."[15] Dwyer further suggests that the rape charges were dropped because the victim identified her attacker as an uncircumcised man, unlike Johnson. But others who reviewed the police records point to the line-up problem as the reason that Paul Howard dropped the case. Howard himself still believes Johnson committed the crimes, although he has refused to comment any further on the circumstances that led to dropping the rape charge in 1981, and Dwyer offers no explanation for the inexplicable severity of the sentence Johnson accepted.

After Jim Dwyer published his book, his version of Calvin Johnson's arrests "for drug possession and petty crimes" was repeated in reviews, particularly in the *New York Times*, which ran not one, but two different book reviews of *Actual Innocence*.[16] In other ways as well, the story of his

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[14] Dwyer, *Actual Innocence*, 196.
[15] Ibid
[16] Allen Boyer, "Sprung," *New York Times*, 13 February 2000, sec. 7, p. 14. Richard Bernstein, "Books of the Times: DNA Tests and the Road to More Reliable Justice," *New York Times*, 25 February 2000, sec. E, p. 49.

first rape accusation disappeared, fading into the mythic fabric of his narrative of injustice. "I'm in Georgia. I'm a black man in front of an all-white jury, accused of committing a crime against a white woman, with all white witnesses testifying," is the way Johnson describes his conviction. While he reportedly preaches a message of forgiveness, others are not so forgiving toward the women who testified against him; *Atlanta Journal-Constitution* columnist Cynthia Tucker, for example, marveled that Johnson could forgive the witnesses, "all white women [who had] accused him of exposing himself or other minor sexual offenses," as she put it, adding of Johnson, "Can such a spirit not be heaven-sent?"[17]

The University of Georgia published Johnson's book about his experiences in prison, *Exit to Freedom*, and the state of Georgia awarded him $500,000 for his wrongful imprisonment.[18] Johnson now speaks, not about forgiveness, but about cross-racial identification errors. In 2005, he addressed the Massachusetts Bar Association as they debated the usefulness of eyewitness identifications.[19] It doesn't seem likely that anybody there raised the subject of the eyewitnesses who identified

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[17] Cynthia Tucker, "Wrongfully Imprisoned Man Starts Life Anew," *Atlanta Journal and Constitution*, 26 December 1999, sec. D, p. 7.

[18] In a review of *Exit To Freedom*, freelance writer Steve Weinberg describes Johnson's prior conviction as his "first attempt" at robbery, a "foolish" and minor crime. Failing to note the prior rape charges, he adds that prosecutors investigating the 1983 rapes included Johnson in line-ups "based on the slimmest of suspicions." Steve Weinberg, "Embracing Freedom: Wrongly Convicted Man Tells His Story With Dignity and Convincing Emotion," *Atlanta Journal and Constitution*, 14 September 2003, sec. F, p. 2.

[19] Martin Luttrell, "New Guidelines for Eyewitness Testimony; Photo Arrays And Line-ups Are Being Discouraged," *Worchester Telegram & Gazette*, 13 March 2005, sec. A, p. 1.

Johnson as a rapist in 1981. These women, it would seem, have disappeared from the story, except for when they are scornfully resurrected as part of the cohort of racist "white women" accusing Johnson of "minor sexual offenses" and crimes he did not commit.

Since Calvin Johnson was acquitted in 1999, the Innocence Project (since 2002, in conjunction with the Georgia Innocence Project) has acquitted three other men in Georgia. All three are black men: the race or races of their victims, however, is not noted. Given the media's and the Innocence Project's tendency to emphasize race when the victim is white and the accused are minorities, particularly in cases that occur in the South, the absence of discussion of race in these cases might well suggest that the rape victims were minorities; this may also be one reason why none achieved the level of notoriety that Johnson received in media markets outside Georgia. Clarence Harrison, the fourth man freed, has become a minor celebrity in the state; dozens of companies donated to his wedding, and in March, 2005, as he was speaking to the Georgia General Assembly, Republican Representative Chip Pearson leapt to his feet and spontaneously volunteered to give Harrison a new car. Afterwards, Pearson tried to frame his gesture in terms of the fiscal conservatism of his party: "If all people would help others in need when they have a need, there'd be a whole lot less need for government," he told reporters.

Despite this sentiment, the Republican-majority legislature also voted to give Harrison $1 million dollars for the time he spent in prison.[20]

However, the second and third men freed, Doug Echols and Samuel Scott, presented a quandary for journalists looking for more heart-wrenching stories and for activists seeking to expand compensation to all exonerated inmates and, more importantly, to "educate the public that wrongful convictions are not isolated or rare events,"[21] as reads the Georgia Innocence Project mission statement. The problem with compensating Echols and Scott and "telling" their story is that they probably aren't innocent. DNA freed them because they didn't leave any DNA at the scene of the crime. But Doug Echols lived in the house where the victim was taken to be raped, and Samuel Scott was still in the house with him when the victim escaped and led the police back to them.[22]

Thus, legislators who lined up to embrace Clarence Harrison avoided Echols and Scott; advocates for the Georgia Innocence Project

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[20] Carlos Campos, "'Great Moment' As Senator Offers Jeep to Inmate Freed by DNA," *Atlanta Journal and Constitution*, 19 March 2005, sec. C, p. 1.

[21] See Innocence Project website, http://www.innocenceproject.org.html/.

[22] Three men abducted the woman, forced her into a car, and drove her to Scott's house. There, one man raped her while another held her down. She escaped, flagged down the police, and brought them back to the house, where they found Echols and Scott. The third man had disappeared. The victim identified Echols as the man who held her down. She picked Echols from a line-up as one of the men in the car. These facts appear to be too troubling for even the most sympathetic advocates of the Innocence Project. While Echols and Scott were freed after DNA taken from the victim failed to match either man, they have not received reimbursement from the state of Georgia, nor has their story been "celebrated" in the media. However, they are counted in the Innocence Project's files and statistics as two of the "innocents freed by DNA." See Innocence Project case files. Paula Reed Ward, "Men Earn Right to New Rape Trial," *Savannah Morning News*, 4 July 2002, sec. A, p. 1.

wisely did not press their case, and the media obliged by not raising questions about their cases in the midst of Clarence Harrison's appeals for compensation.

The Echols and Scott case is the type of case Barry Scheck contemptuously labels an "unidentified co-ejaculator" crime. But Scheck knows when not to press such clients into the public eye; the Innocence Project succeeds or fails on maintaining the impression that its clients are absolute innocents, victims of circumstance and, especially, of racism. When they can succeed in convincing the public that men like Clarence Harrison are not "isolated or rare," the momentum from such socially troubling cases may bring along the Doug Echols and Samuel Scotts, and even more importantly, keep images of all these men foremost in the minds of jurors as they enter the jury box.

After all, the fact that Echols and Scott are even being considered for state compensation represents a victory of sorts for the Innocence Project's strategy of excluding all but the DNA evidence from their narratives of exculpation from crimes, when, that is, the DNA benefits them. Another victory the Innocence Project has achieved is raising the stakes for anyone who would question the exoneration of men like these. Neither the majority Republican legislators nor the Republican Governor of Georgia chose to address the Echols/Scott conundrum in 2005. Instead, they quietly tabled the men's requests for compensation; they tabled a bill

that would grant compensation to every exonerated convict, and then they turned with relief to partake in the celebration of Clarence Harrison, a man everybody could agree upon.

The most famous of these "unidentified co-ejaculator" cases, the Central Park Jogger case, ended similarly with the partial exoneration[23] of the five young men who had all previously confessed to sexually assaulting the jogger. Prosecutor Linda Fairstein, Justice Thomas Galligan, who heard the case, and the New York Police Department each issued statements reasserting their confidence in the young men's guilt and the unimpeachability of the original confessions, but they simultaneously acknowledged that no amount of rehashing the case would trump the drama of a story of a racist frame-up re-framed by DNA. Thus, they did the only pragmatic thing they could do: they gave up.

After all, for those invested in seeing the jogger case as a modern-day Scottsboro Trial, the fact that the defendants' original confessions were always consistent with the revelation that another, unknown man deposited the only available DNA is simply irrelevant. The fact that long before Matias Reyes told the press that he was the lone attacker, he

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[23] The convictions were vacated, not overturned. For the official report repudiating the vacating of the convictions and defending the original findings of guilt, see New York Police Department, "Panel on the Central Park Jogger Case," 27 Jan. 2003, http://www.nyc.gov/html/nypd/html/dcpi/executivesumm_cpjc.html/ (accessed June 5, 2005). For retired state Supreme Court Justice Thomas Galligan's statement, see Karen Freifeld, "First Judge Still Not Convinced," *New York Newsday*, 20 December 2002. For Linda Fairstein, see Jeffrey Toobin, "The Talk of the Town: A Prosecutor Speaks Up," *The New Yorker*, 25 November 2002.

confessed to joining in where a group of young boys were already beating the jogger, is irrelevant also. It's a defense lawyer's dream and another measure of the Innocence Project's successes that the public accepts that six confessions, Reyes' earlier confession and the detailed confessions of the five jogger defendants, can't be believed at all on the grounds that Reyes' current confession to being the sole assailant somehow can't be denied, even though Reyes is a murderer and psychopath who once attacked his own attorney in court.

It is also a success for the Project that many people believe the jogger case has been reversed because of new revelations based on DNA. The DNA revealed as Reyes' through the New York state database proved that he was present at the jogger's rape, but it proves nothing more. As Justice Gallagher observed, the DNA now known to be Reyes' was available at the original trial, but it was not used by the prosecution or by the defense because both sides knew it did not belong to any of the defendants.[24] It is Reyes' confession alone, made after his DNA was identified in a database that set into motion the 2002 exonerations of the five men who had previously confessed to participating in the rape of the jogger. Undoubtedly, the sheer political momentum generated by the Innocence Project created the public momentum that forced the city's

[24] Friefeld, "First Judge Still Not Convinced."

hand in re-opening the cases. And so the Project claimed them as their own, even though there was no real DNA exoneration involved.

Reyes, like Benjamin LaGuer, has a record of sadism and rape (and in Reyes' case, murder) that would seem to mitigate anything he would say.[25] Yet, through his recent "confession," he has become a hero to some. At a press conference attended by Barry Scheck, attorney Myron Beldock announced that Reyes had "redeemed himself" by confessing. "We wouldn't be here but that Matias Reyes found a conscience and came forward," Beldock said. Like LaGuer, Reyes has been transformed into a sort of hero, not because DNA proved his innocence, but because it reinforced his guilt. It is a strange outcome.[26]

Yet, objectively, given the intense media coverage the case originally generated, news of the five young men's exonerations was greeted less enthusiastically in some quarters than might have been expected. Even Al Sharpton, who made so much political hay in the 1980's attacking the jogger as a symbol of white racism and even a sexually perverted racist herself, seemed muted in his response. Sharpton briefly interrupted his

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[25] Reyes' record should give pause: he raped his mother, murdered a pregnant woman in front of her children during another rape, and told other victims "your eyes or your life" while stabbing them in the face during sex assaults.

[26] Robert D. McFadden and Susan Saulny, "A Crime Revisited: The Decision; 13 Years Later, Official Reversal in Jogger Attack," *New York Times*, 6 December 2002, sec. A, p.1.

presidential campaign to demand an investigation into the original prosecutions in the jogger case, but he soon moved on to other subjects.[27]

"Moved on" well describes the public's response to those five acquittals. In part, the racial conflations that flared throughout the late 1980's and early 1990's have burned themselves out. But they have also, or simultaneously, been institutionalized, as is the case with the jogger exonerations; where large street protests might have greeted such exonerations fifteen years ago, now the Innocence Project uses these few cases to develop a framework for "studying" what they define as the phenomenon of widespread, false confessions.[28] These five questionable exonerations actually account for more than 3% of all DNA exonerations and 25% of the exonerations that create the data set Scheck and Neufeld use to promote arguments that "false confession" is a common occurrence, but this hardly matters. The media follows the individual stories, and the stories insinuate the existence of countless others locked away for

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[27] At different times, Sharpton insinuated that the jogger had not actually been injured, that she was covering up a beating inflicted by her boyfriend, and that she had gone to the park seeking sex with black men. He repeatedly announced her name in the black press and encouraged his "Action Network" to riot outside the courtroom when the jogger testified, forcing authorities to transport the brain-injured woman to and from court in an unmarked van. At one point, protestors identified the van and tried to swarm it with the woman inside. In 2002, Sharpton was speaking, not from the streets, but from the stage at the Democratic Presidential Primary, as a candidate. He avoided criticizing the jogger but insisted that the trial was a miscarriage of justice.

[28] The New York Times, for example, ran an op-ed by Dr. Saul Kassin, a professor of psychology and chairman of legal studies at Williams College who offered a sort of scientific anatomy of false confession, noting that the Innocence Project had "amply documented" the phenomenon. Saul Kassin, "False Confessions and the Jogger Case," *New York Times*, 1 November 2002, sec. A, p. 31.

confessing to crimes they were railroaded into confessing. When there are no new stories to recount, there are always the old ones.

The time may come when such tactics need updating. With no cases originating after 1999, and with annual exoneration numbers declining from a high of twenty-three nationally in 2002 to thirteen in 2004 despite vast infrastructure growth,[29] the lack of new DNA exonerations would seem to require new tactics if Neufeld and Scheck are to maintain institutional urgency. Or maybe not: the Project keeps growing despite exonerations dwindling from a high of nearly two a month, nationwide, to one every other month in 2005. There is always, it seems, the tension of waiting for the next case. Even as Scheck and Neufeld have shifted their focus to "educating" the public about false confession and eyewitness error, new Innocence Projects staffed in the states eagerly await their first exonerations, sometimes with disastrous results for crime victims, who must watch as their experience of crime gets co-opted in the countdown-like atmosphere promulgated by the model of DNA exonerations created by Neufeld and Scheck.

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[29] There are now 35 Innocence Projects in the states, staffed by law students and supported by private donors, foundations and even taxpayer-funded indigence defense funds. State Innocence Projects report having to turn away vast numbers of law students wishing to volunteer. Teresa Baldas, "Proliferation of Innocence Projects Pushing DNA Evidence to Exonerate Prisoners Changes Tone, Topics of Debate," *Miami Daily Business Review*, 8 October 2004, p. 12. For funding sources, see the Georgia Innocence Project website, http://ga-innocenceproject.org/ (accessed June 5, 2005).

A Countdown in Georgia

Before her first case went terribly wrong, Aimee Maxwell, director of the Georgia Innocence Project, spoke of her clients as "lottery winners," implying that the few men whose cases were taken on had won out over hundreds or thousands of equally deserving, innocent, convicted men. The Georgia Innocence Project was founded in 2002. By August 2004, it had received 1,150 requests for assistance, and Maxwell felt confident enough in the Project's first case to issue press releases prior to the DNA test results. She may have been particularly hopeful because the case she selected involved a black man who was not only accused of raping a white woman, but was also implicated by a white co-defendant caught driving the victim's dead boyfriend's stolen car. Maxwell's press release repeatedly emphasized this race difference and noted her client's accomplishments in prison, and local media geared up to cover the first exoneration achieved by Georgia's own Innocence Project.[30]

In August 2004, however, DNA tests confirmed that the Georgia Project's first client, Joseph Lee Brown, was indeed guilty of the hideous crime for which he had been charged: raping a woman at knifepoint as she was cleaning out her boyfriend's house just hours after his funeral. The

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[30] Rachel Tobin Ramos, "Georgia Innocence Project's First Client Proves Guilty," *Fulton County Daily Report*, 3 August 2004.

case for Brown's exoneration was actually weak to begin with; the co-defendant who confessed to robbing the house with Brown was disgusted by the rape of the grieving woman and testified to details of the crime that only he and Brown could know. He and Brown were seen together by other witnesses, and Brown's wallet was found in the dead man's stolen truck when the co-defendant was arrested. It may bode very well for the prevalence of innocent defendants in Georgia if the Joseph Lee Brown case was the strongest case found in more than two years of searching by the Georgia Innocence Project.

After the DNA tests implicated her client, however, Maxwell shifted from criticizing prosecutors to talking about how lucky the crime victim was because, according to Maxwell, the Innocence Project had given her new peace of mind. "The great thing about this is that the victim knows for sure now," Maxwell announced "She does not have to wonder."[31] With one positive DNA test, the victim had gone from being that "white woman" to being the reason the Innocence Project does its work of challenging convictions. There was no word from the victim, who had wisely avoided the press.

With nothing to work with but one failed exoneration that reinforced the word of two white people, a rape victim and a co-defendant,

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[31] For Maxwell's quote, endorsed without irony by the editorial staff, see "DNA Tests Deliver Justice For All." Editorial, *Atlanta Journal and Constitution*, 9 August 2004, sec. A, p. 8.

over a black rapist, Maxwell told the press that the Brown case still got to the essence of what the Innocence Project was really all about: the search for the truth. "Not everyone who asks for our help will be innocent," she told the *Fulton County Daily Report*. "The bottom line, when all is said and done, is that he was the only person who knew. Now everyone knows the truth."[32] There was talk of turning the Innocence Project into the Georgia Truth Project. Then Clarence Harrison's DNA came back negative, proving his innocence, and Maxwell immediately returned to renouncing prosecutors and the justice system in general: "People understand that there is real evidence out there that can say who committed the crime, not just testimony," she said.[33] The Project hosted a large wedding for Harrison ("We're lawyers by day and wedding planners by night," said Maxwell). With no new DNA exonerations since the one in August 2004, they are now planning a first anniversary celebration of Harrison's release.

While Aimee Maxwell and the lawyers of the Georgia Innocence Project were waiting to "win the lottery," Georgia's new DNA database was steadily accruing hits, each linking a DNA sample taken from a convicted felon to some unsolved crime. The vast majority of these were rapes; by June 2005, the database had positively identified defendants in 285 unsolved crimes in Georgia and an additional 48 unsolved crimes committed in other states. Unlike exonerations, these database hits are

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[32] Ramos, "Georgia Innocence Project's First Client Proves Guilty."
[33] Baldas, "Proliferation of Innocence Projects."

almost unnoticed events; while the raw numbers get mentioned occasionally in articles about Georgia's Bureau of Investigation lab or in articles about DNA technology, the stories behind them remain unexplored by the media and imperceptible to the public. The victims, like bodies that accumulate on television crime shows, remain backdrops to the drama of prosecution and even, for a television-watching public enchanted by shows such as C.S.I., to the technology of forensics itself.

Consistent records are not yet even kept on the adjudication of crimes following DNA database matches, so there is no way to know if prosecutors are following through by taking action on all or many of these cases. But the Justice Department is attempting to take stock. In 2002, the federal government funded an independent study to identify cases in some states where timely reduction of DNA backlogs or sampling of all felony offenders (as opposed to convicted sex offenders alone) would have made a difference in preventing crimes. Georgia was not included in the study, but in New York City alone, for example, researchers identified twenty-two rapes and one murder that occurred in the 1990's that might have been prevented if New York had required samples from all felons and reduced their backlog of rape kits more quickly.[34] The study revealed something else, as well; these twenty-three crimes were committed by only

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[34] For the most accessible and up-to-date information on Georgia's DNA Database, see Lt. Governor Mark Taylor's website, http://ltgov.georgia.gov/gta/ (accessed June 5, 2005). For the preventable crimes study, see United States, Office of Justice Programs, Department of Justice, *National Forensic DNA Study Report*, Smith Alling Lane, 2002.

three men whose records in total - both before and after DNA might have stopped them - were striking compendiums of lives damaged and lost.

Isaac Jones, the "Bronx Rapist" was suspected in fifty-one rapes between 1993 and 1999. By the time he was arrested, he had raped and brutalized so many women that the victims were divided among seven different trials so their collective presence would not "prejudice" jurors. Perhaps prosecutors need not have bothered; rage against Jones was largely focused on the fact that he was the man police were seeking when they shot and killed Amadou Diallo in 1999.[35] Arohn Kee, who monitored the police's own investigation of his crimes using the internet and, amazingly, was released pending DNA results in one case, was finally convicted in 2000 of six rapes and three murders. Kee dragged one of his victims to a rooftop and set fire to her corpse; he told another 13-year old victim to stop crying and "take it like a woman" as he raped her.[36] The third man was identified in 2001, a year after laws were changed in New York to require all felons to give DNA samples and a backlog of "14,000 to 16,000" untested rape kits were processed.

The database backlog study did not attempt to accumulate a list of all victims of preventable crimes, let alone any record of crimes solved by DNA comparable to the Innocence Project's case files of all exonerated

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[35] Tara George, ""Angry Judge Gives Bronx Rapist 155 Years," *New York Daily News*, 2 August 2000, p. 17.
[36] Barbara Ross, Helen Peterson, Dave Goldiner, "Kee Guilty in Rape-Slay Spree, Faces Life Term," *New York Daily News*, 21 December 2000, p. 4.

men. To do so would be impossible, given variations in record keeping for even serious felony crimes. But the anecdotal picture emerging from the New York database suggests that several assumptions about rape may be re-evaluated in coming years: Arohn Kee, for example, could be labeled both a "date-rapist" and a classic stranger rapist; some rapists choose victims across wide age ranges, like Robert Griffin, whose victims include both a four-year old girl and a sixty-seven year old woman;[37] and serial rapists may be more prolific than research based on arrest records suggest, as evinced by the Bronx Rapist and the recently captured Fletcher Anderson Worrell, who is suspected in twenty-five rapes spanning thirty-two years and four states.[38]

"Unfounding" Rapes

Still, the picture of rape and rape prosecutions emerging from DNA databasing remains fragmentary. Throughout the 1990's, while Barry Scheck and Peter Neufeld enjoyed the benefits of press coverage for nearly every Innocence Project case that resolved in favor of their clients, some journalists on crime beats had to work to find novel ways to uncover rape cases that did not make headlines, or even, sometimes, police reports or any other quantifiable, statistics-garnering record. This task was endlessly

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[37] "Inmate Charged With Two Rapes in 1999," *Associated Press State and Local Wire*, 5 April 2002.

[38] Lindsey Faber, "Cold Case Heats Up; DNA From a Decades-Old Attack Leads Authorities to a Suspected Serial Rapist," *Newsday*, 27 April 2005, sec. A, p. 5.

complicated by victims' lack of legal standing; even states with victim's rights laws on the books were failing to consistently enforce these mandates, and where they were enforced, they were largely looked upon as administrative or therapeutic measures designed to help the victims cope with trauma, not to defend their right to accountability from the system.

Even setting aside for a moment the problem of intentional concealment and neglect, a staggering amount of basic information about crime does not get transmitted from police to prosecutors, from prosecutors to the courts, and from the courts to the reporting agencies organized by states and the Department of Justice. Consequently, journalists who choose a specific precinct, courthouse, or even extended family as their subject have written some of the best accounts mapping the dimensions of forgotten crime.

In 1994, Journalist Edward Humes spent a year observing one juvenile court in Los Angeles. He describes the system of adjudication of juvenile defendants as a "funnel," in which, out of the 2.3 million youths under 18 arrested annually, only 330,000 end up facing any action by the courts at all, including probation, foster home placement, or detention. The other nearly 2 million arrests simply get dropped, and as Hume

found, by no means were all of them for minor crimes.[39] News stories indicate that courts for adults have similar records of simply dropping even serious criminal charges; as only the most recent example, in 2005, 55% of felonies in Philadelphia were being dismissed for reasons including the failure of police to show up for hearings and intentional delay tactics by defense attorneys exploiting case overloads.[40] On the microcosmic scale, *All God's Children*, Fox Butterfield's 1995 Pulitzer Prize winning memoir of one violent family's transgressions from the 1950's through the 1990's, charts a literally uncountable number of rapes, sexual assaults and violations of children, only one of which, the anal rape of a six-year old girl, results in a single arrest.[41]

In 1998, *Philadelphia Inquirer* reporter Mark Fazlollah began examining crime reports and investigating rapes that had been closed without investigation by the Philadelphia police. So-called "unfounded" rape complaints were being reclassified as "investigation of persons" and officially shelved. In Philadelphia alone, Fazlollah and his colleagues found thousands of rapes that had been reclassified, and by December 1999, the police agreed to re-open 2,500 shelved rape reports reaching back five years. Auditors determined that police had mishandled 2,300 of

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[39] Edward Humes, *No Matter How Loud I Shout: A Year in the Life of Juvenile Court* (New York: Simon and Schuster, 1996), especially pp. 323 - 325.
[40] Joseph Tanfani, Thomas Fitzgerald and Rose Ciotta, "Philadelphia dismisses its Felony Cases at a Rate of About Half," *Philadelphia Inquirer*, 15 May 2005.
[41] Fox Butterfield, *All God's Children: The Boskett Family and the American Tradition of Violence* (New York: Alfred A. Knopf, 1995). For rapes, see pp. 92, 148 - 149, 163, 238, 290 - 293.

these cases, including rapes committed by a not-yet-identified murderer and serial rapist.[42]

Fazlollah's investigation led him to other cities, and he began to grow suspicious of the wildly disparate rape rates being reported among urban areas that otherwise have similar crime statistics. Minneapolis, he found, which is known for its sexual assault nurse-examiner program, reported four times more rapes per capita than New York City in 1999. He found cities where the police were "unfounding" rape cases at astonishing rates: in Milwaukee, nearly 50% of all reported rapes were classified "unfounded." He also found that unusually low "unfounded" rates did not necessarily indicate vigilance. In Houston, where the "unfounded" label was attached to only one half of one percent of rape cases, police admitted that they simply did not file any report when they doubted the story of the crime. Virtually everywhere Mark Fazlollah looked, he found clues

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[42] Mark Fazlollah, Michael Matza, Craig McCoy and Clea Benson, "Women Victimized Twice in Police Game of Numbers," *The Philadelphia Inquirer*, 17 October 1999, sec. A, p. 1. Mark Fazlollah, Michael Matza and Craig McCoy, "Police Checking into Old Sex Cases," *The Philadelphia Inquirer*, 29 October 1999, sec. A, p. 1. Craig McCoy and Mark Fazlollah, "Police Knew of Rapist's Pattern; Officers on the Beat in Center City Weren't Told, Though," *The Philadelphia Inquirer*, 3 December 2000, sec. A, p. 1. Mark Fazlollah and Craig McCoy, "Timoney Commends Rape-Squad Reforms; Sex Crimes Now Are Being Pursued Aggressively," *The Philadelphia Inquirer*, 13 December 2000, sec. B, p. 1. Mark Fazlollah, Michael Matza and Craig McCoy, "A 7-year old 'Knew Who Did It'; Philadelphians Who Have Been Sexually Violated Fight to be Taken Seriously," *The Philadelphia Inquirer*, 19 December 1999, sec. A, p. 1. Craig McCoy, Michael Matza and Mark Fazlollah, "Police Doubted Teen Was Groped," *The Philadelphia Inquirer*, 21 December 1999, sec. A, p. 1. Craig McCoy and Mark Fazlollah, "Review Turns Up Hundreds of Rapes; Police Had Dismissed More Than 300 of the Cases From 1995 on, Commissioner John F. Timoney Revealed," *The Philadelphia Inquirer*, 21 June 2000, sec. A, p. 1.

pointing to vast numbers of reported rapes being hidden or "unfounded" without further investigation.

These numbers, or more accurately, absence of numbers and absence of statistics are inherently difficult to grasp. Despite the statistical and reporting irregularities Fazlollah uncovered, and despite additional reports that untested rape kits were being stockpiled by the tens of thousands in police stations all over the country, no coherent picture emerged of the implications of what must have been happening to rape victims throughout all of those years when much of the public assumed that the days of disbelieving them were long gone. If one reporter in one city turned up 2,300 uninvestigated rapes in the interval between 1994 and 1999, then how many rapists were out there? And if police reporting on rapes had been this unreliable for decades, then what should even national statistics look like?

In Atlanta, both police and prosecutor scandals involving sex crimes have been perennial occurrences: reporting irregularities, complaints of hostile treatment at the hands of sex crime unit officers, and complaints that the prosecutor's office wasn't doing enough to put rapists away flared up repeatedly throughout the 1990's. In 1993, a former Fulton County Prosecutor, Sylvia Martin, told the *Atlanta Journal Constitution*: "If you're a rapist, you want to rape in Fulton County. This is where you want to commit your crimes, because you won't do any time." Newspaper reporter

Sandra McIntosh analyzed metro-Atlanta rape cases and found that rapes in Fulton County, which comprises most of the city itself, were much more likely than surrounding areas to result in jury acquittals; convicted rapists were sentenced to less than half the time given in surrounding jurisdictions, and pleas were granted more often and with more generous terms, often only probation. In Fulton County in 1990 and 1991, she wrote:

> At trial, three out of every four defendants accused of rape were found innocent. Defendants in Fulton were 38 percent more likely to strike a deal to plead guilty to reduced charges than elsewhere in metro Atlanta. Plea bargains resulted in much more lenient sentences. Fifty-four percent of Fulton rape suspects who pleaded to reduced charges were given probation and walked out of court free men. Fulton's median sentence for a reduced charge was probation, compared to three years in prison in other metro courts.[43]

Prosecutors pointed fingers at skeptical jurors; judges presiding over failed cases pointed at shoddy police work; victims called the newspaper to say they had never heard back from the Sex Crimes Unit after making a rape report. Even police complained that other police were doing shoddy work and losing rape kits. In truth, the Fulton County prosecutor's officers were in shambles, hampered by lack of funding and inexperienced lawyers. But rape prosecutions fared far worse than other types of cases. One thing everybody agreed upon, McIntosh found, was a common

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[43] Sandra McIntosh, "Getting Away With Rape?; Some Victims of Rape in Fulton County Are Doubly Traumatized by a Justice System That Puts Rapists Back on the Street," *Atlanta Journal and Constitution*, 10 October 1993, sec. F, p. 1.

perception among jurors and the public that the victim, not her assailant, was responsible for the crime. Another former prosecutor put it this way: "Blaming the victim cuts across all racial and economic lines," said Constance Russell. "Everybody from the bank president to the man in the housing project has the same ideas about rape."

This shared cultural unwillingness to blame men for rape resulted in astonishingly low conviction rates. In 1990 and 1991, out of 1,739 reported rapes and 704 arrests in Fulton County, prosecutors brought only thirty-two cases to trial and convicted only eight men. Thirty-one other men pled guilty to rape in exchange for reduced sentences, and seventy others pled guilty to lesser charges, many receiving only probation.[44] A woman bringing rape charges in Fulton County at that time had only about a two-in-one hundred chance of seeing her attacker serve any time in prison for rape.[45]

Until DNA presented the possibility of identifying perpetrators who were never arrested and implicating some others who pled down, were acquitted or merely had their cases dismissed, the fate of the 1,630 women in McIntosh's article who did not see their rapist plead guilty (to anything, even a misdemeanor charge) did not elicit curiosity. Instead,

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[44] Ibid. McIntosh's analysis excluded cases that Police Chief Eldrin Bell deemed "false." See Sandra McIntosh, "Rally to Protest Handling of Rape Cases; Report that Fulton County is Easy on Rapists Angers Rights Groups," *Atlanta Journal and Constitution*, 20 October 2003, sec. C, p. 1.

[45] If criminologists are at all correct in estimating that only one in ten rape victims reports the crime, it is possible than only one out of every 500 rapists were held responsible by Fulton County for committing rape in the early 1990's.

they have literally disappeared from the cultural memory, along with thousands of others from the years following the report.

It is almost a curiosity that victims in Atlanta in the early 1990's reported rapes at all. The courts, at this time, were emotionally dangerous places for rape victims; in contrast to the prosecutor's offices newly graduated lawyers, a handful of seasoned and flamboyant defense attorneys, some sporting trademark ponytails, took on the few rape and child molestation cases that made it to trial and turned them into media circuses. Defense Attorney Michael Hauptman, known for specializing in particularly grotesque child molestations, freed one client who was arrested for rape eight times in three years and had insisted to police that he needed psychological help to stop committing rapes. The police inexplicably dropped six of the rape charges; Hauptman gained an acquittal in the seventh. Even after Mario Brannon told the eighth victim "Tell them Mario did it," he was released on bond again to await his next trial.[46]

Race and racial history exacerbated rape prosecutions in Atlanta in a variety of ways. Michael Hauptman, among others, was well known to "play the race card" when a victim was white and her assailant a black man; however, he also vigorously defended black men accused of raping

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[46] Sandra McIntosh, "Getting Away With Rape?; 'Tell them Mario Did It': One Man Has Been Charged in Eight Assaults, Several Involving Teens. Most Cases Have Been Dropped - To the Surprise of the Victims," *Atlanta Journal and Constitution*, 10 October 1993, sec. F, p. 3.

black women and girls. Some of the "ponytailed lawyers" were rumored to refuse to act as defense in the rare cases when a white man stood accused of raping a black victim. Meanwhile, black victims often blamed white victims for receiving better treatment and thus causing the neglect blacks experienced at the hands of investigators. "If these were white girls, he'd be in jail now," complained one of Mario Brannon's victims. But with a black mayor, a black chief of police, and a mostly-black juror pool, it wasn't white victims preventing them from seeing their cases tried. White victims experienced identical neglect. The system for prosecuting rapes in Atlanta (and many other places) simply was "broken," and the largest role racism played was providing some leaders with excuses to not fix it. One salient fact remained the same, however, through the coming years of reform and retreat on the issue of sexual violence: the typical rape victim in Atlanta was a young black woman, and the typical attacker was a black man.[47]

In 1994, Atlanta was again the most violent city in America. But the Atlanta Police Department was reporting that rape statistics had actually dropped 29% since 1990. An article in the *Atlanta Journal and Constitution* reported that Police Chief Eldrin Bell wrote off nearly one third of reported rapes as "unfounded," which may have accounted for

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[47] For Michael Hauptman, see Peter J. Boyer, "DNA on Trial." Also, personal conversations conducted during work as a rape crisis center volunteer and lobbyist for rape victims, 1992 - 2003. For Brannon's victim, see Sandra McIntosh, "Tell Them Mario Did It."

most of the drop in rape statistics. Bell admitted that he dropped cases where the victim didn't want to prosecute or was too afraid of her attacker, and he also dropped cases he thought were unfounded, which he described as date rapes and prostitutes trying to extort money from men who would not pay them.[48] But in 1996 and 1997, an FBI audit found, the Atlanta Police Department failed to include 115 reported rapes in the statistics they are required to provide to the Department of Justice. In 2001, more allegations of uninvestigated rapes arose when records of uninvestigated rapes, including the gang rape of a 14-year old girl, were delivered anonymously to now-retired Captain Louis Archangeli. Over the years, Archangeli repeatedly told anybody who would listen that the APD was failing to properly investigate and report sex crimes. In 1998, he was demoted from Deputy Chief of Police for blowing the whistle on underreported rapes and the possible destruction of rape kits. Seven years later, he was still pressing for legal action against the officers responsible for hiding those crimes.[49]

In 1995, Atlanta Mayor Bill Campbell named Beverly Harvard as Chief of Police. Fulton County now had black women running its police and sheriff's departments; Jackie Barrett had been elected Sheriff in 1992.

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[48] R. Robin McDonald, "Atlanta Again Tops List for Violent Crime," *Atlanta Journal and Constitution*, 2 May 1994.

[49] Virginia Anderson, "Atlanta Crime Statistics Controversy: Mr. Nice Guy Caught in the Middle?" *Atlanta Journal and Constitution*, 5 June 1998. Tasgola Carla Bruner, "Sex Crime Follow-Ups Fall Short," *Atlanta Journal and Constitution*, 8 June 2003, sec. C, p. 1. Steven H. Pollak, "DA's Office Faces Conflict Questions on Rape Reports," *Fulton County Daily Report*, 24 March 2004.

But city leaders remained in denial about rape rates, unsolved rapes and the legal hurdles to rape prosecution. Occasionally, some public or unusually violent event would attract attention; in 1995, when at least a dozen women were raped at Freaknik, the Black College Spring Break, Beverly Harvard came forward, not to denounce the rapists, but to scold the young women. "Oftentimes we talk about men, indict men, for mistreating women," she said. "Therefore, for women to stand around and behave like they did . . . what kind of message are we sending to our men out there?" Her message did not include complaints about the actual assaults, many of which were committed by older men who descended on the student gathering.[50]

In 2001, a group of female judges from Fulton County marched into District Attorney Paul Howard's offices and demanded that he begin prosecuting pimps who sold underage girls on Atlanta's streets. Thanks in part to lax laws regulating sex industries like nude clubs, massage parlors and "lingerie modeling studios"; in part to family crises in the largely-minority urban underclass; and in part to the celebration of pimp lifestyles in rap and hip hop, Atlanta's prostitution problems had exploded in the late 1990's. Many of these prostitutes were very young girls being lured into prostitution by older men. Howard had done little to prosecute men who were selling girls as young as eleven on Atlanta's streets or to

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[50] Kathy Scruggs and R. Robin McDonald, "Freaknik '95; Sexual Issues," *Atlanta Journal and Constitution*, 24 April 1995, sec. B, p. 5.

crack down on topless clubs that knowingly employed underage girls. Juvenile Court Judges Glenda Hatchett and Nina Hickson demanded that Howard prosecute men exploiting underage girls, both the customers and the pimps. "Police know who these guys are," said one public defender, "There's just no enforcement."[51] "If we know where they're getting the fake IDs, we know where they're dancing, we know where they're prostituting, why aren't we doing something?" Judge Hatchett asked.[52]

"Doing something" would require changing state law to make pimping, even a child, something more than a misdemeanor, Paul Howard replied. According to Judge Hickson, Howard also said that targeting the clubs would constitute harassment. Disgusted, the judges turned to the federal government, just as civil rights leaders had done in the 1960's; the result was a racketeering case filed against fourteen men by the U.S. Attorney's Office in Atlanta. In the end, the men were undermined by the unforgettably visible record they created detailing their crimes: a "training video" depicting the proper way to lure, train, dress and discipline young girls for the street; videos celebrating "pimp culture" in the South; and even the pimp names they tattooed on girls as signs of ownership. For years, these men had operated with complete impunity, conducting

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[51] Jane O. Hansen, "Selling Atlanta's Children; The Pimps: Prostitution's Middle Man Slides By in Court," *Atlanta Journal and Constitution*, 7 January 2001, sec. A, p. 9.
[52] Jane O. Hansen, "Child prostitution: Where is Lloydia?; Young Prey: She, Like Many Others, Has Fallen Victim To Atlanta's Adult Sex Industry," *Atlanta Journal and Constitution*, 12 November 2000, sec. A, p. 1.

nothing less than commercialized child molestation on the streets of Atlanta. Ironically, it was during these same years that the so-called "molestation wars," the debate over false memories and false accusations of child abuse raged. These "wars" were a parallel fight to the Innocence Project's allegations of widespread wrongful incarcerations, and they ended with more Americans believing that reports of molestation were often untrue and that innocent people were frequently convicted. The Atlanta pimp scandal offers a vastly different perspective on claims that overzealous prosecution is the "terror of our times," as *Wall Street Journal* columnist, Dorothy Rabinowitz, terms it.[53]

By 2000, Georgia announced that it was one of the few states on its way to completely clearing its backlog of rape kits in the state's labs.[54] But this did not mean that every rape kit, or even most of them, collected or stockpiled by police had been forwarded to the state lab for testing. In November 2004, Fulton County District Attorney Paul Howard announced that his cold cases unit, which had been formed only seven months earlier, had gleaned possible DNA samples from 150 unsolved sex murders. They were trying, without overwhelming the Georgia Bureau of Investigation's staff, to find funding and lab personnel to test those cases, some of which

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[53] "Feds Courageous in Efforts to End Pimps Lurid Crimes," Editorial, *Atlanta Journal and Constitution*, 11 April 2001, section A, p. 12. Dorothy Rabinowitz, *No Crueler Tyrannies: Accusation, False Witness and Other Terrors of Our Times* (New York: Wall Street Journal Books, 2003).

[54] Jack Warner, "Method of Using DNA Puts State Agency in Crimefighting Vanguard," *Atlanta Journal and Constitution*, 3 December 2000, sec. D, p. 3.

originated as long ago as 1973. "If we add 150 cases to [the GBI's "no suspect"] backlog, under the lab's present staffing and workload, it could take four years to get the complete results back," Howard said.

The problem with working old cases, even murders, was that the lab was required to prioritize cases with pending court dates or identifiable suspects. Chillingly, the one case that had so far produced a DNA match for Howard's Cold Case Unit tied the 1995 rape and murder of a fourteen-year old Atlanta girl to the 2004 rape of another girl; the second child survived and gave police a description of her attacker, but, as of July 2005, he has not yet been identified. What the DNA made visible was that a serial rapist and killer of children had attacked at least two girls in ten years in southeast Atlanta. But the news wasn't greeted with urgency; instead, it was buried in a general story about the problem of DNA backlogs. Two months later, the Georgia General Assembly began its session, and legislators voted to award Clarence Harrison a million dollars for his wrongful incarceration, as they had given Calvin Johnson $500,000 in 2000. But politicians and the media remained silent on the matter of finding the funding to eliminate the DNA backlogs in Fulton County and elsewhere that held the key to identifying hundreds of killers and rapists

still on the streets. The maxim "n" guilty men had been quantified and had also become a self-fulfilling prophecy.[55]

East Point, where the second child was attacked, is part of the same small community that includes College Park, where Calvin Johnson was arrested for rape in 1981 and again in 1983; it shares the main road so colorfully described in *Actual Innocence* as a place of wilting heat, limp Confederate flags, magnolias and racial injustice. DNA has revealed it also to be a place where two adolescent girls, and maybe more, met a man who raped them both and killed one of them. Not five miles north, on that same road, fourteen year-old Mary Phagan's raped and strangled body was discovered in 1913. But none of this makes a good story; nobody would ever dream of remembering it that way.

DNA has transformed the prosecutorial landscape. CODIS hits continued to offer fragmentary insights into what was happening on the streets during the decades of official neglect rape victims of all races and ethnicities had come to expect as crime surged out of control in the 1980's and 1990's. But when it comes to identifying and convicting rapists using DNA, the sheer quantity of unsolved crimes seems to create a public numbness. Twenty-five rapes by one man, seven murders by another; it may be years before the technology catches up to the body count, in stark contrast to DNA exonerations which have unfolded before the public one

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[55] Bill Montgomery, "Cold Cases Thaw Begins; Cash Needed to Progress," *Atlanta Journal and Constitution*, 4 November 2004, sec. JN, p. 1.

or two at a time and have always involved scores of articulate spokespersons.

The great promise of forensic DNA was that it could bring objectivity to the emotional subject of identifying rapists and prosecuting sex crimes. But almost two decades after the beginning of the DNA revolution, what the public is seeing is turning out to every bit as subjective as anything that came before it. Invisible crime victims are still invisible; the chronic under-prosecution of rape remains unexposed and unexplored. All that can be heard is Neufeld and Scheck, and other attorneys and academicians and journalists, all speaking the language of the great American myth of incarcerated innocents.

Chapter 7:

"Rape is Not A Hate Crime Against Women"

I began to change my mind about hate crimes laws in June 1998, five days after James Byrd Jr. was dragged to death in Texas. Driving from a conference in Denver back home to Atlanta, I pulled off the highway to let my engine cool. I was reading the *Tuscaloosa News* in my car when three black men straggled over from the row of silent payphones. They'd been passing time, drinking. There didn't appear to be a lot else to do in the middle of the night in a parking lot carved out from scrub pine in western Alabama. The men were friendly and a little bit drunk. They wanted money to check the oil in my car, and they felt like talking.

Upon learning that I had just made the long drive through Texas, one of them shook his head and said: "I wouldn't go to Texas. They kill black men there." After a day and a night of driving alone, I also wanted to talk. Black men, I said, get killed everywhere, and other people do, too. I pointed to the story I was reading in the *Tuscaloosa News* about a particularly brutal murder that had occurred nearby, in 1995: Mattie Wesson, age 70, had been awakened in her bed by a neighbor who beat her, tied her up, raped her, then shot her five times as she crawled out the

door to escape. The first police officer to arrive on the crime scene was Mattie Wesson's son. He found his mother's body in her carport.[1]

"But that's different," one of the men said. "Those guys in Texas wanted to kill a black man. This guy was looking for crack money, and the old lady woke up. I don't know why he raped her, though. That didn't seem necessary," he added.

As I drove back to Atlanta, the word "necessary" stuck in my mind. The man in the parking lot wasn't minimizing what happened to Mattie Wesson: he expressed horror at the thought of her ordeal. The rape seemed to genuinely puzzle him. Her assailant needed money for crack, and that need was clearly logical; he needed to conceal his identity and Mattie Wesson knew him, so killing her made sense, in a criminal way. But raping a frail old woman you're about to kill couldn't be explained by the logic of addiction. Raping Mattie Wesson, we agreed in that parking lot, was a hateful act. It was just like tying James Byrd to a truck and dragging him behind it until he died. It wasn't necessary.

I remembered this encounter with particular clarity because it forced me to think about something that had been bothering me since I had attended President Clinton's 1997 White House Conference on Hate

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[1] For the Wesson case, see "Court Rules in Capital Murder Case from Montgomery," *The Associated Press State and Local Wire*, 29 October 1999.

Crimes seven months earlier.[2] This conference marked a new level of visibility and prestige for the hate crimes movement. Important White House staff was in attendance, including members of Clinton's Cabinet, Vice President Gore, and Attorney General Janet Reno. Congressional leaders were there, along with scores of community leaders and youth leaders and religious leaders and civil rights leaders and gay and lesbian leaders; it was one of those events touted as "coalition-building." If you couldn't be in Washington, there were more than 50 sites set up around the country so that thousands of additional activists could observe and convene their own events.

I was sitting in one of these satellite-linked audiences, in a public television studio in Atlanta. On the television screen, President Clinton was experiencing his usual high level of empathetic intensity; his voice crackled with sorrow, then excitement; he looked as if he wanted nothing more than to plunge into the crowd of people and start hugging them.

This was an event, it was the place to be, and the vast array of department heads and big-name non-profits bespoke of an enormous hate crimes bureaucracy already humming. This was a church of the believers, and I was one too, sitting in Atlanta in a television studio, surrounded by dozens of community leaders; what we were going to do was nothing less

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[2] The White House Conference on Hate Crimes, 10 November 1977. For a summary of the President's remarks, see, http://clinton2.nara.gov/Initiatives/OneAmerica/whc.html\ (accessed June 5, 2005).

than lead the American public from the darkness of hate and prejudice into a new century of enlightenment, and how we were going to accomplish this task was through tolerance programs funded by the Department of Education, and community mediation programs funded by the Department of Justice's Community Relations Service, and mental health studies funded by the National Institute of Mental Health, and law enforcement trainings to teach police how to identify bias in criminal behavior, and statistics-gathering to make this invisible crime wave visible, and long prison terms for criminals who lash out with prejudice.

All of this was discussed with zeal, in a crowd resplendent of visible multiculturalism, a rainbow of identities and faces in perfect agreement regarding the rightness of their task, for whom in that room could argue that prejudice is not an urgent and omnipresent burden? There was something disorienting about listening to left-leaning activists making fierce arguments for longer prison sentences and crackdowns on crime, but these were no ordinary criminals being discussed; they were neo-Nazis and Klansmen and gay-bashers, people undeserving of the sociological empathy that progressive activists bring to discussions of crime.

There was also a curious emphasis on the historical which reminded me, of all things, of the intensity that Confederate re-enactors bring to their task of re-living the Civil War. The murders that would come to symbolize hate crimes for most Americans, Matthew Shepard's and James

Byrd Jr.'s, had not yet occurred. The hate crimes movement was reaching back into the past for evidence of racial sins. Reference was made to the Klan and to lynching, cross burning, Hitler, and the martyrs of the civil rights movement. Nobody discussed the precipitous rise in violent crimes that terrorized large portions of the public throughout the 1980's and early 1990's, and nobody mentioned violence directed at women and children even though representatives from women's groups were scattered through the crowd.

Clinton spoke about his administration's firm commitment to combating hate. Then someone in Washington, whom I later identified as California State Senator Sheila Kuehl, rose from the crowd and asked the president what was going to be done about the issue of rape. Would it, or would it not be counted as hate? This was clearly an ongoing discussion, and a tense one.

The president tilted his head apologetically, for what is he if not essentially apologetic? Then he said the thing that came flying back to me in the middle of the night on a highway in Alabama.

The President paused and then replied, his voice controllably amenable. He talked about not wanting to "clog" the federal system with crimes that were being prosecuted in the states merely in the interest of being "politically sensitive." He used the federalism argument to dispose of the rape question, which was clearly discomfiting to him, and I

remember him saying, though this exchange does not appear in the fragmentary written record of the event, that there are just "too many of 'em," meaning rapes, to count them as hate crimes.

State Senator Kuehl sat down, and Clinton hurried on to the next subject. What an odd thing to say, I thought, and what an odd reaction from the crowd. In other discussions throughout the day, the question of federal versus state enforcement was openly discussed in terms of what types of crimes state laws should cover versus what federal laws should cover, but nobody spoke of other crimes "clogging" the system or being included due to "political sensitivities." This was a conference in which name-calling was being considered as, well, a federal crime. The question about rape had broken the mood of easy conviviality, for a moment, until it was forgotten. And I put it in the back on my mind as well, until that moment in the parking lot in Alabama when the stranger checking my oil lamented that Mattie Wesson's killer hadn't needed to rape the old woman, that Mattie Wesson's rape wasn't necessary.

The Problem of "Too Many Rapes"

If hate crimes policy were crafted by the type of people you find sharing quarts of beer in parking lots off interstates in western Alabama (where, arguably, it ought to be), then Mattie Wesson's rape might come to be considered a crime of hate. But by the time she was brutally raped and

murdered, the leaders of the hate crimes movement, a coalition of non-profit organizations and elected officials, had already decided that rapes of women must never count as gender bias hate crimes at either the state or federal level. This was a decision that was made quietly, behind closed doors, and evidence of the exclusion would not become clear until state laws began to be enforced and state data collected. Only by default, through the crimes that are prosecuted as bias crimes, is it possible to show that the category "gender bias" has been designated for use only in cases involving transsexual or transvestite victims.

Other abuse of non-transvestite, non-transsexual women, from verbal intimidation to murder, is likewise completely and quietly excluded from hate crimes enforcement. This exclusion begins at the highest level of administration of these laws, in hate crime trainings for police officers and prosecutors administered through federal and state grants and conducted by the non-governmental, non-profit Simon Wiesenthal Center, Anti-Defamation League, and also in internal trainings conducted by law enforcement agencies.

With the exception of Carla Arranaga, whom I will discuss later in this chapter, I have not found one elected official, official non-profit representative, or Office of Justice Programs representative who has been willing to speak with me on the record about policy regarding hate crimes and rape since 1998. One trainer at the Simon Wiesenthal Center told me

that the question of rape as a hate crime "always comes up," when they're training police officers and prosecutors but that the center doesn't "put it in writing, it's not part of our curriculum." She said that the trainers address rape verbally, during the "Q and A" period, instead. However, she would say no more about what was discussed.[3] Not long after that conversation, the woman's supervisor, Sunny Lee, called me and told me that the trainer had no authority to speak about the Center's trainings and that, furthermore, the Center does not play an official role in setting policy. "I am flattered you think we are so important," she told me, "but we just teach tolerance."[4]

In fact, the Wiesenthal Center does train police and prosecutors. As noted prominently on their website,[5] they have brought their Task Force Against Hate program to cities throughout the country. In 2000, the U.S. Department of Justice cited the Simon Wiesenthal Center's *National Institutes Against Hate Crimes* program as a "best practices" program for "training and support for law enforcement professionals." The DOJ "best practices" report noted that, by the end of the four-day seminar, each "multidisciplinary team of law enforcement professionals" attending the training "has developed a comprehensive, coordinated plan for addressing

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[3] Employee of the Simon Weisnethal Center who identified herself as a "law enforcement trainer," telephone conversation with the author, 8 August 2000.

[4] Sunny Lee, Program Manager, Training For Tolerance for Law Enforcement, telephone conversation with the author, 8 August 2000.

[5] http://www.wiesenthal.com/site/.

hate crimes in its community."[6] What is said about rape, however, is something I could not discover, despite written requests and phone conversations.

Public explanations for choosing to exclude women as victims from the "gender bias" category of hate crime victims hardly run longer than Clinton's offhanded comment at the 1997 teleconference; rape is not counted as a gender bias crime against women because too many women are raped; other gender-based attacks, from verbal abuse, to "hate speech" and "hate vandalism," to physical assaults directed at women are not counted because counting them would bring the criminal justice system to a grinding halt. As Senator Orrin Hatch said in 1999, in response to a question about adding "gender bias" to laws in the states, "if you put gender in there it's a real problem because then all rapes would be a hate crime."[7] Counting even a fraction of the hundreds of thousands of sexual attacks committed each year would obscure the few thousand incidents of bias committed against ethnic minorities, religious minorities and gays, particularly gay men.

Certainly, nobody would ever argue that there are too many gay-bashings or cross-burnings or synagogue defacements to count them as

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[6] Steven Wessler, *Promising Practices Against Hate Crimes: Five State and Local Demonstration Projects*, prepared for the U.S. Department of Justice, Office of Justice Programs, May 2000.

[7] Scott Holleran, "Middle of the Right; GOP Presidential Candidate Hatch Supports Hate Crime Laws, Free Market," *Daily News of Los Angeles*, 19 December 1999.

hate crimes, but this is precisely what is said about rape, and it is said with a casual air that reveals the authority these activists feel in deciding what is and is not urgent in the fight against prejudice and violence in American life. It ought to have been embarrassing to be caught saying this. But the leaders of the hate crimes movement have suffered no such embarrassment. Instead, they've successfully deflected attention from the subject, so successfully that even activists working within the movement are completely unaware that there ever was a controversy over "too many rapes." Many (I would argue, most) of these activists, as well as journalists and ordinary people, also know nothing about the peculiar way their leaders solved this problem, a solution which depends, to an extraordinary degree, on disturbing stereotypes about rape itself.

What the leaders of the hate crimes movement have done is decreed that rapes can be counted as hate crimes only if the rapist displays some other bias *in addition to* bias against women -- that is, if in the course of selecting his victim or committing the assault, a rapist displays prejudice against gays, whites, blacks, Jews, Asians, or even, as in one case charged as a hate crime in Ohio, against Amish people.[8] That rapists are displaying animosity toward women, first by selecting them for such "unnecessary"

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[8] The rapist, Michael Vieth, was ultimately not convicted of hate crime, but members of the Amish community rallied against the judge's decision to drop the religious-bias hate crime charge, and prosecutor John Matousek contended that, "[Vieth] not only raped [the victim], he raped the Amish community, and he raped our community." Meg Jones, "Elroy Man's Attacks on Amish are Not Hate Crimes, Judge Says; Vieth Could Get Parole in 15 Years After Rape of Monroe County Girl," *Milwaukee Journal Sentinel*, 26 March 1996.

assaults, then by attacking the part of their bodies that literally makes them female, is thus rendered normative, a part of the background from which other prejudices may arise, but not, in itself, evidence of gender-based hatred toward women.

In August 2000, serial rapist Mark Anthony Lewis was charged with eight counts of hate crimes in Chicago after being identified as the assailant nine rapes.[9] Lewis, who is black, was charged with ethnic bias toward Asians: seven of his victims were Asian women. He was also charged with anti-Asian ethnic bias hate crime in the rape of a Hispanic woman whom he mistakenly believed was Asian. But his rape of the ninth woman, a white Serbian immigrant, didn't count as a hate crime. Also, none of the rapes were counted as gender bias crimes, even though Lewis was clearly seeking out one woman after another to victimize. During the trial, Asian leaders spoke to the press about the fear that Lewis had spread throughout the Asian community. "It was important to emphasize why the hate crimes laws were there," said Tuyet Le, a member of the Illinois Asian Hate Crimes Network.[10]

But why was Lewis charged with anti-Asian bias crime? According to the Department of Justice-funded publication, *A Local Prosecutor's Guide for Responding to Hate Crimes*, "Bias- or hate-motivated incidents and

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[9] Shu Shin Luh, "Serial Rapist Charged; 212 Counts Include 8 for Hate Crimes," *Chicago Sun-Times*, 31 August 2000.
[10] Ibid.

crimes can have a serious impact not only on the victim but also on those who share his or her characteristics because they have been singled out as a result of inherent characteristics and robbed of self-esteem."[11] Whom was Lewis singling out? Lewis raped non-Asian women, and many others had reason to fear being raped by him. Despite being part of the Asian community, however, Asian men did not have to fear being sexually assaulted by Lewis.

Asian women, of course, had reasons to fear of Lewis, but they also had reason to fear being targeted by any number of other rapists stalking women in Chicago in 2000. How do you differentiate the fear based on ethnicity from the fear women experience because of the prevalence of rape, which, more than any other crime, is committed by members of one group (men) and perpetrated against the members of another (women)? Hate crimes laws, as they were applied in the case of Mark Anthony Lewis, told an incomplete truth. To condemn Lewis only for ethnic hatred is to erase the fact that the rapes he committed were intended to terrorize and humiliate his victims in a very specific way: as women. The hate crime charges also meant that one of his rapes, the rape of a white woman, did not carry as severe a sentence as the rapes committed against Asian women.

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[11] American Prosecutor's Research Institute (APRI), *A Local Prosecutor's Guide for Responding to Hate Crimes*, sponsored by the Bureau of Justice Assistance, Office of Justice Programs, United States Department of Justice, 2000, p. 1.

Among the hundreds of other women raped in Chicago that year, none were considered victims of hate crimes, not even those who were beaten, slashed or burned by their rapists, not the ones who were raped by gangs of men acting in unison, like a lynch mob, nor the women strangled and raped and left for dead by the side of the road like Matthew Shepard. Mark Anthony Lewis was charged with hate in Chicago, but Patrick Sykes was not, even though Sykes poured roach killer into the eyes and throat of one of his rape victims, leaving her blind, and he beat her so severely that the nine-year old suffered brain damage, is nearly blind, and will never speak or walk again.[12]

In Georgia, Renaldo Javier Rivera confessed to raping and killing four women and raping at least 150 others, but these killings and rapes weren't called gender bias hate crimes,[13] nor were the rape-murders committed in New York by Arohn Kee, who doused one of his victims with gasoline and set her body on fire, and strangled, stabbed and sodomized three other women and girls.[14]

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[12] In sentencing Sykes, the judge said he wished he could impose a longer sentence, because "[Sykes} should remain in prison for the rest of his life," which might not occur with a sentence of 120 years. Hate crime enhancement would have given the judge the ability to impose a longer sentence. Carlos Sadovi, "Girl X Attacker Gets 120 Years; Judge: I Don't Believe Even This Sentence is Enough," *Chicago Sun-Times*, 3 July 2001.

[13] Sandy Hodson, "Disturbing Details; Rivera Speaks Through Recordings in Columbia County Court, Officers Play Tape of Suspect Describing Killing, Raping Women," *The Augusta Chronicle*, 28 February 2001.

[14] Michael Saul, "Killer Finally Says Sorry; Gets Max Sentence As Victim's Kin Vent Their Rage," *New York Daily News*, 27 January 2001.

What the leaders of the hate crimes movement were saying is this: drink yourself into a state of recklessness, then choose to humiliate and torture a gay man or black man, and you have committed a hate crime. Drink yourself into a state of recklessness and choose to humiliate and violate and torture a woman, and you have not.

How Many Are "Too Many Rapes"?

Hate crimes activists aren't incorrect when they say that counting rapes of women would transform their movement. In 1999, according to the FBI's Uniformed Crime Report, 383,170 women were the victims of rape, attempted rape or sexual assault.[15] In the same year, the FBI reported a total of 9,301 hate crime offenses. Of those, 3,082 were crimes against property; 3, 268 were incidents of verbal intimidation, and another 1,766 were simple assaults, or crimes that involve some physical contact, such as shoving or punching, but negligible injury or physical threat.[16] Only 1,143 hate crime incidents were crimes against persons that rose to the severity of those 383,170 sexual assaults.

Women's advocates and hate crimes advocates alike would argue that the FBI's data tends to underestimate the actual number of crimes. But no amount of debate over the phenomenon of victim underreporting

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[15] U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Reports*, 1999.

[16] U.S. Department of Justice, Federal Bureau of Investigation, *Hate Crime Statistics, 1999.*

(are there six times as many victims of rape; ten times as many hate crime victims?) can obscure the enormous gap between a few thousand annual hate crimes and hundreds of thousands of sexual assaults. In 1999, rape was 41 times more common than all hate crimes combined and 335 times more common than physically violent incidents of hate. "Counting rape" certainly would obscure other hateful acts, particularly the two-thirds of such crimes that involve vandalism or verbal assault.

This activity of quantifying crimes is discomfiting: what is a spray-painted swastika worth? How many gay-bashings equals a rape? But the intense focus on counting or excluding different types of victimization emerges from the culture of the hate crimes movement itself. When President Clinton and Senator Hatch observed that there were too many rapes to count rape as hate crime, what they were actually saying was that counting rape, not to mention other types of offenses directed specifically at women, including speech offenses, would turn the hate crimes movement into an anti-rape movement by default, by the numbers. In 1997, at the White House Hate Crimes Conference, the left-leaning activists of the hate crimes movement greeted the mere suggestion that such a thing might occur with anxious silence.

Throughout the 1990's, as more states passed state-level hate crimes laws, resistance to using the gender-bias category to prosecute crimes

committed against women[17] remained remarkably consistent from state to state. This exclusion of women is not the result of legislative credo or public debate, nor is this interpretation of hate crimes laws transparently expressed in the laws themselves. Bias statutes are notoriously vague, and an entire industry of "trainers" and "educators" has sprung up to explain, to prosecutors and police, precisely what these laws are supposed to mean. Such explanations regularly run to several pages, with supplemental lists of "bias indicators" to cue police in to the presence of a bias motivation, which need not be the entire motivation for the crime, but must be part of the criminal's intent.[18] This explains the existence of crimes like "bias motivated motor vehicle theft," in which it would admittedly be difficult to gauge the percentage of motivation arising from needing or wanting a car, versus the motivation to express some prejudice through car theft.

Within this broadly suggestive universe, and within a social movement known for factionalism, it is remarkable that the official line on hate crimes and rape has held so long. I suspect the reason is as Orrin Hatch inadvertently expressed it: if you count one rape, you must count them all, so none must be counted.

The Myth of Incremental Inclusion of Women

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[17] By "women," I am referring to non-transvestite, non-transsexual, non-hermaphroditic, biological females, here and throughout.

[18] APRI, *A Local Prosecutor's Handbook*, p. 7; For an extensive discussion of the "dual-motive" rule, see Ruben Castaneda, "Hate Crime Laws Rely on Motives, Not Targets," *Washington Post*, 26 October, 1998.

Until the mid-1990's, the problem of "too many rapes" was kept at bay simply by excluding gender bias from hate crimes laws, a strategy that angered some feminist activists, but not so much so that they would dare to risk accusations of being insensitive toward racism or homophobia by asserting too loudly that gender bias is no less significant, in cause or effect, than those types of prejudice. Feminists who wish to keep on in progressive politics learn early to suppress such urges.

Women who raised the subject of rape were told to wait for another day, or they were told that rape already carried enhanced penalties, or that rape was about dominance and dominance was different from hate, or even that rapes shouldn't be counted as hate crimes because most rape victims know their attackers.[19] At the same time, they were being told that rape actually is a hate crime against women but it couldn't be counted as one because there are too many rapes. Women who asked about rape were told absolutely anything, and often contradictory things, because the Anti-Defamation League and other organizations in the Coalition on Hate Crimes Prevention (including the Center for Democratic Renewal, the NAACP, the Southern Poverty Law Center, the American Civil

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[19] Carla Arranaga, then the Deputy in Charge of the Los Angeles District Attorney's Office, Hate Crimes Division and a member of the advisory group that drafted the APRI's *Prosecutor's Handbook*, told the author that "rape is a crime of dominion and control, not hate," and that "gender is not the motive for rape." Carla Arranaga, interview with author, July 2000. For an interesting discussion of the lack of victim interchangeability" in non-strange rape cases as an argument against counting any rapes as hate, see Steven Bennett Weisburd and Brian Levin, "'On the Basis of Sex': Recognizing Gender-Based Bias Crimes," *Stanford Law and Policy Review* 5 (Spring 1994): 36 - 38.

Liberties Union and the National Gay and Lesbian Task Force) had no intention of ever counting rapes as gender bias hate crimes. At the same time, they saw no need to acknowledge their position. In fact, it was through never admitting an official position on rape that these activists have been so successful in keeping rapes, or any other acts of gender-motivated violence directed at women, from being counted as gender bias crimes anywhere in the United States.

By the mid-1990's the hate crimes movement had grown into a significant political force, and media outlets were beginning to use the language of the movement in reporting certain crimes as crimes of hate. The public's perception of gay bashing, in particular, was transformed by activism and press coverage that linked these crimes to historic acts of violence directed at Jews and blacks. Elected officials who previously would have never voted for any law containing the words "sexual orientation" stepped up to condemn such violence, and state legislatures around the country passed hate crimes laws and added new categories of bias victims to laws already on the books. As passage of these laws became an increasingly popular organizing tool, one of the categories often added was gender bias. In 1991, only a few states listed "gender" as a protected victim category; by 1999, 19 states included gender bias in

their laws.[20] Feminist organizations that had championed the causes of hate crimes laws for their gay and minority members celebrated the hate crimes movement's recognition of violence against women.

But inclusion, in this case, was not what it appeared to be. Although only one federal law explicitly prohibits rape from being counted as a crime of gender bias (and this exclusion is buried away in the U.S.S.C. addendum to the law itself, which covers bias in federal parks and reservations),[21] this prohibition has become an unwritten part of every state-level law governing bias crime. Rapists have been charged under state bias crimes laws for choosing to rape women who are white, black, Asian, Amish and gay, but the crime they were charged with was racial, ethnic, or sexual orientation bias, not gender bias.[22] None of the 19 states that included gender bias in their hate crimes laws had used these laws, by 1999, to prosecute rape unless the rapist displays a prejudice against a certain ethnic, religious or racial group, or against lesbians, transvestites or gays. Six years later, there has not yet been even one hate crime

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[20] David Rosenberg and Michael Liberman, *Hate Crime Laws, 1999*, prepared for the Anti-Defamation League (New York, 1999), 2 - 3.

[21] 18 USCS Appx § 3A1.1 (2000).

[22] In 1998, only 12 rapes were prosecuted as hate crimes in the United States: four were prosecuted as hate crimes against whites, four against blacks, two against lesbians, and one against a person with a mental disability. In Michigan, where gender bias is included in the hate crimes law, there were 3,206 rapes, but only two counted as hate crimes, and neither were counted as gender-bias rapes. In New Jersey, which has one of the most extensive hate crimes reporting systems in the nation, there were 1,730 rapes, but none were considered hate crimes. Minnesota and a handful of other states with gender bias laws didn't even bother to include a category for gender bias in their otherwise comprehensive annual hate crime reports. For rape statistics, see FBI, *Uniform Crime Reports*, 1998. For hate crime statistics, see FBI, *Hate Crime Statistics*, 1998.

prosecution on the grounds of gender bias in a rape case in any state. Rapists who stalk and assault one heterosexual woman after another, even serial killers who torture and kill scores of women, have nothing to fear from hate crimes laws. This is a shadow policy, nowhere recorded yet everywhere obeyed: without one word about excluding rape as gender bias, this exclusion has become the status quo.

If rape doesn't count as a gender-based hate crime against women, what does? The answer is that, in practice, nothing does. None of the 1,325 incidents prosecuted as hate crimes in New Jersey in 1997, for example, involved charges of gender bias, and a mere handful of gender-bias cases have been tried in other states. In fact, the majority of gender-bias prosecutions reported in the entire United States have occurred in one of two counties in Michigan, and state police statisticians reported that they believed that many might be coding errors.[23] Elsewhere it appears that gender-bias cases do not even involve female victims, but transvestites: in 1999, the first year California began prosecuting gender-bias cases, all 13 such cases tried in that state involved violent crimes

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[23] In 2000, author spoke by telephone with several women at the Crime Statistics Bureau of the Michigan State Police. They hypothesized that some "Anti-Female" bias reports might actually be "Anti-Female Homosexual" reports, or simple coding errors. Michigan State Police, Hate/Bias Crime State Totals, 1999, http://www.michigan.gov/msp/, (accessed June 5, 2005).

committed, not against women, but against men who were dressed as women when they were assaulted.[24]

It would seem to defy all odds that the only people subjected to violent sexism would not be women at all, but men dressed to look like women, while biological women roamed free of such threats. Of course, women in California were not free from the danger of assault; attacks of women simply weren't reported as hate. In 1999, 9,443 women in California reported a rape. Yet not one of those crimes was viewed as a hate crime by the police, by prosecutors, or by the activists in California's very substantial hate crimes movement.[25]

The same prosecution pattern exists in every state that counts gender bias in its hate crimes law. Between 1991 and 1999, what the leaders of the hate crimes movement did to solve the problem of "too many rapes" was use their status as trainers and consultants for the Justice Department to spread the message that, even if gender bias is to be included in hate crime laws, rapes should not be investigated as gender bias crimes when the victims are women.

Had this policy been the subject of public debate, it might have proven very unpopular. But there was no such debate: how do you debate a policy when nobody will admit that it exists in the first place?

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[24] California Department of Justice, Division of Criminal Justice Information Services, *Hate Crime in California, 1999.*

[25] California Department of Justice, Division of Criminal Justice Information Services, *Crime in California, 1999.*

The Code of Silence

In 1999, after thinking about Mattie Wesson's terrible death, I began asking questions about hate crimes laws. Why were only a handful of rapes being prosecuted as hate crimes? Why were these rapes prosecuted as racial hate crimes or sexual orientation hate crimes, but never as gender bias crimes? Why weren't hate crime laws being used to prosecute serial rapists, gang rapists, and rapist-murderers who tortured and killed one female victim after another? Could it possibly be true that, among the tens of thousands of rapists who have attacked women in states where gender bias is against the law, not a single one of them has used sexist slurs during any of these tens of thousands of rapes? Could absolutely nobody in any of these states have ever come to the conclusion that attacking a woman's sexual organs might constitute hatred or bias toward women in and of itself? I did not find answers to these questions.

In 1996, the Anti-Defamation League (ADL) announced that it had changed its position on hate crimes and women and would heretofore include gender bias in its model hate crimes legislation. The ADL barely commented on their policy change when they instituted it in 1996. But three years later, in a publication titled *1999 Hate Crimes Laws*, the ADL directly addressed their decision to add gender bias to their model hate crimes legislation. Where, elsewhere, the League's rhetoric on hate crimes

runs to urgent condemnation of the "rising tide of hate," on the subject of hate crimes directed at women, they display a different tone:

> Clearly not all crimes against women are gender-based crimes, and prosecutors have discretion in identifying those crimes which (sic) should be prosecuted as hate crimes. Prosecutors also must have concrete admissible evidence of bias to charge an individual with commission of a hate crime. Even in cases where gender bias can be proven, prosecutors may decide that the penalty imposed by the underlying crime is in itself sufficient and penalty enhancement is therefore unnecessary.[26]

This is not the type of statement the League makes when discussing hate crimes committed against gays, blacks, or the Jewish community: in the face of such crimes, their message is always one of demanding an urgent response. Furthermore, to reassure readers that there must be "concrete, admissible evidence of bias" before a gender bias charge may be levied implies that women are likely to levy vague, and even unfounded, charges of gender bias, a claim that echoes allegations that women are prone to lie about rape. Finally, to state that prosecutors don't necessarily need to use hate crimes laws in every case where gender bias is present signals a resistance to including "gender bias" at all; the use of the word, "unnecessary" underscores the tone of grudging disdain.

The writers offer additional reassurances to hate crime activists who worry about an onslaught of gender-bias crimes:

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[26] Rosenberg and Liberman, *Hate Crime Laws*, 2 - 3.

> After studying the [state] statutes in which gender is included, ADL came to the conclusion that the inclusion of gender has not overwhelmed the reporting system, nor has it distracted the criminal justice system from vigorous action against traditional hate-based crimes.[27]

It's difficult to interpret this statement as a real commitment to the notion that even some rapes and other crimes against women should be conceptualized as hate crimes. The ADL advises government employees such as police and prosecutors on the implementation of hate crimes laws, so their opinion regarding the inclusion of women matters a great deal. But perhaps the most troubling part of this statement lays in the final sentence, which reassures readers that "there [have] not been an overwhelming number of gender-based crimes reported." As police and prosecutors are specifically instructed by hate crime trainers to not count violence against women as hate, it is, of course, not surprising that "overwhelming" numbers of such crimes failed to surface in police reports and court dockets. This statement betrays a deep contempt for women who are victims of violent crimes.

Yet, despite great efforts by movement leaders to avoid all discussions of rape, the subject haunts the hate crimes movement. It surfaces incessantly in the language of activists and professionals as they grapple for the best way to explain precisely what a hate crime looks like

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[27] Ibid.

to the observer and feels like to the victim. "It's like rape" is the explanation when other words fail them. In 1985, Representative Raymond J. McGrath of New York testified before a House subcommittee that vandalism at a synagogue in his district left the synagogue's rabbi, David Artz, feeling that the building itself had been "raped." McGrath quoted Rabbi Artz's description of the pain caused by the vandals: "I knew that somebody, some sick crazy, who knows what, had taken these prayer books. At that moment, I actually felt the room moan. It had been violated. It had been raped. It was lying there burning slowly, violated."[28]

Criminologists at the Department of Justice likewise resorted to using the rape of women as an explanatory device for describing hate crimes in their own publications. On the first page of the Department's manual for training law enforcement officers to identify and report hate crimes, the authors describe victims' responses to these crimes as being "like rape victims":

> [L]aw enforcement officers must be particularly skillful in responding in such a way that the trauma of the victim and the community is not exacerbated by a lack of sensitivity in the law enforcement response. Like rape victims, victims of hate crimes suffer possible serious and long-lasting traumatic stress which could be increased by an inappropriate law enforcement response.[29]

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[28] House Committee on the Judiciary, *Crimes Against Religious Practices and Property, Testimony to Accompany H.R. 665*, 99th Congress, 1st. sess., 1985, 94.

[29] U.S. Department of Justice, Criminal Justice Information Services Division, *Training Guide for Hate Crime Collection*, 1990, 1.

Victims of hate crimes respond to these crimes, the experts tell us, in precisely the same way that rape victims respond to rape. What they do not tell us, here or elsewhere, is why rape is not therefore prima facie a hate crime in these experts' eyes. If breaking into a synagogue and setting fire to prayer books -- making ashes of prayers -- is said to desecrate the body of the synagogue *like raping it*, then why is not breaking into a woman's body, desecrating her womanhood, a crime of hate against her as well?

In *A Policymaker's Guide to Hate Crimes*, the Department of Justice uses rape to explain the effects of hate crimes again, this time to talk about the problem of victim underreporting. "Some victims," the authors write, "refuse to report a bias-motivated crime because they consider it a degrading personal experience, like a rape, and feel that filing a report will leave them exposed to further humiliation."[30] Hate crimes are degrading like rape, traumatizing like rape, embarrassing and even frightening to report like rape; according to the experts whose job it is to explain hate crimes, the best way to understand what should be though of as a crime of hate may be to close your eyes and think of a woman being raped.

This is no accident of semantics. Research done on rape victims produced the very model of victimization from which definitions of hate

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[30] U.S. Department of Justice, Bureau of Justice Assistance, *A Policymaker's Guide to Hate Crimes*, 15.

crimes evolved. The earliest psychological research on post-traumatic stress disorder, which is widely described as an effect of hate crimes, was research performed on Vietnam Veterans and female victims of rape. Likewise, anti-violence campaigns by gay and lesbian groups starting in the 1980's were modeled on feminist Violence Against Women campaigns; nevertheless, the National Gay and Lesbian Task Force joined with the Anti-Defamation League and other civil rights groups to keep violence against women from being counted as hate. Maybe a better way to understand hate crimes is to think of rape and imagine the crime being committed against anyone but a heterosexual woman. What they're doing comes disturbingly close to saying that it's normal if you treat a woman or a child that way.

"Rape is not A Crime Against Women"

On the evening news in Atlanta, and in other places, stories about rape are accompanied by a graphic of the international sign of womanhood with a crack running through it. This image is shorthand for the act of sexual violation: a woman's body, whole and round, is split open by violence. This symbol also serves as a warning directed at other women, as surely as three intertwined circles represent the warning for dangerous levels of radioactivity. News anchors report this danger in a manner reminiscent of a weather report: women should avoid walking

alone at night, avoid such and such part of town, be wary if they must wait alone for a bus to take them home from work. And of course, women must be careful in their apartments if they live alone; in their autos if they drive alone, in parking lots and in nightclubs and when they go outside to exercise. We accept such warnings as an ordinary part of life. But that doesn't make them any less disturbing. No matter how much we naturalize them and minimize the meaning of these messages, they still relay the same unpalatable truth: we expect half the population to limit their lives simply because they are women.

In contemporary America, it wouldn't be acceptable for any group other than women to be called upon to give up freedom of movement because of their identities. If gay men were told not to jog alone in Central Park, or if Jewish men were told they should only use public transportation in groups of two or more after dark, scandal would erupt. If the YWCA felt the need to offer special self-defense classes to young black men living or working alone, we would call the threat lying behind this need intolerable. But sexual danger directed at women is considered such an ordinary part of life that, rather than protest it, we tolerate it and we manage it, largely by shifting responsibility for preventing attacks to women themselves.

None of this is news: in fact, the very immutability of sexual danger is what makes it so difficult to articulate as a social problem, let alone an

urgent justice issue. Rape, like domestic violence and child abuse, needs to be "managed" because there are so many victims that it would be morally implausible to do otherwise: if you cannot eradicate the violence that lies at the root, you must at least remove the victims to a safer place, which is why the first business of feminist anti-violence campaigns was to create shelters, rape crisis centers and domestic violence shelters and emergency hotlines for calling for help. Such establishments, despite their intentions and the services they provide, are tributes to a failure: they represent the latitude and longitude of gender violence as surely as refugee camps dotting international borders represent failures to overcome ethnic and political violence.

But despite the reality that the phone book in every city and sizeable town opens with a list of shelters and rape crisis centers, whose clients are overwhelmingly, and sometimes exclusively women, and despite universal cognition that a cracked "female symbol" symbolizes rape, advocates within the hate crimes movement sometimes assert that rape has nothing at all to do with gender, or with sexism, or with any difference between the social status of women and men. Los Angeles County Deputy District Attorney Carla Arranaga, one of the hate crimes movement's most celebrated prosecutors, says that, contrary to what feminists have been saying for thirty years, rape has nothing to do with gender; therefore, rapes of women should not be counted as hate crimes.

As the head of the Hate Crimes Suppression Unit in Los Angeles in 1999, Arranaga acted on this belief every day, as she found no evidence of gender bias in any of the 2,000 rapes or attempted rapes that were committed in the City of Los Angeles that year.

In 1999, at the time that we spoke, Arranaga was lead prosecutor for the Hate Crimes Suppression Unit in Los Angeles County; she also served on the Advisory Council of the Simon Weisenthal National Institute Against Hate Crimes, and she drafted parts of *A Local Prosecutor's Guide for Responding to Hate Crimes*, the nationally-distributed training manual funded by a grant from the Department of Justice. In 1999, she represented the United States in an address to the United Nations Human Rights Commission, where she spoke about creating educational curricula for law enforcement officers with the support of the Department of Justice, the Clinton Administration, and the Simon Weisenthal Museum of Tolerance in Los Angeles. She has received recognition and many honors for her "trailblazing" work developing hate crimes protocol for prosecutors and police. [31]

What Arranaga thinks about hate crimes clearly matters. In comments to the press and to advocacy groups, she has said that evidence of bias crime can be as little as "derogatory words" uttered by the assailant. She describes five types of hate crimes offenders, including

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[31] For biographical information on Carla Arranaga, see Carla Arranaga, Remarks to the United Nations Human Rights Commission, March 30, 1999, Geneva, Switzerland.

"thrill seekers," "reactive" offenders who feel intimidated by those they attack, and "mission offenders," a group which according to her, includes men who "protect against crimes against the gender" by attacking gay men or men who dress like women. These assailants, Arranaga says, "enforce" their masculinity against those who threaten gender stereotypes.[32] But this definition, according to Arranaga, does not apply to men who sexually assault heterosexual, biological women. In Carla Arranaga's vision of hate crimes, it is violent prejudice to attack a man dressed as a woman because men dressed anger you, but attacking a woman because women inspire this type of rage is not prejudice at all. "Gender is not the motive for rape," Arranaga told me in July, 2000, "men get raped and women rape."[33]

Of course, not all victims of rape are women, particularly factoring in child-rape. Men are raped in prison; gay men are raped by both other gay men and by heterosexuals, and even non-incarcerated, adult, heterosexual men are, very rarely, sexual victims. But the existence of men who have been raped does not make raping women any less a gendered act, just as the existence of anti-Christian violence does not somehow cast the specific harm of anti-Semitism into doubt. The existence of rape in prisons, where the men being raped are often, not-so-

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[32] Ken Howard, "Hate Crimes Victim Assistance," *Progress Notes, Newsletter of the Lesbian and Gay Psychotherapy Association*, April, 1999.

[33] Arranaga, interview with author, July 2000

subtly, recast as humiliated does not make the individual rapist outside of prison any less driven by the desire to humiliate and violate women's bodies. The inherent gender-bias of the act is reinforced by prison rape, where, in the absence of women to victimize, some men "create" substitute women through the very act of raping them.

Before there were hate crimes laws, the contradiction between the way we "manage" violence against women and protest violence against other groups of people could be viewed as a simple cultural reality, an unfortunate, but not intentional, fact of life. By passing laws that explicitly differentiate between crimes that threaten people with similar identities and crimes that do not, however, the hate crimes movement has institutionalized this difference, and the choice they made to exclude rapes of women from hate crimes protections sanctions an entirely new form of denial regarding rape. Now when the shattered "woman" symbol appears on the evening news, unaccompanied by the media hype and intensive law enforcement efforts attached to incidents that are called hate crimes, the message being delivered to women is this: exercise caution because you may be attacked because you are a woman, but do not presume that this means women are being targeted because they are female.

Maintaining the boundaries of this fiction is a stress for the hate crime movement's leadership, particularly because they so often find

themselves resorting to rape as an explanatory model for hate crime. The cracked "female symbol" symbolizing rape on the evening news is like a timer ticking down to a day when the movement's ideological contradictions are aired in public. Meanwhile, however, the exclusion of women goes unchallenged, and it has become literally part of the fabric of the hate crimes movement, replicated in trainings, repeated when convenient, denied when necessary. This is the essence of cultural power: to be understood without saying what you mean.

The Other Assaults in Central Park

"Well, thank God for videos," Patricia Ireland said to journalist Paula Zahn.[34] She was speaking of the assaults in New York's Central Park following the June 2000 Puerto Rican Day parade, where dozens of women were surrounded by men who threw them on the pavement, tore off their clothes, and groped their genitals. A horrified bystander videotaped some of the mob scene; other footage was filmed by the attackers themselves and later seized as police evidence. Ireland was thankful for the videos because, already, just days after the sexual assaults, nay-sayers of every stripe were emerging to explain away the violent scenes by talking about the behavior of some of the women in the park, or the ongoing standoff between minorities and the New York Police Department in the long wake

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[34] Paula Zahn Interview With Patricia Ireland, Fox News: *The Edge With Paula Zahn*, 16 June 2000.

of the Amadu Diallo shooting, or the hysteria of "privileged" white New Yorkers, or even the influence of the day's unseasonable heat.

By the time the story broke nationally, the buzz surrounding it had surmounted the assaults themselves; commentators and pundits viewing the videotapes saw in them any story they chose to see. Mostly, what they saw was yet another racial incident in Central Park, although this time the victims were not all white: this wolf pack indiscriminately engulfed blacks, whites and Puerto Ricans. That the victims of a mass sex crime were all women was self-evident, and thus not worth discussing. That fifty women had been mauled in broad daylight simply did not seem to be the point.

Some bystanders and even victims seemed to be struggling to find words to express the difference between what had happened in the Park and what happens to women routinely. "I grew up here, but this was the worst I've ever seen in New York," said one woman who witnessed the assaults.[35] One of the men who rescued fitness instructor, Anne Peyton Bryant, from a throng of attackers was heard to say, "This is too much,"[36] as he reached for her, as if fewer assailants, or less groping, would constitute a completely different scene. The police in Central Park that day did not even respond to pleas from women who had just been attacked and were begging them to prevent attacks on other women.

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[35] Martin Mbugua, Michelle McPhee, Bill Hutchinson, "Central Park Terror; Gang of 15 Strips, Sexually Abuses 4 Women," *Daily News Online Edition*, 12 June 2000.
[36] Jessica Graham, "Terror in Central Park," *New York Post*, 13 June 2000,

"You've been sexually assaulted. You should come back tomorrow when you've calmed down," Bryant was told by the third group of officers to whom she appealed for help.[37]

Sexual abuse of women, from name-calling, to public groping, to assault, is so familiar as to have its own cartography, a moving map each woman carries in her mind as she traverses subway steps and apartment hallways and parking lots. The victims in Central Park spoke familiarly of escape plans and logistics and evading male attention, as if, instead of roller-blading and enjoying the sun, they had actually been conducting maneuvers through enemy territory. "We aimed for the side of the park, me in front and Stephanie behind, assuming the guys would be too busy bothering some other women to notice us, " said one victim who failed to escape the mob. "I will never again leave my house to participate in a Thanksgiving Day parade or any large event that is part of the culture of New York," cried Anne Bryant. "If I put 10,000 cops in Central Park, we couldn't cover every single area," observed Police Commissioner Howard Safir, tacitly endorsing the notion that women should learn to be smarter prey. [38]

When commentators speak of mass sexual assaults on women as "wildings," "whirlpoolings" (sex attacks in public pools) and "trains," they

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[37] Ibid.

[38] Michael Blood, "Giuliani's Safe-City Claim Uses Incorrect Crime Stats," *New York Daily News*, 13 June 2000.

unconsciously inherit a terminology invented by the assailants themselves, a language designed to celebrate sexual invincibility and mob mentality.[39] Members of the press are particularly fond of categorizing crimes this way, because it is dramatic, and, in our crime-saturated culture, the way the media views a crime largely shapes the way the public, and even police respond to it. The assaults in Central Park did not become a "story" because women were attacked: it became a story because the numbers of women were so high, the location was so public, and videotapes recorded the crimes. Women are raped in New York City every single day: sexual assault and harassment are so ubiquitous that nobody is surprised when men videotape the breasts and buttocks of strange women walking down a street, and there are countless slang terms derived from popular songs to describe the act of reducing women to sexual prey: "booty calls," "thongings," "money shots." Some of these sayings can be heard on the Central Park videotapes, along with other, more familiar refrains. "Get the *itches," men are yelling, "get them, get them, get them."[40]

Yet despite the clarity of a videotaped record, and perhaps in part because of it, there were still people who do not view the assaults of these women as a matter of injustice. The assailants themselves believed this: they can be heard calling the women "*luts" as they pin them down and

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[39] Molly Watson, "British Girl Left Naked in Central Park Attack," *The Evening Standard*, 13 June 2000.

[40] Katie Couric, Stone Phillips, "A Witness to Terror: The Central Park Attacks," *Dateline NBC*, 20 June 2000.

"*itches" as they fondle them, and there is no incongruity in this for them: on the videos these men look happy and proud; they are laughing; the sun is shining on them.[41] The police officers in the park who refused to respond to cries for help believed this too, as did the Police Commissioner and Mayor Giuliani, until they saw the writing on the wall that this story was becoming too large to manage with press releases about dropping crime rates. But even after Police Commissioner Safir and Mayor Giuilani changed their tune, from speaking of dwindling crime statistics to expressing outrage, U.S.A. Today columnist Amy Holmes looked at those tapes and did not see an outrage against women.

Amy Holmes looked at the videotapes and saw women laughing as strange men yelled at them and sprayed them with water. In her column, she grudgingly admits that "some women cursed their harassers and fled," and that "[o]thers were pushed down, stripped bare, assaulted and utterly terrorized."[42] But these women were not of interest to Amy Holmes: what interested her were the young women wearing tight clothes who smiled as the men sprayed water at them, the ones who (notoriously: this scene was replayed on the news again and again) ran the gauntlet of eager men who were chanting already, though not hurting anyone or holding them down -- yet. The mere existence of these young women was proof enough, for

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[41] Ibid.

[42] Amy Holmes, " " USA Today, .

Amy Holmes, that society at large, and, by extension, all the women attacked in the park, were responsible for the violence that befell them.

"[P]ublic commentary and official reaction have paid little attention to what actually was tolerated that day by many of the young women in the park," Holmes complains. What is striking about her perspective is how closely it aligned with that of the rapists themselves; she could not see the distinction between innuendo and violence. But even if Amy Holmes couldn't see the difference between condoning tacky horseplay and being sexual assaulted, no woman in the park that day had such doubts.

"I had no reason to feel afraid, especially when all these police [were] here," said college senior Josina Lawrence. The next thing she knew, she said, too many men to count were attacking her. Ashanna Cover added, "[t]hey [were] trying to dig in between my legs. They -- they ripped the crotch to my shorts. I could feel them on my flesh trying to penetrate me with their fingers."[43]

Not all of this is visible on the tapes, either, but there are waves of victims and witnesses to confirm it and film of women emerging from the crowds of men half naked and dazed, as if they have been swallowed up into another world and spat out again. If testosterone and booze and soaring temperatures and male bonding drove some men in the park into

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[43] Couric, Phillips, "A Witness to Terror."

a frenzy of aggression, their assaults drove their victims to a state of physiological shock, the hallmark of "real" victimization. "You've been sexually assaulted. You should come back tomorrow when you've calmed down," said one police officer to Anne Peyton.[44]

On the same day that the 50 women were sexually violated in Central Park, seven Hassidic Jews were assaulted in Coney Island by a group of Hispanic men who mugged them at knifepoint. This crime was immediately declared a hate crime on the grounds that the assailants had shouted anti-Semitic slurs at their Jewish victims while mugging them and stealing their wallets.[45]

The assault, and the hate crime charge, was all that was reported in the papers. Of course, there was no video, but even if there had been, and even if the film had shown the male victims behaving in a careless way -- say by straying onto an unlit portion of the beach -- it's still highly unlikely that Amy Holmes would write a column for *USA Today* suggesting that these men, being aware of the existence of muggers and anti-Semitism in the world, should know better than to walk on a deserted beach at night. *Dateline* would not dedicate a program to interviewing psychologists who dissected the day's heat or the drunkenness of the assailants or the choices the men made in not concealing their religious

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[44] Graham, "Terror in Central Park."

[45] "Attacks on Two Groups Marks Violent New York City Weekend," *Associated Press*, 13 June 2000.

garb. "Monkey see, monkey do," was the way one sociologist on *Dateline* explained the behavior of the men in Central Park, a particularly unfortunate choice of words, not merely for the implied racial slur, but because it bolsters the notion that holding women down and "digitally penetrating" them is a playful, innocent thing to do. "Young women have to be consistent," the sociologist concluded, ignoring the fact, which should not matter anyway, that most of the women assaulted in the park had not engaged in pre-violation flirtation with their attackers.[46] Nobody welcome in polite society today talks about Matthew Shepherd's come-on in a bar as a justification for his brutal murder. That used to happen, but it doesn't anymore. However, it does beg a question: why is it still fine to talk about women this way, even if they are women who wear halter tops to Central Park and laugh when strange men whistle at them and spray them with water? Logically, they shouldn't be doing these things, and sociologically, there's a great deal to be said about the culture under girding the boorish, sexist behavior that exploded in the park that day, but in the legal realm, shouldn't sexual assault victims be reaping some of the benefits of our decades-old experiment with hate crimes laws?

Rape haunts the hate crimes movement because it is a movement mired in a particular history, the history of lynching, a subject that inevitably summons up visions of women lying about rape and minority

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[46] Couric, Phillips, "A Witness to Terror."

men being punished for non-existent sexual assaults. The original drafters of hate crimes laws did not envision using these laws to punish the teenager who mouths a slur in a drunken bar brawl or members of rival ethnic gangs engaging in turf wars: they envisioned using hate crimes laws to combat the much-cited "rising tide" of white supremacist violence supposedly sweeping the nation in the 1990's. Things did not turn out this way. Fewer than 1% of hate crimes prosecutions today involve perpetrators who have even the slimmest ties to a hate group. Yet the lynch mob remains the hate crimes movement's central metaphor for hate. Visual symbols of the Klan -- the hooded crowd, the burning cross -- illustrate the movement's web sites and fundraising brochures. Within this ideological framing, the subject of violence against women is treated at best with ambivalence, at worst with duplicity and contempt.

Much is at stake in defining which crimes are and are not crimes of hate, not only the money the federal government spends annually on "teaching tolerance" and other anti-hate crime trainings, but, more elementally, control over the energies of a large-scale social movement whose membership spans the Democratic Party and the progressive left. The notion of directing these energies toward anti-rape work is literally unthinkable to political activists who cut their teeth on both anti-Klan activism and the rights movement for criminal defendants.

Thus, the problems caused by rape are both symbolic and real: there are "too many" rapes and they are the wrong types of crimes, with the wrong type of defendant, frequently a minority male. Among themselves, hate crimes activists voice concerns that too many minorities will be caught committing hate crimes, and admitting women victims to hate crimes protection would increase this fear. Being hard on crimes committed by minority men is clearly not the type of message the hate crimes movement wishes to send with these laws, even when so many of the victims are minorities themselves.

Conclusion: Remembering Carlie Brucia

At the Atlanta teleconference for the 1997 White House Conference on Hate Crimes, community and religious leaders, elected officials, and law enforcement representatives gathered at a public television studio in Midtown Atlanta to hear President Clinton speak about hate. Before the Washington program began, the Atlanta group held its own conference. This is how speaker Daniel Levitas, a longtime "opposition researcher" affiliated, at times, with the Southern Poverty Law Center and the Center for Democratic Renewal, began his speech:

> It was August 16, 1915, here in Georgia, that Leo Frank, a transplanted New Yorker, the manager of a pencil factory, and a Jew, was abducted from a prison farm and taken to Cobb County and lynched by a mob that called itself "The Knights of Mary Phagan."[1]

With an audible sneer in his voice, Levitas read out a description of Phagan as "a working class gentile, a daughter of the people, a daughter of the common clay." He paused, and continued, "I wonder sometimes when I travel throughout Georgia and see all the monuments to the Confederate war dead and hardly a single monument to the thousands of lynching victims who have died throughout the South and in Georgia." Thus was

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[1] Transcribed by author from videotape and notes taken by author at *the 1997 White House Hate Crimes Conference*, Atlanta Section, 10 November 1997.

Mary Phagan invoked, and the very act of remembering her questioned, at a conference decrying hate and memorializing victims of "hate crime."

By December, 1998, the month when the Leo Frank musical, *Parade* opened on Broadway, the bodies of more than 120 women and girls, mostly young factory workers, had been found in the desert outside the Mexican city Ciudad Juarez, a dusty, impoverished industrial city across the border from El Paso, Texas.[2] Almost half the victims were very young women, like Phagan, who had labored from an early age in factories. Many disappeared, as Phagan did, in transit to and from the factories where they worked. Social conditions in Juarez today are eerily similar to those of Atlanta in 1913: young female laborers leave the protection of their rural families and move to cities in search of jobs that will pay their subsistence and leave something to send home. Some find a measure of independence and of danger. Scores have disappeared. Bodies are found, strangled, in the desert. Many have been found with their clothes cut off and their shoelaces garroting their throats. The garrote, the body thrown in refuse, the clothes torn off, and the subsistence-wage factory job: how could we fail to see Mary Phagan in them?

But we do not. Historical fashion currently dictates against seeing sexual danger as real, rather than hysterical ("sex panics") and reactionary. Of course, "panic" over police brutality is always in fashion.

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[2] Ricardo Sandoval, "Serial Killings Haunting Mexico; 120 Young Women Slain Since 1993," *Times-Picayune*, 21 November 1998, sec. A, p. 1.

Some reporters covering the Juarez murders have chosen to focus, not on the dead girls, but rather on the possibility that police may be subjecting some suspects to illegal interrogations. In September 2003, *The New Yorker* ran a feature story detailing the plight of a "hippy couple" arrested and interrogated in the search for suspects in the Juarez murders. Halfway through the article, the reporter got around to noting that Ulises Perzabel, the husband, had a prior record for "a brief affair with a minor" and had been accused of photographing other young girls. Inexplicably, the article is titled, "A Hundred Women," though most of the victims have been young adolescents, and the death count then stood above 300, not 100.[3] *The New York Times* seemed to take notice of the murders in Juarez only when criticism of inept police work became the focus of Amnesty International and others.[4]

Some victims of sex assault matter; Abner Louima, the black man sodomized by out-of-control cop Justin Volpe, is memorialized as a victim of hate crime on dozens of web sites. Jim Dwyer, Peter Neufeld and Barry Scheck, who otherwise work to get rapists out of prison, have taken on rape victim Louima as a cause, calling him a victim of torture. In one article in the *New York Times Magazine*, Dwyer plays up the theme of

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[3] Alma Guillermoprieto, "Letter From Mexico: A Hundred Women," *The New Yorker*, 29 September 2003, 82 - 93.

[4] See, for example, "Juan Forero, "Rights Group Faults Police in Deaths of Women," *The New York Times*, 12 August 2003; Ginger Thompson, "Hundreds of Thousands in Mexico March Against Crime," *The New York Times*, 28 June 2004; James C. McKinley Jr., "Little Evidence of Serial Killings in Women's Deaths," *The New York Times*, 25 October 2004.

Louima as a Christ-figure: "[t]he ancient Roman technique of crucifixion," he writes, "runs toward the same point as Justin Volpe's station-house impalement." His hagiographically detailed description of the rape committed against Louima in no way resembles his perfunctory descriptions of murders and rapes in *Actual Innocence* and elsewhere. "No credible system of justice could ignore the assault on Louima," Dwyer rages, although the attack was, of course, far from ignored.[5]

The Southern Poverty Law Center, the American Civil Liberties Union, Human Rights Watch, and even the Yale School of Law "discovered" rape in 2003, when they lobbied for the Prison Rape Reduction Law.[6] The rape of men in prison, it would seem, fits these organizations' definition of injustice in ways that the rape of women and children outside prisons cannot. "The feminist mantra that 'rape isn't about sex, it's about power' may be even more applicable in the prison context," writes Daniel Brook in the Yale Law School magazine, *Legal Affairs*. "The relationship between rapist and victim in prison," he writes, "can devolve into out-and-out servitude. Victims are given women's names and made to perform household tasks."[7]

The men at Abu Ghraib Prison who were subjected to sexual

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[5] Jim Dwyer, "No Way Out," *The New York Times Magazine*, 23 June 2002, 19 - 23.
[6] For the Stop Prison Rape coalition, see Stop Prison Rape, http://www.spr.org/en/history.html/. Adam Liptak, "Ex-Inmate's Suit Offers View Into Sexual Slavery in Prisons," *The New York Times*, 16 October 2004.
[7] Daniel Brook, "The Problem of Prison Rape," *Legal Affairs*, March/April 2004, 24 - 29.

humiliations have likewise become subjects of veneration, and we have been commanded to contemplate these images of assault. "The photographs are us," observes Susan Sontag, in the *New York Times Magazine*, comparing them to photographs of lynching and of the Holocaust. "Rape and pain inflicted on the genitals are among the most common forms of torture," she writes, "[n]ot just in Nazi Concentration camps and in Abu Ghraib when it was run by Saddam Hussein. Americans, too, have done and do them when . . . they are led to believe that the people they are torturing belong to an inferior race or religion."[8] Or gender, she might have added, but does not; instead, she writes of hazing rituals in fraternities and on sports teams, and of the French torture of "recalcitrant natives" during their colonial occupation of Algeria. She is writing of actions taken by "a collectivity": the pictures are taken by all of us, she argues. It is doubtful she would see street crimes, rapes of women, that way.

But there are other forms of collective action. Specifically, there is collective inaction, and this might be said to largely define public responses to rape and other forms of torture in which the object of torture is women or children. Sontag does not count this as torture. She notes, "you wonder how much of the sexual tortures inflicted on the inmates of

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[8] Susan Sontag, "Regarding the Torture of Others; Notes On What Has Been Done - And Why - To Prisoners, By Americans," *The New York Times Magazine*, 23 May 2004, 24 - 29, 42.

Abu Ghraib was inspired by the vast repertory of pornographic imagery available on the Internet," but she carefully avoids calling pornography itself a problem. To do so would raise questions of free speech and civil liberties, distractions from the subject at hand. For Sontag, the pornographic images that inspired the Abu Ghraib photographs only constitute a problem insomuch as they desensitize Americans to "the torture of others." How can she so blandly reinscribe the politics of "public" and "private" torture, in, of all things, a treatise on respecting human dignity? The language of hate crimes, which draws distinctions like these and codifies them in our laws, has actually created a new political world and political language in which the torture of some simply is not equal to "the torture of others."

Some collective inaction is, likewise, deemed less important that other collective inaction. In Sarasota, Florida, serial rapist Joseph P. Smith was able to walk away from crime after crime until he experienced the shockingly bad luck of being caught on video kidnapping an 11-year old girl, Carlie Brucia, whose raped-and-murdered body was later discovered near a church parking lot. It might be argued that the Smith kidnapping video is much like the photographs from Abu Ghraib. But to argue this is to ignore the other evidence that accrued against Smith in the decades before he killed Brucia, evidence that was perfectly visible, but disbelieved. It is also to ignore the absolute difference between the way

the Smith video and the Abu Ghraib photographs are really viewed: the one as fodder for the *National Enquirer* crowd, the other as a searing indictment of America's violation of foreign prisoners' human rights.

Smith was out on the streets, instead of in prison, because every time he was caught attacking other women, somebody decided the crime wasn't serious enough to punish him, or the evidence wasn't overwhelming enough to convict him, or the woman reporting the attack must have been lying, and this has everything to do with the last fifty years of activists and defense attorneys and politicians and artists all arguing that to accuse any man of rape summons images of lynching. 11-year old Carlie Brucia's abduction, rape and murder is one consequence of half a century of social activism that has strayed far from its original, admirable goal of ensuring equal protection under the law, and has instead, become a movement dedicated to wearing down the criminal justice system until no man is incarcerated for this crime.

Thirty years after the advent of the feminist anti-rape movement, it is not supposed to be this way. Rapists are supposed to be behind bars: victims are supposed to be believed. When a strange man tries to drag you into the underbrush and pull your clothes off, nothing you have done is supposed to justify his actions in the eyes of the law. The case of Carlie Brucia, such thinking goes, must be an anomaly, certainly tragic, but signifying nothing. If Joseph Smith wasn't convicted and imprisoned for

his other known assaults of women, there must not have been adequate proof of these crimes. We choose to not see how broken the system is.

But even before he snatched Carlie Brucia off a city street, Joseph Smith's record of assaulting women was extreme, frightening, well documented, and repeatedly excused by officials and jurors alike. On three separate occasions, Smith was caught trying to overpower women using the same shock-and-grab method he used on Brucia. Each time, someone at a different level of the criminal justice system decided that Smith's attacks on women weren't important enough for punishment -- a judge, a prosecutor -- or that the victim was lying, as jurors said when they acquitted him of one of the assaults.

In 1993, Smith jumped a woman walking home from a club late at night and smashed her in the face before a Sarasota deputy on routine patrol interrupted the attack. Even though the woman suffered a fractured nose and other injuries, and only the fortuitous arrival of a policeman enabled her to escape, Sarasota Circuit Judge Lee Haworth allowed Smith a plea bargain that kept the nature of the crime off his record and sentenced him to only sixty days in jail. Later, even that sentence was reduced to weekend incarceration. In 1997, Smith walked into a convenience store, bought a knife, concealed it in his shorts, then approached a woman in the store's parking lot and tried to enter her car by claiming that he needed a jump start for his own vehicle. The woman

wouldn't let him into her car, but she agreed to follow him to where he said his car was stalled. An anonymous caller alerted police that Smith was acting strangely, and they headed him off as he led the trusting woman toward a secluded place. His car, recovered elsewhere, started easily. In addition to the knife, he had concealed pepper spray in his shorts: a policeman wrote in his report that he believed Smith intended "to do great harm" to the woman. But the incident report somehow never made its way into the courtroom or Smith's parole records. He simply wasn't charged. Instead, despite his prior record, he was allowed to plead no contest to a concealed weapons charge and was given probation.

Obviously emboldened, a few months later, Smith attacked another woman, dragging her off a sidewalk into underbrush before a group of retired golfers passing in a car stopped and rescued her. This time, there were more witnesses, respectable retirees at that, and the case went to trial. The woman testified that she was walking to a friend's house when Smith tried to drag her away from the road. He tore her clothes and said he would knife her if she didn't stop screaming. The retirees stopped their car and chased him away with their golf clubs. Smith testified that he wasn't trying to harm the woman, but save her: he said he thought she was suicidal and needed to be kept away from traffic, and he said that she was afraid of his tattoos, and this was why she was screaming. To the astonishment of the prosecutors, the victim and the golfers, the jury

believed Smith and acquitted him of all charges. They shook his hands and congratulated him after the trial.

It isn't even clear that the jurors believed Smith's improbable tale. But they clearly believed that Joseph Smith should not go to jail for attacking a woman who had the nerve to be walking alone at 9:30 in the evening, who had the nerve to go to a bar and play some pool and then walk home on a public sidewalk by a busy street, who had the nerve to do anything but lock herself inside.

Charged with passing judgment on Joseph Smith, they anesthetized themselves to his violence and passed judgment on his victim instead, and in doing so they doubtlessly saw themselves as Henry Fonda in *12 Angry Men* or Gregory Peck in *To Kill a Mockingbird*, as jurors often do and say quite proudly. Prosecutors and police keep getting better at dealing with sex crimes; they spend time with victims, after all, and they spend time with criminals too, so when feminists first articulated that *rape is violence, not sex*, cops got it a lot faster than anybody else. But all the understanding cops in the world don't matter so long as jurors and judges are willing to let serial offenders walk out the door.

Carlie Brucia's rape and murder sent shockwaves because her abduction was visible; it was captured on a security camera and replayed on millions of television screens in millions of living rooms. That one image caught the Court TV-watching public's attention, in the same way that the

multitude of images of Jon-Benet Ramsey made her famous: a young girl teetering on the edge of obliteration is fascinating: an adolescent snatched off the streets or a child attacked in her home becomes vicariously scary eye-candy to guiltily devour.

It is also a type of story that certain other people like to dismiss, categorizing it as a worst-case scenario that almost never happens, the telling and re-telling a conspiracy designed to stoke white, middle-class fears and enrich the producers of nightly news magazines and home-alarm manufacturers and gated community developers. But the tape of Carlie Brucia's abduction revealed something farther-reaching, showing what would have happened to those other three women had Joseph Smith not been so careless or unlucky; it revealed a systematic failure on the part of everyone to respond with alarm to a man who went hunting for women.

But instead of asking, "Why wasn't Smith in prison?" what people asked was: "Why didn't Carlie fight back?" Even though no one watching that tape could doubt that the 11-year old was dead the moment Joseph Smith grasped her, they still bothered to dissect the girl's behavior. Why didn't she scream? Why didn't she go limp or start clawing him or do anything, but instead kept walking? Because Brucia was 11-years old, and because she was found dead, the questions more or less stopped there. But if she had been a few years older, or had been found alive, a residue of suspicion would attach to her: were her jeans a little too tight; was she

wearing make-up; did she provoke him? If Brucia had been 21 and a bartender like the woman Smith bashed in the face, would she even be able to convince anyone that she went unwillingly? Then the videotape would be evidence for the defense, not the prosecution.

The story about rape that we are apparently willing to believe is the one in which the woman has something to hide, is deceptive, is "a little bit slutty or a little bit nutty" or, best of all, is a racist white woman or an angry black woman just waiting to pounce on the nearest black man and ruin his life. This is the story, in the form of *To Kill a Mockingbird*, we watch at Thanksgiving and assign to school kids and even to whole states, to read for the edifying purpose of "understanding" racism. It is the story jurors tell when they're asked why they let the guy go; more often, it is the story judges and prosecutors and detectives tell themselves when they do not choose or do not feel able to pursue a case or impose a reasonable sentence. It is the plot of a thousand Hollywood movies, and it is how people like Joseph Smith end up with a fistful of get-out-of-jail-free cards and people like Carlie Brucia, and millions of victims end up being killed or assaulted and denied justice. We still reside at the crossroads of racism and sexism, Brownmiller's "violent meeting place," but the policies conceived at this site have expanded to include all defendants, white and black, and exclude all victims, black and white. This cannot be called progress.

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