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ABSTRACT

By tracing the concept of rape as it has been defined by man in the earliest laws, it is evident that the criminal act was viewed with horror, and the deadly punishments that were seen fit to apply had little to do with an actual act of sexual violence that a woman might sustain. The past records indicate a gradual decrease in the prosecution rate of rape. This decrease coincided with an increase in assessing a lesser penalty of attempted rape or assault, which held a more lenient penalty for these charges. This gradual change appears to have led to a trend which has evolved into the current prosecution and penalty process today. Based on the information that is known about rape during the seventeenth, eighteenth, and nineteenth centuries, it appears that rape was not as prevalent as it has become within this past century. This was due to several factors. First of all, the populations of towns and cities were much smaller. Another possibility for the low reports of this crime could be due to women being fearful of reporting the crime. The culture during this time fostered women to be non-assertive, dependent, and to feel inferior to men. The act of rape could have occurred more frequently than the records show, but was underreported due to various circumstances. (ABL)

A History of Rape in American Society Prior to 1900

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Abstract

Since the woman's movement, during the 1970's, the amount of research on the topic of rape has greatly increased. Within the past several years the media and the public have focused more on the prevalence of rape and how women can prevent themselves from being raped. Several researchers have historically investigated the issues involved in rape, to observe any trends that can be related to the act of rape presently. This paper compiles information concerning the act of rape during the seventeenth, eighteenth, and nineteenth centuries. Information regarding the circumstances involved in rape, the previous laws and prosecution processes of rape, and factors that influenced the prevalence of rape are discussed. Past laws and penalities for the crime of rape show an evolutionary trend that moves toward our current laws and punishments. The frequency of rape seems to be lower than the rates of this current century, but the trend for this crime to be underreported is consistent.

A History of Rape in American Society Prior to 1900

In the last fifteen years, the number of reported rapes in the United States has risen greatly. Feminist have gone to great efforts to publicize rape as the ultimate expression of male dominance over women. It appears that they have succeeded from the considerable attention, within the last five years, the media has provided through television, radio, newspapers and magazines. Even college campuses and high-schools are involved in facilitating student's awareness of the frequency of rape and how women and men can prevent rape from occurring. Even the term "date rape" has become common knowledge to the public due to the increase in attention from researchers, the media and institutions.

Rape, as current law defines it, is the forcible perpetration of an act of sexual intercourse on the body of a woman. In some states this act would not include one's wife. This law has changed somewhat in America within the time frame of almost four hundred years since being inhabited by the Europeans. This paper attempts to compile what is known about rape in the past by examining the circumstances in which rape occurred, the prosecution of rape, changes in the law and factors that affected the frequency of rape. Rape will be examined in the time periods of the seventeenth, eighteenth, and nineteenth centuries and under the specific circumstances of slavery and the conflict between the Indians and white men.

Rape in the Seventeenth Century New England

In Puritan times, 1600s, women were considered the weaker sex and had to be careful because they could easily be lead astray by the solicitous members of the stronger sex. If a woman happened to engage in uncleanliness, it would leave an

indelible imprint upon her character. Unless she was of very respectable status, she could, with one act of intercourse, be transformed from an admirable virgin to a despicable whore or slut (Cotton, 1641). Whereas the woman was "defiled", "wofully corrupted", or "ruin'd", her partner had merely "committed folly". A woman who made sexual overtures toward a man was guilty of "bold whorish carriage", although a male enticer was guilty only of "lewdness" or lascivious conduct" (Winthrop, 1908). Even a woman who had been raped was in trouble: John Cotton (1641) wished the rapist to marry his victim, if she and her father consented, because "it is worse to make a whore, than to say one is a whore" (p. 11). Once a woman had fallen into sin, her return to respectability was nearly impossible. As Cotton Mather (1692) declared, "For a Man to be Reclaimed from the Sin of Vncleanness when once he has given thereunto is Rare; but for a Woman to be Snatch'd out of the Unclean Divels Hands when once he has had any full Possession of her is more Extraordinary!"(p.44). Rarely did the Puritans view men as having been defiled and never was a woman said to have defiled him. If anything, he defiled both her and himself. The authorities prosecuted the male, because he was the initiator of sex and received the brunt of the blame.

If a young woman did not verbally resist an enticer "as she ought", she could be whipped for encouraging his lasciviousness. The woman suspected of having been "deflowered" was often examined by a jury of midwives; if found to possess a ruptured hymen, she was severely whipped for not reporting her "ravisher" to the authorities (Colman, 1711).

Puritans detested sexual license, but their acceptance of the male as initiator, coupled with their belief in explosive "instincts", sometimes brought about the very license they condemned. It was easy for some men to assume that dependent, passive women existed to fulfill their needs, sexual or otherwise. A man might make advances toward a woman and then justify his "immoral"

behavior with the subliminal (if not fully conscious) presumption that he was merely responding to the demand of gonads bursting with unused energy. In fact, the rapist usually defended himself by asserting that the devil or "my own lust overcame me"; he hardly valued the point of view of the "dependent" woman with whom he was attempting to take liberties (Koehler, 1980).

Various cases discuss the aggressiveness of men's overtures toward women, in spite of the fact of asking the woman's consent to sexual relations (Dexter,1917). Other males assumed more literally that woman existed to serve their needs. In New Hampshire, records show that at least seventy-two men appeared before the Puritan authorities in seventeenth-century New England for taking forcible sexual liberties with seventy-eight nonconsenting females. The females included twenty-six unwed servants, thirty-five wives (including four Indian squaws), nine single women, and eight children between the ages of three and thirteen (Amir, 1971).

There are several cultural tendencies during this Puritan period which might have collectively predisposed these men to attempt rape. First, was the belief that women existed to serve men's needs. Second, was the Puritan obsession with the explosiveness of "sexual instincts", which meshed with the prevailing notion that no conception could follow a "forced" copulation (Aristotle's Compleat Masterpiece, 1755). Therefore, a man that did not want a potential bastardy charge hanging over his head could consider rape a sexual approach preferable to seduction. Third, the very real feeling of powerlessness before God, nature, and the authorities -that same feeling which led Puritans to polarize sex roles into rigid terms of male dominance and female submission - had a sexual reference point. The acceptance of the notion that the "stronger" male was the initiator in sex indicate that power and control were sexual concerns. A further suggestion of such a preoccupation was the tendency of some men to wear codpieces to

accentuate the size of their penis. The equation of penile size and functioning with personal power may have caused some men to want to test and affirm their masculinity through forcible intercourse. (Koehler, 1980).

The rape attempt of a man rendered "impotent" did not necessarily involve any particular hatered of the victim; rather, it displayed his profound inability to acknowledge that women had any basic "rights", including the right to accept or reject his overtures. As a result, the man usually overpowered the woman without using a weapon, and did not brutalize her by sticking foreign objects up her vagina or beating her severely (Koehler, 1980).

At other times, however, the rape attempt might proceed out of a profound sense of misogyny. If a male sensed and struggled against his generalized lack of power, he could easily bring himself to detest someone who was not the cause of his problem. A need for vengeance could occur, making the rape particularly brutal. There are records of two such rapes, both murders, in New Hampshire (Pulsifer, Middlesex County Court House).

The man who felt that his sexual "instincts" needed release could attempt to find a "help-mate". However, gaining a wife involved an elaborate wooing process, securing her parents' permission, and displaying the ability as well as the willingness to support her. Due to this process, seduction was an immediate and (if effective) appeasing answer to the male's dilemma. If his verbal overtures failed, the male might decide to become more forceful Rape might then follow, which would be the result of the bachelor's delusions and egocentricity. A few of the rape cases mentioned earlier stated that the man had first asked their victim's permission and then rejected their refusals. They may have been acting in accordance with this pattern of sex-role conditioning. Koehler (1980) states that this argument for a cultural belief in self-justifying, explosive sexual "instincts"

could easily serve as a starting point for rape, with some confirmation from the fact that 91 percent of all males who attempted rape were single.

During this period, there was a tendency not to view sex as a form of interpersonal communication, which probably made it easier for the rapist to separate the woman from her body while he momentarily "used" it. Since it was easier for a man to rape an object than a person, the woman who objected strongly may have brought the seducer-rapist to his senses by forcing him to confront her as a human being. Almost half of all would-be "seducers" stopped using force when the woman called out or objected vociferously.

It seems as though the Puritan culture allowed rape to become the instrument through which some men expressed their frustrations, their feelings of inadequacy, and their inability to view women as equals. Even though the culture seem to foster rape, the Puritans did not treat that offense lightly. The penalties were severe: New Haven (1656), Plymouth (1671), and New Hampshire (1679) specified capital punishment. Connecticut and Massachusetts authorities made some effort to differentiate between the rape of a single or a married woman, suggesting that some Puritans viewed the offense more as a crime against the man's estate than as a crime against the woman's body. The first Connecticut law code, in 1642, provided capital punishment only for the rape of a woman who was married or contracted to marry. In the same year, the Massachusetts General Court directed that any man who raped a married or espoused woman be hanged, and that all other rapists (if the victim were ten or older) be punished by death or "other grievous" penalty (Koehler, 1980). In 1642, the Bay Colony deputies and assistants enacted a law capitally punishing any intercourse with a female child of less than ten years, even if the sexual relations were undertaken with her consent (Nobel & Cronin, 1901-28).

The sentences that the magistrates handed down to the convicted rapists varied from death to paying fines. At least six rapists were hanged, an Indian man was sold into life-long servitude, another man had an "R" branded on his cheek, forty-two men received severe whippings as well as fines (Nobel & Cronin, 1901-28).

Since the usual penalty for forcible rape was death or a severe lashing, the rapist may have to select a victim of low credibility. Servants constituted one-third of the victims but no more than 10 percent of the adult female population. Koehler (1980) suggests that servants answered this need, as well as the associated needs of high subservience and availability, especially after 1650 when the social status of the servant plummeted.

Identification of the assailant in seventeenth-century New England was much easier due to the lower populous. Throughout New England the victim's testimony sufficed to convict a man of attempted rape. If an examination by a jury of midwives revealed that a maiden possessed a ruptured hymen or that any woman had lacerations or bruises in the genital area, such findings constituted grounds for conviction on the more serious charge of actual rape. Puritans assumed that rape would immobilize the victim with fear; therefore she was not expected physically to resist a male assault. Since scratching and hitting a man would have been contrary to her sex-role conditioning, the magistrates did not consider lack of physical resistance as grounds for questioning a victim's testimony, nor did they presume that she was in any way responsible for attracting the assailant. Rape was considered so serious that a woman could not lie about it. Even if the community suspected that the woman invited the advance, the man who made it received sharp punishment (Koehler, 1980).

Koehler (1980) states that "rape attempts were not simply the spontaneous, thoughtless expressions of a man's uncontrollable desire" (p.97). They had to be

planned due to the communities being so tight knit, and where women seldom went far from home by themselves. The scarcity of opportunity, plus the ease at which the rapist could be identified, makes the total of seventy-nine attempts larger than it seems (Hammond, 1943). A potential rapist had to lure a particular woman to a secluded spot or approach a neighbor's house when adult males were away. Husbands, brothers, sons and other women were usually in close enough proximity to make rape extremely difficult.

Although records indicate that twenty percent of all rape attempts occurred either in public places or in houses where another person in an adjacent room could overhear a struggle. In 85.3 percent of the cases of rape or attempted rape, the victim was a neighbor or even a servant in the same household (MacDonald, 1971). The woman's familiarity with the man probably contributed to her willingness to trust him. One-third of the rapes occurred in the forest or other isolated terrain. Since the rapist knew his victim, he may have chosen a woman who he suspected would not report the assault. Koehler (1980) found that most victims responded with shocked disbelief and some verbal objection; only seven scratched or bit their assailants.

A female servant, when assaulted, had to deal with the inhibiting nature of two conditions of submissiveness: that of being a female before a male, and a servant before a master. This suggests that the number of unreported rapes and rape attempts against servants may have be numerous. For an assaulted woman to complain to the authorities required great courage. She would have to contradict her sex-role conditioning about modesty, undergo the pain of describing her traumatic experience, and press charges against the "superior" male. Even after this was over she might be regarded as regrettably damaged goods.

The effects of rape on women of this time period are not known because they were not recorded. The Puritan belief in rape as contributory of female promiscuity, combined with the polarization of female sexuality into virginity versus whoredom, probably caused the victim much concern. Also, the belief that rape could not lead to pregnancy, probably caused those who did conceive to wonder whether they had somehow consented to the assault. Even though the magistrates believed the victim's testimony without asking her embarrassing or character-assainating questions, they did not seem motivated by much humane concern for the victim (Koehler, 1980). They were more concerned with exposing and punishing sinful acts. The authorities failed to refer the assaulted female to other sympathetic women or to a clergyman for consolation. (Koehler, 1980). Surely, the victim who was taught to value her virginity highly and who had been severely frightened, would be in great need for consolation. If a wife was raped by her husband there were no grounds for even a criminal charge, "for by their mutual matrimonial consent and contract his wife hath given up herself in this kind to her husband, which she cannot retract" (p.101). Perhaps the extent of the Puritan leaders' insensitivity is revealed when it was recommended by a magistrate that the victim marry the rapist (Cotton, 1641).

Rape in Eighteenth-Century Massachusetts

By the 1690s, Massachusetts law clearly defined rape in accordance with common law. The phrase "to ravish" a woman in the eighteenth century meant to gain "carnal knowledge of any woman above the age of ten years against her will and of a woman child under the age of ten years with or against her will" (Cyril, 1974). Conviction for this offense brought a mandatory death sentence and required the testimony of two witnesses, or of one witness plus evidence that

would be equivalent to the testimony of a second witness. Rape remained on the list in 1780 as one of the seven capital offenses (Powers, 1966).

Between 1698 and 1797, the Supreme Judicial Court of Massachusetts heard forty-three indictments of rape or attempted rape, representing a total of forty separate cases involving thirty-six defendants (Lindemann, 1984). The existing records reveal prosecution patterns, the age and/or marital status of the most of the victims, the social standing of the accused, and details of a few cases.

Convictions were not made in two cases. It appears from the documented information that the victims were not able to convince the jury of their resistance to the sexual encounter. Lindemann (1984) states that the grand jury may have refused to indict because some doubt was left in their minds. Consent was clearly a central issue in these cases. The rules of evidence required for cases were such that a conviction was possible only when a victim could convince a male jury that the defendant was fully aware of her refusal and resistance. Any indication that the victim was willing to socialize alone with her attacker or that she put up little resistance could be taken as consent, even if the woman believed differently (Lindemann, 1984). In absence of visible and serious injuries, the victim had to have two witnesses, which was difficult to have if no-one came to her assistance.

During the eighteenth century few cases reached the high court; only one rape case per decade before 1729 reached the high court (Lindemann, 1984). As the population increased from 55, 941 in 1700 to 114,116 in 1730, there was not a proportionate increase in the number of rape prosecutions. Thus the decade rate per 100,00 between 1725 and 1734 was 3.5, and the thirteen-year average between 1785 and 1797 was 3.16; the two highest rates in the century (Lindemann, 1984). What is significant is that there was such a small number of rape prosecutions and a consistently low prosecution rate throughout the hundred-year period.

A rape charge would come to the attention of the authorities in a variety of ways. The most common method was for the victim to first bring her complaint to the local justice of the peace, a man of high social standing, who summoned witnesses and the accused, tried to obtain a confession from the suspect through close questioning, heard testimony from witnesses, and then deciding whether to hold the accused in jail or on bail for a hearing before the grand jury. A complaint could also be made by local grand jurymen, citizens who represented their town on the grand jury for one or two years and who were sworn to watch for breaches of the law. Victims thus had access to the justice system (Flaherty, 1972).

In eighteenth century Massachusetts, communities were small enough that most people knew each other by name. For example, Boston by 1790 had reached a population of 15,000. In the towns, strangers quickly became known. So, the chances of being raped by a stranger were not great and the suspect was likely to be apprehended (Koehler, 1980). Based on these figures, it appears that in eighteenth century Massachusetts there were fewer rapes committed in proportion to the population.

Several years before the American Revolution, in 1768, American patriots began collecting reports of sexual abuses by British soldiers. They were collected in response to colonial unrest because of the unpopular Townshend Acts and British troops landing in Boston that September. An anonymous group of Americans -Henry Knox, the Greenleafs, John Adams and Josiah Quincy may have been among them-secretly prepared a weekly account of city life under military rule and distributed their reports to sympathetic liberal newspapers in Boston, New York and London. The weekly unsigned column was known as *A Journal of the Times* or *A Journal of Occurrences* (Dickerson, 1936). Among the news items they gathered, to give evidence of the "great impropriety and

grievance of quartering troops in town", was a considerable amount of attempted rape (Brownmiller, 1975). Continuing sexual harassment of Boston's women was seen by the patriots as an integral part of colonial oppression. Several rapes and attempted rapes were recorded from November, 1768 and July 1769. Once the war began in 1776, there was a tremendous increase in rapes or "ravishings of women" (Commager & Morris, R.B., 1958). It seems that during war time, rape and sexual aggression is imposed by the aggressor army fighting on foreign soil. But, the American army was not rape free. Washington's army was recorded to have committed several rapes and there were executions for this crime (Fitzpatrick, 1937).

Eighteenth-century justices of the peace and grand jurymen were acquainted with those involved in the non-military cases- victim, witnesses, and accused alike- and therefore would take into account their reputations and social standing. They were more concerned with the truth of the charge than with the amount of evidence needed to ensure a jury conviction. The rules of evidence in trials were not strict. Confessions and heresay evidence were freely admitted, the prosecution did not have to reproduce witnesses for cross-examination, and the accused could not refuse to answer questions that might incriminate himself (Haskins, 1969). Conviction for a capital offense demanded at least two witnesses, but in practice judges interpreted this requirement loosely (Powers, 1966). If the justice of the peace was convinced of the accused's guilt, he was therefore likely to send the case to the grand jury.

Only twelve of the forty cases brought before the Superior Court charged rape, and three of these were reduced to an accusation of attempted rape; the remaining twenty-eight cases involved the lesser offense. Lindemann (1984) states that it is likely that justices of the peace and grand juries brought indictments for attempted rape even when a forcible rape accusation had been

brought before them, because juries were far more apt to convict an accused of this lesser charge.

The rate of rape prosecutions remained surprisingly constant even though Massachusetts underwent significant demographic, economic and social changes in this hundred-year period. The colony was hard hit economically several times during the century and the numbers of poor increased, with no impact on the rate of rape prosecutions (Lindemann, 1984). Changes in the sexual behavior of unmarried couples also did not have any impact on the number of rape prosecutions. Premarital pregnancies increased gradually throughout the century. Approximately 10 percent of firstborn children were conceived before marriage in the late seventeenth century; by the 1780s this figure rose to 30 percent (Smith & Hindus, 1975). Fathers were unable to provide their marriageable children with land and therefore were losing control over their offspring. No new system of social and sexual control had yet replaced the decaying community and patriarchal system. Consequently, more and more people were engaging in sexual activity before marriage. Yet the rate of rape prosecutions neither declined nor increased (Lindemann, 1984).

In the 1760's four defendants were tried for rape. Three were found guilty of the lesser charge of attempted rape, and one was sentenced to death. It is evident that in Massachusetts juries were reluctant to convict in rape cases, and also a determination that accused rapists should not go unpunished (Hoffer & Hull, 1981). Another decade passed before efforts to get a rape conviction stopped entirely. Three laborers were charged with rape in the 1770s, one was acquitted and two were sentenced to death. The grand juries would prepare two indictments in rape cases, one charging the accused with rape and one for attempted rape. The grand juries were recognizing the unpopularity of capital punishment (Lindemann, 1984).

Juries in the 1780s and 1790s became even more reluctant to convict on charges of attempted rape. In five cases, two involving the same defendant, the jury found the accused guilty of assault, but not guilty of the formal charge of rape. Three of these assault cases brought considerably lighter sentences than for the charge of attempted rape (Lindemann, 1984).

These cases, in which the prosecutors and juries tried to redefine the original charge, were probably related to the changing sexual mores at the end of the century and are a part of a wide pattern of changes in criminal prosecution. At the same time that premarital sexual activity was increasing, fewer people were being brought before the courts for fornication (if pregnancy was not involved) (Nelson, 1975). Although, as mentioned before, increased premarital sexual activity did not affect the relative number of rape cases brought to court, it well may have affected the disposition of cases that came to trial, particularly since criminal courts increasingly ignored illicit sexual activity, except for prostitution (Lindemann, 1984).

William Nelson (1975) states that ethical values were breaking down in Massachusetts between 1760 and 1830, an early sign of profound social and economic changes that led to major modifications of criminal law in the first half of the nineteenth century. Beginning in the late 1780s, the courts became increasingly reluctant to prosecute cases involving private morality, such as fornication and illegitimacy, and spent more time on those cases which involved property. The courts stopped enforcing a particular standard of sexual or family conduct. By the second half of the eighteenth century, prosecutions for sexual offenses reflected not moral disapproval but economic and class interests: the magistrates wanted to ensure that illegitimate babies would not become public charges and therefore prosecuted poor, unwed mothers (Hindus, 1980).

Law, customs and social practice in eighteenth-century Massachusetts recognized the authority of men in the family, the church, the state, the economy, and the political system. Men wrote the laws and enforced them, prescribing the limits of male sexual behavior. Since women were taught from childhood to defer to men, many instances of coerced sexual relations may not have been perceived as rape by the assailant, neighbors or the victim. Thus the only cases that would be reported and prosecuted were those in which the community acknowledged that the attacker had no right to the woman sexually. Rape by a husband was not believed to exist. Rape of a servant by a master would be difficult to prosecute and was more than likely not reported. If a man raped a single woman of the same or lower social standing, the issue of consent would make his crime difficult to prove unless there was clear evidence of her resistance (Lindemann, 1984).

The cases of rape most likely to come to the attention of the authorities would be those in which the assailant was of a lower social order than the victim, or in which the victim was a married woman who forcefully resisted. Lindemann (1984) finds support for this thru observing due higher conviction rates for assailants of married women and minors. The overall conviction rate in these two categories was at a high rate of 82 percent. Evidence from the conviction patterns, according to the defendant's social standing, indicates that rape was more likely to be punished when the accused was at the bottom of the social order. Records indicate that the accused from lower social orders were convicted more than accused from high social order.

One reason so few cases appeared in the Superior Court of Judicature is that few assaults were perceived as rape. In a patriarchal and explicitly hierarchical culture, rapes committed by men of the upper or middle orders never came to public attention, much less to the courts. Because of their positions of prestige and authority, respectable men of the community could force their attention on

servants or single girls, finding a grudging acquiescence. Not even the victims would recognize this situation as rape. When men of the lower order raped women of a higher social standing, they were threatening the perogatives of other men, using physical force as a primary means of obtaining compliance (Lindemann, 1980). Their actions were clearly condemned by society and forbidden by the laws of rape, and they were brought before the courts.

The cultural expectations about sexual behavior probably minimized the occurrence of rape during this time. Extramarital sexual activity by men and women alike was severely condemned and frequently punished. Ministers persuaded women not to flaunt their sexual attractiveness. Men were not encouraged to engage in the sexual conquest of many women; in fact, they were condemned if not prosecuted. Women were understood to be as interested in sex as men. Thus neither in marriage nor in courtship would a man believe that a woman really meant yes when she said no (Lindemann, 1984). The rape prototype of female enticement, coy female resistance, and ultimate male conquest was not built into the pattern of normal sexual relations (Norton, 1980).

Finally, family and community structure effectively upheld sexual mores and minimized the opportunity for rape. Communities were small throughout the century; residents knew other residents and were related to many of them. The right of the community to watch over a wide range of personal behavior and exact conformity to law and custom was generally accepted. Social pressures were even more important than laws in setting limits on individual sexual behavior. The culture discouraged rape, and the community structure minimized opportunities for it to occur.

Rape in the Nineteenth Century

The occurrence of rape during the nineteenth century, in this paper, is depicted through two battles between white Anglos and a minority group. As America became more populous and productive, and Anglos began to move westward, they dominated two groups of people, the Indians and the black slaves. Many acts of violence were committed between these groups, including rape.

General James Clinton, who participated in a punitive expedition against the Iroquois in New York in 1799, presented a blanket summation of the Indians: "Bad as the savages are, they never violate the chasity of any women their prisoners" (Farb, 1971, p.130). If sexual abuse had occurred,women were naturally reluctant to admit that it had. The common experience of most female captives was to live as an Indian wife for the duration of their captivity.

As the white man pushed westward with increasing violence, the Indian responded in kind as they retreated westward. Historian Elizabeth Mix in 1842 wrote, "From all history and tradition, it would appear that neither seduction, prostitution, nor rape was known in the calendar of crimes of this rude savage race, until the females were contaminated by the embrace of civilized men."(Seaver, 1941, p.97). J.P. Dunn (1958) published a book, *Massacres of the Mountains*, which was an early history of the Indian wars of the west. He distinguished between the mores of the Plains Indians, on the run and highly victimized by whites, from the mores of the eastern Indians in less desperate times. He quoted a Captain Johnson regarding the treatment of women (white, Mexican or Indian) by the Apaches:

> "Women when captured are taken as wives by those who capture them . . . The most unfortunate thing which can befall a captive woman is to be

claimed by two persons. In this case she is either shot or delivered or for indiscriminate violence." (Dunn, 1958, p.319)

On September 29, 1879 the White River Utes Indians attacked a settlement in Colorado. Three women were carried off and later rescued. The women were reluctant to testify about what had occurred while they were captives. They were afraid that if they told their story of being raped, it would place a stigma on them. One widowed women with three children was afraid that the public knowledge of her rape would kill her chance at remarriage. Also due to their religious values and the sexual mores at the time, such as not discussing even obstetrics with your husband, caused the women to be reluctant to tell their stories (Sprague, 1957).

There are few accounts of the rape of Indian women by white men because the Indians were rarely heard and if they were, the information was not recorded. In April 1871, a vigilante group of Americans, Mexicans and Papago Indians assaulted a group of Aripava Apaches in Arizona. The Apaches were on friendly terms with the neighboring ranchers and were even flying the American flag. Dr. C.B. Briesly, the camp's surgeon, reported, "Two of the best-looking squaws were lying in such a position, and from their appearance of the genital organs and of their wounds, there can be no doubt that they were first ravished and then shot" (Dunn, 1958, 621).

Sexual mutilation was used during the Sand Creek Massacre of November 29, 1864, under the direction of Colonel John M. Chivington. Sand Creek was an official U.S. Cavalry operation (Dunn, 1958). In the investigation that followed this attack, Lieutenant James Conner reported (Brown, 1970):

"In going over the battleground the next day I did not see a body of a man, woman or child but was scalped, and in many instances their bodies were

mutilated in the most horrible manner-men, women and children's privates cut out, ect. I heard one man say that he had cut out a woman's private parts and had them for exhibition on a stick . . . . I also heard of numerous instances in which men had cut out the private parts of females and stretched them over the saddle-bows and wore them over their hats while riding in the ranks."(p.328)

L.V. McWhorter was adopted into the Nez Perce tribe and wrote down the oral history of the tribe as he heard it. He concluded that the Nez Perce story was full of "ghastly, unprintable disclosures" regarding "the stalking spectre of rape". These stories of rape by white men were so distasteful that he could not deal with them directly in his book (McWhorter,1952).

Rape in slavery was more than a tool of violence, it was an institutional crime, part of the white man's subjugation of a group for economic and psychological gain. This patriarchal institution took the form of white over black, male over female and white male over black female. The female slave was forced into dual exploitation as both a laborer and reproducer. Her body and all of its parts belonged outright to her white master. Forced sexual exploitation of the black woman under slavery offered a steady enterprise of slave babies. Slave children , when they reached the age of six or eight, were put to work, whether they were full-blooded or mulatto (Brownmiller, 1975).

An important psychological advantage, along with the economic, aided in the sexual abuse of female slaves. Easy access to numerous submissive female bodies afforded swaggering proof of masculinity to slaveholding males. Female salves were expected to "breed"; some were retained specifically for that purpose. In the height of slavery, "breeder woman", "childbearing woman", "too old to breed" and "not a breeding woman" were common descriptive terms. Incountry breeding

was crucial to the planter economy after the African slave trade was banned in 1807, and the slave woman's value increased in accordance with her ability to produce healthy offspring (Bancroft, 1959).

Field laborer, house servant and breeder woman were the principal economic roles of the female slave, but she was also used by her white owner for his on sexual-recreational pleasure, a hierarchical privilege that spilled over to his neighbors, and to his young sons eager for initiation into the mysteries of sex (Stampp, 1956). A female abolitionist by the name of Margarite Douglas, who was imprisoned for teaching black children to read, wrote from prison in 1853 (Child, 1860):

> The female slave, however fair she may have become by various comminglings of her progenitors, or whatever her mental and moral acquirements may be, knows that she is slave, and, as such, power-less beneath the whims and fancies of her master. If he casts upon her a desiring eye, she knows that she must submit; and her only thought is, that the more gracefully she yields, the stronger and longer hold she may perchance retain upon the brutal appetite of her master. Still, she feels her degradation, and so do others with whom she is connected. She has parents, brothers, sisters, a lover, perhaps,who all suffer through her and with her.(p.28)

Since the slaveholding class created the language and wrote the laws pertaining to slavery, it is not surprising that legally the concept of raping a slave simply did not exist. One cannot rape one's own property. The rape of one man's slave by another white man was considered a mere "trespass" in the eyes of plantation law. The rape of one man's slave by another slave had no official recognition in law at all (Phillips,1969).

Moral objections to the "liberties" that the slaveholder and his overseer took as a matter of course were voiced within the odd framework of miscegenation, amalgamation, mixture of the races, licentiousness, degradation and lust. Typically for the power class, the slave's coerced participation in the act was turned on her. Her passive submission (the rule of survival in slavery) was styled as concubinage, prostitution or promiscuity when it was alluded to at all. Even the Northern abolitionists shied away from defining coercive sexual abuse under slavery as criminal rape, preferring to speak emotionally, but guardedly, of illicit passion and lust (Brownmiller, 1975).

The patriarchal institution of marriage combined with the patriarchal institution of slavery prevented the perception of a concept of sexual rights and bodily integrity for the female slave. In the nineteenth century, a married woman was considered by law to be the property of her husband, and any abuse to her person was considered, by law, to be an abuse to his property. If the woman was not married, the abuse was to her father's property. But slaves were not permitted to marry legally, and criminal sexual abuse of a female slave (a rape) could not be considered by law an affront to her slave "husband" or slave father, who had no rights of their own. The examples found in abolitionist literature that express concern over the sexual abuse of female slaves are frequently discussed in terms of sympathy for the abused women's husbands (Brownmiller, 1975).

Statutory prohibitions against interracial sex, or more accurately, against the act of sex between slaveholder and slave, were on the books of all the slave states from the time the establishment of the colonies (Johnston, 1970). A South Carolina grand jury in 1743 took notice of "the too common practice of criminal conversation with Negro and other slave wenches in this province," and labeled this conversation as "an Enormity and Evil of general Ill-Consequence" (Jordan, 1968, p.140).

The prominent concern was for the "pollution of the white race" and not for the rights of slaves. The laws against "mixture" between the races that white men wrote were not applied to the white men. They were applied by white men against white women (as several divorce suits and bastardy charges at this time indicated) and they were applied with a special vengeance against those black men who entered relationships with white women (Jordan, 1968).

In the last decades of slavery the role of the female slave forcibly progressed to outright prostitution. Traders openly sold their prettiest and "near-white" females for sexual use on the New Orleans market. The cavalier term was "fancy girl"(Bancroft, 1959). This trading took place at the St. Louis Hotel on Chartres Street, with the most active trading occurring during the racing season and Mardi Gras.

Conclusion

By tracing the concept of rape as it has been defined by man in the earliest laws, it is evident that the criminal act was viewed with horror, and the deadly punishments that were saw fit to apply, had little to do with an actual act of sexual violence that a woman might sustain. The law has come a long way from its beginnings when rape meant simply and conclusively the theft of a father's daughter's virginity, a specialized crime that damaged valuable goods before they could reach the matrimonial market. But modern legal perceptions of rape are rooted still in the ancient male concepts of property.

Since the earliest of times, when males from one tribe freely raped females from another tribe to secure new wives, the laws of marriage and the laws of rape have been philosophically intertwined, and are still difficult to separate. Brownmiller (1975) states that "man's historic desire to maintain sole, total and complete access to woman's vagina, as codified by his earliest laws of marriage,

sprang from his need to be the sole physical instrument governing impregnation, progeny and inheritance rights" (p.376). A man's reality was understood as it being perfectly lawful to capture and rape some other tribe's women. But it was unlawful for this act to be returned. The criminal act was viewed with horror and punished as rape, an act of unlawful possession and not sexual assault. It was viewed as a "trespass against his tribal right to control vaginal access to all women who belonged to him and his kin" (Brownmiller, 1975, p.376).

Since marriage, by law, was consummated only by defloration of virginity, the act viewed as criminal rape was the illegal destruction of virginity outside a marriage contract. Later, when this definition was seen as too narrow, he broadened his criminal concept to cover the ruination of a wife's chasity, to extend the law to nonvirgins too (Brownmiller, 1975). As the laws of rape continued to evolve they never shook free of their initial conception- that the violation was first a violation of male rights of possession, based on male requirements of virginity, chasity and consent to private access as the female agreement in the marriage contract. Rape is still, in some states, not defined as occurring within a marriage.

The past records indicate a gradual decrease in the prosecution rate of rape. This decrease coincided with an increase in assessing a lesser penalty of attempted rape or assault, which held a more lienent penalty for these charges. This gradual change appears to have led to a trend which has evolved into the current prosecution and penalty process today.

Based on the information that is known about rape during this time period, it appears that rape was not as prevalent as it has become within this past century. This was due to several factors, some of which have already been mentioned. First of all, the population of towns and cities were much smaller. Individuals knew one another and it was difficult to commit criminal acts and not eventually

be caught and prosecuted. Also due to the smaller populations, people were able to monitor each others' behavior more frequently. It seems that there was more peer pressure to obey the laws. Individuals were concerned about how their friends, family and neighbors viewed them. People were afraid of being gossiped about and of being ostracized by the community. The severe punishment for rape could of also been a deterrent to commit this crime.

Another possibility for the low reports of this crime could be due to women being fearful of reporting the crime. The culture during this time fostered women to be non-assertive, dependent and feel inferior to men. Therefore, women may have been frightened to accuse a man of committing a crime against them, especially if she was a slave. She would be afraid of what he would do to her and how she would be viewed by others. Women did not have much power during this time period. Lack of power tends to create an unwillingness to stand up to those in positions of power, because it might be useless. There was also the fear of how a single woman would be viewed by the community. A rape would place a stigma upon a woman and lessen her chances of getting married . In addition, slaves obviously did not report their sexual assaults as rape; they did not have any rights at all. They did not have any means to prevent or obtain justice for their abuse. All of these factors probably fostered the occurrence of rape. So, the act of rape could have occurred more frequently than records show, due to the fact that various circumstances caused it to be underreported.

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