

Anything but a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond

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ABSTRACT. In December 2003, Essie Mae Washington-Williams, a bi-racial retired schoolteacher living in Southern California, revealed that she is the illegitimate daughter of the late Strom Thurmond. Thurmond served as South Carolina's United States Senator for nearly fifty years and was a passionate segregationist during the Civil Rights Era. Washington-Williams's revelation shocked many because few people outside South Carolina had expected Thurmond to have a "Black daughter." But this story is not simply about race. Carrie Butler, Washington-Williams's mother, was a teenage maid in Thurmond's parents' home when the then-twenty-two-year-old Thurmond had sex with her. Both the law of South Carolina and the power dynamic between Black women and White men during the Jim Crow era suggests that Thurmond statutorily raped and/or sexually assaulted Butler. Yet, this aspect of the story has been largely ignored; journalists reporting on Thurmond's "Black child" focused on Thurmond's hypocrisy—that is, his readiness to preach segregation while practicing integration of the most intimate kind.

This Article begins with a content analysis of news articles following this story's break, which shows that journalists largely reported Washington-Williams's revelation as a story of racial hypocrisy without fully discussing the issues of rape or sexual assault. After legally and historically situating the Thurmond-Butler "relationship," this Article then develops a theory of interactionality, grounded upon Kimberlé Crenshaw's intersectionality analysis, to explore how and why journalists "missed" this story. This Article argues that a "colorblind" race ideology can at least partially explain this omission. By focusing on race aesthetics without a deeper conversation about racism, and by taking the potential rape and sexual assault out of their narrative, journalists were able to partially absolve America of any lingering racial guilt or unease, ultimately impeding any path towards genuine racial redemption.

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I. INTRODUCTION



Ed Clark / Getty Images. GOV. J. STROM THURMOND OF S.C. STANDING ON HIS HEAD FOR THE BENEFIT OF HIS NEWLY WED WIFE (AND FORMER SECRETARY) (1947). Reprinted by permission.

“Virile governor demonstrates his prowess in the mansion yard day before wedding,” read the caption accompanying the photograph above, which appeared in a 1947 edition of *LIFE* magazine. Then-Governor Strom Thurmond, aged forty-four, had chosen twenty-one-year-old Jean Crouch as his wife-to-be and wanted “to show that he wasn’t too old to marry [her]”¹ by publicly—and no less dramatically—demonstrating his youthfulness and vigor in a national publication. This sign of gentlemanly affection and southern genteelness no doubt played well upon the sweet tea and magnolia sentiments that permeate South Carolinian culture, but it ultimately elided the rather curious fact that Thurmond’s interest in Crouch began six years earlier in a Barnwell County courthouse where then-Judge Thurmond, aged thirty-eight, first met the then-fifteen-year-old girl.² After numerous correspondences and chaperoned visits over a period of years, Governor Thurmond offered Crouch a job after she finished college as his *personal* secretary, “hoping [she] would remain close.”³ Not too long afterwards, Governor Thurmond *dictated* his marriage proposal to Crouch, relieving her of her secretarial duties and offering

1. *You’re Fired. Will You Marry Me?*, THE STATE, Dec. 9, 2002, http://www.thestate.com/mld/thestate/news/special_packages/strom/4701782.htm.

2. *Id.*

3. *Id.*

her a “new assignment”⁴ as his wife. Crouch accepted, and the couple was married until 1960 when she died of a brain tumor.⁵ Thurmond would marry again in 1968 (at age sixty-five) to a former Miss South Carolina—and former intern in his Senate office—named Nancy Moore who, like Crouch, was a teenager at the time of her introduction to Thurmond and twenty-one years of age at the time of their marriage.⁶ She would bear Thurmond’s first child in 1971, followed by three others.

Or was this child his first? Thurmond was well-known throughout South Carolina and among his congressional colleagues as an unapologetic womanizer, even going so far as to state on the United States Senate floor during his farewell address that “I love all of you—and especially your wives.”⁷ At an Army football rally in 1999, Thurmond showed his appreciation for the cheerleaders by stating, “I may be 96 years old, but I still like young women.”⁸ Without question, Thurmond thoroughly enjoyed his reputation as a ladies’ man and unabashedly flirted with women young enough to be his great-great granddaughters up until his death at 100.⁹ Moreover, Thurmond’s political background—he penned the 1956 “Southern Manifesto”¹⁰ to protest school desegregation and filibustered for a record twenty-four hours and eighteen minutes¹¹ to impede the passage of the 1957 Civil Rights Act—reflects his similarly troublesome reputation as a segregationist.¹² Yet, when

4. Letter from J. Strom Thurmond, Governor, State of South Carolina, to Jean Crouch, Secretary to J. Strom Thurmond (Sept. 13, 1947), available at <http://www.timelifepictures.com> (search 50447546).

5. Christine Schweickert, *A Life of Romance and Tragedy*, THE STATE, Dec. 9, 2002, available at http://www.thestate.com/mld/thestate/news/special_packages/strom/4701785.htm.

6. *Id.*

7. *Strom Thurmond Dead At 100*, CNN.COM, Dec. 17, 2003, available at <http://www.cnn.com/2003/ALLPOLITICS/06/26/thurmond.obit/>.

8. *Id.* (follow “Gallery: A Life in Pictures” and follow “next” to the twenty-second picture).

9. *Cf. id.* In her autobiography, Thurmond’s daughter, Essie Mae Washington-Williams, recalls a conversation with her mother, Carrie Butler, about the Thurmond men’s fondness of women: “In addition to [Strom Thurmond’s] big brother William, there was another brother, Allen George, who also become a doctor. [Butler noted] ‘He flirted with me, too. Those boys sure liked women.’ They liked them so much they both became gynecologists. I found that a little weird.” *ESSIE MAE WASHINGTON-WILLIAMS & WILLIAM STADIEM, DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND* 42 (2005).

10. *The Southern Manifesto*, 84 CONG. REC. 102, 4 (1956), available at <http://www.strom.clemson.edu/strom/manifesto.html>. In a campaign known as “Massive Resistance,” Southern White legislators and school boards enacted policies designed to defy *Brown*’s mandate to integrate schools and other public facilities. Thurmond drafted the first version of the Southern Manifesto, which openly criticized the Supreme Court for “encroach[ing] on the rights reserved to the States and to the people” while also “commend[ing] the motives of those States which have declared the intention to resist forced integration by any lawful means.” *Id.*

11. Tim Flach, *Historic Filibuster Waged to Stop Civil Rights Plan*, THE STATE, Dec. 9, 2002, available at http://www.thestate.com/mld/thestate/news/special_packages/strom/4701448.htm. Thurmond stepped down from the Senate floor only “after doctors threatened to force him to quit amid concern about kidney damage.” *Id.*

12. While campaigning for the presidency in 1948 as a States’ Rights Democrat, or Dixiecrat, Thurmond famously “declared that, ‘all the laws of Washington, and all the bayonets of the Army, cannot force the Negro into our homes, our schools, our churches and our places of recreation.’” James DiLiberto Jr., *Strom Thurmond Dead at 100*, FOXNEWS.COM, June 27, 2003, <http://www.foxnews.com/story/0,2933,90549,00.html>.

rumors emerged during his gubernatorial and Senate careers that as a young man he fathered a child with his family's Black housekeeper, such allegations never caught much traction—at least not in the White community.¹³ Despite Thurmond's refusal to deny the allegations¹⁴ and an overwhelming amount of incriminating evidence—including numerous personal visits and a lifetime of financial support to a curiously bi-racial Essie Mae Washington-Williams—the public remained largely ignorant of or unresponsive to this aspect of his life.

This lack of awareness changed after Thurmond's death in June 2003. After numerous rebuttals over several decades, Washington-Williams told *The Washington Post* shortly after Thurmond's death, "I want to bring closure to this," and admitted that she is the daughter of Strom Thurmond and Carrie Butler—an adolescent Black housemaid to Thurmond's parents.¹⁵ As evidence, Washington-Williams offered several documents, including cashier's check stubs from years of financial assistance, several mementos, and a letter from an intermediary who delivered money on behalf of Thurmond.¹⁶ The Thurmond family did not challenge Washington-Williams's claim and publicly acknowledged their blood tie shortly after the publication of *The Washington Post* article.¹⁷

These revelations have fueled a resurgent interest in the life and career of one of America's most controversial political figures.¹⁸ Born in 1902, Thurmond dedicated most of his life to serving his country and his home state of South Carolina. After practicing law and being elected a judge, Thurmond resigned his seat on the bench in 1941 to join the war effort, winning eighteen decorations, medals, and awards. In 1947, he was elected governor of South Carolina. He was a presidential candidate in 1948 on the States' Rights, or

13. As Harvard Law School Professor Randall Kennedy pointed out, "I am from South Carolina. . . . [a]nd I can tell you that every black person I have ever known in South Carolina has known about [Strom Thurmond's Black daughter]." Rebecca Traister, *American Gothic*, SALON, Dec. 18, 2003, <http://www.salon.com/mwt/feature/2003/12/18/thurmond/index.html>. See also Ken Cummins, *Strom's Secret*, BLACK COMMENTATOR, 1996, reprinted in BLACK COMMENTATOR, Dec. 19, 2002, available at http://www.blackcommentator.com/21_re_print.html ("The story of Essie Washington is well-known in South Carolina among people, black and white, who lived in the state and were active in politics in the late 1940s and 1950s when this tale circulated widely.").

14. Cummins, *supra* note 13.

15. Marilyn W. Thompson, *Woman Claims Thurmond as Father*, WASH. POST, Dec. 14, 2003, at A1.

16. *Id.*

17. In a statement released two days after Ms. Washington-Williams's revelations, the family stated, "As J. Strom Thurmond has passed away and cannot speak for himself, the Thurmond family acknowledges Ms. Essie Mae Washington-Williams' claim to her heritage. We hope this acknowledgement will bring closure for Ms. Williams." David Mattingly, *Strom Thurmond's Family Confirms Paternity Claim*, CNN.COM, Dec. 16, 2003, <http://www.cnn.com/2003/US/12/15/thurmond.paternity/>.

18. Numerous books have been written about Strom Thurmond. See, e.g., JACK BASS & MARILYN W. THOMPSON, *STROM: THE COMPLICATED PERSONAL AND POLITICAL LIFE OF STROM THURMOND* (2005) [hereinafter *COMPLICATED LIFE*]; JACK BASS & MARILYN W. THOMPSON, *OL' STROM: AN UNAUTHORIZED BIOGRAPHY OF STROM THURMOND* (2003); NADINE COHODAS, *STROM THURMOND AND THE POLITICS OF SOUTHERN CHANGE* (1993); ALBERTA LACHICOTTE, *REBEL SENATOR: STROM THURMOND OF SOUTH CAROLINA* (1966); WASHINGTON-WILLIAMS & STADIEM, *supra* note 9.

Dixiecrat, ticket—a splinter group of Southern Democrats who opposed their party's desegregation efforts. Thurmond won only four states and thirty-nine electoral votes. In 1954, he became the only person ever elected to the United States Senate as a write-in candidate, serving South Carolina in this capacity for almost fifty years.

Race colored Thurmond's entire political career. For example, in December 2002 incoming Senate Majority Leader Trent Lott was forced to resign his position after suggesting at Thurmond's 100th birthday party that had Thurmond won the presidency in 1948 on his segregationist platform, "we wouldn't have had all these problems over all these years."¹⁹ Yet, the political dynamite perpetually strapped to Thurmond's past did not necessarily attach to Thurmond himself. For many, Thurmond's life represents an allegory of Southern racial redemption—a man whose early life reflects the inconsistencies and struggles of early twentieth century Southern culture, but who eventually learned his mistakes and used his position to advocate on behalf of his Black constituents.²⁰ This redemptive trope rubs uneasily against continued accusations that Thurmond's apparent racial transformation late in his career did not reflect his true sentiments, but was tailored to place a sugar maple covering over what was undoubtedly a shameful past.²¹ These two views are obviously in tension. What remains remarkable, however, is that both narratives tend to view Thurmond's sexual engagement with his family's fifteen-year-old Black housemaid as merely an episode inconsistent with his racial politics rather than a possible rape or sexual assault perpetrated by a then-twenty-two-year-old man upon a minor. Indeed, where mainstream media outlets were critical of this revelation, the common theme was that he was a hypocrite, not a rapist. How did this "choice" in reading past events occur? What social conditions rendered this reading possible?

19. Thomas B. Edsall, *Lott Decried for Part of Salute to Thurmond*, WASH. POST, Dec. 7, 2002, at A6. But see Carl Hulse & David Stout, *Trent Lott Wins Back Senate Leadership Slot*, N.Y. TIMES, Nov. 15, 2006, available at <http://www.nytimes.com/2006/11/15/us/politics/16congcnd.html>.

20. Thurmond once remarked, "When the times change and people change, you've got to change too. If you don't change, you don't stay around long. And I'm the senior senator in the whole United States Senate." Donald P. Myers, *Old Strom, Can He Win?*, NEWSDAY, Apr. 30, 1996, at B4. Later in his career, Thurmond became the first Southern senator to hire Black staffers and appointed several Blacks to influential positions. He also used federal money to improve several predominantly Black schools in South Carolina and voted for the Martin Luther King Jr. federal holiday and the renewal of the Voting Rights Act. Thurmond eventually earned the support of several Black leaders in South Carolina: during his 1978 re-election bid, ten out of eleven Black mayors in South Carolina endorsed his candidacy. Kevin Alexander Gray, *Segregation (and Hypocrisy) Forever*, COUNTERPUNCH, Mar. 8, 2004, <http://www.counterpunch.org/gray03082004.html>.

21. See, e.g., Christopher George, *Strom Won't Be Missed*, ALTERNET, June 27, 2003, <http://www.alternet.org/story/16277/>; John Ibbitson, *The Detestable, Decrepit Strom Thurmond*, TORONTO GLOBE & MAIL, Jan. 7, 2002, available at <http://www.commondreams.org/views02/0107-04.htm>.

Of the critical traditions available to re-read the “relationship”²² between Thurmond and Carrie Butler, intersectionality provides the most sensible explanation for why, in 2003, most journalists publicly described a Black teenage housemaid’s sexual encounter with her affluent White employer’s son in 1920s Jim Crow South Carolina as an incident of political inconsistency rather than a reflection of sexual exploitation of Black women. By centering the discriminatory experiences of women of color at an intersecting “site” of racism and sexism, intersectionality highlights how sex and race converge in many settings to produce forms of discrimination that cannot be neatly reduced to “racism” or “sexism” as traditionally understood. Though not without criticism,²³ intersectionality remains indispensable in understanding the nuanced relationship between identity, subject position, and subordination. Yet, the laser precision with which intersectionality approaches the substantive question of *who* experiences discrimination does not fully help us understand precisely *how* subordination works. This Article builds upon intersectionality’s insights to complement its contributions with a theory of interactionality: a more process-oriented investigation as to how subordination occurs and persists beyond inquiries simply into who experiences it, particularly in a post-Civil Rights Movement environment of formal equality. Drawing upon both qualitative and quantitative traditions within the social sciences, this Article uses the media’s “hypocrite-not-rapist” portrayal of Thurmond to develop *interactionality* as a means to move beyond racial and sexual historicism and to empirically resituate and rethink the relationship between identity and subordination.

Putting the intersectional identity question of *who* experiences discrimination in dialogue with the interactional subordination question of *how* the Thurmond-Butler “relationship” became understood as hypocritical rather than criminal, Part II pursues a content analysis of the media’s coverage in order to empirically ground an inquiry into why this issue was publicly framed as a question of political inconsistency rather than one of criminality or predatory sexuality. Part III then revisits the connections between race and rape during Jim Crow to provide an appropriate social context in which to examine

22. Throughout this Article, the sexual encounter(s) between Strom Thurmond and Carrie Butler will be referred to as a relationship in quotations (“relationship”) to underscore the uncertainty as to whether these acts were criminal, consensual, or both (in the case of statutory rape).

23. See generally Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001) (offering “multidimensionality” as an extension of intersectional analyses); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999) (challenging the heterosexist assumptions in traditional race scholarship, critical race theory, and race politics); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997) (offering a theory of “cosynthesis” to displace intersectionality’s shortcomings); Francisco Valdes, Symposium, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25 (1995) (providing a theory of “inter-connectivity” to emphasize the historical, situational, and aspirational commonalities among identity groups).

South Carolina's rape statutes in the first quarter of the twentieth century. After legally and historically grounding the claim that Butler's consent in this "relationship" was at best questionable, Part IV uses intersectionality's epistemological standpoint to advance an alternative reading of this "relationship," highlighting the theory's contributions and opportunities for addenda. Finally, Part V proposes a theory of *interactionality* that builds upon intersectionality's primary concern of where axes of discrimination cross paths and offers the more sociologically-grounded theories of symbolic interactionism and interaction effects to suggest a complementary model for understanding the relationship between multiple variables of subordination. In particular, this exploration reveals how the elision of sexual assault from these public accounts is, in fact, constituted by these variables' interaction with a tertiary element not immediately considered by an intersectional model: a colorblind race ideology that rereads history in an attempt to redeem America of its racial past.

II. CONTENT ANALYSIS OF MEDIA COVERAGE

A. Methodology

This Article addresses the following empirical inquiry: After Essie Mae Washington-Williams confirmed (1) that she is the bi-racial daughter of Strom Thurmond and Carrie Butler, Thurmond's parents' Black housemaid, and (2) that she was conceived when Thurmond was twenty-two years old and her mother was likely to have been an underage teenager, how did the media report this information? Surely, Thurmond's political background as an impassioned segregationist fueled the media's interest in what appeared to be his contradictory predilection towards race-mixing of the most intimate kind. However, assuming that stories concerning public figures' sexual impropriety are as journalistically enticing as those concerning perceived inconsistencies between their personal and public lives, it is not unreasonable to think that both aspects of this story—political hypocrisy and the possibility of rape—would have received similar scrutiny. This Part addresses the inquiry through a content analysis of journalists' reporting on this topic.²⁴

24. Content analyses allow researchers to determine the presence of specified words or concepts within or across a series of texts. By quantifying and analyzing the presence, meanings, and relationships of a selected set of words or concepts, social scientists are able to make inferences about the message(s) within the texts, the writers, the audience, and perhaps even the culture and time from which these variables emanate. These texts can be historical documents, speeches, articles, or any other record of communicative language. They are then coded and examined to highlight various commonalities and distinctions. See generally John Markoff et al., *Toward the Integration of Content Analysis and General Methodology*, 6 SOC. METHODOLOGY 1 (1975) (critiquing content analysis as a method of social science inquiry).

This analysis focuses on media outlets' coverage of the Essie Mae Washington-Williams story following its "break" in the December 14, 2003 edition of *The Washington Post*.²⁵ The sample is drawn from the Lexis-Nexis "News and Business" database (News, All (English, Full Text)) and was obtained through a series of searches with the results stratified by day from December 14, 2003 through December 22, 2003. For each day, a broad search was conducted using the terms "Strom Thurmond" and "Essie Mae."²⁶ After these results were retrieved, four separate "Focus" searches were performed within this broader sample to determine the number of articles that:

- (1) *Mentioned* race (using the search terms "Black," "African-American," "rac!," or "bi-racial");
- (2) Were *critical* of the alleged inconsistency between Thurmond's segregationist past and the revelation of his bi-racial daughter (using the focus search terms "segregat!," "hypocrit!," "Dixiecrat," or "racist");
- (3) *Mentioned* the ages of Thurmond and Butler at the time Washington-Williams was born (using the focus search terms "age," "old," "22," or "twenty");²⁷
- (4) Were *critical* of the age difference between Thurmond and Butler (using the focus search terms "statut!," "rape," or "consent").

B. Results

Table 1 and Graph 1 display the results of the content analysis:

25. Thompson, *supra* note 15. December 22 is this sample's end date as it marks the end of the story's news cycle; the number of results produced by the search terms after this date are negligible and do not add any significant information.

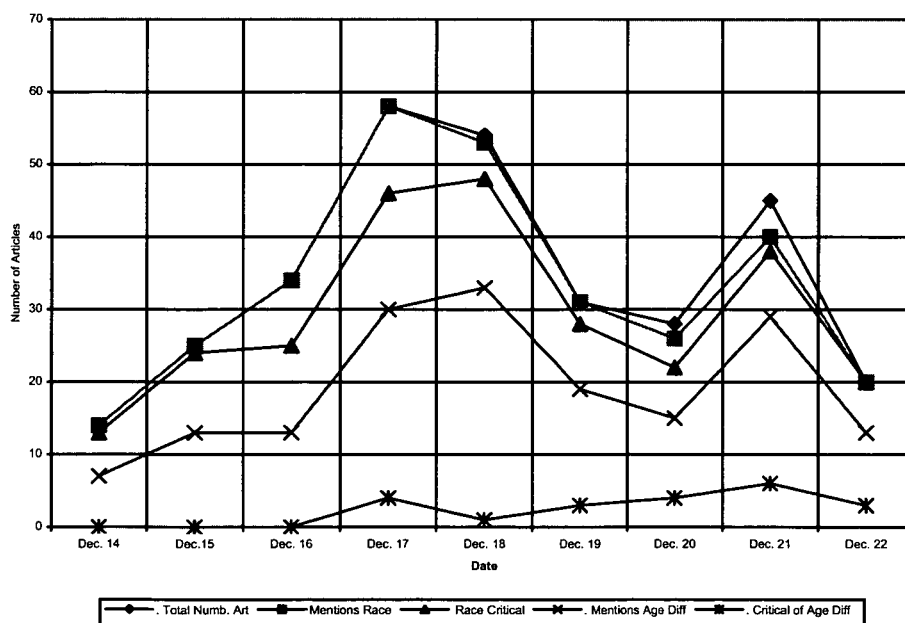
26. Search last conducted on November 17, 2006. Each article was subjected to a qualitative review to ensure its appropriateness in each category.

27. Since words like "age" and "old" are commonplace and were often used in articles without necessarily describing the ages of either Thurmond or Butler at the time that Washington-Williams was conceived (e.g., "Mr. Thurmond was 100 years old at the time of his death") each result underwent a second analysis to ensure that the retrieved article was appropriate for inclusion in the sample.

Table 1²⁸

Date	Total Number of Articles	Articles Mentioning Race	Articles Critical of Race	Articles Mentioning Age Difference	Articles Critical of Age Difference
Dec. 14	14	14 (100%)	13 (92.8%)	7 (50%)	0 (0%)
Dec. 15	25	25 (100%)	24 (96%)	13 (52%)	0 (0%)
Dec. 16	34	34 (100%)	25 (73.5%)	13 (38.2%)	0 (0%)
Dec. 17	58	58 (100%)	46 (79.3%)	30 (51.7%)	4 (6.9%)
Dec. 18	54	53 (98.1%)	48 (88.9%)	33 (61.1%)	1 (1.9%)
Dec. 19	31	31 (100%)	28 (90.3%)	19 (61.3%)	3 (9.7%)
Dec. 20	28	26 (92.9%)	22 (78.6%)	15 (53.6%)	4 (14.3%)
Dec. 21	45	40 (88.9%)	38 (84.4%)	29 (64.4%)	6 (13.3%)
Dec. 22	20	20 (100%)	20 (100%)	13 (65%)	3 (15%)
Total	309	301 (97.4%)	264 (85.4%)	172 (55.7%)	21 (6.7%)

Graph 1



28. Numbers in parentheses represent the percentage of articles falling within that category.

These data suggest that race and, in particular, race-based criticisms of the late Strom Thurmond, were the media's dominant themes. The fact that nearly all of the articles in this sample mention race or describe the race of Thurmond and/or Washington-Williams is not surprising. At its most dramatic level, this is a story involving a Black woman claiming as her father a man who built his career and reputation on opposing African-Americans' social and political advancement.²⁹ It is also understandable that journalists were critical and not merely descriptive in highlighting this revelation's racial implications. While "hypocrite" may not have been the most accurate term to describe Thurmond's indiscretions,³⁰ these data become particularly interesting once we shift our attention to the results concerning the media's coverage of the age difference between Thurmond and Butler. Although over 97% of the sampled articles mentioned the race of either Thurmond or Butler, only slightly over half of them mentioned their ages at the time of their sexual involvement.³¹ While 85% of the sampled articles were critical of the perceived incongruity between Thurmond's political background and his "relationship" with a Black woman, only 6.7%—about one in fifteen—were critical of their age difference. Where journalists did criticize the age difference, these articles were substantially more likely to be focused on Thurmond's racial hypocrisy than the possibility that he raped a woman. Graph 1 demonstrates the disparity between reports in this sample that were critical of race on the one hand and intergenerational sex on the other; the relatively flat line at the bottom represents the few articles critical of the age difference. Moreover, where articles mentioned the age difference or used language criticizing it, a qualitative review of the sampled articles shows that many of them used these descriptive or critical terms to dispel, rather than to further investigate, the possibility of forcible or statutory rape.³²

29. Some argue that Thurmond did not oppose integration, but only *forced* integration by the federal government, in violation of what he claimed to be state sovereignty. Indeed, according to Washington-Williams, this was a point her father passionately tried to imprint upon her when she challenged his racially charged politics: "The owners [of private property] can do what they want. Private property is the essence of American democracy. Would *you* want the government telling you what to do with your property? . . . You don't want the federal government in your life. Then we're all slaves." WASHINGTON-WILLIAMS & STADIEM, *supra* note 9, at 145-46.

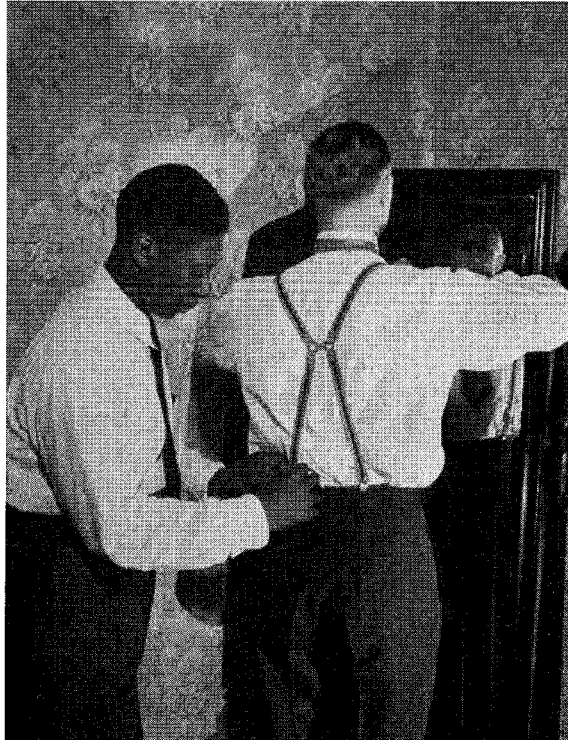
30. See *infra* Part III (providing evidence that the sexual assault of Black slaves and Black domestic workers was consistent with the ideologies of slavery and Jim Crow.)

31. *Supra* tbl.1.

32. See, e.g., Kathleen Parker, *Strom's Daughter Is a Class Act*, ORLANDO SENTINEL, Dec. 21, 2003, at G3 ("[W]hat would be statutory rape was perfectly legal in 1925 when the black family maid gave birth to Thurmond's daughter. The cutoff for consent in those days was age 14."); Marilyn W. Thompson, *Thurmond Kin Admits Payments: Nephew Acknowledges His Role as "Pass-Through" to Mixed-Race Daughter*, WASH. POST, Dec. 17, 2003, at A3 ("Williams's mother, Carrie Butler, was 16 and Thurmond was 22 when the baby was born. At the time, the age of consent in South Carolina was 14." (emphasis added)). As I demonstrate *infra* Part III.B., South Carolina's laws concerning adults' sexual contact with minors were significantly more complicated than journalists led the public to believe.

These data indicate that the media coverage concerning the Thurmond-Butler “relationship” conveyed at least two significant ideas to the public. First, by the close correlation between the total number of sampled articles and the number of sampled articles mentioning race, in addition to the relatively high number of “race-critical” articles, journalists promoted the idea that the Thurmond-Butler “relationship” was solely an episode about race; at worst, Thurmond was a hypocrite for not practicing what he preached. Second, journalists’ failure to fully investigate the ramifications of Butler being a minor when conceiving Thurmond’s child conveyed that the “relationship” was, in fact, both consensual and legal. That is, where age was mentioned in the fifty-five percent of sampled articles, it was largely relegated to a descriptive variable within the larger race narrative. Indeed, it is curious that for many journalists, the *moral* question created by a twenty-two-year-old man having sex with a teenager was confined to a discussion about *law* and *legality*. Taken together, these articles characterize Thurmond’s sexual behavior as at worst unsavory, or “[White] boys will be boys,” but far from criminal. Were these dual messages of “racial hypocrisy yet legal permissibility” accurate? Part III questions their validity.

III. RACE, RAPE, AND THE LAW



Ed Clark / Getty Images. GOV. J. STROM THURMOND OF SOUTH CAROLINA GETTING ASSISTANCE FROM VALET WHILE PREPARING FOR HIS WEDDING (1947). Reprinted by permission.

A. *A Socio-Historical Approach*³³

Like the Black servant of then-Governor Thurmond featured in the above picture, Carrie Butler worked as a housemaid for the Thurmond family in Edgefield, South Carolina. Not much is known about Butler except that during the 1920s, when she was employed by the Thurmond family, she lived in the poor Black section of Edgefield and was considered destitute even by its standards.³⁴ Indeed, Butler was so poor that when Thurmond's daughter was born, local residents reported that her neighbors had to help feed and clothe the

33. It is important to place Carrie Butler's experiences in an appropriate social and historical context that informs this inquiry yet resists historical determinism. This process defines the interactional approach developed in this Article, and its importance is discussed in detail in Parts IV and V. For now, we can limit this point to emphasizing this Article's commitment to using history as context, not as chains.

34. Retha Hill, *Sex and Race in the American South*, MSNBCNEWS.COM, Jan. 4, 2004, <http://www.msnbc.msn.com/id/3842554/>.

child. Ultimately, Butler gave the child to her aunt in Coatesville, Pennsylvania.³⁵

Despite recent discoveries of other prominent White politicians who sired children with their Black servants in the face of their racially insensitive political commitments,³⁶ public discussions have consistently treated such “relationships” as consensual aberrations in the presumptive consistency between one’s racial politics and one’s sexual practices. Yet, a deeper historical investigation into the interactions between White men and Black women reveals that sex (and indeed sexual assault) was not uncommon. Using this history as a backdrop, this Part looks at the social and legal contexts of Thurmond and Butler’s sexual engagement to examine the legality of Thurmond’s behavior.

Historian Winthrop Jordan notes that from the beginning of what can be properly identified as Western race relations, “Englishmen . . . fastened upon Negroes a pronounced sexuality virtually upon first sight [that] . . . developed . . . rapidly and in . . . explicit terms in the sixteenth and early seventeenth centuries.”³⁷ Much of this was supported by a preexisting³⁸ yet evolving ideology that used gender, race, and sexuality to constitute meanings for “the Other” from which to juxtapose (and thus reaffirm) the ostensibly civilized Christian mores of European culture. Africa and Africans occupied a projected space of moral, emotional, psychic, and cultural deviancy which, by virtue of its contrast with whiteness, helped to reconstitute it as inferior as European explorations became increasingly global.³⁹ This depraved vision of Africa and

35. Jeremiah Marquez, *Woman Says She’s Thurmond’s Daughter*, VENTURA COUNTY STAR, Dec. 14, 2003, at 10.

36. See, e.g., Eugene A. Foster et al., *Jefferson Fathered Slave’s Last Child*, 396 NATURE 27 (1998). “Because most of the Y chromosome is passed unchanged from father to son, apart from occasional mutations, DNA analysis of the Y chromosome can reveal whether or not individuals are likely to be male-line relatives.” *Id.* at 27. The researchers’ findings “provide evidence that [Jefferson] was the biological father of Eston Hemings Jefferson,” a man who reportedly bore a “striking resemblance” to Thomas Jefferson. *Id.* See also Erika Check, *Jefferson’s Descendants Continue To Deny Slave Link*, 417 NATURE 213 (2002). A subsequent investigation in 2000 by the Thomas Jefferson Foundation, which owns and operates Monticello, concluded that there was “a high probability that Thomas Jefferson fathered Eston Hemings, and that he most likely was the father of all six of Sally Hemings’s children.” *Id.* Nevertheless, the Monticello Association, a group of close to 800 descendants of Jefferson’s daughters, voted to exclude Sally Hemings’s descendants from their group. *Id.*

37. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 35 (1968).

38. Jordan notes, “Long before they found that some men were black, Englishmen found in the idea of blackness a way of expressing some of their most ingrained values White and black connoted purity and filthiness, virginity and sin, virtue and baseness, beauty and ugliness, beneficence and evil, God and the devil.” *Id.* at 7.

39. Anne McClintock describes the eroticized perception of Africa and other continents:

For centuries, the uncertain continents—Africa, the Americas, Asia—were figured in European lore as libidinally eroticized. Travelers’ tales abounded with visions of the monstrous sexuality of far-off lands, where, as legend had it, men sported gigantic penises and women consorted with apes, feminized men’s breasts flowed with milk and militarized women lopped theirs off. . . . Africa and the Americas had become what can be called a porno-tropics for the European imagination—a fantastic magic lantern of the mind onto which Europe projected its forbidden sexual desires and fears.

its peoples merged seamlessly with the increasing material and labor needs of the New World.⁴⁰ Not only did this ideology justify slavery as a social, economic, and political institution,⁴¹ but it also fostered Black women's sexual mistreatment while de-emphasizing legal protection and diffusing any moral or social outrage at their suffering. Under slavery, sexual desire and profit motives often overlapped and were at times indistinguishable.⁴² Occupying the dual role of persons and property, Black female slaves produced wealth for their owners not only by attending to the fields, but also by reproducing the workforce.⁴³ Breeding was not limited to forced copulation between male and female slaves,⁴⁴ as slave owners often took a personal interest in increasing their net value. They usually treated their bi-racial children similarly to or the same as other slaves, thus adding value to their estates. Since slave law dictated that the status of the mother determined whether her child was free or property, legal rules incentivized Black women's rape as a way for White slave owners to sexually gratify themselves and, if childbirth resulted, to expand their workforce and capital.⁴⁵ This is not to say that since White men *could* profit from raping Black slaves, the antebellum rape of Black women was *primarily*

ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST* 22 (1995).

40. Manning Marable writes,

The "Great Ascent" of the West . . . [was] the endless drive to control the human and material resources of the world's people. . . . Development was . . . the institutionalization of the hegemony of capitalism as a world system. Underdevelopment was the direct consequence of this process: chattel slavery, sharecropping, peonage, industrial labor at low wages, and cultural chaos.

MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA* 3 (1983).

41. According to Joane Nagel, "It [was] easier for Europeans to justify seizing the lands of savages and enslaving them than it would be to mistreat and violate the rights of peoples whom Europeans considered their moral equals. Consistent assertions of African savagery rendered them barely human in the European racial cosmology." JOANE NAGEL, *RACE, ETHNICITY, AND SEXUALITY: INTIMATE INTERSECTIONS*, *FORBIDDEN FRONTIERS* 96 (2003).

42. Nagel notes, "Lurid images of African sexuality served well the interests of those selling black women to white men. Slavers appealed to their potential customers by portraying African women as willing, even enthusiastic sexual partners who found white men especially attractive." *Id.*

43. Oral histories have been particularly helpful in exposing this often forgotten aspect of slavery. A slave by the name of Hannah Jones recalled,

Ben Oil had a hundred niggers. He just raised niggers, on his plantation. His brother-in-law, John Cross, raised niggers, too. He had a hundred and twenty-five niggers. He had a nigger farm. His older brother-in-law, old man English, had a hundred niggers. Dey all jes' had nothin' else but niggers.

BULLWHIP DAYS: THE SLAVES REMEMBER 148 (James Mellon ed., 1988). A slave by the name of John Smith recalled,

My marster owned three plantations and three hundred slaves. He started out wid two 'oman slaves and raised three hundred slaves. One wuz called "Short Peggy," and the udder wuz called "Long Peggy." Long Peggy had twenty-five chilluns. Long Peggy, a black 'oman, wuz boss ob de plantation. Marster freed her attar she had twenty-five chilluns. Just think o' dat—raisin' three hundred slaves wid two 'omans. It sho' is de trufe, do'.

Id. at 148.

44. Dorothy Roberts notes that some slave masters "rented men of exceptional physical stature to serve as studs . . . 'stockmen,' 'travelin' niggers,' and 'breedin niggers,' . . . remembered being 'weighed and tested,' then used like animals to sire chattel for their masters. Of course, this also meant forcing slave women to submit to being impregnated." DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 28 (1997).

45. See *id.* at 29-31.

driven by economic impulses. Rather, it is to suggest that legal rules correlated with these oppressive social conditions to ensure that any and all consequences of Black women's rape favored Whites' interests. Like lynching,⁴⁶ rape used sex and sexuality "to stifle Black women's will to resist and to remind them of their servile status."⁴⁷ This perverse yet pervasive sanctioning of rape speaks volumes to the extent to which sexual terrorism against Black women was institutionalized during this period, and "the paucity of antebellum cases featuring Black female victims of sex crimes is in itself eloquent testimony to [their] extreme vulnerability."⁴⁸

Institutionalization implies not only a legal component, but also a cultural one;⁴⁹ the eradication of the former does not necessarily lead to the demise of the latter. Yet, as a sociological matter, it would be imprecise to characterize Black women's sexual assault by White men from slavery to Reconstruction to Jim Crow as an instance of *institutional* sexism, racism, or some intersection thereof.⁵⁰ These experiences do not reflect institutionalism's traditional conceptual focus on actors' intent within legal institutions or race-neutral practices with disparate effects on particular subpopulations.⁵¹ The nature and number of sexual assaults perpetrated against Black women during these periods suggest that they were not unintentionally or unconsciously racist or sexist, yet to resign these acts to the legal and discursive arena of purposeful

46. Rape and lynching are generally understood as two sides of the same coin in terms of understanding how sex and sexuality were used as tools of social control. Patricia Hill Collins views lynching and rape as "race/gender-specific forms of sexual violence [that] merged with their ideological justifications of the rapist and prostitute . . . to provide an effective system of social control. . . . 'The mythical rapist implies the mythical whore—and a race of rapists and whores deserves punishment and nothing more.'" PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 177 (1990) (quoting Angela Davis, *Rape, Racism and the Capitalist Setting*, 9 *BLACK SCHOLAR* 24-30 (1978)).

47. ROBERTS, *supra* note 43, at 30. With regards to the systemic raping of Black women, Roberts states that "its intended long-term effect . . . was the maintenance of a submissive workforce. Whites' sexual exploitation of their slaves, therefore, should not be viewed simply as either a method of slave-breeding or the fulfillment of slaveholders' sexual urges." *Id.* at 29. *But see* MARABLE, *supra* note 40, at 73-74 (arguing that there is a stronger link between rape and slave owners' economic enrichment in that "[r]aping the Black woman was not unlike plowing up fertile ground; the realities of plantation labor descended into the beds of the slaves' quarters, where the violent ritual of rape paralleled the harsh political realities of slave agricultural production.").

48. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 176 (2003).

49. *See generally* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 *YALE L.J.* 1717 (2000) (borrowing from New Institutionalism, a sociological theory that seeks to understand the interplay between organizations and individuals by reading the underlying set of cultural practices that conditions behaviors and expectations in order to shed light on how judicial decision-making can simultaneously reject racism yet also empirically reveal discrimination towards people of color).

50. *See infra* Part IV.

51. *See* López, *supra* note 49, at 1727. López offers an alternative institutional model that diverges from these restraints, but this approach only partially applies here; its inquiry largely focuses on *nonintentional* behavior. López writes that the distinction between institutional and purposeful racism "resides in the extent to which actors recognize race as influencing their motivations. Institutional analysis . . . [helps explain] how persons engage in actions with clear and even recognized discriminatory effects, and yet stridently insist and genuinely believe that they possess no discriminatory intent." *Id.* at 1823.

racism⁵² is to unjustly focus on their individual character without adequately theorizing their social ramifications. However, Ian Haney López's version of new institutionalism offers a partial understanding of the legal and social significance of embedded behavior preferences—or what he terms scripts and paths⁵³—in explaining the gross disjunction that often occurs between what the law says and what people do, particularly in relation to matters of race. As with situations like Thurmond's "relationship" with Carrie Butler, it is not productive to relegate these men to the role of crazed sexual deviants taking advantage of whomever was most accessible. Moreover, it is similarly insufficient to frame women as the unwitting passive recipients of some binding cultural ideology. There seems to be a negotiated middle ground that allows us to understand how White men interpreted the assault of Black women as not only a right, but as *righteous* in the face of shifting legal norms slowly recognizing Black women's bodily integrity. It is in this space that we can begin to understand the relationship between and among race, sex, and sexuality in a manner that complements and builds upon intersectionality's contributions.⁵⁴

Understanding how status relationships are preserved in the face of transforming legal rules is key to this discussion,⁵⁵ and the notion of scripts and paths allows us to frame post-Civil War social conditions and grasp how and why, even after the Reconstruction Amendments provided Black women formal access to anti-rape statutes, White men continued to rape them with impunity. Randall Kennedy notes, "[T]hroughout the Reconstruction period, violent white supremacists used rape as a weapon of terror aimed at intimidating or punishing Blacks who dared to read, travel, work for themselves, or pursue politics."⁵⁶ These offenses were not just committed by a few hooded men riding horses at night, but were practiced by the White community at large. For example, during an 1868 race riot in Memphis, Whites angered by the presence of Black militiamen attacked the city's Black

52. Purposeful racism can be understood as "status-enforcing action stem[ming] from a consciously embraced desire to discriminate." *Id.* at 1811.

53. According to López, "'Script institutionalism' refers to institutional models of human behavior that emphasize stock prescriptions of conventional action, in which action stems from ingrained habits and responses with virtually no conscious thought." *Id.* at 1781. On the other hand, "path institutionalism" is understood as "the manner in which taken-for-granted knowledge prescribes not the specifics of action but its boundaries, channeling actors along certain courses within which some significant latitude in decision making is exercised." *Id.* at 1782.

54. See *infra* Part IV.

55. For a more detailed discussion on the preservation of status relationships through transforming legal regimes, see Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative*, 105 YALE L.J. 2117 (1996). Siegel notes that efforts to reform status regimes often elicit social change, but not always the change its advocates seek: "When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend." *Id.* at 2119.

56. KENNEDY, *supra* note 48, at 178.

community and murdered, beat, and raped several Black women.⁵⁷ In subsequent testimony before Congress, Black women from Memphis testified to being gang-raped by police officers. At least one Black woman was raped while pregnant.⁵⁸ In other congressional hearings, "Black women from all over the South . . . testif[ied] about being raped by white men enraged by black assertiveness."⁵⁹

As Reconstruction devolved into Jim Crow, White men's sexual aggression continued to be a horrifying reality for Black women. At a time when the normative model of family relations positioned men as the breadwinners while women worked at home, the fact that a Black man's labor was worth a fraction of his White counterpart's meant that his wife and daughters had to work outside of the home as domestic servants to Whites, placing them in remarkably vulnerable positions. As a result of being "[i]solated from witnesses, stereotyped as sexually lax, and deprived of powerful male protectors, Black female laborers who were raped or otherwise assaulted by white men stood little chance of receiving redress from police, prosecutors, juries, or judges."⁶⁰ Although it was not uncommon for criminal laws to be applied unequally in the early twentieth century, the lack of protection afforded to Black women from White perpetrators was particularly egregious, even when these women beat the odds and were able to secure a conviction. For example, over the course of his tenure from 1910 to 1914, Governor Cole Blease (one of Strom Thurmond's gubernatorial predecessors in South Carolina) pardoned more than a few White men convicted of raping Black women. His view was clear: "I am of the opinion, as I always been, and have very serious doubts as to whether the crime of rape can be committed upon a negro."⁶¹ Governor Blease also pardoned a White man convicted of raping a Black woman because he considered it incomprehensible that someone would risk incarceration for "what he could usually get for prices ranging from 25 cents to \$1."⁶² To the extent that Governor Blease's sentiments and actions reflect, at least in part, the preferences of his South Carolinian constituents⁶³ at

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* Kennedy also recounts the story of a Black nurse in 1912 who was dismissed after refusing the sexual advances of a White employer. After her husband confronted the White employer, the employer had him arrested. In court, the woman testified to the truth of her charges, which were denied by the employer, and the judge responded: "This court will never take the word of a nigger against the word of a white man." *Id.* at 179.

61. *Statement of Pardons, South Carolina, 1913*, at 236, 384, quoted in LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 269 (1998).

62. *Id.*

63. Litwack writes,

Like any good politician, Blease has a sense of what the community was willing and unwilling to tolerate in black behavior, and the tolerance level increased perceptibly if the "crime" had not involved whites. . . . Whatever his reputation for racial demagoguery, Blease in his often candidly expressed judgments reflected attitudes that would have resonated with whites in much of the South, including the "better sort" who might have chosen to articulate

a time immediately preceding Thurmond's sexual involvement with Carrie Butler, we now have both a broad and a narrow context from which to reflect upon their "relationship."

What is particularly striking in the Thurmond-Butler case is the discrepancy between journalists' absolution of Thurmond for any wrongdoing and the facts at hand. When asked whether her mother consented to having sex with Thurmond, Essie Mae Washington-Williams told CBS News's Dan Rather that her mother "didn't go into details how anything happened. She only . . . introduced me to him as my father. But she didn't go into any details about any affair they had together."⁶⁴ When Rather asked whether her mother cared for Thurmond, Washington-Williams merely replied, "she thought he was a very nice person."⁶⁵

Such statements may have led some journalists to cease further inquiries into Butler's consent, as Washington-Williams's recounting of her mother's favorable recollection of Thurmond seems incompatible with what are understood to be the normative sentiments a "real" rape victim *ought* to have towards her assailant. Yet it may be premature, if not wholly inaccurate, to allow such "evidence" to procure this conclusion. According to the National Center for Victims of Crime, a significant number of acquaintance rape victims blame themselves for what happened rather than their assailant, which can allow them to experience rape's physical and emotional trauma without necessarily blaming or thinking less of their attacker.⁶⁶ Recent clinical research highlights how sexual assault often occurs in the context of existing relationships and power relations that produce coping mechanisms—what Kristen Bumiller labels in the post-Civil Rights Movement employment context an "ethic of survival"⁶⁷—which is not always outwardly consistent with how

them in a more sophisticated legalese. Blease saw no need to hide his views; he might be accused of crass bigotry, but never of pretense.

LITWACK, *supra* note 61, at 269.

64. Interview by Dan Rather with Essie Mae Washington (Dec. 17, 2003), *available at* <http://www.cbsnews.com/stories/2003/12/17/6011/main589107.shtml>. Oddly enough, Washington-Williams's autobiography (written with William Stadiem), published nearly two years after the CBS interview, sharply contradicts this statement. In the book, she recalls Butler telling her of a romance that began in the Thurmonds' kitchen and vegetable garden and ended in a sexual encounter in the "big house." Washington-Williams's autobiography also implies that she and Butler had discussed some aspects of Butler's relationship with Thurmond, where Butler said of Thurmond, "[L]ove is love. It's color-blind. Besides . . . all that hate talk is just politics." WASHINGTON-WILLIAMS & STADIEM, *supra* note 9, at 41-42. It is not clear if these contradictions come from the clarity of mind afforded by time or by the literary liberties (and sometimes inaccuracies) that come with co-authoring an autobiography with someone else. Where there is such plain contradiction, this Article takes the statements that were first in time and of the unambiguous voice of Essie Mae Washington-Williams as the most accurate.

65. Interview by Dan Rather with Essie Mae Washington-Williams, *supra* note 64.

66. See NATIONAL CENTER FOR VICTIMS OF CRIME, ACQUAINTANCE RAPE, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32306> (last visited Nov. 18, 2006).

67. KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 88 (1988). The employment discrimination analogy is particularly apt considering that, in addition to the power dynamic created by Butler's status as a Black woman and Thurmond's as a White man, there was

society expects victims to behave.⁶⁸ Moreover, "sex-role socialization encourages this type of rape victim to see herself as a possible *contributor* to her own victimization."⁶⁹

I present these clinical insights not to pathologize Carrie Butler, but rather to put her particular life experiences in the most appropriate social context. While there are notable distinctions between today's acquaintance rape victims and the conditions endured by Black women under Jim Crow, there are enough parallels to begin reframing Washington-Williams's "testimony" in the context of Rather's questions about the consensual nature of her parents' "relationship" as a form of *sociological hearsay*. That is, where rules of legal hearsay⁷⁰ would exclude such evidence from a formal legal proceeding because the statement was made by someone other than the declarant (e.g., Washington-Williams) and was offered to prove the truth of the matter asserted (e.g., that Thurmond was in fact nice and, inferentially, nice to Butler in a manner that precludes the possibility of rape or sexual assault), so too should we as social critics similarly question the statement's value as we assess the contours of this "relationship." While as a legal matter of evidentiary admissibility such statements may eventually be permissible,⁷¹ I offer this concept only to suggest that we apply the same logic and scrutiny demanded by the rule of law to our perception, cognition, and reading of past events. If anything, this historical and sociological backdrop combined with the hearsay rule's skepticism allows us to appreciate the extent to which Washington-Williams's retelling of her mother's sentiments towards Thurmond may not necessarily be dispositive with regards to what actually occurred between her biological parents.

One can never truly know if Butler consented to sex with Thurmond. In the next Section, however, I address a separate question: Given that Butler was likely to have been fifteen years old at the time she conceived Essie Mae Washington-Williams, could she legally consent to sexual relations with Thurmond?

the overlaying and further legitimizing power differential in Butler's status as an employee of Thurmond's parents.

68. See generally JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* (1992) (describing the hardships endured by victims of sexual and domestic violence who balance their psychological and emotional trauma with having to live in a society that often denies the prevalence of such atrocities).

69. Linda S. Williams, *The Classic Rape: When Do Victims Report?*, 31 SOC. PROBS. 459, 464 (1980).

70. See FED. R. EVID. 801 (describing the federal hearsay rule).

71. See FED. R. EVID. 804 (discussing the admissibility of hearsay evidence in federal court when the declarant is unavailable).

B. Statutory Rape in Early Twentieth-Century South Carolina



Strom Thurmond Collection, Clemson University. Reprinted by permission. This photograph dates to the early 1900s.

Early twentieth century South Carolina law was atypical in that its provisions for what is commonly referred to as statutory rape were part of both its criminal code and its state constitution. This has led to some confusion—and indeed misreporting—as to what acts were legally permissible at the time Essie Mae Washington-Williams was conceived. Article III, section 33 of the South Carolina Constitution states, “No married woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years.”⁷² However, in 1922, the state’s criminal statutes were amended to make it a felony for any person to “unlawfully and carnally know and abuse any woman child under the age of sixteen years.”⁷³ These apparently conflicting legal standards coexisted without controversy until 1931, when the South Carolina Supreme Court decided *State v. Wilson*.⁷⁴ The facts of this case are straightforward. Wilson, an adult male, was charged with “assault with intent to ravish” a ten-year-old girl.⁷⁵ He was convicted and sentenced to fifteen years of imprisonment, whereby on appeal the defendant asserted, in part, that he was unduly prosecuted under the wrong law—article III, section 33 of the state

72. S.C. CONST. art. III, § 33.

73. S.C. CRIM. CODE § 9 (1922).

74. 161 S.E. 104 (S.C. 1931).

75. The court states at the beginning of its opinion that “[t]he victim of the alleged assault was a colored girl; and the appellant, of the same race, was a minister of the gospel.” *Id.* at 108. The opinion was written by Justice Eugene Blease of Newberry, South Carolina—likely to be a relative of Governor Cole Blease (also of Newberry, South Carolina) who had a notoriously inflammable opinion of Black women. See *supra* note 61 and accompanying text.

constitution instead of section 9 of the Criminal Code—to the extent that they have conflicting standards as to what constitutes impermissible sex with a minor. As the court noted, this was an odd, weak argument on appeal; the victim in this case was young enough to fall under the protection of either law.⁷⁶ Nevertheless, the court proceeded to the merits of the appellant's claim, and in doing so, shed light on the state's legal standard regarding sex between adults and minors. In giving primacy to the provisions of the state constitution, the court noted that any legal enactment made prior or subsequent to the South Carolina constitution and in conflict with it must yield.⁷⁷ Thus, in construing the state constitution according to this common law principle, the majority concluded that the "unlawful carnal knowledge of a female child under the age of fourteen years, either with or without her consent, is rape."⁷⁸ However, one ought not conclude that this is an implicit repeal of section 9 of the Criminal Code since this holding only pertains to the issue of *consent*. It was still presumptively illegal after *Wilson*—and thus, ostensibly before *Wilson* in 1925 when Essie Mae Washington-Williams was conceived—for a man to "unlawfully and carnally know and abuse any woman child under the age of sixteen years" pursuant to section 9, regardless of whether she was legally capable of consenting to sex. *Wilson*, inasmuch as it functions as an evidentiary rule, is only dispositive as to the age when a female can legally consent to sexual activity in South Carolina.⁷⁹ Section 9 of the Criminal Code shifts the inquiry from whether or not a female was capable of consent to whether a male committed an overt act proscribed by law, in that one can do (and be punished for) the latter irrespective of and in addition to the former. Despite significant

76. *Wilson*, 161 S.E. at 108 ("A reading of appellant's brief discloses that some of the positions taken are contradictory."). However, in giving the appellant the benefit of the doubt, the court clarifies the appellant's position by focusing on the argument that the defendant's indictment did not include a charge of a violation of section 9 of the Criminal Code, and therefore he could not be found guilty of a crime for which he was not charged.

77. The court notes,

It is absolutely clear that, when the organic law was adopted, the age at which an unmarried woman might consent to sexual intercourse was fixed at 14 years, and the common law, as to the age of consent, and any law of force in South Carolina theretofore, in conflict therewith, was abrogated. To the constitutional provision any and all statutes enacted prior thereto, must yield . . . and if there is conflict between [subsequent] statutes and the constitutional provision, the former must give way.

Id. at 110 (emphasis in original).

78. *Id.* (emphasis omitted).

79. The *Wilson* court writes,

The constitutional provision operated only on the question of consent to sexual intercourse, creating a new rule of evidence in the proof of consent,—declaring certain persons incapable of consenting. Therefore, under the common law, in an indictment for rape it was unnecessary to allege that the female was [underage], but, notwithstanding that, proof was allowed, or competent to be made, as to the age of the child, because to prove one incapable of consenting either in law, or by reason of physical condition, is tantamount to proving the absence of consent; as, in this State, there may be an indictment for rape without alleging that the female is unmarried and under 14 years old, and under such indictment it may be proven by the State, in its testimony in chief, that the female is unmarried and under 14 years old, in order thereby to establish that the sexual intercourse was without consent, or such proof may be offered by the State in reply to defendant's defense that the female actually consented.

Id. at 111-12 (emphasis omitted) (quoting *State v. Haddon*, 27 S.E. 194, 196 (1897)).

overlap, the *Wilson* court refused to abrogate section 9 in this first judicial review of the two provisions, noting that “a decision as to the value of section 9 is not necessary at this time, . . . [but the provision] may be of effective benefit. The question is not as to the *uselessness* of section 9; it concerns the *usefulness* of the constitutional provision.”⁸⁰ In essence, the *Wilson* court left open a small window that, despite actual or statutory consent, criminalized the carnal knowledge of a fifteen-year-old—the likely age of Carrie Butler at the time she had sexual relations with Strom Thurmond.

Pinning down Carrie Butler’s exact age at the time she conceived Washington-Williams is difficult because official birth certificates were uncommon among poor Black people in Edgefield, South Carolina at the turn of the century. What we do know, however, is that Essie Mae Washington-Williams was born on October 12, 1925, meaning that it is likely that she was conceived in mid-to-late January of 1925. According to Washington-Williams’s account, her mother was born in either 1909 or 1910. This date range means that in order for Thurmond to evade charges of a section 9 violation, Butler would have had to have been born no later than early January 1909.⁸¹ Moreover, this careful alignment would also rely upon an assumption that there was no sexual contact between Butler and Thurmond prior to 1925, as conception itself only demonstrates that sex occurred at least once, not that it was the first or only sexual contact between Thurmond and Butler.

Though Washington-Williams later confirmed that her mother was indeed fifteen years old at the beginning of her “relationship” with Thurmond,⁸² what becomes particularly interesting is the extraordinary measures journalists took to convince the public that Butler was sixteen at the time of the affair, presumably *legally* competent to consent, and therefore not raped. See, for example, Marilyn W. Thompson’s follow-up article to her piece breaking this news in *The Washington Post*: “Williams’s mother, Carrie Butler, was 16 and Thurmond was 22 *when the baby was born*. At the time, the age of consent in South Carolina was 14.”⁸³ Or consider Kathleen Parker’s article in the *Orlando Sentinel*: “[W]hat would be statutory rape was perfectly legal in 1925 when the black family maid *gave birth* to Thurmond’s daughter.”⁸⁴

80. *Id.* at 112 (emphasis in original). In prodding the limits of the relationship between the constitutional and statutory provisions, the court asks rhetorically,

Shall the provision of section 33, article 3, of our highest law, be made useless because the General Assembly has continued to retain as a part of our statutory law the provisions of section 9 of the Criminal Code, which were deemed necessary for the protection of little girls? . . . If it is still necessary in a case of rape, or of assault with intent to ravish, on an unmarried female under 14 years of age *to show force*, then the constitutional provision was *absolutely useless*.

Id.

81. See Kimberlé Williams Crenshaw, *Was Strom a Rapist?*, THE NATION, March 15, 2004, at 5.

82. WASHINGTON-WILLIAMS & STADIEM, *supra* note 9, at 41.

83. Thompson, *supra* note 32 (emphasis added).

84. Kathleen Parker, *Strom’s Daughter is a Class Act*, ORLANDO SENTINEL, Dec. 21, 2003, at G3 (emphasis added).

This line of reasoning is troubling. Not only were journalists' investigations into South Carolina's statutory rape laws remarkably inadequate, but Thompson's and Parker's articles epitomize the inaccurate reporting regarding this story's possible criminal aspects. There is little dispute that Butler may very well have been sixteen when she *gave birth* to Washington-Williams, but this does not necessarily speak to her age when she *had sex* with Thurmond. Even Washington-Williams's adolescent children immediately understood the criminal implications when told that Strom Thurmond was their grandfather,⁸⁵ yet somehow seasoned adult journalists missed the link. CBS's Dan Rather also played an interesting role:

Dan Rather: So your mother was working for the Thurmond family?

Essie Mae Williams: Yes.

Dan Rather: She was 16?

Essie Mae Williams: Around 16 years of age.

Dan Rather: And Strom Thurmond at that time was how old? In his 20s?

Essie Mae Williams: 22.

Dan Rather: So he was 22. Your mother was 16.

Essie Mae Williams: Yes.⁸⁶

"Around 16 years of age" is not necessarily sixteen years old; this statement alone should have alerted Rather and other journalists to the possibility that Butler may have been fifteen at the time. Rather's willingness to fix Thurmond's and Butler's ages at twenty-two and sixteen is certainly surprising, yet what is more troubling is the underlying sentiment that these journalists share: that legality presumably makes this aspect of the Butler-Thurmond narrative morally unproblematic, leaving only its racial and political implications open for public discussion. This is not to say that journalists had a conscious motive or purposefully misreported this story. Rather, it is to put forward that a more constitutive ideology was at play—passively transforming Butler's and Washington-Williams's story of struggle and perseverance in the face of racial and sexual terror into a narrative absolving Thurmond of wrongdoing.

Altogether, there is considerable evidence supporting the likelihood that Strom Thurmond raped or sexually assaulted Carrie Butler. This evidence calls into question not only journalists' assertions that the "relationship" was legal

85. In her autobiography, Washington-Williams recalls how she told her children that Thurmond was their grandfather: "Not one of them believed that Strom Thurmond loved my mother. 'You're fooling yourself, mom,' Monica said. 'I'm sure he took advantage of her.' . . . 'That's what rich, white men do to their servants,' Ronald reinforced her. 'She was scared to death of him. She had no choice.'" WASHINGTON-WILLIAMS & STADIEM, *supra* note 9, at 196.

86. *60 Minutes II: Essie Mae on Strom Thurmond: Part I of Dan Rather's Interview with Biracial Daughter* (CBS television broadcast Dec. 17, 2003), available at <http://www.cbsnews.com/stories/2003/12/17/60II/main589107.shtml> (emphasis added).

and consensual, but also their narrative that Thurmond was, at worst, only a hypocrite for publicly preaching segregation while having privately engaged in a very intimate form of integration. This Article has challenged this framing by showing that social and legal norms at this time were constituted, in part, by and through Black women's sexual exploitation.⁸⁷ Sex with Black women, who had little capacity to "say no," was both a script and path of early twentieth-century White masculinity.

Some may point to Thurmond's ongoing relationship with Butler and Washington-Williams⁸⁸—including years of financial support⁸⁹—as further evidence of hypocrisy; surely a segregationist may sexually gratify himself with Black women, but to secretly support and maintain a relationship with his "Black family" while campaigning as a Dixiecrat demonstrates, to many, a racial sensitivity absent from his public life. This perspective may also be a bit misguided. During slavery, for example, it was not uncommon for White men to "look after" their bi-racial children, either by emancipating them or by offering them relatively plum jobs as domestic servants rather than hard-laboring field hands.⁹⁰ "Taking care of one's own," even when one's own was half-Black, was yet another script and path of White southern masculinity and did little to mitigate White men's sense of racial superiority.⁹¹ As Essie Mae Washington-Williams notes: "What Strom Thurmond was doing with me [in terms of occasional mentoring and financial support], then, was part of a long Edgefield tradition."⁹²

Strom Thurmond was therefore anything but a hypocrite; his behavior was entirely consistent with centuries of racial and sexual exploitation experienced by the Black community. Given these corrections to journalists' "hypocrite" and "consensual sex" narratives, it is important to now ask: How did these misrepresentations occur? How did a story that, in essence, reflects the structural hardships and sexual exploitation of Black women become a narrative about a White man's alleged political inconsistencies? What

87. See Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984) (describing how the southern racial caste system was partly maintained through controlling and exploiting sexual relationships).

88. See generally WASHINGTON-WILLIAMS & STADIEM, *supra* note 9 (chronicling Washington-Williams's lifelong relationship with Thurmond).

89. Thurmond Bishop, Strom Thurmond's nephew who handled the financial transactions between Thurmond and Washington-Williams, "estimated that altogether [Essie Mae Washington-Williams] received more than \$100,000, which in terms of inflated 2004 dollars would be several times that." BASS & THOMPSON, *COMPLICATED LIFE*, *supra* note 18, at 357.

90. See Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1714-18 (2000).

91. It is likely that this "taking care of one's own" sensibility is also tied up with the sense of "honor" that ran deep in the Old South, where a man's social worth and personal identity were inextricably linked to his ability to care for his family and 'keep his word.' Indeed, Bertram Wyatt-Brown notes, "Honor, not conscience, shame, not guilt, were the psychological and social underpinnings of Southern culture." BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* 22 (1982).

92. WASHINGTON-WILLIAMS & STADIEM, *supra* note 9, at 55.

influences led to the erasure of sex and sexual assault—typically hot topics for today’s journalists—and the out-of-character fixation on racial hypocrisy, which is not uncommon in contemporary politics yet often overlooked? Intersectionality has been the approach most capable of enhancing our understanding of these shifts and choices, and I turn to it to answer these questions in the next Part.

IV. TOWARD INTERSECTIONALITY

A. *Feminism and Anti-Essentialism*

Before delving into intersectionality, it is useful to first look at rape jurisprudence and critical legal scholarship in this area to both introduce and contextualize how a woman-centered approach to rape differs from lay and legal understandings. This provides a deeper and richer backdrop from which to understand journalists’ shortcomings in reporting the Thurmond-Butler story. At common law, rape was defined as having “carnal knowledge of a woman forcibly and against her will.”⁹³ This only included sexual intercourse; other nonconsensual sexual acts with a minor were usually punished as other crimes. Although this common law definition is terse, it generally included four elements: (1) the defendant had sexual intercourse (2) with a woman not his wife (3) using physical force or the threat of force and (4) without her consent.⁹⁴ Despite substantial shifts in rape law during the late twentieth century, feminist scholars have critiqued this common law tradition and its subsequent permutations in contemporary rape jurisprudence as inherently sexist. Indeed, much of rape law has its origins in contract and property law, in that such sexual transgressions were not recognized as violent encroachments on women’s autonomy,⁹⁵ but on her husband’s interests.⁹⁶ Moreover, this

93. 4 WILLIAM BLACKSTONE, COMMENTARIES 210.

94. See Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV. 625, 628 (2005).

95. Catharine MacKinnon notes,

[T]he crime of rape centers on penetration. The law to protect women’s sexuality from forcible violation and expropriation defines that protection in male genital terms. Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women’s sexuality, pleasure or violation, than it is to male sexuality. This definitive element of rape centers upon a male-defined loss. It also centers upon one way men define loss of exclusive access. In this light, rape, as legally defined, appears more a crime against female monogamy (exclusive access by one man) than against women’s sexual dignity or intimate integrity.

CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989) (footnotes omitted).

96. Seventeenth-century jurist Matthew Hale writes, “But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (photo. reprint 1987) (1736). This spousal immunity to rape was further bolstered at common law by a “unity concept,” which held that after marriage, the husband and wife became one person under the law with neither retaining a separate legal existence, ergo one cannot legally rape oneself. See *State v. Smith*, 426 A.2d 38, 41-43 (N.J. 1981).

phallic-centered actus reus worked in conjunction with a mens rea⁹⁷ that, contrary to the common law tradition of investigating perpetrators' mental state, was functionally "defined according to the response of the victim; and nonconsent—the sine qua non of the offense—turns entirely on the victim's response."⁹⁸ Where most crimes define the actus reus by what the victim experienced (for example, did the gunshot victim die, was he injured, or did the bullet completely miss?) and the mens rea by what the perpetrator intended (e.g., did the shooter try to kill the victim or did the weapon accidentally discharge?), rape jurisprudence moves in the opposite direction in analyzing the physical act by perpetrator norms and framing the question of intent by what was going on in the victim's mind.⁹⁹ As a result, feminist legal scholars have taken note that the problem with this jurisprudence is that the injury

lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant. Rape is only an injury from women's point of view. It is only a crime from the male point of view, explicitly including that of the accused.¹⁰⁰

A significant contribution from feminist thought is the recognition that with rape, "sexuality defines gender norms."¹⁰¹ By bringing sexuality into the equation and centering it as the paradigmatic way in which society understands "normal" and "deviant" behavior between men and women, feminists have framed rape's legal problem as "determin[ing] whose view of [the meaning of the sexual encounter] constitutes what really happened, as if what happened objectively exists to be objectively determined"¹⁰²—an inquiry that the law has assumed to be distinguishable from any meaningful discussion about gender, sexuality, or how they influence a variety of social interactions. Yet, given the previous discussions on rape's social history from slavery through Jim Crow, is

97. It is important to note that at common law there was not a mens rea component to adjudicating rape claims. However, this absence of an investigation into the perpetrator's mental state resurfaced as an investigation into the victim's mental state through the legal fixation on consent.

98. Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1094 (1986).

99. Estrich notes that while the focus of the rape inquiry is on the female victim, the judgment of her actions is entirely male. "If the issue were what the defendant knew, thought, or intended as to key elements of the offense, this perspective might be understandable; yet the issue has instead been the appropriateness of the woman's behavior, according to male standards of appropriate female behavior." *Id.* at 1094.

100. MACKINNON, *supra* note 95, at 180. MacKinnon and Estrich are not the only scholars writing in this area. They do, however, provide a clear articulation of a traditional feminist perspective. For other critiques and perspectives, *See, e.g.*, SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975); NANCY GAGER, *SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA* (1976); ANDRA MEDEA, *AGAINST RAPE* (1974); DIANA E. H. RUSSELL, *THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE* (1975); Jacquelyn Dowd Hall, *The Mind That Burns in Each Body*, in *POWERS OF DESIRE* 328 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983); Darlene Clark Hine, *Rape and Inner Lives of Black Women in the Middle West: Preliminary Thoughts on the Culture of Dissemblance*, in *THE GENDER/SEXUALITY READER* 434 (Roger N. Lancaster and Micaela di Leonardo eds., 1997); Valerie Smith, *Split Affinities: The Case of Interracial Rape*, in *CONFLICTS IN FEMINISM* 271 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

101. MACKINNON, *supra* note 95, at 180.

102. *Id.*

it accurate to say that sexuality, in itself, defines gender norms in rape law's construction?

Though laudable in its attempt to posit a woman-centered analysis of rape jurisprudence, these claims have become increasingly subject to accusations of gender essentialism. Angela Harris notes that gender essentialism involves "the notion that a unitary 'essential' women's experience can be isolated and described independently of race, class . . . and other realities of experience."¹⁰³ This perspective highlights the extent to which feminism silences certain voices (most notably, those of women of color) in a manner that mirrors, if not affirmatively plays upon, the silencing of these same voices through mainstream legal thinking. While not racist per se,¹⁰⁴ feminism's tendency to advance an abstract woman's standpoint that does not engage with the nuances and complexities resulting from other identity traits (for example, race, class, ethnicity) ultimately renders women of color invisible. In opposition to this view, anti-essentialists and Black feminist scholars have suggested a counter-epistemology that resists the elision of difference under the presumptively unitary umbrella of "woman" by "encompass[ing] theoretical interpretations of Black women's reality by those who live it."¹⁰⁵

Much of anti-essentialism's critique is grounded in a distinct perspective on rape and rape jurisprudence. This is not to say that anti-essentialists necessarily disagree with the aforementioned feminist outlook. Rather, their claim is that these perspectives only represent one reality, or, more specifically, a partial reality with regards to other concerns involving rape that emanate from other aspects of the self, including race. In particular, Angela Harris criticizes the feminist assertion that problems of rape center on the divide between men and women, in which race is only an ancillary concern rather than a standpoint from which to understand how certain men relate to specific populations of women.¹⁰⁶ Thus, Harris concludes that this permutation of feminism "is an analysis of what rape means to white women masquerading as a general account; it has nothing to do with the experience of black women. For black women, rape is a far more complex experience, and an experience as deeply

103. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1989).

104. Harris notes that the gender essentialism espoused by feminist legal scholars is not indicative of any personal antipathy they may harbor towards Black people. Rather, "[j]ust as law itself, in trying to speak for all persons, ends up silencing those without power, feminist legal theory is in danger of silencing those who have traditionally been kept from speaking, or who have been ignored when they spoke, including black women." *Id.*

105. Patricia Hill Collins, *Defining Black Feminist Thought*, in RACE CRITICAL THEORIES: TEXT AND CONTEXT 152, 155 (Philomena Essed & David Theo Goldberg eds., 2002).

106. MacKinnon's writings reflect traditional feminism's deracialized male/female dichotomy, whereby rape law is seen as dividing women into various categories of presumed consent. Where a particular woman falls "depends upon who she is relative to a man who wants her, not what she says or does. These categories tell men whom they can legally fuck, who is open season and who is off limits, not how to listen to women." MACKINNON, *supra* note 95, at 175.

rooted in color as in gender.”¹⁰⁷ Dorothy Roberts corroborates this sentiment: “American society has always defined rape in terms of race. Race is not a peculiar aspect of rape; race helps to determine what rape means.”¹⁰⁸

B. Intersectional Perspectives on Race, Gender, and Rape

Where feminism has not fully represented women of color, intersectionality represents an opportunity to rebuild a positive account of how multiple identities and forms of discrimination constitute their experience. As a theoretical and methodological response to feminism’s shortcomings, intersectionality builds on important threads in both sociological and legal literature that, despite small variations, constitutes a fairly parsimonious approach. From a sociological perspective, Patricia Hill Collins frames intersectionality as a “remind[er] . . . that oppression cannot be reduced to one fundamental type and that oppressions work together in producing injustice.”¹⁰⁹ Thus, “[i]ntersectional paradigms view race, class, gender, sexuality, [and] ethnicity . . . as mutually constructive systems of power.”¹¹⁰ This implies that the convergence of these particular lines of oppression can be leveraged as a material site from which to “theorize upward” in gaining insight on individual life experiences and social relations. From this perspective, intersectionality has deep connections with classic standpoint theory,¹¹¹ yet nonetheless remains critical of its “additive” approach to framing the relationships between and among multiple oppressions.¹¹² Rather than universalizing experiences along this overly quantitative framework, Collins develops intersectionality as an opportunity for groups experiencing multiple oppressions to “speak[] from

107. Harris, *supra* note 103, at 598 (footnote omitted). Harris also notes that by “recreat[ing] the paradigmatic woman in the image of the white woman,” feminist essentialism misreads Black women’s experiences as “just like us, only more so.” *Id.* at 601. Perhaps most importantly, Harris argues that “feminist essentialism represents not just an insult to black women, but a broken promise—the promise to listen to women’s stories, the promise of feminist method.” *Id.*

108. Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 CHI.-KENT L. REV. 359, 364 (1993) (footnote omitted).

109. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 18 (2d ed. 2000).

110. PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* 11 (2004).

111. Standpoint theory is an approach developed in the late 1960s and early 1970s by feminist sociologists such as Dorothy Smith and Sandra Harding that highlights the extent to which “all knowledge is affected by . . . the social location and social biography of the observer and the observed.” Susan A. Mann & Lori R. Kelley, *Standing at the Crossroads of Modernist Thought: Collins, Smith, and the New Feminist Epistemologies*, 11 GENDER & SOC’Y 391, 392 (1997). Hence, standpoint theory represents a commitment to using the material conditions of women as a source of social truth. *See also* THE FEMINIST STANDPOINT THEORY READER: INTELLECTUAL AND POLITICAL CONTROVERSIES (Sandra Harding ed., 2004).

112. Collins notes that one implication of standpoint theory is the perception that the more subordinated the group, “the purer the vision available to them. . . . Although it is tempting to claim that Black women are more oppressed than everyone else and therefore have the best standpoint from which to understand the mechanisms, processes, and effects of oppression, this is not the case.” COLLINS, *supra* note 109, at 270.

[their] own standpoint and share[] [their] own partial, situated knowledge.”¹¹³ Hence, Collins’s intersectional framework critically resituates our normative epistemology concerning “the content of what currently passes as truth and simultaneously challenges the process of arriving at that truth.”¹¹⁴

Kimberlé Crenshaw’s writings have brought intersectionality into everyday legal discourse, where having an accurate understanding of victims’ daily experiences can profoundly affect whether legal remedies are neglected or pursued.¹¹⁵ Both Collins and Crenshaw are concerned with how the failure to incorporate intersectional analyses renders women of color invisible. Yet, Crenshaw’s scholarship has been particularly salient. By exploring how legal standards often ignore the needs of women of color, Crenshaw’s writings challenge assumptions embedded in law and legal advocacy by creating a space for their material conditions to become legally cognizable without requiring separate statutory remedies for women and racial minorities.¹¹⁶ Crenshaw offers a useful metaphor for this distinct intersectional experience:

Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.

Judicial decisions which premise intersectional relief on a showing that Black women are specifically recognized as a class are analogous to a doctor’s decision at the scene of an accident to treat a victim only if the injury is recognized by medical insurance. Similarly, providing legal relief only when Black women show that their claims are based on race or on sex is analogous to calling an ambulance for the victim only after the driver responsible for the injuries is identified. But it is not always easy to reconstruct an accident: . . . In these cases the tendency seems to be that no driver is held responsible, no treatment is administered, and the involved parties simply get back in their cars and zoom away.¹¹⁷

113. *Id.*

114. *Id.* at 271.

115. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing how the experiences of battered and/or raped women of color are often the product of intersecting patterns of racism and sexism that are not reflected in feminism or antiracism’s traditional discourses).

116. Crenshaw notes that feminist theory and anti-racist policy have largely failed to take into account how the interaction of race and gender create a discrete set of experiences, and that this absence ultimately excludes women of color. She argues that this “exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.” Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex; A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140.

117. *Id.* at 149.

Thus, Crenshaw suggests that Black women “experience discrimination in ways both similar to and different from those experienced by white women and Black men. . . . Yet often they experience double-discrimination. . . . And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.”¹¹⁸

Like Collins, Crenshaw provides an intersectional model that fixes the subject without fixing the subjective experience. That is, while every woman of color can be metaphorically located at the intersection of Bancroft and Shattuck, she can be injured by a barreling truck of discrimination traveling in any one or multiple directions.

This notion of fixing the subject without fixing an a priori experience has fueled a number of “post-intersectional” critiques that applaud intersectionality’s contributions but are critical of its implied limitations for identity politics.¹¹⁹ Regardless of one’s take on these accounts, fixing the subject without fixing an experience has functioned as a sine qua non of intersectionality and has influenced its approach to rape and rape jurisprudence. Both Collins and Crenshaw retreat from the traditional feminist account of rape being primarily a gendered phenomenon and instead fix their analyses’ subject at the intersection of racism and sexism to theorize rape as a sexualized form of social control over African-Americans. By bringing attention to the rape of Black women by White men without diminishing the significance of intraracial sexual assault, intersectionality reframes rape as not simply a manifestation of male dominance, but as the “visible dimensions of a more generalized, routinized system of oppression”¹²⁰ and even as a “weapon of racial terror.”¹²¹ Thus, intersectionality posits that when White men systematically raped Black women during slavery and Jim Crow, “they were being raped *not* as women generally, but as Black women *specifically*: Their femaleness made them sexually vulnerable to racist domination while their Blackness effectively denied them any protection.”¹²² Moreover, intersectionality contends that these past occurrences effectively condition the contemporary experiences of all

118. *Id.*

119. See Kwan, *supra* note 23, at 1277. Kwan writes:

[I]ntersectionality risks theoretical collapse as categories multiply. . . . Even if, hypothetically, one can precisely reduce, define and fully describe this complex matrix of identities, and repeat this process on everyone else, we are left with a comprehensive intersectional model of all individuals, but no way of comparing each individual’s experiences. . . . [Moreover this prevents] the forging [of] ideological coalitions, political allegiances, or communities of support. Ultimately, intersectionality forces one to decide *a priori* which identities matter, and this is theoretically no different than a pre-intersectionality approach.”

Id. See also Hutchinson, *Identity Crisis*, *supra* note 23, at 311; Hutchinson, *Ignoring the Sexualization of Race*, *supra* note 23, at 10 (proposing a new theory of “multidimensionality” that “brings to intersectional scholarship [an] examination of heterosexist subordination (alongside race, gender, and class), a topic that is omitted from much of the intersectionality literature.”).

120. COLLINS, *supra* note 109, at 146.

121. Crenshaw, *supra* note 116, at 158.

122. *Id.* at 158-59 (emphasis added).

Black women in a manner that resembles a form of historical determinism.¹²³ Collins writes, “Black women continue to deal with this legacy of the sexual violence visited on African-Americans generally and with *our history as collective rape victims*.”¹²⁴

C. Intersectionality's Limits

Intersectionality has at least three limitations. First, its historical materialism is seen by some as creating a distinctively unidirectional methodology—that is, intersectionality’s epistemology is structured to understand the significance of multiple oppressions in only one direction: past → present. Intersectionality implies that we can only understand the subject fixed at the intersection to the extent that the subject has been treated a certain way over an extended period of time. The intersectional methodology extends beyond providing historical context and can be effectively understood as demonstrating an experiential or narrative commonality between contemporary subjects and their foremothers. This may unduly limit its ability to understand how current legal and sociological trends, in addition to discursive shifts, affect, mitigate, and, at times, disrupt our reading of the past in a more multidirectional manner: past ↔ present.¹²⁵ Intersectionality’s harshest critics may argue, with or without merit, that the theory breaks down into a tautology by effectively advocating that “Black women experience intersecting oppressions because they are Black women and Black women have always had this experience.” If one takes these concerns seriously, it may be helpful to have a model that not only reads the *substantive* experiences of subjects as part of a historical continuum, but also moves in other directions to understand the always-transforming *processes* that affect the social interpretation of the meanings that undergird identity and subordination.

Secondly, intersectionality implies that the social construction of race and gender occurs independently rather than interpenetratively. That is, if one takes

123. It is important to highlight the close relationship between Marxism and various “woman-centered” critiques of the social order, including standpoint theory, Black feminist thought, and intersectionality. Nancy Hartsock writes, “just as Marx’s understanding of the world from the standpoint of the proletariat enabled him to go beneath bourgeois ideology, so [too can] a feminist standpoint allow[] us to understand patriarchal institutions and ideologies as perverse inversions of more humane social relations.” Nancy C.M. Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in *THE FEMINIST STANDPOINT THEORY READER: INTELLECTUAL AND POLITICAL CONTROVERSIES* 36 (Sandra Harding ed. 2004). Working from this link between Marxism and standpoint perspectives, Hartsock argues that it is possible to “conclude then that women’s life activity does form the basis of a specifically feminist materialism, a materialism which can provide a point from which both to critique and to work against phallocratic ideology and institutions.” *Id.* at 50. Though several distinctions remain between classic feminism and intersectionality, this conception of history as inevitably materializing towards a more egalitarian society is an important point of commonality.

124. COLLINS, *supra* note 109, at 147 (emphasis added).

125. See *infra* Part V (contrasting this shortcoming of intersectionality with interactionality’s seamless integration of colorblindness).

the metaphor and its explanation at face value, intersectionality implies a spatial geometry¹²⁶ where the “race part” and “gender part” exclude one another *but for* their specific point of commonality, whereby this is the only site where they mutually construct one another. While the subject may be located within a field of discrimination, we can see from the traffic analogy¹²⁷ that the specific causal mechanisms—in this case, race and gender discrimination—travel independently along separate axes until they mutually converge on the fixed subject, who experiences a unique discrimination that only exists at that point of convergence. This notion, even at the level of metaphor, furthers a sociologically disfavored premise that we can or should understand the social construction and meaning of sex and race categories independently of each other.¹²⁸

Lastly, intersectionality can be seen as implying that race and gender, as independent axes of identity and subordination, converge mutually and on equal footing. Thus, even if we accept that it is possible to analytically distinguish between “race” and “gender” as socially constructed entities, intersectionality may not fully explain if and how one part may take primacy over another, in terms of the subjective experiences conditioned by intersectional oppressions, the causal agent, and/or the push and pull of external social conditions. In short, by building a model that presumes that the convergence of intersecting oppressions occurs with equitable magnitudes (or, in the alternative, does not readily incorporate the possibility of differing degrees), intersectionality may not fully support investigations into, for example, how race can construct gender (or vice versa) in relation to the particular social and political climate in which they interact. This is not to fall back into the epistemological falsehood that one form of discrimination is or can be “more important” than another. Rather, it is to properly situate the connection between and among competing forms of oppression to understand their relationship. A more organic approach reveals that primacy need not imply dominance or importance.

Some of these concerns are partly discernable in how intersectionality has been used to understand the media’s coverage of Essie Mae Washington-Williams’s public acknowledgement that Strom Thurmond was her father. Not unlike this Article’s findings in Part II, Kimberlé Crenshaw writes in *The Nation*, “[T]he very real possibility that Butler was a victim of an illegal sexual assault has been virtually ignored by a media eager to commend Thurmond’s families for playing nice.”¹²⁹ An intersectional analysis identifies this finding

126. The definition of “intersection” is “the point or locus of points common to two or more geometric figures” (e.g., lines). RIVERSIDE WEBSTER’S II NEW COLLEGE DICTIONARY 580 (1995).

127. See *supra* text accompanying note 116.

128. See generally NAGEL, *supra* note 41 (introducing the term “ethnosexual” to describe the extent to which ethnicity, race, sex, and sexuality define and depend on one another for their meaning and power).

129. Crenshaw, *supra* note 81, at 5.

with razor precision. Yet, rather than exploring the contemporary social conditions that rendered this particular reading of the Thurmond-Butler “relationship” possible, this intersectional analysis explains it through situating the media’s elision of Carrie Butler’s sexually exploitive experiences within a longer historical practice of ignoring Black female victims.¹³⁰ This example also draws attention to intersectionality’s tendency to frame race and sex discrimination as internally coherent and hermetically sealed-in-construction-but-for-their-intersection by framing them as analytically, legally, and socially distinct, yet uniquely converging on Black female subjects.¹³¹

None of this is to say that an intersectional approach is wrong; intersectionality’s contributions have been profound in their ability to highlight the unique conditions and experiences of women of color. But perhaps to fully appreciate the theory’s contributions, we should understand intersectionality not as a theory of subordination (which has been its standard construction), but more narrowly as a theory of identity.¹³² Although intersectionality certainly embraces and celebrates a general anti-subordination principle, arguably its central concerns deal with the construction of identities and the experiences resulting thereof, rather than the “practices that enforce the inferior social status of historically oppressed groups.”¹³³ That is, intersectionality (and to a certain extent its “post-intersectional” critics) largely looks at the substantive inquiries of “who” experiences discrimination and “why” it occurs rather than the more process-oriented and deeply sociological questions of “how” these particular realities are rendered. This may very well have been intersectionality’s original endeavor, though subsequent articulations may have been overly ambitious in broadening its scope. In drawing these substance/process and identity/subordination distinctions, this argument should in no way be read as disparaging intersectionality. Rather, this Article attempts to firmly stand on intersectionality’s shoulders. Part V brings us back to the Thurmond-Butler “relationship” to develop interactionality—a complementary model that reconciles the tension between subordination and discrimination based upon multiple identities.

130. Crenshaw explains that the failure to acknowledge “the elephant in the middle of the room” regarding the Thurmond revelation “speaks volumes about the brutish life black women faced in 1925 . . . [and] the contemporary media’s refusal to acknowledge Carrie Butler as a likely victim of such abuse reflects the sexual racism that black women continue to face today.” *Id.* at 6.

131. Crenshaw notes that the horror that Black women workers experienced under slavery and Jim Crow provided the backdrop for Black women’s central roles in legal reform. “No doubt that’s why African-American women were among the first plaintiffs to challenge sexual harassment on the job as employment discrimination. After decades of workplace sexual abuse deformed the lives of black women like Butler, they were especially attuned to the connection between [sexual] harassment and [race] discrimination.” *Id.* at 6.

132. This notion of intersectionality as anti-subordination is deeply intertwined with intersectionality’s basic epistemology. Collins explains, “[I]ntersectional paradigms remind us that oppression cannot be reduced to one fundamental type, and that oppressions work together in producing injustice.” COLLINS, *supra* note 109.

133. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004).

V. TOWARD INTERACTIONALITY

It is not uncommon for intersectionality's proponents to use the terms "interact" and "intersect" synonymously.¹³⁴ As this Article builds upon intersectionality to develop the other side of the identity/subordination coin, this interchangeability is an important point of commonality and departure. Both intersectionality and interactionality model how persons embodying multiple identity traits experience prejudice or discrimination implicating those very characteristics. Both terms recognize the existence of multiple "-isms" and that people often experience discriminations that cannot be readily compartmentalized. Yet, despite this semantic similarity, interactionality departs from intersectionality by embracing the rich sociological meaning of interaction—both in its qualitative and quantitative forms—to ground inquiries into the dynamics of identity and subordination.

A. *Interactionality's Conceptual Foundations*1. *Qualitative Methods: Symbolic Interactionism*

As a qualitative manner, symbolic interactionism is a sociological perspective that examines how individuals and groups relate, focusing on how identity is constructed through the process of interacting with other persons. Berkeley sociologist Herbert Blumer first coined the term in the 1930s, setting out its three basic tenets.¹³⁵ The first is that human beings act toward things on the basis of the *meanings* that the things have for them. This includes everything from physical objects in the world, like trees or lamps, to other human beings and institutions. Second, symbolic interactionism posits that this meaning is derived from one's social interaction with other humans. Blumer's third premise is that "these meanings are handled in, and modified through, an interpretive process used by the person in dealing with the things he encounters."¹³⁶ As a whole, symbolic interactionism is largely concerned with countering the tendency among many social theorists to mistakenly "treat

134. See Patricia Hill Collins, *Learning From the Outsider Within: The Sociological Significance of Black Feminist Thought*, in THE FEMINIST STANDPOINT THEORY READER, *supra* note 123, at 110 (stating that intersectionality "treats the *interaction* among multiple systems [of discrimination] as the object of study . . . [where it] aim[s] to develop new theoretical interpretations of the *interaction* itself.") (emphasis added); see also Crenshaw, *supra* note 115, at 1265 (framing "intersectionality as a way to articulate the *interaction* of racism and patriarchy.") (emphasis added).

135. See Herbert Blumer, *Social Psychology*, in MAN AND SOCIETY: A SUBSTANTIVE INTRODUCTION TO THE SOCIAL SCIENCES (Emerson P. Schmidt ed., 1937); see also HERBERT BLUMER, SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD (1969) [hereinafter SYMBOLIC INTERACTIONISM]. For other important works in the area of symbolic interactionism, see GEORGE H. MEAD, MIND, SELF & SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST (1934); and ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

136. BLUMER, *supra* note 135, at 2.

human behavior as the product of various factors that play upon human beings, . . . rely[ing] on such factors as social position, status demands, social roles, cultural prescriptions, norms and values, social pressures, and group affiliation to provide such explanations.”¹³⁷ This is not to say that these factors are unimportant. Rather, it is to retreat from the tendency to treat them as static and exogenous variables that pre-date human interaction and basic social relations. Indeed, symbolic interactionism can be understood as an attempt to situate how repeated and reified social interactions give these factors meaning.

This focus on meaning and interpretation is what separates symbolic interactionism from other approaches to identity and subordination: meaning is a social product negotiated by the parties involved.¹³⁸ Like any other negotiation, outside influences such as power differentials or information asymmetries may affect the final outcome. Yet, this negotiation of meaning does not wholly constitute the interpretive process, but is rather part of it. Symbolic interactionism moves away from the tendency to treat individuals as instrumentalities through which factors such as status and custom flow.¹³⁹ Instead, it focuses its attention on the more organic processes of how interpretations of meanings, both at the structural and individual levels, complicate human behaviors, choices, and actions, even those that are repetitive.¹⁴⁰ Thus, symbolic interactionism’s mandate moves beyond identifying the social or experiential elements constituting identity and towards “catch[ing] the process of interpretation through which they construct their actions.”¹⁴¹ By doing so, symbolic interactionism represents a separate yet

137. *Id.* at 2-3.

138. Blumer notes that, contrary to other approaches, symbolic interactionism does not regard meaning as emanating from the intrinsic makeup of the thing that has meaning, nor does it see meaning as arising through a coalescence of psychological elements in the person. Instead, it sees meaning as arising in the process of interaction between people. The meaning of a thing for a person grows out of the ways in which other persons act toward the person with regard to the thing. Their actions operate to define the thing for the person. Thus, symbolic interactionism sees meanings as social products, as creations that are formed in and through the defining activities of people as they interact.

Id. at 4-5.

139. Blumer notes that sociology rarely recognizes that individuality can be a driving force within human societies. Rather, sociology tends to assume “that the behavior of people as members of a society is an expression of the play on them of [structural] factors or forces. . . . This approach or point of view denies, or at least ignores, that human beings have selves—that they act by making indications to themselves.” *Id.* at 83.

140. With regard to the role of interpretation and interaction in common or repeated social situations, Blumer writes,

[t]he common repetitive behavior of people in such situations should not mislead the student into believing that no process of interpretation is in play; on the contrary, even though fixed, the actions of the participating people are constructed by them through a process of interpretation. Since ready-made and commonly accepted definitions are at hand, little strain is placed on people in guiding and organizing their acts. However, many other situations may not be defined in a single way by the participating people. In this event, their lines of action do not fit together readily and collective action is blocked. Interpretations have to be developed and effective accommodation of the participants to one another has to be worked out. In the case of such “undefined” situations, it is necessary to trace and study the emerging process of definition which is brought into play.

Id. at 86.

141. *Id.*

complementary approach to intersectionality's historicism.¹⁴² Though similar to intersectionality's standpoint-oriented approach, interactionality frames past events as informative to, rather than dispositive of, social behavior.

2. *Quantitative Methods: Statistical Models*

Statisticians use "interaction" to demonstrate how the overall effect of two or more variables (X_1 and X_2) with coefficients (β_1 and β_2) is not always additive: $Y(x) = \beta_1 X_1 + \beta_2 X_2$. The effect of X_1 may not always be the same for all levels of X_2 . Put differently, in understanding how two or more variables relate to one another, it is not always accurate simply to estimate a generalized effect of each variable. Rather, the effect of $\beta_1 X_1$ may differ depending on the level and magnitude of $\beta_2 X_2$. It is not uncommon that, in anticipating these adjustments and explaining the proper relationship between these variables, a tertiary variable may emanate from the commingling of the original two: $Y(x) = \beta_1 X_1 + \beta_2 X_2 + \beta(X_1 \cdot X_2)$.¹⁴³ The consequence of such interactions is that the effect of one variable depends upon the value of another. In this case, the interactive variable and coefficient $\beta(X_1 \cdot X_2)$ is not independent, as its value is tied to the separate values of $\beta_1 X_1$ and $\beta_2 X_2$. A real world example is the interaction between adding sugar to coffee ($\beta_1 X_1$) and stirring the coffee ($\beta_2 X_2$). Neither of these variables, in and of themselves, has much effect on sweetness in most situations. But a combination of the two often does: $\beta(X_1 \cdot X_2)$. As we apply this understanding to the media's coverage of the Thurmond-Butler "relationship," it is important to note that this model is not being offered to over-empiricize what is in essence a deeply subjective phenomenon; there are notable distinctions between how I adopt the term "interaction" for the purposes of this Article and how statisticians use it in their daily work. Rather, I offer it to provide a type of symbolic shorthand to understand the relative magnitudes in which variables can relate to one another and how it is possible in some circumstances that a tertiary variable can arise to explain the relationship between two primary variables. This nuance and flexibility is a significant addition to intersectional models. Intersectionality lends itself to a similar form of empirical modeling since "the intersectional experience is greater than the sum of racism and sexism"¹⁴⁴: $Y(x) > \beta_1 X_1 + \beta_2 X_2$.

Taken together, these qualitative and quantitative perspectives form interactionality's backbone—an approach that builds upon intersectionality to examine not only identity construction and its significance when subjects

142. Blumer notes that "this process is not to be caught merely by turning to conditions which are antecedent to the process. Such antecedent conditions are helpful in understanding the process insofar as they enter into it, but . . . they do not constitute the process." *Id.* To catch the process, Blumer argues that a person "must take the role of the acting unit whose behavior he is studying. . . [whereby] the process has to be seen from the standpoint of the acting unit." *Id.*

143. See ALAN AGRESTI & BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 369 (3d ed. 1997).

144. Crenshaw, *supra* note 116, at 140.

experience discrimination along two separate identity axes, but also *the construction of subordination*: the iterative process between identity and social context that helps explain the nature, continuities, and discontinuities between individual discrimination and group stratification. Until now, identity and subordination have been largely conflated, and in many ways interactionality provides an opportunity to carefully understand this relationship. By focusing on meanings and their actors' interpretations in addition to modeling these interactions in a manner that is sensitive to the empirical reality that the combination of two variables often leads to (or is dependent upon) the existence of a third,¹⁴⁵ it is possible to gain a better sense of how, for example, a contemporary social and political commitment to formal equality can coexist with a profound, though unintentional, misreading of past events. Put differently, understanding how a Black fifteen-year-old housemaid's sexual encounter with her wealthy White employer's son during Jim Crow was publicly discussed as a legal and consensual relationship involves much more than drawing connections between Black women's treatment then and now. It also involves a serious look at the social ideologies that contextualize this particular reading beyond the individual victim's overlapping identities.

Interactionality's contributions can be demonstrated by taking another look at this Article's central question: *How* did the Thurmond-Butler affair, given the considerable evidence of Thurmond's criminality, become articulated as primarily an instance of racial hypocrisy without meaningful investigation into the possibility of forced sex or statutory rape? Intersectionality alone frames this outcome as the most recent endpoint of a still-evolving historical continuum of racism and sexism converging on the fixed Black female subject. The media's inaccurate portrayal of Butler's story in 2003 is functionally equivalent to the legal and social conditions leading to the silencing of her rape seventy-eight years earlier.¹⁴⁶

Working from this insight, an interactional model begins with freeing the previously fixed subject. Interactionality builds upon, yet loosens, the intersectional model's view that exogenous social forces ostensibly determine life experiences, moving toward a model that examines how a wealthy White male was likely to interpret the social meanings of Blackness and femaleness in his daily interactions with his Black maid in 1920s Jim Crow South Carolina. Although this inquiry leads us to a similar conclusion—that the social meaning of Blackness and femaleness, in addition to the attendant social climate, probably led Thurmond to interpret and act upon Butler's sexual and racial vulnerabilities—it nevertheless highlights the importance of using history as informative rather than dispositive evidence. As a model of social inquiry, interactionality is open to the possibility of alternatively negotiated

145. Interaction effects are not limited to bi-variate models and can be applied in multivariate analyses.

146. See Crenshaw, *supra* note 81.

relationships between similarly situated Black women and White men in a manner that intersectional analyses do not immediately capture.

However, the heart of this inquiry involves the more process-oriented question of how journalists—typically thirsty for sex scandals involving public officials and averse to substantiating claims of racial hypocrisy—vigorously chastised Thurmond as politically unprincipled without exercising due diligence in investigating whether he broke the law. Table 1¹⁴⁷ shows that most of the sampled articles framed the Thurmond story with a particular emphasis on its racial meaning. For the entire nine-day sample, over 97% of the articles mentioned race while over 85% were critical of the story's racial dynamics. Moreover, close to 60% percent of the sampled articles mentioned the age difference between Thurmond and Butler, yet only 6.7% of those articles were critical of it. This suggests that many critics of this story's racial implications may have largely viewed Thurmond's and Butler's age difference as unproblematic, or at least unworthy of public criticism. I do not suggest that this neglect is purposeful or intentional. Rather, I suggest that this gloss-over is the product of an interaction effect whereby a third variable emerges through the interaction of race and sex to disrupt an equitable critique. This tertiary variable is colorblindness.¹⁴⁸

B. Interactionality and Colorblindness: Re-Reading History

Oprah Winfrey and her close friend Gayle King recently took reality television to new heights by briefly participating in a PBS special entitled *Colonial House*, in which they joined a family in rural Maine living life as American colonists did in the seventeenth century.¹⁴⁹ Their experiences were the subject of the May 17, 2004 episode of *The Oprah Winfrey Show*. This certainly was a lifestyle change for the two; Winfrey is a wealthy and powerful media mogul while King describes herself as a "room service girl."¹⁵⁰ Abandoning twenty-first century comforts, the two spent four days living, working, and socializing with the twenty-six colony members, most of whom had been living this lifestyle months before Winfrey and King arrived.

147. *Supra* Part II.B.

148. Despite variations in its definition, colorblindness can be effectively understood as a normative ideology and, increasingly, legal standard arguing that racism lies in the *recognition* of racial differences. Consequently, racial disparities are framed as a natural byproduct of market competition and individual preferences rather than structural inequality. See, e.g., EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2003); MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

149. For a description of this project, see PBS, *Colonial House: About the Project*, <http://www.pbs.org/wnet/colonialhouse/about.html>. A slideshow of photographs of Winfrey's and King's participation in the project can be found at http://www2.oprah.com/omagazine/200406/slide/omag_200406_slide_house_01.jhtml.

150. Transcript from *The Oprah Winfrey Show, Oprah Goes Back in Time* (ABC television broadcast May 17, 2004), at 4.

Winfrey notes that of all the adjustments, from exhausting meal preparations to using the bathroom without a toilet,

the hardest adjustment [was] learning to live under a strict 17th century code of conduct. Women have to keep their heads covered as a sign of submission. Profanity, blasphemy, and modest laws are strictly enforced . . . You could be tied to a stake, forced to wear the scarlet letter, all forms of public humiliation.¹⁵¹

Indeed, women's hardships became a recurring theme throughout this episode. One of the female colonists told Winfrey, "We're living in 1628. You're a woman. I'm a woman. We are at the bottom of the ladder and that's the way it is."¹⁵² As a result, sex and gender played prominent roles in this version of what PBS calls "experiential history."¹⁵³ Winfrey and King joined the colony as two additional female hands, and went to great lengths to describe the arduous work involved in keeping a colonial household, preparing meals, and providing the domestic backbone for the community to flourish. The work, as Winfrey states, "started at the crack of dawn. Now . . . do you understand better why it took women so long to get liberated?"¹⁵⁴

What is remarkable in this depiction of colonial life is that Winfrey and King did not only join this seventeenth-century colony as women, but as *Black* women. The particular experiences of Blacks during colonial times were simply read out of this historical reenactment and publicly portrayed as an accurate depiction of colonial life: an ostensibly harmonious community where Black and White people shared meals and living quarters in furtherance of God, family, and community. Even Winfrey questions this portrayal's legitimacy:

Winfrey: As the weekend unfolded, what we couldn't figure out is where would the black people be in that particular time. The truth of the matter is we wouldn't have been sitting at this [dinner] table in 1628.

Unidentified Man: Right.

Winfrey: We wouldn't be sitting at the table in 1628. And we didn't know how seriously you guys were taking this.

Unidentified Man: Yeah.¹⁵⁵

History certainly supports Winfrey; it is improbable that her Blackness would have gone unnoticed in seventeenth-century New England.¹⁵⁶ But if it is almost certain that her race would have shaped her experiences as much as her sex or gender, how was it seen as even remotely possible to portray this reenactment in this manner? Is this not as problematic as a colonial reenactment where

151. *Id.* at 2.

152. *Id.*

153. PBS, *supra* note 149.

154. *Oprah Goes Back in Time*, *supra* note 150, at 22.

155. *Id.* at 26.

156. See generally JORDAN, *supra* note 37 (providing one description of Blacks' treatment from the sixteenth through the early nineteenth centuries).

women chopped firewood and held leadership positions as government officials and clergy while men donned aprons, churned butter, and looked after the children? How did sex render race invisible here, just as race rendered sex invisible in journalists' coverage of the Thurmond-Butler "relationship?"

The answer is colorblindness. As the preeminent trope or "semantic code"¹⁵⁷ through which American society *thinks it ought* to publicly discuss race,¹⁵⁸ colorblindness embodies both a social and legal vision that race represents mere skin color or aesthetic differences and should not be part of public consideration in remedying past and ongoing wrongs. This colorblind ideal is preoccupied with formal equality without looking at the context and consequences of real world inequality.¹⁵⁹ Deracialized *individuals*, not racial *groups*, embody this vision, despite overwhelming evidence of race's continued significance: schools are becoming more segregated,¹⁶⁰ poverty is becoming increasingly racialized,¹⁶¹ and the number of imprisoned Black and Brown people has become grotesquely disproportionate to the number of Whites.¹⁶² As Reva Siegel notes, "the discourse of colorblindness itself works to disrupt and to rationalize the practices that sustain group inequality."¹⁶³ Colorblindness recognizes racial discrimination as a private, individual, or episodic aberration detached from public or structural explanations.¹⁶⁴ Hence, colorblindness

157. Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 89 (2000). Siegel notes that colorblindness is a "rhetorical system [that] is used to characterize the social practices that enforce and perpetuate the differential status of racial groups." *Id.* at 87.

158. I distinguish this normative vision for public debates and policies concerning race from how many Americans probably talk about race in their private lives, which is likely to often include language that is anything but blind towards color.

159. Lani Guinier and Gerald Torres note,

[T]he discourse of colorblindness focuses on managing the appearance of formal equality without worrying overmuch about the consequences of real-world inequality. Proponents of a colorblind ethos define freedom and equality exclusively in terms of the autonomous—some would say atomized—individual. This individual has no historical antecedents, no important social relationships, and no political commitments. By structuring the primary concerns around the idea of freedom for an everyman or everywoman, proponents of colorblind analysis locate that atomized individual in an abstract universe of rights and preferences rather than within an obdurate social structure that may limit or even predetermine a person's choices. In relationship to the state and to the market, the paramount virtue of the colorblind universe resides in treating each abstract individual the same way as every other. By subjecting rules to this metric of simple sameness, people are legitimized through the appearance of abstract fairness.

LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 38 (2002).

160. See ERICA FRANKENBERG & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HARVARD UNIV., *RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS* (2002), http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf (providing statistical evidence of racial resegregation of American public schools).

161. See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995) (discussing the growing wealth inequality between Whites and Blacks).

162. See generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (describing race and class differences in the administration of criminal justice).

163. Siegel, *supra* note 157, at 85.

164. Sociologist Eduardo Bonilla-Silva notes,

promotes the reconciliation of the irreconcilable: racists exist as individuals apart from any systemic race problem.

Many have discussed how today's colorblind ideology furthers racial inequality.¹⁶⁵ This Article is concerned not only with the ideology's contemporary effects, but also how it is being used to reinterpret past—and surely more explicit—forms of racial discrimination in a manner that obscures race's past and ongoing significance. Kimberlé Crenshaw has offered what she calls “loosely formed” or “mushy thoughts” on this topic.¹⁶⁶ But interactionality's ability to take account of ideological factors such as colorblindness in modeling the relationship between identity and subordination gives it a great advantage in analyzing how colorblindness renders certain identities and experiences invisible to mainstream legal and social consciousness. Colorblindness can redeem even the most virulent forms of racial discrimination. For example, though Winfrey and King are Black and cognizant of their racial heritage,¹⁶⁷ it is only through colorblind ideology that they, the other colonists, and the television audience can believe that their Blackness can be bracketed in a manner that their sex could not without affecting the overall legitimacy of this particular historical reading. Through Winfrey's and King's portrayal, the public is relieved from having to confront Colonial America's real racial dynamics and instead embraces a vision, albeit passively, of an America that was racially harmonious from its very inception.

We can now begin to see how colorblindness filters the racial and sexual meanings embedded in the Thurmond-Butler narrative to render its particular public reading possible. Colorblindness is not as much about *method* as it is about producing *outcomes* that preserve particular status relationships.¹⁶⁸

Compared to Jim Crow racism, the ideology of color-blindness seems like “racism lite.” Instead of relying on name calling (niggers, Spics, Chinks), color-blind racism otherizes softly (“these people are human, too”); instead of proclaiming God placed minorities in the world in a servile position, it suggests they are behind because they do not work hard enough; instead of viewing interracial marriage as wrong on a straight racial basis, it regards it as “problematic” because of concerns over the children, location, or the extra burden it places on couples. Yet this new ideology has become a formidable political tool for the maintenance of the racial order. Much as Jim Crow racism served as the glue for defending a brutal and overt system of racial oppression in the pre-Civil Rights era, color-blind racism serves today as the ideological armor for a covert and institutionalized system in the post-Civil Rights era. And the beauty of this new ideology is that it aids in the maintenance of white privilege without fanfare, without naming those who it subjects and those who it rewards.

BONILLA-SILVA, *supra* note 148, at 3-4 (2003).

165. See, e.g., *id.*; BROWN ET AL., *supra* note 148; Gotanda, *supra* note 148; Siegel, *supra* note 157.

166. Kimberlé Williams Crenshaw, *Color Blindness, History, and the Law*, in *THE HOUSE THAT RACE BUILT* 281 (Wahneema Lubiano ed., 1997). Crenshaw notes that the “force of ahistoricism” has led to a “willful inattention to the historical operations of white supremacy.” *Id.* at 282. She is particularly concerned with “how law has come to endorse this narrative and how in doing so, it, too, presumes a discontinuity between the past and the present that its own analytics simultaneously deny.” *Id.*

167. For a discussion of how some Black people may partially adopt colorblind consciousness, see BONILLA-SILVA, *supra* note 148, at 151-76 (2003).

168. Reva Siegel notes, “[O]ne needs a concept of social stratification, of status inequality among groups arising out of the interaction of social structure and social meaning, in order to make sense of the

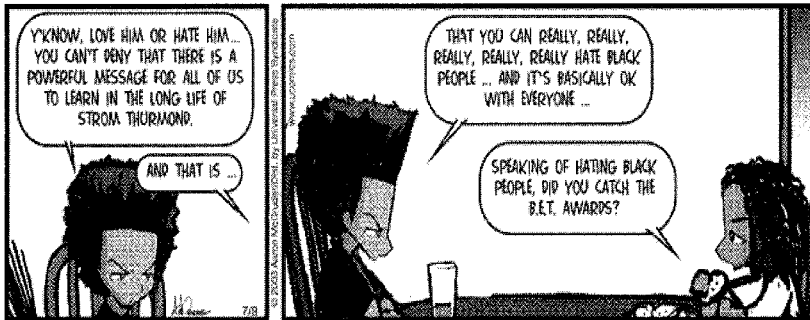
Therefore, the link between the Colonial House and Thurmond examples, despite the disregard for race in the former and the fixation upon race in the latter, is their shared commitment to a colorblind outcome: a racially redeemed White America that neither recognizes nor is accountable to past or ongoing racisms. Through introducing colorblindness as a formal variable within the interactive model, we can appreciate in the Thurmond example not only how identity and various discriminatory experiences are constituted at the epistemological crossroads of race and sex,¹⁶⁹ but also the subordinative process culminating in an outcome that accentuates race while eliding rape/sexual assault. This allows us to move towards a more organic understanding of how social and political ideologies saturate the meaning-making and interpretive processes so as to shape, condition, and procure subordinative outcomes. Like sweetness in the coffee example,¹⁷⁰ colorblindness— $\beta(X_1 \cdot X_2)$ —becomes perceptible as an interactive variable conditioning the relationship between race ($\beta_1 X_1$) and sex ($\beta_2 X_2$) in such a way that Strom Thurmond is posthumously re-read as a hypocrite and not a rapist. Colorblindness shaped journalists' interpretations and the public's consumption of Washington-Williams's revelation, as her story became reframed within the normative vision of what we now think racism is and ought to look like: an antiquated belief embraced by stodgy old men who were a product of their time. From this perspective, Washington-Williams's disclosure and relatively fond memories of Thurmond are spun to reveal that such bigotry was never whole-heartedly embraced by even the most radical Dixiecrat. While the charge of hypocrisy may temporarily label Thurmond as unprincipled for publicly advocating policies he did not personally embrace, it ultimately functions as a redemptive mechanism—precisely by fixating on race and eliding the rape issue—and fosters the misperception that even America's most famous segregationist experienced intimacy and love across racial boundaries.

[color]blindness trope . . . [that] works to disrupt and rationalize the practices that sustain group inequality." Siegel, *supra* note 157, at 84-85.

169. This is not to say that intersectionality's proponents are not cognizant of the harms inflicted upon minorities through tropes such as colorblindness. See, e.g., Crenshaw, *Color Blindness, History, and the Law*, *supra* note 166.

170. *Infra* Part V.A.2.

VI. CONCLUSION



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This Article proposes interactionality as a theory and method from which to move towards a more holistic and sociologically-grounded approach to the nuanced relationship between multiple identities and subordination. Our racial sensibilities are anchored in how we understand our racial pasts. Today's colorblind ideologies play a seductive role in rereading history to destabilize and delegitimize racial framings of current inequalities. Colorblindness may very well operate differently in different contexts. In the Colonial House setting, for example, race evaporates; journalists describing Thurmond's "relationship" with Carrie Butler, however, accentuate race and Thurmond's racial politics. Yet, the emphasis here is how colorblindness produces similar outcomes: it redeems America of its racial past, thus making genuinely effective remedies to racial injustice ever more distant.

Intersectionality offers a necessary but not always sufficient model to approach these dynamics. Interactionality attempts to stand on intersectionality's shoulders by clarifying and supplementing its vital contributions through sociologically grounding its pathbreaking inquiries. Its goal is to pursue a robust understanding of the relationship between converging identities and racial subordination. Applied to journalists' coverage of the Thurmond-Butler "relationship," interactionality reveals the extent to which subjects experiencing multiple discriminations are more than a "fixed" part of historical continua. Identity and subordinative experiences are characterized by a fluid interaction of meanings and interpretations that are always transforming, yet nonetheless often preserve status relationships. Interactionality offers a model that captures what we can loosely call the "interaction effects" emanating from the convergence of identity traits, such as race and sex, to highlight the extent to which prevailing ideologies like colorblindness are changing how people experience identity and subordination and what these experiences mean, both in the past and the present. As colorblindness becomes more influential in shaping how individuals understand themselves and the

world around them, while also providing a merely cosmetic sense of reconciliation and redemption in the face of growing racial disparities, interactionality provides a lens through which critical thought can effectively respond to these challenges and set us on a path toward genuine redemption.

