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The Moral Dilemma of 20th Century Interracial Rape

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THE MORAL DILEMMA OF 20TH CENTURY INTERRACIAL RAPE

Russell L. Christopher*

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I. INTRODUCTION

Responding to allegations of a Black man raping a proper, well-respected young white woman, the police arrested a Black man near the scene of the crime. Fearing the unruly crowd that had assembled around the town jail where the Black man was being held would turn into a lynch mob, the police deployed fire sirens to distract the crowd while the suspect was moved to a prison out of town. Incensed by the denial of their opportunity for meting out vigilante justice, the mob began burning Black businesses and assaulting and killing any Black men in the vicinity. Ultimately, 4,000 troops were dispatched to end the riot. Even after peace was restored, two thousand Black people, fearing for their lives, moved from the town. As to the alleged initial assault that triggered the riot, the victim subsequently admitted fabricating the interracial rape to protect the identity of the white man who had actually assaulted her.[1]

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1. Scott W. Stern, *The NAACP's Rape Docket and the Origins of Criminal Procedure*, 24 U. PA. J.L. & SOC.

Is this an account of the infamous Tulsa Race Massacre of 1921 that took at least thirty-nine lives[2] and destroyed millions of dollars in property?[3] No, the Tulsa Race Massacre was not the first and it was certainly not the last of the tragic scenes that "recurred countless times throughout the United States in the early- and mid-twentieth century."[4] While the Tulsa Race Massacre is distinctive as the most deadly and the most destructive, the elements of these episodes were all too common: an allegation[5] or even rumor[6] of an assault or rape by a Black man of a white woman leading to lynch mobs and civil unrest, deaths of innocents and the destruction of property.[7] And these occurrences were not even limited to the South.[8] The above-described episode occurred in 1908 in Springfield, the state capital of Illinois, during the preparations for the centennial birthday celebration of Abraham Lincoln.[9]

Though tragic, the intersection of racism and sexism that converged at the point of interracial rape[10] triggered three important developments. First, it led to the formation of the National Association for the Advancement of Colored People, or NAACP. Nation-wide outrage over the Springfield "race war" galvanized prominent liberal reformers, Black and white, to create the National Negro Conference in 1909 to prevent the Springfield tragedy from recurring.[11] Notable among the Black speakers were W.E.B. Du Bois—the first Black person to garner a Ph.D. from Harvard—and journalist Ida Wells-Barnett who placed the issue of lynching front and center and sought to expose the myth that Black men compulsively rape white women.[12] Tellingly, as future critics would maintain, most women were excluded, including Wells-Barnett herself, from what would

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CHANGE 241, 251 (2021). Much of this essay's background information contained in the Introduction and Part I relies heavily on Stern's article and its invaluable archival research.

2. Clyde Collins Snow, *Confirmed Death: A Preliminary Report*, *in* TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at 109, 114 (2001) (reporting confirmed death certificates for thirty-nine victims); *see id.* at 111 (noting that speculation as to the death toll ranged from 50-500 deaths).

3. Larry O'Dell, *Riot Property Loss*, *in* TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921, at 143, 149 (2001) (reporting that the $1.8 million loss in property in 1921 would be worth nearly $17 million in 1999).

4. Stern, *supra* note 1, at 243.

5. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 53–54 (2000) ("In the South during this period, the mere allegation by a white woman that she had been raped by a black man generally was the equivalent to a conviction.").

6. Kimberle Crenshaw, *Mapping the Margins, Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1272 (1991) ("Ironically, while the fear of the Black rapist was exploited to legitimate the practice of lynching, rape was not even alleged in most cases.").

7. *See* Klarman, *supra* note 5, at 52 (noting the similarity, in their basic elements, of these episodes, especially in the South).

8. *See* Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, *in* TORTURE: A COLLECTION 105, 105 (Sanford Levinson ed., 2004) [hereinafter TORTURE] ("After the Civil War and into the 1930s, the public torments of Southern 'lynchings' were inflicted on black men in the interests of upholding a racist social order.") (citing GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 558–69 (1944)).

9. Stern, *supra* note 1, at 250.

10. SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO 6 (1987) ("The history of rape in the United States is clearly a history of both racism and sexism.").

11. Stern, *supra* note 1, at 251.

12. *Id.* at 251, 257 (noting that "almost every Black man the NAACP defended on rape charges during the 1920s had nearly been lynched.").

become in 1910 the NAACP.[13] Despite largely excluding women, Scott Stern notes, "[f]rom the very beginning, rape was central to the NAACP's legal work. Eventually, rape cases came to be the Association's bread-and-butter, constituting many of its best-known triumphs, hardest defeats, and most bitterly contested battles."[14] But critics would point out that what was central to the NAACP was defending Black men charged with raping white women, not vindicating Black women raped by white men.[15]

Second, the NAACP's defense of such interracial rape was integral to the rise of Black attorneys and judges. Stern provides the following account:

> [T]he first significant Supreme Court case argued for the NAACP by a Black attorney was an interracial rape case. The first Supreme Court case ever argued by a Black woman, Constance Baker Motley, was an interracial rape case. The first case that [future Supreme Court justice] Thurgood Marshall ever argued before the Supreme Court was an interracial rape case.[16]

Third, the origins and flowering of modern criminal procedure stem from interracial rape cases defended by the liberal left and NAACP.[17] The very first Supreme Court decision requiring a state to provide counsel for indigent defendants was *Powell v. Alabama*.[18] The Court reversed the conviction of two Black defendants sentenced to death for raping two white girls because their lack of counsel violated due process.[19] Two of the Court's most famous cases—*Gideon v. Wainright*,[20] establishing for the first time a right to counsel for indigents charged with a non-capital felony offense, and *Miranda v. Arizona*,[21] triggering the celebrated *Miranda* warning that one has the right to remain silent—cited to and relied on interracial rape cases defended by the NAACP.[22] Emanating from the infamous attempted lynching of the Scottsboro Boys for interracial rape, the Court in *Norris v. Alabama* in 1935 streamlined defendants' evidentiary burden for establishing an Equal Protection clause jury discrimination violation.[23]

The NAACP's defense of Black men charged with the rape of white women also led

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13. *Id.* at 252.

14. *Id.* at 253.

15. *See* Cory D. Hernandez, Book Note, 30 BERKELEY J. GENDER L. & JUST. 323, 328 (2015) ("[T]he unique concerns of black women were essentially made invisible as an unintended consequence of early civil rights efforts, subsumed under a broader preoccupation with racialized violence toward black men.") (reviewing ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION (2013)).

16. Stern, *supra* note 1, at 244.

17. *See* Klarman, *supra* note 5, at 48 ("[T]he linkage between the birth of modern criminal procedure and southern black defendants is no fortuity."); *id.* at 49 (noting "the birth of modern criminal procedure" arising from "egregious exemplars of Jim Crow justice" in cases with "black defendants charged with serious interracial crimes, usually rape or murder.").

18. 287 U.S. 45 (1932).

19. *Id.* at 47, 71.

20. 372 U.S. 335 (1963).

21. 384 U.S. 436 (1966).

22. Gideon v. Wainright, 372 U.S. 335, 347 (1963) (Clark, J., concurring) (citing Hamilton v. Alabama, 368 U.S. 52 (1961)); *id.* at 350 (Harlan, J., concurring) (citing *Hamilton*); Miranda v. Arizona, 384 U.S. 436, 446 (citing White v. Texas, 309 U.S. 631 (1940)).

23. 294 U.S. 587, 596 (1935) (holding that a defendant's showing that there was a substantial number of Black people in the community that could have served on the jury but were largely excluded sufficed to establish a prima facie case of discriminatory and unconstitutional jury selection).

to the Court's first case finding the death penalty unconstitutional as applied, *Furman v. Georgia*.[24] Black men were disproportionately likely to receive the death penalty, particularly for the crime of rape.[25] "The death penalty for rape in the United States . . . was traditionally reserved for black men who raped white women."[26] From 1930 to 1967, nearly ninety percent of those executed for rape were Black men convicted of raping white women.[27] Perhaps the accomplishment most directly related to the NAACP's defense of interracial rape cases was its work in barring capital punishment for the offense of rape.[28] The Court in 1977, in *Coker v. Georgia*, found the death penalty for rape grossly disproportional and excessive.[29] Its ruling relied on the numerous states that revoked the death penalty for rape in the aftermath of *Furman*[30] and that rape's "moral depravity . . . does not compare with murder."[31]

While interracial rape cases gained numerous constitutional protections and safeguards for defendants, critics contend that the defense strategies employed maligned the victims and retarded the reform of sexist rape laws.[32] As Scott Stern is perhaps the first to observe, while those cases marked the ascent of criminal procedure and constitutional protections for defendants, they marked the descent (or at least stymied the progress) of substantive rape law. They undermined the protections of rape victims afforded by the substantive law of rape and perhaps even increased the incidence of rape. Part I of this essay presents the debate over the tactics and strategies employed in the defense of Black men accused of raping white women. First, it canvasses the criticisms by feminists and rape reformers that the defense of Black male defendants accused of interracial rape created a myth of female promiscuity and mendacity. Next, it presents the counterarguments by scholars contending that these criticisms revive the myth of the Black man as compulsive rapist of white women and ignore that both sexism and racism are intertwined and need to be jointly addressed. As pioneering rape scholar Susan Brownmiller has observed, "[r]acism and sexism and the fight against both converge at the point of interracial rape, the baffling crossroads of an authentic, peculiarly American dilemma."[33]

Rather than joining this political and ideological debate, Part II of this essay narrowly conceives this "peculiarly American dilemma" as a moral dilemma. Black defendants were facing either a lynching by an angry mob or the death penalty by a biased all-white jury—a "legal lynching"[34] given the unfairness of the trials: What should be

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24. 408 U.S. 238 (1972).

25. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 216 (1975). Even when not receiving the death penalty for rape, "heavier sentences imposed on blacks for raping white women is an incontestable historic fact." *Id.*

26. ESTRICH, *supra* note 10, at 107 n.2.

27. *Id.*

28. BROWNMILLER, *supra* note 25, at 215. The last execution for rape in the United States was in 1964. *Id.*

29. 433 U.S. 584 (1977).

30. *See id.* at 593–96.

31. *Id.* at 598.

32. *See* Hernandez, *supra* note 15.

33. BROWNMILLER, *supra* note 25, at 210.

34. Klarman, *supra* note 5, at 53.

done? The essay assumes as a premise that the situation constituted a zero-sum game.[35] The benefits and gains to the Black male rape defendants came by way of the costs and losses to the female rape victims.[36] If the interests of the female rape victims were to be advanced, the Black male defendants' interests would be sacrificed.[37] No matter what choice was made one group or the other would suffer.[38] A moral dilemma arises when moral reasons conflict and it is unclear what is the morally right thing to do.[39] More precisely, a moral dilemma arises when "an agent morally ought to (and can) take one course of action and morally ought to (and can) take another course of action, even though the agent cannot take both courses of action."[40] Legal and extra-legal lynchings ought to be averted as well as rape victims ought not be blamed and slandered and substantive rape law undermined. Though both courses of action ought to be done, if the situation presents a zero-sum game, then the two courses of actions are incompatible. A moral dilemma results as to which course of action ought to be done.[41]

Part II next presents various arguments that might tentatively resolve the dilemma. It first sets out three arguments—both consequentialist[42] and nonconsequentialist[43]—justifying the sacrifice of women's interests and the undermining of substantive rape law so as to avert legal and extra-legal lynchings. It next presents three nonconsequentialist arguments as to why utilizing that defense strategy was wrong. Because most of us are neither exclusively or strictly consequentialist nor nonconsequentialist, for most of us much of the moral dilemma remains. Because there are some arguments against it, the defense strategy was not clearly right; because there are some arguments supporting it, the defense strategy was not clearly wrong.

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35. *See, e.g.*, Russell Hardin, *Game Theory*, *in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 339, 340 (Robert Audi ed., 2d ed. 1999) (noting the defining characteristic of such games as "each player's gain is the other's loss."). Of course, one might well contest this assumed premise. But even if the situation did not involve a pure zero-sum game, surely there would still be trade-offs between averting the lynchings of the defendants and promoting the interests of the rape victims. And attempting to balance such trade-offs would raise much of the same dilemma.

36. *See generally* Stern, *supra* note 1 (arguing the NAACP's rigid defense of Black male rape defendants negatively impacted rape victims).

37. Hernandez, *supra* note 15, at 333.

38. Crenshaw, *supra* note 6, at 1266.

39. *See, e.g.*, Walter Sinnott-Armstrong, *Moral Dilemma, in* CAMBRIDGE DICTIONARY OF PHILOSOPHY 584, 584 (Robert Audi ed., 2d ed. 1999) (supplying a typology of seven different conceptions of moral dilemma).

40. CHRISTOPHER W. GOWANS, INNOCENCE LOST: AN EXAMINATION OF INESCAPABLE MORAL WRONGDOING 4 (1994).

41. There are a variety of different types of moral dilemma. As opposed to an "equal" or "symmetrical" dilemma in which the same moral principle supports each incompatible course of action, an "incomparable" dilemma features different moral principles supporting each incompatible course of action. WALTER SINNOTT-ARMSTRONG, MORAL DILEMMAS 54, 58 (1988); GOWANS, *supra* note 40, at 50, 52. As opposed to a dilemma "secundum quid" in which the dilemma arises through the fault of the agent, a dilemma "simpliciter," arises through no fault of the agent. SINNOTT-ARMSTRONG, *supra*, at 102; GOWANS, *supra* note 40, at 222. The NAACP and other defenders of the rape defendants confronted an incomparable and simpliciter moral dilemma.

42. SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 77 (1996) (defining consequentialism as "[t]he view that the value of an action derives entirely from the value if its consequences.").

43. *Id.* (contrasting consequentialism "both with the view that the value of an action may derive from the value of the kind of character whose action it is (courageous, just, temperate, etc.), and with the view that its value may be intrinsic, belonging to it simply as an act of truth-telling, promise-keeping, etc.").

II. A MORAL DILEMMA: PROTECT RAPE VICTIMS V. AVERT LYNCHINGS

While the defense of interracial rape cases—particularly by the NAACP—sparked the flowering and marked the ascent of modern criminal procedure, critics claim that it marked if not the descent then the stymied progress of the substantive law of rape.[44] If the defense of interracial rape cases caused the evolution of criminal procedure, it equally triggered the devolution of the substantive law of rape.[45] If the defense of interracial rape cases greatly expanded the constitutional rights and protections for criminal defendants, it led to the degradation and attack of rape victims.[46]

The strategy of what Brownmiller terms "the [liberal] left,"[47] including the NAACP, in defending such cases was two-fold. First, to claim that the alleged victim was of ill-repute, disrespectable, and promiscuous.[48] Such victims were purportedly either unable or less likely to have withheld consent.[49] Alternatively, such victims were either unworthy of the protection of rape laws or the degree of the wrong of their victimization was less.[50] Even if the defense was only able to convince the jury of the latter, that was often enough to prevent a legal or extra-legal lynching. Second, and related to the first, to brand the alleged victims as liars who falsely cried rape.[51] Such branding was based either on their lack of respectability and promiscuity[52] or was claimed independently true. The NAACP variously claimed that accusers fabricated rape claims "when hysterical, or excited by newspaper or other reports of alleged attacks upon other women"[53] or to save their reputation.[54] In essence, the way the liberal left and NAACP combatted the myth that Black men compulsively raped white women was to supplant that myth with another myth: that white women compulsively fabricated rape claims, especially against Black men.[55] Just as President Theodore Roosevelt blamed lynchings on those being lynched,[56] the

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44. Stern, *supra* note 1, at 247.

45. *Id.* at 248–49.

46. *Id.* at 275.

47. BROWNMILLER, *supra* note 25, at 238.

48. Stern, *supra* note 1, at 258–59.

49. *Id.* at 297 (noting that the NAACP argued that evidence of prostitution was evidence of consent).

50. BROWNMILLER, *supra* note 25, at 221 (noting that "the poor reputations of a certain class of white women render their rape a lesser crime even if their rapists are black"); Stern, *supra* note 1, at 261 (claiming that the "NAACP entrenched the idea that only some rape survivors [the virtuous] were worthy of seeing their claims vindicated in court").

51. Stern, *supra* note 1, at 258 (Typically, "the true basis of the NAACP's legal arguments was 'evidence of female duplicity.'" (quoting ESTELLE B. FREEDMAN, REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION 246 (2013))).

52. *Id.* at 264 (noting that the "dominant strategy" was "impugning the alleged victim's sexual propriety in order to impeach her credibility"); *id.* at 269; *id.* at 292 ("In many cases, for instance, the Association's strategy centered on impugning a woman's believability by calling her a prostitute.").

53. *Id.* at 259.

54. *Id.* at 258–59 (citing numerous accounts in which the defense claimed the accuser's rape claims were trumped up in order save the accuser's reputation, or "distract from her extramarital affair with another man," or to "cover their own misdeeds").

55. *See id.* at 256 ("According to this strategy, in order to show that these Black men [accused of rape] were telling the truth [that they were innocent], the NAACP and its lawyers had to show that their white female accusers were liars.").

56. Klarman, *supra* note 5, at 60 n.48 (citing Theodore Roosevelt, *Annual Message to Congress (1906)*, *in* 17 THE WORKS OF THEODORE ROOSEVELT 412, 420–25 (1925) ("The greatest existing cause of lynching is the perpetration, especially by black men, of the hideous crime of rape . . . .")).

NAACP and liberal left blamed rape on those being raped.[57]

This defense strategy, critics maintained, was not merely injurious to the victims seeking justice in the individual cases. It also harmed future rape victims who were assumed to be as mendacious and promiscuous as those victims so depicted by the NAACP.[58] Because many of these interracial rape cases attracted significant nation-wide media attention, the defense claims of white female mendacity and promiscuity crystallized in the public mind.[59] The famous "case of the Scottsboro Boys had begun to convince many southerners—white as well as Black—that white women sometimes did lie about being raped."[60] Implanted in the minds of future jurors, the myth became imprinted in the national culture.[61]

Critics contended that the NAACP's defense efforts also spawned a sexist rape law and retarded the evolution of rape law.[62] Before becoming a Supreme Court Justice, Ruth Bader Ginsburg co-authored an amicus curiae brief to the Supreme Court in the *Coker* case.[63] The brief argued that "[t]he history of rape as a crime against man's property, not against the woman herself . . . led to special rules requiring corroboration of the victim's testimony, permitting evidence of the woman's prior sexual conduct or reputation for chastity and authorizing cautionary jury instructions which impugn the victim's credibility."[64]

These sexist special rules for rape, the brief argued, "increase the likelihood of acquittal and deter the victim from prosecuting."[65] As a result, they "leav[e] women with little real protection against rape."[66] The corroboration requirement sometimes required that every element of the crime had to be corroborated by evidence independent of the complainant's testimony, who was apparently presumed unreliable.[67] Walter White,

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57. Stern, *supra* note 1, at 318.

58. Hernandez, *supra* note 15, at 333. Hernandez provides the following explanation:

> Due in part to this legal tactic [of blaming the victim], women were, and continue to be, shamed and distrusted when alleging rape. Thus although these defenses undoubtedly served black men who were falsely accused of rape, they also helped keep alive the narrative that women are just 'crying rape' when they make an allegation of sexual assault.

59. *See* Stern, *supra* note 1, at 259 (Walter White, the future head of the NAACP, reported "'a growing skepticism regarding charges by women of rape or attempted rape.'" (quoting WALTER WHITE, ROPE AND FAGGOT: A BIOGRAPHY OF JUDGE LYNCH 261 (2001))).

60. *Id.* at 269.

61. And once created, this myth of female rape complainant mendacity and promiscuity was not limited to white females. The myth, at least as to promiscuity, took hold to an even greater degree as to Black females accusing white men of rape. Thus, the strategy that the NAACP employed fairly successfully to free Black men charged with rape redounded to the detriment of not just white women or women in general but to Black women in particular. *Id.* at 264 ("Challenges against the sexist demands of rape laws would have disproportionately benefited Black Women and girls."); *id.* at 290; *see also* Crenshaw, *supra* note 6, at 1269 (noting that "African-American victims of rape are the least likely to be believed.").

62. Stern, *supra* note 1, at 255. *See also id.* at 247.

63. Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, Coker v. Georgia, 433 U.S. 584 (1977), 1976 WL 181482 (1976).

64. *Id.* at 6–7; *see also id.* at 19.

65. *Id.* at 30.

66. *Id.* at 11.

67. ESTRICH, *supra* note 10, at 43–44 ("Sometimes they insisted on corroboration of every detail: not only the fact of intercourse, but force, resistance, and the identity of the defendant.").

leader of the NAACP from 1929 to 1955, approved of the corroboration requirement.[68] The "insidious" utmost resistance requirement[69] required that the complainant resist throughout the entire rape with every fiber of her being or else she would be deemed to have consented.[70] "[T]he NAACP routinely took advantage of existing rape laws . . . embracing the heavy demands of the resistance, consent, and force standards."[71] It failed to "challenge the gendered impacts of contemporary rape laws."[72]

Susan Brownmiller's landmark 1975 *Against Our Will: Men, Women, and Rape* criticized the liberal left's (including the NAACP) defense of Black defendants accused of raping white women as entrenching white female rape victims as liars. Brownmiller described the "standard defense strategy" as follows:

> [It was] an attempt to destroy the credibility of the complaining witness as mentally unbalanced, or as sexually frustrated, or as an oversexed, promiscuous whore. In its mass-protest campaigns to save the lives of convicted black rapists, the left employed all these tactics, and more, against white women with a virulence that bordered on hate.[73]

Encapsulating this as the "rape lie," Brownmiller objected that white female rape victims did not routinely lie[74] and noted the harm it had caused by deterring victims from reporting rapes.[75] White victims of Black rapists were reluctant to report or prosecute the crime because rape was "'an extension of the social struggle of black against white or poor against rich.'"[76] Such a victim explained, "'I just can't throw off history. I feel like I'm being used to pay off the old debts to men falsely accused in the South of raping white women.'"[77] Brownmiller identified the origin of this "rape lie" in the Scottsboro case which "convinced the American public—and international opinion—that lying, scheming white women who cried rape were directly responsible for the terrible penalties inflicted on black men."[78]

Ironically, the very sexist and unenlightened aspects of substantive rape law that critics claim the NAACP exploited, all too often Black male defendants charged with rape were unable to enjoy. Joan McGregor observes that in cases of Black men charged with raping white women "the law did not require 'utmost resistance' since it was assumed that a white woman would never consent to sexual intercourse with a black man."[79] McGregor and Susan Estrich cite a Virginia Supreme Court opinion, decided the same year as the Tulsa Race Massacre, upholding the sentence of death for an attempted rape with no

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68. Stern, *supra* note 1, at 263 (citing WHITE, *supra* note 59, at 260).

69. Crenshaw, *supra* note 6, at 1266.

70. ESTRICH, *supra* note 10, at 30 ("'There must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.'" (quoting Brown v. State, 106 N.W. 536, 538 (Wis. 1906))).

71. Stern, *supra* note 1, at 296–97.

72. *Id.* at 298.

73. BROWNMILLER, *supra* note 25, at 238.

74. *Id.* at 227–28.

75. *Id.* at 253–54.

76. *Id.* at 253.

77. *Id.*

78. BROWNMILLER, *supra* note 25, at 230.

79. JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 33 (2005).

requirement that the victim resist to the utmost.[80] As Estrich explained the asymmetry, "White women are not required to resist black men, but black women are."[81] Stephen Schulhofer points out that "the stringent force requirement was usually ignored when a black defendant was charged with raping a white woman. In that situation courts apparently assumed that the man's sexual overtures were inherently terrifying or that there was no conceivable possibility that a woman might want to consent."[82]

Replying to Brownmiller and other rape reformers, scholars including Angela Davis criticized Brownmiller and other feminists for their critique of the NAACP and liberal left's efforts as reviving "the timeworn myth of the black rapist."[83] That is, in order to retire the myth of the Black male rapist, the NAACP and liberal left had erected, Brownmiller charged, the myth of the white female liar.[84] In order to retire the myth of the white female liar, Brownmiller resurrected, Davis charged, the myth of the Black male rapist.[85]

Kimberle Crenshaw further criticized Brownmiller and traditional feminists for failing to combat both racism and sexism.[86] Crenshaw advanced a new paradigm of "intersectionality" that sought to view racism and sexism as inextricably intertwined, particularly in the experience of Black women.[87] Crenshaw explains the concept of intersectionality as follows:

> In mapping the intersections of race and gender, the concept [of intersectionality] does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.[88]

Crenshaw observes that "[t]he historical experience of Black men [in being the victims of lynchings and false accusations of rape] has so completely occupied the dominant conceptions of racism and rape that there is little room to squeeze in the experiences of Black women."[89] She argues that "[t]he primary beneficiaries of policies supported by feminists and others concerned about rape tend to be white women; the primary beneficiaries of the Black community's concern over racism and rape, Black

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80. *Id.*; ESTRICH, *supra* note 10, at 35 n.27 (citing Hart v. Commonwealth, 131 Va. 726, 729 (1921)).

81. ESTRICH, *supra* note 10, at 36.

82. STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 24–25 (1998).

83. Stern, *supra* note 1, at 318 (citing Angela Davis, *Rape, Racism, and the Capitalist Setting*, 12 BLACK SCHOLAR 39, 42 (1978)).

84. BROWNMILLER, *supra* note 25, at 228–29.

85. Stern, *supra* note 1, at 318.

86. Crenshaw, *supra* note 6, at 1241–42 nn.1 & 2.

87. *Id*. at 1243–44.

88. *Id.* at 1244–45 n.9. Crenshaw explains an application of intersectionality as follows:

> [M]any of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.

Id. at 1244.

89. *Id.* at 1273.

men."[90] As a result, "the plight of Black women is relegated to a secondary importance."[91] And this history "underlies the antiracist defense of Black men accused of rape even when the accuser herself is a Black woman."[92] Addressing this, Crenshaw reports the following:

> Black women are more likely to be raped than Black men are to be falsely accused of it. Given the magnitude of Black women's vulnerability to sexual violence, it is not unreasonable to expect as much concern for Black women who are raped as is expressed for the men who are accused of raping them.[93]

III. TOWARD A RESOLUTION OF THE MORAL DILEMMA

Criticisms of the liberal left's defense of Black men accused of interracial rape—whether it be for propagating the myth of female promiscuity and white female mendacity or from the intersectional lens of failing to consider the intertwined nature of racism and sexism and the rape of Black women—implicitly assumes that it should have done otherwise. The left should have prevented the legal and extra-legal lynchings by means other than creating and exploiting sexist and unfair rape laws. But is this realistic? Should the left have argued that the defendants' claims of innocence were true while not arguing that accusers' claims of defendants' guilt were false? Doing so would surely have undermined—if not delivered a fatal blow to—the defendants' chances for acquittal. Neither critique of the left's defense of rape defendants addresses how it could not exploit existing, sexist rape law yet still provide a zealous defense.

The conflict between the interests of Black male rape defendants and their white female accusers may be a zero-sum game. That is, their conflicting interests are such that the gains of each group result in losses for the other. Acquittals for defendants resulted in loss of vindication for their accusers; vindication of rape victims necessitated convictions for rape defendants. In order to gain acquittals, the defendants' protestations of innocence must be perceived to be truthful. In such he-said, she-said situations, if one is telling the truth the other is not. Therefore, "in order to show that these Black men were telling the truth, the NAACP and its lawyers had to show that their white female accusers were liars."[94]

This Part presents arguments both for and against the NAACP's defense strategy. It first sets out arguments that the moral dilemma should have been resolved as the NAACP did—sacrificing rape victims and rape law in order to avert legal and extra-legal lynchings. It next articulates arguments that the good end of averting lynchings did not justify the impermissible means of blaming the victims and thwarting the development of a fair and just substantive rape law.

A. Arguments Supporting Sacrificing Rape Victims to Avert Lynchings

Let us first dispose of an obvious but insufficient argument in favor of sacrificing rape victims in order to avert such lynchings is the professional duty of a defense attorney

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90. *Id.* at 1269.
91. Crenshaw, *supra* note 6, at 1269.
92. *Id.* at 1273.
93. *Id.* at 1274.
94. Stern, *supra* note 1, at 250.

to zealously represent their clients. An influential view of the zealousness required is articulated by the great nineteenth century barrister, Lord Henry Brougham, in defending the Queen of England against a charge of criminal adultery: "'an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client.'"[95] Lord Brougham further explained that, in the duty to zealously defend, an attorney "'must not regard the alarm, the torments, the destruction he may bring upon others.'"[96] That is, the situational or role-based ethics of an attorney not only allow but even require disregarding the interests of others, including rape victims, when they conflict with the client. Thus, what might otherwise be wrongful and immoral is obligatory and ethical in zealously representing the client. Thus, construed from the perspective of the role-based ethics and lawyers' professional responsibility, the NAACP and liberal left had no dilemma and acted permissibly.

This resolution of the dilemma, however, is too easy. Even assuming arguendo that Lord Brougham's view is a correct understanding of lawyers' professional responsibility once undertaking a representation, it begs the question whether the NAACP and liberal left should have even undertaken the representation. Because some have criticized the NAACP for utilizing its resources to defend Black men charged with rape of white women rather than promoting the prosecution of white men charged with raping Black women, the dilemma remains as to whether the NAACP should have ever undertaken the representations. Thus the more challenging formulation of the dilemma, and the one this essay addresses, situates it both before and after the NAACP's initial representations of Black men charged with raping white women. That is, both after the initial representations when the NAACP realized that the best and perhaps only effective way to avert the lynchings required undermining women's interests and before any subsequent representations when the NAACP might be under an attorney's duty to provide zealous representation. Thus, this essay approaches the dilemma such that situational or role-based morality did not trump everyday morality.

The next three arguments supporting the sacrifice of rape victims and substantive rape law so as to avert such lynchings are more promising. First, a fundamental axiom of our legal system is that, at the trial stage, protecting defendants is more important than protecting victims. Second, wrongful death is a greater moral harm than rape. And third, preventing concrete, imminent harm to particular, identifiable persons is more important than preventing speculative, temporally distant harm to statistical persons.

i. Better Ten Guilty Go Free than One Innocent Be Convicted

The precept that it is better that a guilty defendant goes free than an innocent defendant be punished suggests the defense of criminal defendants is a more important interest than vindicating crime victims. Though of an earlier origin,[97] perhaps the most

95. STEPHEN GILLERS, THE REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 19 (12th ed. 2021) (quoting TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821)).

96. *Id.* at 19–20 (quoting TRIAL OF QUEEN CAROLINE, *supra* note 95, at 333).

97. Jeffrey Reiman & Ernest van den Haag, *On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con*, 7 SOCIAL PHIL. & POL'Y 226, 226 & 226 nn.1–2 (1990) (citing the French novelist and philosopher Voltaire in 1748 and the English legal historian Sir Mathew Hale in 1694 as predating Blackstone in articulations of the principle).

noted articulation of the precept is from the great English historian, William Blackstone: "better that ten guilty persons escape, than that one innocent suffer."[98] Others have increased the ratio even further: 100 to 1.[99] Regardless of the particular numbers or optimal ratio, it is a moral axiom and bedrock of our criminal justice system. "It is treated as a truism in no need of defense."[100] It is reflected in the presumption of innocence and the reasonable doubt standard of proof.[101] As Justice Harlan explained, in his concurring opinion in *In re Winship*, where the Supreme Court established for the first time the constitutional right to the reasonable doubt standard,[102] "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[103]

Applying the precept to the issue here, better a guilty rape defendant be acquitted than an innocent rape defendant be convicted. Because the acquittal of a guilty rape defendant necessarily entails that an actual rape victim's interests will not be vindicated, the axiom also entails that better an actual rape victim's interests not be vindicated than an innocent rape defendant be convicted. (Or, to put it in Blackstone's terms, better that ten rape victims go unvindicated than one innocent rape defendant be convicted.) In turn, this formulation converts, or is equivalent, to the following: better an innocent rape defendant be acquitted than an actual rape victim be vindicated. In 1922, a senator from Mississippi, rallying opposition to a bill in Congress that would make lynching a federal crime, expressed disagreement with the above axiom, at least as applied to interracial rape: "I would rather the whole black race of this world were lynched than for one of the fair daughters of the South to be ravished and torn."[104] The NAACP's strategy in defending Black men accused of raping white women embodied the opposite sentiment: better that rape victims go unvindicated by branding them as liars or promiscuous or both than one innocent rape defendant be legally or extra-legally lynched. The NAACP's stance seems consistent with Blackstone's precept that undergirds our criminal justice system. Therefore, sacrificing the interests of female rape victims to promote the interests of Black men accused of rape draws support from this fundamental axiom of our criminal justice system as a resolution of the dilemma.

One might object that the asymmetry between societal valuations favoring erroneous acquittals over erroneous convictions cannot fully explain the NAACP's defense strategy. While the asymmetry might well explain sacrificing the interests of victims in order to promote the interests of defendants, it cannot explain the comparative disparity in NAACP

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98. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *352 (1765).

99. *See, e.g.*, Alexander Volokh, *'n' Guilty Men*, 146 U. PA. L. REV. 173, 187–91 (1997).

100. Reiman & van den Haag, *supra* note 97, at 226.

101. *In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."); *id.* at 363 ("The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law." (quoting Coffin v. United States, 156 U.S. 432, 453 (1895))).

102. *Id.* at 364 ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged.").

103. *Id.* at 372.

104. Stern, *supra* note 1, at 256 (quoting Sen. Thomas Sisson, on Jan. 25, 1922, 62 Cong. Rec. 1721).

resources expended to support various type of prosecutions. The NAACP widely and invariably urged and supported the prosecutions of white lynchers of Black men accused of rape. But comparatively infrequently did the NAACP urge and support the prosecutions of white male rapists of Black women. As Scott Stern observes, the national office of the NAACP "rarely demanded prosecutions" of white men accused of raping Black women.[105] This was "in notable contrast to cases where alleged Black rapists had been lynched; the national office consistently fought for the prosecution of the lynchers."[106] Here the comparatively greater protection of the interests of Black men over Black women[107] cannot be explained by the asymmetry in the societal value of erroneous acquittals over erroneous convictions. Some critics charge that the obvious implication was sexism in the NAACP.[108]

The next section provides another argument supporting the same resolution of the dilemma but avoids the sexism criticism. It offers a non-sexist rationale for both NAACP strategies. First, it supports the NAACP's decision to defend Black men accused of rape at the expense of their female accusers. Second, it supports the comparative disparity in resources expended to facilitate prosecution of white lynchers of Black male rapists versus prosecution of white male rapists of Black women.

ii. Wrongful Death is a Greater Moral Harm than Rape

In establishing the unconstitutionality of capital punishment for the crime of rape, the plurality in *Coker v. Georgia* found that the death penalty was an excessive and grossly disproportional punishment for the crime of rape.[109] It was disproportional because the moral gravity of a wrongful death or murder was significantly greater than the moral gravity of rape. "[I]n terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."[110] The plurality opinion explained that "[t]he murderer kills; the rapist, if no more than that, does not."[111] The plurality held that "the death penalty, which is 'unique in its severity and irrevocability' is an excessive penalty for the rapist who, as such, does not take human life."[112]

This simple supposition—wrongful death is a greater moral harm than rape[113]—

105. Stern, *supra* note 1, at 48 (citing GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 88–89 (1983) and PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 18–19 (2009)).

106. *Id.*

107. *See, e.g.*, Hernandez, *supra* note 15, at 328 ("Unfortunately, the concerns of black women were largely ignored buy those seeking to advance civil rights.").

108. Stern, *supra* note 1, at 260 (sexist notions of female promiscuity prevented the NAACP from focusing on the rape of black women by white men and supplanting lynching as the distinguishing feature of black oppression (citing HAZEL V. CARBY, RECONSTRUCTING WOMANHOOD: THE EMERGENCE OF THE AFRO-AMERICAN WOMAN NOVELIST 39 (1987))).

109. 433 U.S. 584, 592 (1977) ("We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.").

110. *Id.* at 598.

111. *Id.*

112. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976)) (internal citation omitted).

113. *Id.*

provides the basis for an argument supporting the NAACP's defense strategy. If wrongful death is a greater moral harm than rape, then preventing wrongful death trumps preventing rape. By pursuing their legal strategy (opting to prevent the legal and extra-legal lynching of Black men by sacrificing women's interests and undermining the protection of the rape laws), the NAACP was promoting the greater interest—preventing wrongful death. Even if their strategy led to an increase in the incidence of rape by a diminution in the protection of the laws prohibiting rape, preventing wrongful death was more important than preventing rape.

This rationale from *Coker* also explains the NAACP's comparatively greater focus on facilitating the prosecution of white lynchers of Black male rapists than the prosecution of white male rapists of Black women. Facilitating the prosecution of white lynchers will create a deterrent effect that will lead to a diminution in the incidence of lynching. Facilitating the prosecution of white male rapists will create a deterrent effect that will lead to the diminution of the incidence of rape. But because the moral harm of wrongful death is greater than the moral harm of rape, preventing lynching trumps preventing rape. Thus, more resources should be expended to facilitate that which will prevent lynching—the prosecution of white male lynchers—than should be expended to facilitate that which will prevent rape—the prosecution of white male rapists.

One might object to the *Coker* calculus of comparative harms. The moral harm of wrongful death is not necessarily greater, one might argue, than that of rape. After all, jurisdictions typically justify the use of deadly force to prevent a rape.[114] Perhaps that suggests the equivalence of rape and wrongful death in moral harm or gravity. However, the permissibility of the use of deadly force in preventing a crime may not be a reliable indicia of the comparative gravity of harms. For example, deadly force might justifiably be used to prevent robbery or other felonies.[115] But surely wrongful death is nonetheless a greater moral harm than robbery.

But even if we agree with the moral calculus of harms referenced in *Coker*—wrongful death being a greater moral harm than rape—as providing support for the NAACP's strategy, one might object that the argument is premised on an equal number of wrongful deaths vs. rapes. The objection would concede the *Coker* calculus of moral gravity in a one-to-one comparison. But what if the numbers differed? Is one wrongful death still greater than ten rapes or 100 rapes? The objection might speculate that legal or extra-legal lynchings prevented by branding the accusers as mendacious and promiscuous altered our substantive rape laws by the implementation of resistance and corroboration requirements. This led to the under-protection of rape victims. Branding rape accusers as typically mendacious and promiscuous may have also led to a culture that emboldened rapists to commit the crime and discouraged victims from reporting their victimization. All of this might have led to a substantial increase in the incidence of rape. As a result, the objection might speculate, preventing wrongful executions by such wrongful means led to

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114. *See, e.g.*, MODEL PENAL CODE § 3.04(2)(b) (AM. L. INST.) (justifying lethal self-defense force as protection against "sexual intercourse compelled by force or threat").

115. *E.g.*, *id.* § 3.06(3)(d)(ii) (making lethal force eligible to be justified against the commission or attempted commission of "arson, burglary, robbery or other felonious theft or property destruction"); N.Y. PENAL LAW § 35.15(2)(b) (McKinney 2021) (justifying lethal self-defense force to prevent a robbery).

an increase in rapes. Thus, for each lynching prevented there may have been some number of rapes caused that are greater than one. At some sufficiently high number of rapes caused, the moral harm of a lynching might not be greater.

Of course, the objection is based on considerable speculation. First, there is no clear consensus as to what that sufficiently high number would be. Second, there is no clear evidence that the number of rapes caused for each lynching prevented would be a number greater than one. Third, there might not even be clear evidence that the NAACP's defense strategy led to an increase in the incidence of rape. However, it does seem reasonable to infer that it increased the incidence somewhat. To the extent it is thought likely that any incidence of increased rape not only was greater than the lynchings prevented but also greater by a substantial margin, the objection is persuasive. If the objection is persuasive, it undermines the moral calculus of comparative harms as supporting the NAACP's strategy. Even if the above objection is persuasive, however, the argument advanced in the next section would still apply and support the same resolution of the moral dilemma.

iii. Preventing Imminent Concrete Harm Trumps Preventing Temporally Distant Statistical Harm

That imminent harm is of greater concern than temporally distant harm is evident throughout the criminal law. Being threatened with imminent unlawful aggression might justify the use of self-defense force, even lethal force, that threatened distant aggression would not.[116] Being coerced into commission of a crime by a threat of imminent harm might provide an excuse under a duress defense that a distant threat of harm would not.[117] In some jurisdictions, the necessity justification defense is only applicable to avert an imminent harm; distant harms are ineligible for the defense.[118] Because of this general prioritizing of averting imminent harms over temporally distant harms, preventing imminent harms trumps preventing temporally distant harms. Furthermore, nonconsequentialist moral philosophers insist that concretely harming particular, identifiable innocents is morally worse than visiting a probabilistic harm on a statistical number of innocents.[119] As a result, our moral duty to prevent imminent, concrete harm

116. *E.g.*, N.Y. PENAL LAW § 35.15(1) (McKinney 2021) (requiring a reasonable belief that any self-defense force be employed against "the use or imminent use of unlawful physical force").

117. *E.g.*, *id.* § 40.00(1) (requiring that the defendant be coerced by the "the use or threatened imminent use of unlawful physical force").

118. *See, e.g.*, Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience*, *in* TORTURE, *supra* note 8, at 183, 191 (noting that the necessity defense is "limited to emergency cases in which there is an imminent and concrete danger to an interest recognized by the legal system.").

119. Michael Moore illustrates the principle in the context of the issue of mistaken punishment of the innocent:

> The probable punishment of the innocent in any real-world punishment scheme is not much of a worry . . . . We rightly set up many social institutions where we know that some percentage of individuals affected by them will be hurt or even killed, for example, coal mining, high-rise construction, and speed limits on freeways. That we know that some percentage of individuals will likely suffer these harms if we arrange these institutions as we do arrange them is not to be equated with either our intending that they be so harmed, or knowing that some identified individual will suffer that harm. [Our nonconsequential] moral norms bind us absolutely only with respect to evils we either intend or (on some versions) knowingly visit on specified individuals.

MICHAEL MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 158 (1997); *see also* RONALD DWORKIN, A

to particular, identifiable individuals is greater than to prevent temporally distant, speculative harm to unidentifiable, statistical persons.

This common sense precept, reflected throughout the law, provides a rationale for the NAACP's defense strategy. No matter what the liberal left or NAACP did or did not do, the rape of the complainant in a particular case cannot be averted. It has already happened. The only rapes that the NAACP could prevent are temporally distant, future rapes of some number of unknown victims—by not blaming present victims and by not exploiting sexist and unfair rape laws. In comparison to these statistical and temporally distant harms that could be averted, the NAACP could seek to avert a comparatively more imminent, concrete harm to a specific, identifiable person—the legal or extra-legal lynching of an existing Black defendant accused of raping a white woman. To the extent that the situation truly constitutes a zero-sum game, then the NAACP could seek to avert either type of harm but not both. If averting both harms is not possible, should the NAACP have sought to avert the statistical and comparatively more temporally distant harm or the comparatively imminent harm to a specific, certain individual? Given the greater value attaching to preventing imminent, concrete harm to a specific, identifiable individual over that of statistical, temporally distant harm, the NAACP should have done what it did—seek to prevent the imminent, concrete harm of the Black male defendant being lynched or executed. Therefore, a comparison of the imminent and temporally distant harms to be averted supplies a sex-neutral rationale supporting the NAACP's decision to prevent the legal and extra-legal lynchings by sacrificing the interests of women. That is, the rationale provides a reason independent of any possible motivation to advance the interests of men at the expense of the interests of women.

The rationale might also avoid the objection above that the NAACP strategy induced a greater number of rapes than prevented lynchings. Because preventing imminent concrete harm to specific individuals is more important than preventing temporally distant statistical harm to unspecified individuals, the objection is unpersuasive even if true. The greater value attached to preventing imminent concrete harm to specific individuals than preventing temporally distant statistical harm to unspecified individuals may apply even if the amount of imminent harm sought to be averted is less than the amount of temporally distant statistical harm to unspecified individuals. Thus, even if the strategy would induce more rapes than prevent wrongful executions, preventing imminent concrete harm to specific (but fewer) individuals may still be more important than preventing temporally distant statistical harm to (a greater number of) unspecified individuals.

Even so, one might object, if the margin between the number of rapes prevented and lynchings prevented was sufficiently large, then the rationale would fail. Preventing imminent harm to comparatively few is not more important than preventing temporally distant harm to a *sufficiently* large number of persons.

True, but the margin would have to be exceedingly large. The margin would have to be large enough to overcome not only (i) the greater value in averting imminent than temporally distant harm, (ii) the greater value in preventing harm to concrete, specific individuals than statistical, unspecified individuals, (iii) the greater value in averting

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MATTER OF PRINCIPLE 79–89 (1985).

wrongful death than rape, and (iv) the greater value in averting wrongful convictions than wrongful acquittals or non-prosecutions. Though there is no specific evidence that the number of rapes induced was greater than the number of lynchings prevented, it is a reasonable supposition. But it is not so reasonable to suppose that the margin was so large as to overcome the above four factors.

As a result, the objection is not entirely persuasive. But the objection may be persuasive enough so that the rationale does not entirely succeed. The rationale is plausible and perhaps persuasive, but in light of the objection, not clearly persuasive.

One might alternatively object that the comparison between imminent and temporally distant harm to be averted is inapt. Rather than conceiving of the harm to be averted as the temporally distant one of preventing future rapes, the harm to be averted is that of presently violating the dignitary interests of the actual, identifiable rape victim. The imminent harm to the rape victim is both during trial and as a consequence of the trial. During trial, the harm is branding her as promiscuous and mendacious. After the trial, the harm is precluding her vindication as a victim by effecting an acquittal of the defendant. Those harms are all imminent. With the victim's harms so conceived, it is no longer a comparison between imminent and temporally distant harms. It is an apples-to-apples comparison of imminent harms. As a result, the factors supporting the NAACP's strategy prioritizing preventing imminent harms to concrete, specific individuals are now inapplicable.

While eliminating the relevance of those factors as support for the defense strategy, the objection makes the *Coker* comparative gravity of harms even more persuasive support for the strategy. Rather than a wrongful death versus rape comparison of harms, the comparison would be between wrongful death versus dignitary harm (slander during trial and lack of vindication of victim's interests in obtaining justice). But arguably the margin of moral gravity between wrongful death and dignitary harm is significantly greater than that between wrongful death and rape. If the margin between the latter sufficed to support the NAACP defense strategy, then *a fortiori* the margin between the former is sufficient to support the NAACP strategy.

B. Arguments Against Sacrificing Rape Victims to Avert Lynchings

This section presents three arguments against the sacrifice of rape victims and substantive rape law in order to avert legal and extra-legal lynchings of Black men charged with interracial rape. First, under the act/omission distinction, negative duties not to directly harm through actions are greater than positive duties to prevent harm. Second, the Doctrine of Double Effect assesses the permissibility of causing unintended, but foreseen, collateral harm. And third, the Kantian maxim prohibits using persons as mere means, even if to attain a good end.

i. Acts v. Omissions; Negative Duties v. Positive Duties

Generally, and *ceteris paribus*, harming through commission of direct acts is morally worse than harming through failing to act, or committing omissions.[120] The duty to not

120. JOEL FEINBERG, HARM TO OTHERS 166 (1984) (noting the traditional claim that "there is great moral

directly cause harm through actions is greater than a duty to prevent harm.[121] And these distinctions are reflected throughout the law. For example, while everyone is subject to the negative duty not to kill, only some—paradigmatically, a parent as to a child—are subject to a positive duty to prevent death.[122] As some scholars observe, "[j]ust about everyone thinks that it is worse to put a bullet in a person's head than to fail to send food to someone starving in Bangladesh, though the result in both cases is the death of an innocent person."[123] Thus, "even where the results are morally comparable, it is worse to bring them about by action than by omission."[124]

Applying these distinctions to our moral dilemma provides an argument against the NAACP's defense strategy. To the extent to which there is a duty to prevent lynchings, it is a positive duty and the NAACP fulfilled it. But in fulfilling such a possible positive duty, the NAACP violated the more stringent negative duty to not act so as to cause harm by harming the interests of rape victims. To fulfill the more stringent duty, the NAACP should have opted to not brand rape victims as promiscuous and mendacious, and not undermine substantive rape law. Thus, the act/omission and negative/positive duty distinctions provide an argument against resolving the moral dilemma by sacrificing women's interests.

However, negative duties are only more stringent than positive duties *ceteris paribus*. And all other things are not equal in the NAACP's moral dilemma. A negative duty not to cause a comparatively minor harm is not necessarily more stringent than a positive duty to prevent a comparatively major harm. For example, a negative duty not to trespass or commit petty theft is presumably not more stringent than a positive duty to prevent a wrongful death. Similarly, a negative duty not to slander rape victims is presumably not more stringent than the positive duty to prevent a lynching or wrongful execution. However, a negative duty not to increase the incidence of rape (as some critics maintained the NAACP did) might or might not be more stringent than a positive duty to prevent legal and extra-legal lynchings. It is a difficult comparison because while negative duties are stronger than positive duties, preventing the incidence of rape may be less important than preventing lynchings. As a result, while the act/omission and positive/negative duty distinctions provide an argument against the NAACP's strategy *ceteris paribus*, because all other things are not equal the argument's persuasiveness is unclear.

ii. Doctrine of Double Effect

Perhaps first formulated by the Catholic theologian and moral philosopher, St. Thomas Aquinas,[125] the Doctrine of Double Effect offers support for the permissibility of

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significance in the distinction between causing harm and merely allowing it to happen, and that this significance is important enough to warrant imposing criminal liability for those who intentionally cause certain harms while withholding criminal liability from those who merely fail to prevent those harms").

121. *Id.* at 169 (noting the traditional claim of "the superiority of negative over positive duties").

122. *E.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.07[A][2][a] at 106 (6th ed. 2012).

123. Reiman & van den Haag, *supra* note 97, at 229.

124. *Id.*

125. 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1656 (Fathers of the English Dominican Prince trans., 1947) (located in part II-II, quest. 64, 7th art.).

actions that produce some bad consequences.[126] Simply put, the Doctrine states that if an action has two effects—one good and one bad—the action may nonetheless be permissible if the good effect or consequence is intended, and the bad effect or consequence, even if known or foreseen, is neither intended nor used as a means to attain the good consequence.[127] The Doctrine has been used to justify a wide variety of particular types of lethal force despite a general prohibition against killing.[128] For example, abortion (when the mother's life is endangered), lethal self-defense against an unlawful aggressor, and the killing of innocent civilians as collateral damage in a just war might well all be permissible under the Doctrine because the deaths of the fetus, aggressor, and innocent civilians, respectively, might be only foreseen, but not intended, incurred in the pursuit of a good effect, and were not the means by which the good effect was attained.[129]

Although formulations of the Doctrine vary, a somewhat standard account of the Doctrine might be explained in terms of the following four components: "An action is permissible if (i) the action is not wrong in itself, (ii) the bad consequence is not that which is intended, (iii) the good is not itself a result of the bad consequence, and (iv) the two consequences are commensurate."[130]

Let us apply the Doctrine to the NAACP's strategy in defending interracial rape cases. Their action of defending Black men accused of interracial rape by branding the white female complainants as promiscuous and mendacious would be permissible under the Doctrine if the action is (i) not wrong in itself, (ii) the bad consequence of setting back women's interests and undermining substantive rape law is not intended, (iii) the good consequence of averting legal and extra-legal lynchings is not a result of the bad consequence of setting back women's interests and undermining substantive rape law, and (iv) the good consequence of averting such lynchings is commensurate with the bad consequence of setting back women's interests and undermining substantive rape law. Analysis of the first component depends on how the action is described and the underlying, but possibly unknowable, facts. It is not wrong in itself to defend defendants charged with interracial rape. It is possibly wrong to do so by blaming the victim. It is clearly wrong to do so by blaming the victim in a way that was intentionally untruthful. As a result, satisfaction of the first component is unclear. The second component is satisfied—while the bad consequence was known or foreseen it was not intended. Had such lynchings been able to be averted without causing those bad consequences there is no evidence the bad consequences would have been pursued independently. The third component is not satisfied. The good consequence of averted legal and extra-legal lynchings was attained through the means of blaming victims and the bad consequence of undermining substantive rape law. The fourth component is presumably satisfied. As discussed above, the good consequence of averted lynchings and wrongful executions is commensurate with, if not clearly greater than, the bad consequences of victims blamed, substantive rape

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126. BLACKBURN, *supra* note 42, at 109.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* For a similar analysis of the Doctrine divided into four somewhat different components, see Philip E. Devine, *Principle of Double Effect*, *in* CAMBRIDGE DICTIONARY OF PHILOSOPHY 737, 737–38 (Robert Audi ed., 2d ed. 1999).

law undermined, and even arguably a greater incidence of rape.

Because at least one component is arguably not satisfied, the Doctrine fails to clearly support the permissibility of the NAACP's strategy. Because the good consequence is achieved as a result of the bad consequence, the Doctrine is unsatisfied. The averted legal and extra-legal lynchings came about through the sacrifice of women's interests and the retardation of the development of a rape law that would have afforded greater protection to victims. That the Doctrine fails to support the permissibility of the defense strategy suggests that the moral dilemma should be resolved by not sacrificing rape victims and rape law.

iii. Kant's Maxim Prohibiting Using Persons as Mere Means

A central, perhaps the most fundamental, principle of non-consequential, deontological morality is that one must not use other persons as mere means. As Immanuel Kant stated, "Act so that you treat humanity, whether in your own person or that of another, always as an end and never as a means only."[131] Persons "can never be treated merely as a means to the purposes of another."[132] Leading modern moral and political philosophers affirm the importance and centrality of Kant's principle. Robert Nozick declared that "Individuals are inviolable [and] may not be sacrificed or used for the achieving of other ends [than their own] without their consent."[133] John Rawls similarly maintained that "[t]he principles of justice manifest in the basic structure of society men's desire to treat one another not as means only but as ends in themselves."[134] Contemporary philosopher Nancy Davis observes that the principle is "well-entrenched in our moral thinking . . . fundamental[] . . . [and supplies] the framework of much recent work in moral philosophy,"[135] and "jurisprudence as well."[136] Onora O'Neill agrees: "Few moral criticisms strike deeper than the allegation that somebody has used another."[137]

The NAACP's strategy of sacrificing women's interests in order to avert legal and extra-legal lynchings of Black defendants charged with raping white women arguably violates this principle. Rather than treating the rape victims as ends in themselves, the NAACP strategy treats them as mere means in seeking to prevent the lynchings of the defendants. By obtaining the end of preventing the defendants' lynching by sacrificing the interests of the rape victims, the NAACP treats the victims as mere means. Specifically, the NAACP did this by branding them as promiscuous, mendacious, and exploiting the unfair aspects of the substantive law of rape. As a result, the NAACP violating this principle undermines the permissibility of their strategy. Based on the principle, the moral dilemma should be resolved by not using rape victims as mere means, even for the laudable end of averting lynchings.

However, the Kantian principle is not persuasive to all. Of course, consequentialists,

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131. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46 (Lewis White Beck trans., 2d ed. 1990) (1785).
132. IMMANUEL KANT, THE METAPHYSICS OF MORALS 140 (Mary Gregor trans., 1991) (1787).
133. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 31 (1974).
134. JOHN RAWLS, A THEORY OF JUSTICE 179 (1971).
135. Nancy Davis, *Using Persons and Common Sense*, 94 ETHICS 387, 387 (1984).
136. *Id.* at 387 n.2.
137. Onora O'Neill, *Between Consenting Adults*, 14 PHIL. & PUB. AFF. 252, 252 (1985).

who maintain that the end justifies the means, are not adherents to the principle. They would argue that if the good consequences of averting legal and extra-legal lynchings outweigh the bad consequences of sacrificing rape victims and rape law, then the strategy is permissible. And it is permissible even if doing so uses the rape victims as mere means. Even some nonconsequentialists might be hesitant to treat the Kantian principle as absolute for two reasons.

First, the principle seems unrealistic. As Nancy Davis argues, "the things that philosophers have said about using persons do not happily characterize our commonsense notions."[138] For example, when I get into a taxi seeking to get from point A to point B, am I not treating the driver as a mere means to reach my destination?[139] As Justice Oliver Wendell Holmes observed, "[i]f a man lives in society, he is liable to find himself so treated [as a mere means]."[140] According to Holmes, "[n]o society has ever admitted that it could not sacrifice individual welfare for its own existence."[141] After providing examples in which society acceptably treats persons as mere means,[142] Holmes concludes that it is "perfectly proper."[143] Much of modern life would seem difficult, if not impossible, by strictly adhering to the principle.

Second, the very meaning of the principle is ambiguous. What does it mean to treat someone as a mere means? Critics have observed that the meaning of the principle is "unclear,"[144] "vague,"[145] and enjoys "little agreement" among scholars.[146] Even one of its adherents concedes it is "notoriously obscure."[147]

Even if the above two criticisms of the principle are persuasive, they only pertain to the principle in the abstract. They do not pertain to the principle's application to the NAACP's defense strategy. While a blanket prohibition against using persons as mere means may not be realistic or reasonable, it seems reasonable that one should not attain one's end by publicly branding others as promiscuous and mendacious (without sufficient evidence). And while some instances of using others as mere means may be obscure, there

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138. Davis, *supra* note 135, at 389.

139. One might argue that payment to the driver through a freely negotiated transaction constitutes treating the driver as an end rather than as a mere means. Thanks to Nick Hartman for pressing me on this point. For endorsement of this view, see, for example, D.D. RAPHAEL, MORAL PHILOSOPHY 56–57 (2d ed. 1994) (discussing the similar example of hiring a carpenter). But does payment suffice? I might also pay to use a motorized scooter but that does not preclude me from treating the scooter as a mere means. Alternatively, what if rather than utilizing a taxi driver, I board a free airport shuttle bus in order to get from point A to B. Because I am neither paying nor negotiating with such a driver, am I not treating the driver as a mere means? But surely such an ordinary transaction is not morally impermissible. Surely, schoolchildren aboard a school bus—who are neither paying nor negotiating with the school bus driver—are not acting immorally.

140. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 44 (reprint ed. 1991) (1881).

141. *Id.* at 43.

142. *Id.* Holmes' explains how society uses its members as mere means as follows:

> If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death. It runs highways and railroads through old family places in spite of the owner's protest, paying in this instance market value, to be sure, because no civilized government sacrifices the citizen more than it can help, but still sacrificing his will and his welfare to that of the rest.

143. *Id.* at 47.

144. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1631 (1992).

145. TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 49 (1969).

146. O'Neill, *supra* note 137, at 252.

147. R. A. DUFF, TRIALS AND PUNISHMENTS 178 (1986).

is nothing unclear about publicly branding rape victims as promiscuous and mendacious as a means to attain benefits for others. As a result, the above two criticisms of the Kantian principle are inapplicable to its application to the moral dilemma faced by the NAACP. The principle provides a strong argument against the NAACP's defense strategy.

IV. CONCLUSION

The convergence of racism and sexism at the point of interracial rape created a political and ideological dilemma for much of the twentieth century, stretching from before the Tulsa Race Massacre at the dawn of the century into the late 1960s. The elements of what was all too common throughout much of the country, especially in the South, were as follows: a rumor or allegation of an assault or rape by a Black man of a white woman sparked civil unrest followed by a mob lynching or a "legal lynching" via an unfair trial before a biased all-white jury. Perhaps the only way to avert such lynchings was to supplant the myth of Black men as compulsive rapists of white women with another myth—the myth of promiscuous white women fabricating rape claims. And this, critics contend, is what the liberal left, including the NAACP, did. Critics maintain that the left's defense strategy sacrificed rape victims, contributed to the creation of sexist rape laws, reduced the protection afforded to women, and increased the incidence of rape.[148] In turn, other scholars argued that by seeking to retire the myth of the promiscuous and mendacious white woman, the critics were resurrecting the original myth of the compulsive Black rapist. Rather than pitting racism against sexism, these other scholars urge an intersectional approach that treats racism and sexism as inextricably intertwined.

Rather than join this debate, this essay conceives of the political and ideological dilemma as a zero-sum game constituting a moral dilemma. The choice was to either avert the legal and extra-legal lynchings by sacrificing rape victims and undermining rape law or avoid sacrificing rape victims and rape law but accept an increased incidence of lynching. No matter the choice, harm will occur. What should be done? Consequential arguments—the end justifies the means—clearly support resolving the dilemma in favor of averting lynchings. Averting lynchings, even if by sacrificing present and future rape victims, is the lesser evil.[149] While nonconsequential arguments support either resolution, perhaps the most powerful nonconsequential argument—Kant's prohibition against using persons as mere means no matter the good end—favors declining to sacrifice rape victims and law, even at the cost of an increased number of lynchings. According to this argument, branding rape victims as promiscuous and mendacious is impermissibly using persons as mere means, despite it attaining the good end of averted lynchings. Because most of us are neither strict consequentialists nor strict nonconsequentialists, much of the moral dilemma remains. Because there are some arguments against the defense strategy, it was not clearly right; because there are some arguments supporting it, the strategy was not clearly wrong.

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148. Stern, *supra* note 1, at 247; ESTRICH, *supra* note 10, at 30, 43–44.

149. The lesser evils or choice-of-evils or necessity defense in criminal law is identified with consequentialist reasoning. *E.g.*, Gur-Arye, *supra* note 118, at 191 ("Necessity as a justification derives from consequential moral theories, according to which wrongful actions may be morally deemed by the goodness of their consequences. It justifies the sacrifice of legitimate interests to protect other interests of substantially higher value.").