Sex, Drugs, and . . . Race-to-Castrate: A Black Box Warning of Chemical Castration's Potential Racial Side Effects

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Every black man walking in this country pays a tremendous price for walking: for men are not women and a man's balance depends on the weight he carries between his legs. All men, however they may face or fail to face it, however they may handle, or be handled by it, know something about each other, which is simply that a man without balls is not a man. . . .[1]

INTRODUCTION

The social oppression and castration of black men is rooted in race and gender. Intersectional theories that explicitly or implicitly suggest that black men are privileged by gender are thus flawed.[2] Black men, instead, are also the victims of "gendered racism."[3] Indeed, there is a gender analysis implicit in the notion that white supremacy "castrates" black men – castration itself is an act of gendered racism. Historically, black men have thus been targeted for certain types of treatment – including castration – because they are both black *and* male. Therefore, although men constitute the dominant and privileged group within American society, black men convey a "subordinated masculinity."[4] Black masculinity as a subordinated form of masculinity arises because the interplay between racial and socioeconomic prejudices prevents black males, as individuals, from reaping the full benefits of male class privilege.

The legal system, moreover, has served as a primary instrument of oppression, carving out the racialized sphere of subordinated masculinity. According to critical race theorists, the law does not merely reflect, mediate, and arbitrate preexisting race relations. Rather, the law "constitutes, constructs and produces races and race relations in a way that supports" white racial power and subordination.[5] The transformative power of law in shaping race relations is reflected in a 1697 Pennsylvania statute that imposed the penalty of castration for a black man who attempted

1. JAMES BALDWIN, NO NAME IN THE STREET 64 (1972).
2. *See* Orlando Patterson, *Blacklash: The Crisis of Gender Relations among African Americans*, 62 TRANSITION: AN INTERNATIONAL REVIEW 4, 8 (1994) (noting that the "double burden argument, while not strictly incorrect, obscures more than it illuminates"). It should be noted, however, that black feminist "double burden" arguments have increasingly been abandoned in favor of a revolutionary black womanist account of gender relations that "does not seek to pit black women and men against one another in an endless, meaningless debate about who has suffered more" since "white supremacist capitalist patriarchy assaults the psyches of black males and females alike." bell hooks, *Feminist Transformation*, 66 TRANSITION: AN INTERNATIONAL REVIEW 93, 98 (1995).
3. *See* Athena D. Matua, *Theorizing Progressive Black Masculinities, in* PROGRESSIVE BLACK MASCULINITIES 5 (Athena D. Matua ed., 2006) (suggesting that black men are not only oppressed by racism, but that their oppression is gendered – in other words, they are oppressed by gendered racism). Matua further states that "black men are sometimes oppressed because they are blackmen – one socially and multidimensionally constructed positionality." *Id.* at 23.
4. Athena D. Matua, *Introduction: Mapping the Contours of Progressive Masculinities, in* PROGRESSIVE BLACK MASCULINITIES xix (Athena D. Matua ed., 2006) (defining "subordinated masculinity" as a term to be contrasted with hegemonic masculinity and used to describe those groups of men subordinated by things such as class, race, and sexuality).
5. *Id.* at xviii.

rape of a white woman and the death sentence for a black man convicted of the rape of a white woman.[6] The legalized tar-and-feather regime manifested by this Pennsylvania law is not an archaic relic of the past, moreover. Rather, sentiments of gendered racism against black men continue to dictate the sway of rape and sexual assault law in modern times.

Currently, a handful of states have enacted chemical castration laws applicable to offenders of sex crimes.[7] The phenomenon of chemical castration, in turn, threatens to serve as a tool of white domination insofar as it possesses the kinetic energy to perpetuate and further entrench black male subordination. Propelled by miseducation and fears concerning black masculinity, the prevailing stereotypes concerning black male hypersexuality and hyperagression pervade the societal psyche. These conceptualizations, in turn, cloud the judgment and perception of judges and juries alike, as evidenced by the disparate prosecution and sentencing of black men for sex-related crimes. Until America can reconceptualize black masculinity, chemical castration statutes must be repealed in order to avert "cruel and unusual punishment" and comport with notions of "equal protection."

This Article thus provides a black box warning for chemical castration drugs, addressing the potential racial implications of chemical castration laws vis-à-vis black men. Part I analyzes the historical roots of sterilization and castration within the United States and how eugenic theories of isolating and exterminating the "unfit" members of society undergirded these practices. To provide a foil for the subsequent castration of black men, Part II delves into a historical analysis of African circumcision and its traditional role in the masculine affirmation and validation processes. These constructive African rituals stood in stark contrast to the destructive rituals that black male slaves later endured on American soil. In America, castration emerged as a white supremacist tool designed to incite the demasculinization, dehumanization, and invisibilisation[8] of black men – the subject of Part III. These castrative acts of violence against black men constituted a predictable reaction to the myths, legends, and fears concerning black male hypersexuality. Part IV then explores how, as a result of these deeply-entrenched conceptualizations of black male

6. *See* Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2100-01 (1993) (citing The Law About Trying and Punishing Negroes, *in* 1 STATUTES AT LARGE OF PENNSYLVANIA IN THE TIME OF WILLIAM PENN (Gail McKnight Beckman ed., 1887)) (noting that white men who committed the same offense would merely receive a fine, whipping, or imprisonment for one year).

7. *See* CAL. PENAL CODE § 645 (2008); FLA. STAT. § 794.0235 (2008); IOWA CODE § 903B.10 (2008); LA. REV. STAT. ANN. § 15:538(C) (2008); MONT. CODE ANN. § 45-5-512 (2008); OR. REV. STAT. §§ 144.625-29 (2008); WIS. STAT. § 304.06(1q) (2008).

8. "Invisibilisation" refers to the process wherein society categorizes black men on the basis of group biases and prejudices, thereby disregarding the diversity within and amongst black males. A cloud of stereotypes thus render an individual black man invisible behind the haze of the black male collective. For the groundbreaking literary piece that established the framework of invisibilisation, see RALPH ELLISON, INVISIBLE MAN (1952). In the prologue of Ellison's work, the black male narrator describes the concept of being invisible: "I am invisible, understand, simply because people refuse to see me. . . . they see only my surroundings, themselves, or figments of their imagination – indeed, everything and anything except me." *Id.* at 3.

hypersexuality, the burgeoning chemical castration regime possesses the potential to revert to the lynch mob mentality of yesteryear. In response, Part V suggests that a moratorium should be placed on chemical castration, lest the legal system disparately apply the statutes against black male defendants – the historical icons of sexual aggression.

I. HISTORY OF CASTRATION IN THE UNITED STATES: ELIMINATING THE "UNFIT"

The practice of castration possesses deep roots across cultures and nations. Biblical,[9] mythological,[10] and historical references to castration are indicative of its universal acclaim as a method of punishment. The history of castration, however, is a sordid one insofar as it has often been used as an instrument of divine judgment; a means of sifting between the "wheat" and the "chaff"[11] – the "fit" and the "unfit."

Historically, discrimination has always assumed one of its most insidious forms when mixed with unethical scientific and medicinal practices.[12] Reverting to a mentality reminiscent of the Dark Ages, the twentieth-century United States eugenics movement endorsed surgical castration and sterilization as a panacea for society's ills.[13] In some respects, American eugenics thus presented itself as a predecessor of the practices utilized during the Nazi Germany Holocaust.[14] Indeed, sterilizations in the

9. *See Matthew* 19:12 (King James) ("For there are some eunuchs, which were so born from their mother's womb: and there are some eunuchs, which were made eunuchs of men: and there be eunuchs, which have made themselves eunuchs for the kingdom of heaven's sake. He that is able to receive it, let him receive it."). *Cf. Leviticus* 24:20 (King James) ("Breach for breach, eye for eye, tooth for tooth: as he has caused a blemish in a man, so shall it be done to him again."); *Mark* 9:43 (King James) ("And if thy hand offend thee, cut it off: it is better for you to enter into life maimed, than having two hands to go into hell, into the fire that shall never be quenched."). Interestingly enough, one of the most-referenced eunuchs mentioned in the Bible was of Ethiopian descent – i.e., a black man. *See Acts* 8:26-40.

10. *See, e.g.*, Georg K. Stürup, *Castration: The Total Treatment*, *in* SEXUAL BEHAVIORS: SOCIAL, CLINICAL, AND LEGAL ASPECTS 361, 362-63 (H.L.P. Resnik & Marvin E. Wolfgang eds., 1972) (recounting Zeus' castration of his father, Cronos, as retribution for the swallowing of his brothers).

11. *Cf. Matthew* 3:12 (New King James) ("His winnowing fan is in His hand, and He will thoroughly clean out His threshing floor, and gather His wheat into the barn; but He will burn up the chaff with unquenchable fire.").

12. *See, e.g.*, Abigail Perkiss, *Public Accountability and the Tuskegee Syphilis Experiments: Restorative Justice Approach*, 10 BERKELEY J. AFR.-AM. L & POL'Y 70 (2008) (describing the United States Government's "Tuskegee Study of Untreated Syphilis in the Negro Male," which utilized black men in Macon County, Alabama as test subjects to record the natural life cycle of the syphilis disease, deliberately manipulating and preventing these test subjects from receiving available forms of treatment over the span of forty years).

13. *See* Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 FLA. ST. U. L. REV. 117, 119 (1998) (providing a brief history of chemical castration in the United States); Karl A. Vanderzyl, Comment, *Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders*, 15 N. ILL. U. L. REV. 107, 109-13 (1994) (describing the eugenics movement of the early twentieth century in the United States).

14. *See* Linda Beckman, Student Work, *Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment*, 100 W. VA. L. REV. 853,

United States primarily occurred in public mental institutions that housed poor ethnic and racial minorities in disproportionately high numbers.[15] This eugenics movement sprung from Social Darwinist theories that taught that the improvement of the quality of the human race could be attained by discouraging the breeding of individuals with undesirable traits, particularly those whom society considered feebleminded or criminal.

In many states, laws were thus passed enabling compulsory sterilization of criminals and persons with mental disabilities in order to prevent them from reproducing and passing on undesirable genetic traits.[16] According to Supreme Court Justice Oliver Wendell Holmes in the 1927 *Buck v. Bell*[17] decision upholding a Virginia statute mandating the compulsory sterilization of the mentally retarded: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime . . . society can prevent those who are manifestly unfit from continuing their kind."[18]

Predictably, eugenic theories tended to disparately identify blacks as being "unfit." Eugenicists popularized theories, for example, that posited criminality in racial terms – correlating blackness with a proclivity toward criminal behavior. It is thus no coincidence that the State of Oklahoma attempted to force Walter Skinner, a black man, to undergo sterilization following his third criminal conviction, even though none of his prior convictions involved sexual offences.[19] Garnering lessons from the experience with Nazi Germany,[20] the Supreme Court held in *Skinner v. Oklahoma*[21] that the Oklahoma law permitting the sterilization of recidivist criminals violated the Equal Protection Clause of the Fourteenth Amendment. In support of its holding, the Court noted that, by exempting white-collar crimes, the statute invidiously discriminated against "blue-collar" criminals.[22]

In the post-World War II era, Americans gradually viewed eugenic practices as unacceptable human rights violations and the movement de-

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890 (1998) (associating chemical castration with the biological experiments conducted by Nazi Germany in World War II).

15. David Morgan, *Study: U.S. Eugenics Policies Akin to Nazis'/ Sterilization Went on for Decades*, CHI. TRIB., Feb. 15, 2000, Zone N at 3.
16. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 36 (1942) (striking down an Oklahoma statute that authorized the sterilization of recidivist criminals); Davis v. Berry, 216 F. 413, 417 (S.D. Iowa 1914*), rev'd on other grounds*, 242 U.S. 468 (1917) (striking down an Iowa statute permitting vasectomies for repeat felons as violative of the Eighth Amendment prohibition against cruel and unusual punishment because vasectomies, like castration, inflict shame, humiliation, degradation, and mental torture on the defendant). Eighteen states, at some point, had passed compulsory sterilization statutes. Morgan, *supra* note 16, at 3.
17. 274 U.S. 200 (1927).
18. *Id.* at 207.
19. *See generally* Skinner v. Oklahoma, 316 U.S. 535 (1942). Skinner's prior convictions were for chicken theft and armed robbery. *Id.* at 537.
20. *See* Stacy Russell, Comment, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L L. 425, 439-40 (1997) (noting that knowledge of Nazi experimentation with sterilization and castration incited the American public to disfavor these procedures).
21. 316 U.S. 535 (1942).
22. *See Skinner*, 316 U.S. at 538.

clined in strength, as evidenced by court decisions. Courts held, for example, that surgical castration constituted "cruel and unusual punishment" in contravention of state or federal constitutions.[23] Plagued by the modern problem of prison overcrowding in recent years, however, legislators across various states began to explore alternatives to incarceration. In the midst of this search, legislators stumbled upon a solution dubbed "chemical castration."[24]

The recent legal-medical phenomenon of chemical castration, however, has arguably reincarnated the former eugenics regime. Chemical suppression of the sex drive through the injection of antiandrogen drugs has arisen as a viable alternative to surgical castration, thereby aiding and abetting the eugenics reincarnation. The practice has been coined "chemical castration" to reference its use of libido-inhibiting drugs to lower testosterone levels and reduce male sex drive, effectively "castrating" men via chemicals. Dr. Fred Berlin of John Hopkins Hospital in Baltimore originated the experimental use of drugs for the purposes of chemical castration and published a study of the procedures in 1981.[25] In 1984, a Michigan judge then ordered a convicted sex offender to undergo chemical castration through medroxyprogesterone (MPA)[26] injections as condition of probation.[27] Although the Michigan appellate court subsequently set the sentence aside as violative of the state probation statute, the trial-level victory paved the way for later advocacy of chemical castration, both in the United States and abroad.[28]

Today, court-ordered chemical castration is dangerous inasmuch as it establishes a slippery slope toward a eugenics regime, rendering it a regressive rather than progressive form of punishment. Despite pervasive medical evidence that MPA is ineffective in preventing recidivism in most cases involving sex offenders, its use has persisted. If the benefit of chemical castration is not rooted in the prevention of recidivism or other rehabilitative or therapeutic purposes, however, then its value must lie in its

23. *See, e.g.*, State v. Brown, 326 S.E.2d 410, 412 (S.C. 1985) (holding that surgical castration is a form of mutilation and, therefore constitutes "cruel and unusual punishment" under the South Carolina Constitution).
24. *See* Pamela K. Hicks, *Castration of Sexual Offenders*, 14 J. LEGAL MED. 641, 642-44 (1993) (explaining how prison overcrowding provided the contextual framework for the promotion of chemical castration). Indeed, the use of alternative sentencing is becoming more widespread. While pondering what sentence to impose upon a young man convicted of voluntary manslaughter, for example, a California judge solicited suggestions from the community as to an appropriate sentence. After receiving several responses, the defendant was sentenced to two years of missionary work. Martha Middleton, *Sentencing: The Alternatives*, NAT'L L.J., Apr. 23, 1984, at 1.
25. *See* People v. Gauntlett, 352 N.W. 2d 310, 315 (Mich. Ct. App. 1984).
26. Medroxyprogesterone acetate (MPA) is a synthetic progesterone more commonly known by the brand name Depo-Provera, a female contraceptive. It is the drug used for "chemical castration." *See* PHYSICIANS' DESK REFERENCE 2083-84 (51st ed. 1997).
27. *Gauntlett*, 352 N.W.2d at 313.
28. Debra Wilson, *The Legal Implications of Chemical Castration of Sex Offenders in Criminal Law*, Australian Law Teachers Association 2007 Refereed Conference Papers 3-4 (2007) (explaining that both France, in 2005, and the United Kingdom, in 2007, have introduced chemical castration legislation; in Australia and New Zealand, moreover, calls for the introduction of such legislation are increasing).

retributive function. In this retributive function, nonetheless, the ugly head of eugenics has reemerged. Aside from the punishment for the harm done to the alleged victim, the primary act of retribution lies in the State's temporary (or permanent) deprivation of the capacity to procreate amongst particular segments of society deemed "unfit" – a cornerstone of eugenics.

II. THE MIDDLE PASSAGE: FROM CIRCUMCISION TO CASTRATION

Ironically, the cutting of penis foreskin, or circumcision, symbolizes that a boy is "fit" to enter manhood in many cultures.[29] African societies, in particular, comprised some of the first cultures to adopt the practice of circumcision.[30] Predating European colonialism, such practices held widespread significance throughout sub-Saharan Africa.[31] Circumcision and the attendant rituals promoted the social maturation of young males and facilitated the transition to manhood.[32] Prior to circumcision, for example, communities would seclude young initiates and, during this time of isolation, they would receive training and instruction on the precepts of manhood. These initiation schools might last as long as six months.[33]

Initiation schools constituted the apex of African educational systems. Within Xhosa society, the primary instructor and guardian, known as the "*ikhankatha*," was poetically described as follows:

Lingumntu ongenantaka
He is a person of courage
Xa liphethe ubudoda
When he handles manhood
Nobasele toshatosha
Even when he squirms
Lisuka liginy'ilitye
He just swallows a stone

Limakha ngesandla salo
He (the guardian) builds him with his hand
Nqwa nogqira wakwamlungu
Just like the doctor from the whites
Libukhal iliso lalo
His eye is sharp
Lokubhaq' izonakalo

29. *See, e.g.*, *Genesis* 17:11 (King James) ("And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you.").
30. *See* LUMKA SHEILA FUNANI, CIRCUMCISION AMONG THE AMA-XHOSA – A MEDICAL INVESTIGATION 20 (1990) (noting that the "black world," including Egyptian and Ethiopian cultures, practiced circumcision in early times and transmitted this practice to the Semitic world).
31. *See id.* at 19-34.
32. *See id.* at 29.
33. PHILIP CURTIN, STEVEN FEIERMAN, LEONARD THOMPSON & JAN VANSINA, AFRICAN HISTORY: FROM EARLIEST TIMES TO INDEPENDENCE 249 (2d ed. 1995). In addition to learning the customs and traditions of their culture and the foundations of manhood, the initiates typically underwent a series of tough physical tasks. *Id.*

To notice damage

Lilunga lokucoceka
He is a practitioner of cleanliness
Ngaphandle nangaphakathi
Outside and inside
Likuthand' ukuzihlamba
He likes to clean
Izandla kwanentliziyo
His hands and the heart too.[34]

The language of internal "cleansing" and "building"[35] breathes life into the notion that the act of circumcision held significance beyond the mere physical act of foreskin extrication. Rather, African cultures revered the rituals as a requisite stepping stone to manhood. In a Dogon village, for example, a cleft in the rock face opened on to a cave and then narrowed again to an exit on the far side, providing the setting wherein "[y]ou went in through the entrance as a boy and left through the exit on the other side as a man."[36] Similarly, in oral denotation of this transformative process, each boy in Xhosa society was called upon to say "Ndyindoda" – "I am indeed a man" – at the moment of circumcision.[37] African circumcision ceremonies therefore signified the child's acceptance within the community and his or her assumption of the responsibilities of adulthood.[38] The rituals also denoted the acknowledgment of the task of procreation.[39] In this sense, circumcision constituted rites of passage for African males.

Juxtaposing pre-Middle Passage circumcision rituals and post-Middle Passage castrative acts becomes relevant insofar as the two circumstances of penile incision present diametrically-opposed objectives. The former was constructive whereas the latter was destructive. Indeed, edification and character development were the hallmark of circumcision.[40] Africans viewed circumcision, attendant by the removal of the penis foreskin, as an affirmative validation of masculinity and manhood and a license to procreate. Post-Middle Passage acts of castration, on the other hand, cut off the penis entirely from black male bodies, constructing a complete and irreversible barrier to procreation and undercutting the foundations of masculinity. Viewed from this lens, the legacy of black male castration both reflected and reinforced the regressive black male social status. Castration on American soil ultimately represented a flank of a strategic attack upon black masculinity – the de-circumcision of black men.

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34. FUNANI, *supra* note 31, at 30-31.
35. *See also* JOHN READER, AFRICA: A BIOGRAPHY OF THE CONTINENT 281 (1997) (describing a place of circumcision as an "operating theatre").
36. *Id.*
37. FUNANI, *supra* note 31, at 32
38. *See id.* at 29. To signify the transition, circumcised men in Africa often received new names. CURTIN ET AL., *supra* note 34, at 249.
39. FUNANI, *supra* note 31, at 29.
40. Following circumcision, the newly-circumcised men would be instructed by tribal elders about how they should behave now that they had become men. *See id.* at 33-34.

III. HISTORY OF BLACK MALE CASTRATION: DEMASCULINIZATION, DEHUMANIZATION, AND INVISIBILITY

The history of black male castration arose within the social framework of power and subordination. In particular, white male domination and power,[41] in many ways, remained contingent upon black male subordination.[42] Predating the slavery era, whites portrayed people of African descent as primitive and animalistic as part of the process of demonizing and Other-izing black men. This animalistic conceptualization naturally led to the stereotyping of black men as both hypersexual and hyperaggressive – "[i]n the Negro all the passions, emotions, and ambitions, are almost wholly subservient to the sexual instinct. . . ."[43] At the core, this construction of the oversexed black male parlayed perfectly into notions of black bestiality and primitivism. Whites framed black male sexuality in a manner that evoked connotations of the "foreign," "imposing," and "unnatural." Within American society, black males thus emerged as the sexualized Other.[44] When these sex-crazed conceptualizations of black men juxtaposed themselves against the countervailing conceptualizations of white women as pure and docile, the stage was set for interracial tension and conflict.

Indeed, while the rape of black women was legal,[45] American political and judicial institutions provided excessive protections for white women,

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41. Many scholars suggest that masculinity, as a way of being, constitutes a social and political institution of domination. In other words, masculinity is defined, understood, believed, and practiced as domination over others. *See* Athena D. Matua, *Theorizing Progressive Black Masculinities, in* PROGRESSIVE BLACK MASCULINITIES 3 (Athena D. Matua ed., 2006).

42. *See* Patricia Hill Collins, *A Telling Difference: Dominance: Strength, and Black Masculinities*, *in* PROGRESSIVE BLACK MASCULINITIES 73, 88 (Athena D. Matua ed., 2006) (stating that "[s]exual dominance constitutes [an] important component of hegemonic white masculinity").

43. J.A. ROGERS, III SEX AND RACE 150 (1944).

44. The Otherness of black men manifested itself in the spectacle of lynching scenes. Chronicling the atmosphere of a lynching, for example, Ida B. Wells-Barnett stated that, "[the black man's] body hung thus exposed . . . during which time, several photographs of him as he hung dangling at the end of the chain were taken, and his toes and fingers cut off." DAVID MARRIOTT, ON BLACK MEN 9 (2000). The carnival-like atmosphere described by Wells-Barnett hints at an air of excitement similar to a childhood trip to the zoo. Lynching spectators often took the initiative to leave with "souvenirs" from a black male body, which allegedly appeared more animalistic than the body of their white male counterparts. *See id.* Indeed, in another lynching incident first recorded in *Red Wine First,* a white man purportedly stated, "I'm gonna borer me a Kodak tomorrer and I'm coming back here and I'm gonna take me some pitchers of that. Don't look human does it?" *Id*.

45. *See* Evans, *Rape, Race, and Research, in* BLACKS AND CRIMINAL JUSTICE 75, 79 (C. Owens & J. Bell eds., 1977); S. BROWNMILLER, AGAINST OUR WILL 176 (1975). Indeed, indictments were sometimes dismissed for failure to allege that the victim was white. *See, e.g.*, State v. Charles, *a slave*, 1 Fla. 298 (1847); George, a slave, v. State, 37 Miss. 316 (1859). For a critique of the way in which legal institutions narrowly focused on black male/white female rapes, to the detriment of black female rape victims, see Jennifer B. Wriggins, Note, *Rape, Racism, and the Law,* 6 HARV. WOMEN'S L.J. 103 (1983).

crafting a regime of racialized property.[46] The white male preoccupation with the sexual activity of white women, however, found its roots as much in fear as in love. Driven by fear of black male sexuality, the law of sexual assault and rape emerged as a tool to fortify white male power and control over their possessions – black women and white women.[47] By constructing myths concerning the sanctity, chastity, and purity[48] of white womanhood, moreover, white men firmly established white women as a protected property interest.

The ensuing property-based struggle dictated the sway of interracial relations within American society. As the rightful "owners" of white women, white men ascertained a need to protect white women from savage and rapacious black men who would attempt to "steal" them. Earl Hutchinson, author of *The Assassination of the Black Male Image*, defined the "Big Black Scare" as the societal perception of a widespread black male conspiracy to acquire land, power, and *white women*.[49] This fear was, in part, reinforced by the purported sexual prowess of black men –

46. Legal protection of white women from rape and sexual assault, however, often remained premised on the defendant being a black male. Many states provided less severe penalties for convicted white rapists than convicted black ones. For example, the Virginia Code of 1819 and 1823 Law prescribed the death penalty for rape or attempted rape of a white woman by a slave, Black, or mulatto whereas only a term of 10-21 years for rape by a white man; the Georgia Penal Code of 1816 permitted the death penalty for rape or attempted rape of a free white woman by a slave or free person of color but a term of not more than 20 years for rape or attempted rape by a white man; and the Kentucky 1802 Code allowed for the death penalty for rape of a white woman by a slave whereas a term of years for rape by a white man. Wriggins, *supra* note 46, at 106 n.15; *see also* Leigh Bienen, *Rape III – National Developments In Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 173 n.14 (1980).

47. *See* Cheryl I. Harris, *Whiteness as Property*, *in* CRITICAL RACE THEORY 276, 277-87 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); S. BROWNMILLER, *supra* note 46, at 7-9; L. CLARK & D. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY 115-32 (1977); Camille E. LeGrand, Comment, *Rape and Rape Laws: Sexism in Society and Law,* 61 CAL. L. REV. 919, 941 (1973) (noting that rape laws originated in the conception of women as property). Slavery prevented black men from "controlling" black women's sexuality in the way that white men controlled the sexuality of white women and black women. Additionally, black men could not prevent white men from raping or abusing their wives, sisters, and daughters. In this manner, black men were denied the "privileges" of manhood and effectively "emasculated." *See* Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, *in* BLACK MEN ON RACE, GENDER, AND SEXUALITY 170 (Devon W. Carbado ed., 1999); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,* 43 STAN. L. REV. 1241, 1273 (1991) ("To the extent rape of Black women is thought to dramatize racism, it is usually cast as an assault on Black manhood, demonstrating his inability to protect Black women.").

48. The prevailing force of the myth of white female sexual chastity and purity was exemplified in *Dallas v. State*, 76 Fla. 358 (Fla. 1918), where the court stated: "What has been said by some of our courts about an unchaste female being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race." Note, *Statutory Rape: Previous Chaste Character in Florida*, 13 U. FLA. L. REV. 201, 203-04 (1960) (quoting the *Dallas v. State* case). With regard to the notion of purity, white women, as child bearers also played an integral role in ensuring white *racial* purity. *See generally* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995).

49. *See generally* EARL OFARI HUTCHINSON, THE ASSASSINATION OF THE BLACK MALE IMAGE (1994).

the Mandingo Theory. Although many doctors, scientists, and pseudo-scientists attempted to deemphasize the gravitational force of the Mandingo obsession by advancing theories that the larger genitalia coincided with a smaller brain, lower intellectual endowment, and increased lasciviousness,[50] such efforts floundered. Rumors of black male sexual prowess continued to simultaneously stimulate and intimidate the imaginations of white America. Henry Havelock Ellis, a sexual psychologist, noted:

> I am informed that the sexual power of Negroes . . . are the cause of the favor with which they are viewed by some white women of strong sexual passions in America and by many prostitutes. At one time there was a special house in New York City to which white women resorted for these "buck lovers." The women came heavily veiled and would inspect the penises of the men before making the selection.[51]

White male fear of interracial sexual relations provided an impetus for the passage of anti-miscegenation laws in many states that prohibited interracial marriage. White liberals and conservatives alike set their differences aside to support these suppressive regimes of racial segregation. During the nineteenth century, thirty-eight states adopted anti-miscegenation statutes.[52] The United States Supreme Court upheld the constitutionality of anti-miscegenation laws, moreover, in the 1883 *Pace v. Alabama* case.[53] In *Pace*, the Supreme Court ruled that the Alabama anti-miscegenation statute did not violate the Fourteenth Amendment because the statute treated the races equally insofar as both whites and blacks were punished in equal measure for breaking the law against interracial marriage and interracial sex.[54] The *Pace* decision remained good law until it was overturned in 1967 when the Supreme Court unanimously held in *Loving v. Virginia* that anti-miscegenation laws were unconstitutional.[55] Surviving until 1967, the long-standing prohibition of interracial marriage contracts in many states reflected a legal reaction to fears of race-mixing.

Illustrating the depth of white male fears concerning race-mixing, the scope of anti-miscegenation statutes sometimes branched beyond marriage into the prohibition of mere interracial sex or cohabitation. As late as 1964, for example, a Florida statute stated that:

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50. Dr. William Lee Howard asserted in 1903, for example, that black male "attacks on defenseless white women are evidence of racial instincts that are about as amenable to ethnic culture as is the inherent odor of the race." The root of the problem, according to Howard, was the "large size of the Negro's penis" and the fact that blacks lacked "the sensitiveness of the terminal fibers which exists in the Caucasian." GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 279 (1971); *see also* JESSIE DANIELS, WHITE LIES 76-78 (1997) (explicating how white supremacists have historically advanced biological theories of intelligence that equated "blackness" with low intelligence).
51. J.A. ROGERS, *supra* note 44, at 148 (quoting Havelock Ellis' *Studies in the Psychology of Sex*, Vol. 3, 238).
52. Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50 (1964).
53. 106 U.S. 583 (1883).
54. *Id.* at 585.
55. 388 U.S. 1 (1967).

> Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.[56]

This statute exemplified the deep-seeded societal aversion to the notion of sexual relations between black men and white women. Such sentiments, moreover, remained prevalent throughout the twentieth century. When Gunnar Myrdal formulated "The Rank Order of Discrimination" in 1944, for example, the "Big Black Scare" mentality still permeated American society. When asking white Southerners to rank the things that they thought blacks coveted, they ranked intermarriage and sexual intercourse with whites as the leading desire – ahead of social equality, desegregation, political enfranchisement, legal equality, and economic opportunity.[57]

Manifesting the paranoia of the "Big Black Scare," many whites believed that the black male desire for interracial sexual intercourse was so strong that black men would go to any extent, including rape, to satisfy their savage desires. For example, Iwan Bloch, a noted early sexologist, hypothesized that the desire of blacks to mate with whites was much greater than that of whites to mate with blacks. He stated:

> "[M]uch greater is the alluring force exercised by the white upon the black; more especially among the civilized Negroes does the white woman play the part of a fetish. This is the explanation of the frequent rape or attempted rape on white girls on the part of Negroes – one of the principal causes of the Southern lynchings."[58]

Indeed, a mere suspicion or allegation of rape proved enough to catapult an angry white mob into a frenzied, hysterical lynching scene, as evidenced by the fate of Emmett Till. In the wake of such gruesome lynchings, fear restricted the gaze of black men insofar as they had to be wary of accusations of "eyeball rape." The fear of charges of "eyeball rape" spiked tremendously in the aftermath of *McQuirter v. State*, a case where the appellant, a black man, had been convicted of "attempt to commit assault with intent to rape"[59] – a nonsensical legal construct of an attempt to attempt to rape. Following *McQuirter*, black men could scarcely make eye contact with white women, lest they face the wrath of an angry white mob, either in the courts of law or the "courts of the streets." Black men thus possessed a repressed gaze and it is not coincidental that, in the infamous slaughtering of Emmett Till, the angry mob

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56. FLA. STAT. ANN. § 798.05 (1964); *see also* McLaughlin v. Florida, 379 U.S. 184, 184-85 (1964) (holding the Florida statute invalid as a denial of equal protection under the Fourteenth Amendment).

57. CALVIN C. HERNTON, SEX AND RACISM IN AMERICA 3 (1965).

58. IWAN BLOCH, SEXUAL LIFE OF OUR TIME IN ITS RELATIONS TO MODERN CIVILISATION 614 (1908).

59. 63 So. 2d 388, 390 (Ala. Ct. App. 1953).

extracted his eyeball[60] – the instrument that he had used to "penetrate" the body of a white female.

A. Castration as a Tool of Demasculinization

Although black men could be convicted of mere "eyeball rape," the penis, rather than the eye, remained the defining instrument of male penetration. Therefore, many lynching mobs elevated their attack on black male bodies through the use of castration. Lynching scenes thus frequently featured the spectacle of castration. The use of castration, in many respects, reveals that the act of lynching represented an attempt to dehumanize and emasculate black men, thereby indirectly reinforcing white male superiority. A 1934 account of the lynching of Claude Neal, published by the National Association for the Advancement of Colored People (NAACP), for example, vividly portrays the emasculinization of black men that typified lynching scenes. According to the account, a white lynching mob subjected a black man accused of raping and killing a nineteen-year-old white girl in Marianna, Florida to a series of denigrating forms of torture that "shock the conscience." In particular, the account described how: "After taking the nigger to the woods . . . they cut off his penis. He was made to eat it. Then they cut off his testicles and made him eat them and say he liked it."[61]

From the perspective of white America, the social utility of these atrocious acts of castration lie in their ability to restore the racial and gender balance within communities. Prompted by fear of black male sexual power, for example, the coerced consumption of genitalia forced Claude Neal to literally swallow his own "manhood." The castration and consumption of black manhood thus arose as a tool of white supremacy. Balancing feelings of disgust and jealousy, the white man "sees in the Negro the essence of his own sexuality, that is, those qualities that he wishes for but fears he does not possess . . . [a]nd that is why he must castrate him."[62] Indeed, black male castration represented a sexualized transfer of power – it was an overt attempt to extract the organ that perpetuated the legend of black sexual superiority. In the 1960s, black writer Calvin Hernton commented on the white male need to reassert their superiority through castration:

> In taking the black man's genitals, the hooded men in white are amputating the portion of themselves which they secretly con-

60. *Cf.* DORA APEL, IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN, AND THE MOB 180 (2004) (explaining that, when interviewed by the *Chicago Defender*, Emmett Till's mother remarked that, when she saw the body of her dead son, "the right eye was lying on his cheek").

61. MARRIOTT, *supra* note 45, at 6 (2000). In addition to the act of castration, the account also recounts that "they sliced his sides and stomach with knives and every now and then somebody would cut off a finger or toe. Red hot irons were used on the nigger to burn him from top to bottom . . . [f]rom time to time during the torture a rope would be tied around Neal's neck and he was pulled over a limb and held there until he almost choked to death, when he would be let down and the torture began all over again." APEL, *supra* note 61, at 137.

62. DORIS Y. WILKINSON & RONALD L. TAYLOR, THE BLACK MALE IN AMERICA: PERSPECTIVES ON HIS STATUS IN CONTEMPORARY SOCIETY 141 (1977) (quoting Calvin Hernton).

> sider vile, filthy, and most of all, inadequate. At the same time, castration is the acting out of the white man's guilt for having sex with Negro women, and of the white man's hatred and envy of the Negro male's supposed relations with and appeal to white women. And finally, through the castration rite, white men hope to acquire the grotesque powers they have assigned to the Negro phallus which they symbolically extol by the act of destroying it.[63]

Once castrated, the victimized black male body could be presented for public display as subordinate and feminized. Mutilating the icon of black male prowess and virility, castration reduced the black male body from hypermasculine to hypomasculine,[64] thereby negating black masculinity and affirming white male sexual hegemony.

B. Castration as a Tool of Dehumanization

Insofar as castration effeminized and subordinated black men, historical revisitors must also view castration through the lens of dehumanization and racial domestication. Indeed, castration is frequently performed on domestic animals that are not intended for breeding. Domestic animals are castrated to prevent unwanted or uncontrolled reproduction and to reduce the indirect consequences of sexual behavior such as territorial aggression.[65] Similarly, whites viewed black men as animals necessitating domestication – they were untamed "bucks." From this conceptualization, the enslavement of African men arose as a form of chattel slavery. As domesticated bucks, however, whites could tame black men, but only to a certain extent because they would always remain a "wolf [held] by the ears."[66] George T. Winston, a writer and second president of North Carolina College of Agriculture and Mechanic Arts, claimed that:

> [W]hen a knock is heard at the door [a white woman] shudders with nameless horror. The black brute is lurking in the dark, a monstrous beast, crazed with lust. His ferocity is almost demoniacal. A mad bull or a tiger could scarcely be more brutal. A

63. Hernton, *supra* note 58, at 115.

64. *Cf.* APEL, *supra* note 61, at 140 (noting that the photograph of the Claude Neal lynching "stresses the abject state of the body characterized by lack and limpness, its nudity a sign of powerlessness meant to reassure its viewers of the defused sexual threat. Even minor organs of sensation . . . are visibly removed.").

65. *See, e.g.*, Mitzel v. Zachman, 16 N.W.2d 472 (Minn. 1945); Hummel v. State, 99 P.2d 913 (Okla. Crim. App. 1940) (holding that a "private nuisance" existed where the owner of a bull, which was not a thoroughbred, permitted it to run at large on a free range in violation of statute. Owners of thoroughbred cattle on that range were not guilty of "malicious mischief," however, when they abated that nuisance by castrating the bull without any malice towards its owner and without disturbing the peace).

66. *See* JOHN CHESTER MILLER, THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY 241 (1977) (citing an 1820 letter from Thomas Jefferson to John Holmes, a Maine Senator, where Jefferson analogized slavery to a condition in which "[w]e have the wolf by the ears; and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other.").

> whole community is now frenzied with horror, with blind and furious rage for vengeance.[67]

In light of the analogies to mad bulls, tigers, or other wild animals, one can interpret the history of castration within the United States as an attempt to domesticate black male chattel. In many respects, castration also treated black men like rabid animals that needed to be "put out of their misery." Although some whites might concede that lynching and castration were evil, it remained a necessity – a lesser of two evils. From their vantage point, the greater evil and the greater danger was the "black brute." The black brute thus had to be castrated in order to make him amenable to white control. These rash acts of castration possessed the side effect of destroying the organ and aborting the substance that gives life to black male existence. Castration thus emerged as a dehumanizing form of racial domestication.

C. Castration as a Tool of Invisibilisation

The phallocentric trajectory of castration also negated the individuality of black males by defining them solely upon the basis of their physical attributes. In an account of an Alabama lynching scene, for example, a man recollected:

> I looked up at the man. I knew him, yet he was so messed up I could not tell who he was. He was naked, and they had put tar on him and burnt him. He smelled awful. . . . I knew what they had done was a sin. They had cut out his private and left it laying on the ground.[68]

It is noteworthy that, in this particular instance, the lynching mob committed the act of violence against the black man's penis rather than his head. Indeed, throughout history, individuals have commonly utilized beheadings as a form of punishment because the head is normally representative of one's personal identity, thoughts, and emotions. Nevertheless, by centering and focusing aggression upon sexual organs, American lynching scenes lucidly illustrate that outside spectators recognized the black man's penis, rather than his face, as his distinguishing, identifying characteristic – his "nerve center." The spectator's comment that the black man, after castration, "was so messed up" that he could not identify him demonstrates a phallocentric method of identification. From the spectator's gaze, this penis-less black man might as well have been headless – he could have been any black man. His manhood and identity merely lay within the context of his severed sexual organ.

To the extent that black masculine identity is defined by one's sexual organs, black men suffer from the invisibility syndrome. This syndrome is debilitating for black men inasmuch as it causes the "content of their

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67. George T. Winston, *The Relations of the Whites to the Negroes*, 18 ANNALS AM. ACAD. POL. AND SOC. SCI. 105, 108-109 (1901).

68. MARRIOTT, *supra* note 45, at 14.

character"[69] to play a minimal role in the way in which outside persons conceptualize them.[70] Instead of focusing upon internal attributes, society adopts a phallocentric[71] perspective wherein black males are relegated to sexual instruments and the entire notion of black masculinity becomes indistinguishable from the black male phallus itself. In Ralph Ellison's novel *Invisible Man,* for example, one scholar has noted how the protagonist evinces his concern with purely physical attractions when he indignantly states to a white woman: "You can't get to my intellect through my gonads."[72] Through their acts of castrative violence, however, American lynch mobs gave iconic significance to black male gonads, placing them on a pedestal as an idol worthy of admiration and revile. From their perspective, the black man's penis *was* his head – the defining characteristic that rendered it a prime object of attack.

D. Legal Lynching/Castration

The legal system often remained ill-equipped to prevent angry white mobs from exacting revenge upon black males accused of the rape or sexual assault of a white woman. Former South Carolina Governor and U.S. Senator Benjamin Tillman confessed on the floor of Congress in 1907: "So far as I am concerned, [the Negro accused of raping a white woman] has put himself outside the pale of the law, human and divine."[73] Tillman's statement reflected the sentiments of the times and these sentiments tangibly manifested themselves in race relations, both within and outside the legal framework. In *United States v. Shipp*, for example, Justice Harlan issued a stay of execution to allow the Court to "intervene to ensure an

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69. *See* Martin Luther King, Jr., I Have A Dream Speech at the Lincoln Memorial (Aug. 28, 1963) (transcript available at http://www.americanrhetoric.com/speeches/mlkihaveadream.htm).

70. *See* MARRIOTT, *supra* note 45, at vii. Today, the conceptualization of black masculinity remains captive to sexual characterizations. In NO NAME IN THE STREET, for example, James Baldwin states, "[I]t is absolutely certain that white men, who invented the nigger's prick, are still at the mercy of the nightmare. . . ." BALDWIN, *supra* note 2, at 63. Baldwin's assertion of white phallocentrism is evidenced by the works of Robert Mapplethorpe, a world-renowned photographer. In his infamous photograph entitled "Man in Polyester Suit" (1980), a black man is photographed from the chest down, clad in a business suit. Erupting from this façade of civility, however, appears his exposed penis, "sullen and heavy like the trunk of an elephant . . . veiny and pulpy" *Id.* at 25. The reference to its elephantine nature facilitates the conceptualization of black masculinity as animalistic and inhuman. Indeed, when viewing the photograph, the spectator sees that, behind this black man's seemingly professional, civilized exterior exists something grossly primitive and bestial. Since the spectator cannot view the man's face, moreover, the darkness of the animalistic penis emerges as the only physical characteristic identifying the man as black.

71. For a critique of phallocentrism, *see* bell hooks, *Reconstructing Black Masculinity*, *in* BLACK LOOKS: RACE AND REPRESENTATION 111-13 (1992).

72. HERNTON, *supra* note 58, at 49. (Hernton may have attempted to recite this quotation from memory. He did not directly cite to Ellisom's novel, and nowhere in *Invisible Man* does Ellison use the word "gonads." Regardless, Hernton's assertion only adds to the notion that black men suffer from the invisibility syndrome.)

73. STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL 4 (1988). During his tenure as Governor of South Carolina, Tillman also stated, "Governor as I am, I would lead a mob to lynch the negro who ravishes a white woman." *Id.* at 3.

opportunity for appellate review of a fatally defective [rape] conviction" of Ed Johnson, an uneducated young black man.[74] Legal protections could not prevent a local mob, however, from storming the jail where Johnson was being held and, with the assistance of the local sheriff, lynching, shooting, and mutilating the body of Johnson.[75] In this manner, whites often took the law into their own hands when a black man faced allegations of raping a white woman.

Likewise, by the 1930s, the "trial" of the Scottsboro boys illustrated that gendered racism had tarnished the racial landscape of the South. In the Scottsboro case, nine black boys faced accusations of a "most foul and revolting crime" – the raping of "two defenseless white girls."[76] The legal proceedings, however, constituted little more than a "legal lynching" insofar as the defendants were denied effective assistance of counsel and the proceedings were "conducted under the shadow of fixed bayonets and in a courtroom surcharged with racial hatred, while a crowd of ten thousand milled about the courthouse . . . [releasing a] thunderous applause as the guilty verdict was returned."[77] Langston Hughes, an important literary voice of the Harlem Renaissance, thus published a volume of poetry inspired by the Scottsboro case that included a short poem entitled "The Town of Scottsboro": "Scottsboro's just a little place: / No shame is write across its face – / Its Court, too weak to stand against a mob, / Its people's heart, too small to hold a sob."[78]

Responding to community outrage, courts often developed particularized legal doctrines to handle situations where a white woman accused a black man of rape or attempted rape. For example, if the accused was black and the victim was white, courts often permitted the jury to draw the inference, merely based upon the race of the parties, that the accused intended to rape her. In *McQuirter*, for example, an Alabama court stated that, "[i]n determining the question of intention, the jury may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man."[79] Such "considerations of social conditions and customs" presupposed that a white woman would not consent to engaging in sexual inter-

74. 214 U.S. 386, 410-11 (1909).
75. *See* MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED 100 YEARS OF FEDERALISM 211-14 (1999).
76. *See* Powell v. State, 141 So. 201, 204, 207 (Ala. 1932).
77. Charles J. Ogletree, Jr., *Making Race Matter in Death Matters, in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 55, 59 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006). After a lengthy appellate process, including three favorable Supreme Court rulings, all of the Scottsboro defendants were released, after having spent a total of 104 years in prison. *See* C. NORRIS & S.WASHINGTON, THE LAST OF THE SCOTTSBORO BOYS, 19-25 (1979). Around the same time as the Scottsboro case, another black man named Willie Peterson experienced a similar "mockery of justice" when he, who did not remotely resemble the description of the man accused of raping and murdering two white women, was stopped on the street, labeled as the accused, and taken into custody. At trial, the jury returned a guilty verdict after only twenty minutes of deliberation and Peterson was subsequently sentenced to death. OGLETREE, *supra,* at 60.
78. LANGSTON HUGHES, SCOTTSBORO LIMITED: FOUR POEMS AND A PLAY IN VERSE (1932).
79. McQuirter v. State, 63 So.2d 388, 390 (Ala. Ct. App. 1953).

course with a black man.[80] The Georgia Supreme Court thus explicitly held that race could be properly considered "to rebut any presumption that might otherwise arise in favor of the accused that his intention was to obtain the consent of the female."[81]

The judicial hypersexualization of black men manifested itself in court opinions, which routinely portrayed black males as savage aggressors. An Arkansas court, for example, wrote that "[the victim,] while clad only in her pajamas was forced to a remote spot some two blocks from her home, where battered, bruised, bleeding and exhausted she was overpowered. . . ."[82] Under these "facts," the court sentenced the black male defendant to execution – a legally-sanctioned sentencing that paralleled the violence of socially-sanctioned lynching mobs. The Arkansas case is not an anomaly, moreover. Between 1945 and 1965, thirty-six percent of the black men convicted of raping a white woman were executed.[83] With all other racial combinations, only two percent of the defendants convicted of rape faced the same fate.[84] These facts buttress the argument that black men were past victims of gendered racism. This gendered racism continues to find voice and expression within a modern legal system where, "[f]or many blacks, every black man is on trial . . . not because the black man is a criminal but because the black man is increasingly seen as a criminal by virtue of his sex and color."[85] The gendered racism of American society has thus transformed the legal system itself into an instrument of black male castration, both figuratively and, possibly, literally.

IV. FUTURE OF BLACK MALE CASTRATION: A CHEMICAL APPROACH

A. Chemical Castration Statutory Regimes

In 1996, California became the first state to enact legislation providing for compulsory chemical castration of certain categories of sex offenders.[86]

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80. For an explanation of the nineteenth-century legal argument that a white woman could never consent to sex with a black man, see A. Leon Higginbotham, Jr. & Barbara Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia, in* INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW 81, 124-28 (Werner Sollors ed., 2000).
81. Dorsey v. State, 34 S.E. 135, 136 (Ga. 1899).
82. Maxwell v. State, 370 S.W.2d 113, 115 (Ark. 1963).
83. Marvin E. Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, *in* WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 109, 116 (1974).
84. *Id.*
85. *See* Jill Smolowe, *Race and the O.J. Case,* TIME, Aug. 1, 1994, at 24 (quoting Eleanor Holmes Norton).
86. *See* CAL. PENAL CODE § 645 (West 1997); *see also* Note, *Constitutional Law – Due Process and Equal Protection – California Becomes First State to Require Chemical Castration of Certain Sex Offenders*, 110 HARV. L. REV. 799, 799 (1997). In addition, in 1996 and 1997, state legislatures introduced chemical castration bills in Alabama, Arizona, Colorado, Hawaii, Michigan, Mississippi, Missouri, New Jersey, New York, Oregon, and Tennessee. *See* S. 116, 1st Spec. Sess. (Ala. 1997); H.R. 8, Reg. Sess. (Ala. 1997); H.R. 2216, 43d Leg., 1st Reg. Sess. (Ariz. 1997); H.R. 1133, 61st Leg., 1st Reg. Sess. (Colo. 1997); S. 215, 19th Leg. (Haw. 1997); H.R. 4307, 89th Leg., Reg. Sess. (Mich. 1997); S. 2465, Reg. Sess. (Miss. 1997); H.R. 753, 89th Leg., 1st Reg. Gen. Assem. (Mo. 1997); S. 1568, 207th Leg., 1st Ann. Sess. (N.J. 1996); S. 4925, 220th Leg., Ann. Sess.

In particular, any person convicted for the second time of forcible or statutory rape is required to undergo chemical castration as a condition of parole.[87] Under the statute, the chemical castration treatment can continue for as long as the State determines it is necessary, and there is no requirement that medical personnel be involved in this process.[88] Following California's lead, six other states implemented similar legislation – Florida, Iowa, Louisiana, Montana, Oregon, and Wisconsin.[89] While modeling their provisions on California's laws, some of these states even extended the reach of their respective statutes. Montana, for example, broadened the scope of the law to include first-time offenders if the crime is considered particularly heinous.[90] Oregon, moreover, requires only the commission of a "sex crime."[91] At the discretion of the court, Florida permits chemical castration to be administered for the rest of the offender's life.[92] Despite these expansions, none of the states adopting chemical castration require that the offender be diagnosed with paraphilia,[93] pedophilia,[94] or any other sexual disorder prior to treatment – in fact, none of the states explicitly require any physician involvement whatsoever.[95] Two states, Florida and Iowa, do not even necessitate that the offender receive information concerning the effects of chemical castration prior to undergoing treatment.[96]

(N.Y. 1997); H.R. 3672, 69th Leg. Assem. (Or. 1997); H.R. 482, 100th Gen. Assem. (Tenn. 1997); H.R. 483, 100th Gen. Assem. (Tenn. 1997); H.R. 585, 100th Gen. Assem. (Tenn. 1997); S. 1152, 100th Gen. Assem. (Tenn. 1997); S. 1153, 100th Gen. Assem. (Tenn. 1997).

87. *See* CAL. PENAL CODE § 645(b). When a person is convicted for the first time of any of the above crimes, that person *may* undergo chemical castration as a condition of parole. *See* CAL. PENAL CODE § 645(a).
88. *See* CAL. PENAL CODE § 645(d).
89. *See* FLA. STAT. § 794.0235 (2008); IOWA CODE § 903B.10 (2008); LA. REV. STAT. ANN. § 15:538(C) (2008); MONT. CODE ANN. § 45-5-512 (2008); OR. REV. STAT. §§ 144.625-29 (2008); WIS. STAT. § 304.06(1q) (2008). Texas law permits sex offenders to petition for "voluntary" surgical castration under certain circumstances. *See* TEX. GOV'T CODE ANN. § 501.061 (2008).
90. *See* MONT. CODE ANN. § 45-5-512(1) (2008).
91. *See* OR. REV. STAT. § 144.625(1) (2008).
92. *See* FLA. STAT. § 794.0235(2)(a) (2008).
93. Paraphilias are abnormal sexual preferences, in which sexual excitement requires, or is at least maximized by unusual or inappropriate targets. Examples include transvestitism, masochism, fetishism, pedophilia, hebephilia, exhibitionism, and sexual sadism. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM IV 522-24 (1994).
94. Pedophilia is a type of abnormal sexual behavior that is characterized by recurrent, intense sexual urges or behaviors that involve sexual activity with a prepubescent child, but only where such urges are acted upon. *See* Courtney Flack, *Chemical Castration: An Effective Treatment for the Sexually Motivated Pedophile or an Impotent Alternative to Traditional Incarceration?*, 7 J.L. SOC'Y 173, 175-77 (2005) (providing diagnostic criteria for pedophilia from the Diagnostic and Statistical Manual of Mental Disorders). Florida and Oregon do not even define the triggering offense as one in which the victim is a child. *See* John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 579-81 (2006).
95. Although there is sometimes mention of the retention of "medical experts," this does not necessarily imply that physicians will be involved.
96. *See generally* FLA. STAT. § 794.0235 (2008); IOWA CODE § 903B.10 (2008).

Although chemical castration statutes sometimes provide "alternatives" to chemical castration, further inquiry reveals that the semblance of choice presented by these "alternatives" often proves vacuous. According to Black's Law Dictionary, "voluntary" is defined as (1) done by design or intention; (2) unconstrained by interference; not impelled by outside influence; and (3) without valuable consideration; gratuitous."[97] Under all of these definitions, chemical castration statutes do not qualify as voluntary. In particular, the voluntariness of such provisions is suspect where the plea deal involves a defendant's consent to castration in return for a shorter sentence because, by its nature, this constitutes consideration that is impelled by outside influence. If an alleged offender agrees to be castrated to escape a lengthy sentence that the courts would otherwise impose, he is never acting in a truly "voluntary" fashion.

Defenders of chemical castration nonetheless maintain that the statutes imply "voluntariness," but their arguments are misguided. It is unrealistic to assert, for example, that a parolee could feasibly opt to refuse to consent to a probationary condition of MPA treatment. By refusing to consent, the parolee typically subjects himself not only to penalties associated with the violation of probation,[98] but also to penalties resulting from the automatic commission of criminal contempt[99] or a second-degree felony[100] as well.[101]

Similarly, proponents of chemical castration assert that chemical castration statutes often provide "alternatives" by permitting sex offenders to elect physical or surgical castration in lieu of chemical castration.[102] The proponents of chemical castration thus claim that the defendant possesses a "choice." Providing an option of permanent, irreversible surgical or physical castration, however, does not present a choice that defendants are likely to choose and thus constitutes little choice at all.

In addition to the issues concerning choice, another unresolved issue with chemical castration statutes revolves around the determination of eligibility. The enacted statutes generally provide little interpretation or guidance. Consequently, there are no guidelines for selecting appropriate candidates for chemical castration. This lack of guidance, in turn, affords

97. BLACK'S LAW DICTIONARY 1605-1606 (8th ed. 2004).

98. *See, e.g.*, FLA. STAT. § 794.0235(5) (2008); MONT. CODE ANN. § 45-5-512(4) (2008).

99. *See, e.g.*, MONT. CODE ANN. § 45-5-512(4) (2008) (stating that failure to continue treatment as ordered by the department of corrections constitutes criminal contempt of court for failure to comply with the sentence and the sentencing court shall thus impose a term of incarceration without possibility of parole of not less than 10 years or more than 100 years).

100. *See, e.g.*, FLA. STAT. § 794.0235(5) (2008) (stating that a defendant whom the court has sentenced to be treated with MPA who fails or refuses to allow the administration of the drug is guilty of a felony of the second degree).

101. Additionally, some have questioned whether there can be valid consent to castration where the alternative is incarceration. One commentator states that "the question of real consent is problematic in the face of extensive prison time, not to mention violence from other inmates against sex offenders, especially those who violate young people." James C. Harrington, *Castration Case Highlights Larger Problem of Society*, TEX. LAW, Apr. 6, 1992, at 13.

102. *See, e.g.*, CAL. PENAL CODE § 645(e) (2008); FLA. STAT. § 794.0235(1)(b) (2008); LA. REV. STAT. ANN. § 15:538(C)(8) (2008).

a broad range of discretion on the part of the Department of Corrections, the judiciary, and medical experts in the application of chemical castration statutes. Such unfettered discretion is likely to result not only in constitutional overbreadth, but also in the creation of racial disparities.

Although chemical castration has thus far eluded analysis pursuant to the federal Constitution, many courts have restricted the ability of state or lower courts to implement vasectomies and *physical* castration as a condition of probation for sexual offenses. In particular, these "form[s] of mutilation" have been found to constitute cruel and unusual punishment, rendering them void as a matter of public policy.[103] In *Whitten v. State*,[104] for example, the Georgia Supreme Court explained that quartering, burning, hanging in chains, and castration constituted prime examples of cruel and unusual punishment. In *Davis v. Berry*,[105] moreover, a federal district court struck down an Iowa statute authorizing vasectomies for repeat felons, holding that the statute constituted cruel and unusual punishment. Analogizing the procedure to castration, the court held that judicially-sanctioned vasectomies rose to the level of cruel and unusual punishment because "the humiliation, degradation, and the mental suffering are always present and known."[106]

Unlike physical castration and vasectomies, however, chemical castration has flown under the radar of federal and state constitutional scrutiny over the past decade. Chemical castration has received scarce attention from media outlets, moreover, and the general public appears relatively unaware that chemical castration exists as a permissible form of punishment. Furthermore, although surgical castration and vasectomies remain likely to incite public and judicial disapproval as cruel and unusual punishment because of the inherent barbarity of physical mutilation, chemical castration has not incited the same moral reaction.

The differential responses to physical and chemical castration appear to rest in the physical-chemical distinction itself. Physical disfigurement of a person's body tends to offend all norms and sensibilities of civilized society. Chemical rearrangement of one's internal organs, however, is not necessarily outwardly visible and thus does not blatantly offend such norms and sensibilities. Indeed, many individuals view chemical castration as a preferable alternative to surgical castration because it is a less invasive procedure and it is reversible.[107] Nonetheless, research indicates that the effectiveness of chemical castration in reducing recidivism rates remains questionable.[108] Several studies suggest, moreover, that cognitive-behavioral therapy proves as effective as chemical castration in

103. State v. Brown, 326 S.E.2d 410 (S.C. 1985).
104. 47 Ga. 297 (Ga. 1872).
105. 216 F. 413 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917).
106. *Id.* at 416.
107. Studies indicate, for example, that within seven to ten days after the termination of treatment, subjects regain full erective and ejaculatory abilities. Flack, *supra* note 95, at 179.
108. *See, e.g.*, Barry M. Maletzky & Gary Field, *The Biological Treatment of Dangerous Sexual Offenders, A Review and Preliminary Report of the Oregon Pilot Depo-Provera Program*, 8 AGGRESSION & VIOLENT BEHAVIOR 391, 406 (2002) (reporting that preliminary results from Oregon's program of mandatory chemical castration demonstrated no differ-

preventing recidivism.[109] Notwithstanding such studies, legislators in many states have continued to push for the adoption of chemical castration, as evidenced by the fact that an increasing number of states have considered enacting chemical castration statutes over the past few years.[110]

Given the unresolved questions and concerns regarding chemical castration, it becomes unclear why chemical castration possesses such a strong gravitational force amongst lawmakers. Does its attraction lie in its ability to punish the predators "skulking in the shadows?"[111] If so, one must wonder whether this fear of "lurkers" possesses any correlation to race. In particular, could historically-entrenched fears of the hypersexual black male aggressor seeking to prey upon innocent, defenseless young white girls play a role in the application of chemical castration statutes? The past and present racialized criminalization of black men seems to suggest that the answer to this question should be a resounding "yes."

B. Racialized Criminalization of Rape and Sexual Assault

Black men are more likely to face punishment under chemical castration statutory regimes because of the racialized criminalization of rape and sexual assault. Historically, courts have consistently applied statutory penalties for rape and sexual assault in a discriminatory manner. Studies have concluded that black men convicted of raping white women receive far more serious sentences than defendants of other races.[112] Research has also concluded that the general public possesses a prevalent, although misguided, perception that the most common racial combination for instances of rape is a black male offender and a white female victim.[113]

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ences in recidivism rates between offenders who underwent chemical castration and those who did not).

109. *See, e.g.*, Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. 802, 807 (1995) (reporting that both cognitive-behavioral treatment and hormonal treatment programs achieved a reduced recidivism rate of 30%).

110. States that have recently considered proposals for chemical castration laws include Minnesota, Oklahoma, Pennsylvania, and Vermont. *See* Stinneford, *supra* note 95, at 585 n.172.

111. On September 17, 1996, after approving the nation's first chemical castration law, Governor Pete Wilson of California said: "I have a message for those skulking in the shadows. You better stay in the shadows or leave this state, because we will not tolerate your conduct. . . . We are going to win this fight." *Wilson in Van Nuys to Sign Chemical Castration Bill for Child Molesters*, CITY NEWS SERV. (L.A., Cal.) (Sept. 17, 1996) *available at* LEXIS (News & Bus., Individual Publications Folder, City News Serv. File).

112. *See, e.g.*, Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AMER. SOC. REV. 842, 852 (1980).

113. In response to the question, "Among which racial combination do most rapes occur?," 48% of respondents stated black males and white females, 16% stated black males and black females, 3% stated white males and black females, and 33% stated white males and white females. H. FIELD & L. BIENEN, JURORS AND RAPE 80 (1980).

Mass media has manufactured and bombarded society with images and representations of black masculinity that have commodified the black male body and heightened the fear of black male-white female sexual relations. Over the years, mediums of television, print, and digital communication have perfected the process of assembling, advertising, and auctioning a lucrative product – black male hypermasculinity. D.W. Griffith's *The Birth of a Nation*, released to the public in 1915, was one of the first major mass circulations of a hypersexualized, hyperaggressive image of black men in film. Practically a century later, D.W. Griffith's work still constitutes the blueprint for mass media depictions of black men. Gail Dines's findings, for example, illustrates that the representations of black men have remained consistent since the turn of the twentieth century. Dines's research analyzed the recent treatment of black men in *Hustler* magazine, a popular pornographic periodical. Utilizing the depiction of King Kong in *Hustler* to frame her analysis, she argued that movies and magazines featuring black men tended to promote a hypersexualized portrait of black masculinity. Dines particularly noted that, "whereas the original Kong lacked a penis, the *Hustler* version has, as his main characteristic, a huge black penis that is often wrapped around the 'man's' neck or sticking out of his trouser leg. The penis, whether erect or limp, visually dominates the cartoon. . . ."[114] This modern phallocentric obsession with black male gonads builds upon the long-standing Mandingo Theory.

The Mandingo Theory and the alleged insatiable sexual appetite of black men has simultaneously promoted white fascination and fear of black men, which, in turn, has contributed to the development of a racially-oppressive legal structure. Studies conclude, for example, that judges typically impose harsher sentences for rape when the victim is white.[115] Similarly, studies have shown that sample white jurors imposed significantly heavier sentences upon defendants in rape cases where the victims were white as opposed to black.[116]

Today, white fear of interracial relationships vividly manifests itself within the context of highly-publicized, sensationalized cases where black men are charged with the rape or sexual assault of a white woman. Prosecutorial regimes disproportionately target black men as the perpetrators of these sex crimes. A recent example is the Marcus Dixon case. Dixon was a star-studded Georgia high school football player possessing a 3.96 GPA and National Honor Society membership who had been awarded a full scholarship to Vanderbilt University.[117] In February 2003,

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114. Gail Dines, *King Kong and the White Woman: Hustler Magazine and the Demonization of Black Masculinity*, 4 J. OF VIOLENCE AGAINST WOMEN 291, 299 (1998).

115. *See* LaFree, *supra* note 113, at 847-48. Additionally, a 1968 study of Maryland rape sentencing found that the average sentence received by black men, excluding cases involving life imprisonment, was 16.4 years if the victim was white and only 4.2 years if the victim was black. Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121, 123 (1975).

116. H. FIELD & L. BIENEN, *supra* note 114, at 106. Interestingly, black jurors exhibited no such bias. *Id.* at 110.

117. *See* Lisa M. Calderon, *Rape, Racism, and Victim Advocacy*, 98 BLACK COMMENTATOR, July 8, 2004, *available at* http://www.blackcommentator.com/98/98_calderon_rape_racism.html.

however, the 18-year-old, 6-foot-6, 265-pound defensive lineman was arrested and charged with rape, aggravated assault, false imprisonment, sexual battery, misdemeanor statutory rape, and aggravated child molestation of a 15-year-old white girl who alleged that Dixon took her virginity.[118] Based partly upon the girl's claim that they never had a romantic relationship and that they scarcely knew each other outside of the classroom setting, Dixon was convicted to serve a maximum 10-year sentence without the possibility of parole in the Georgia State Penitentiary.[119] A Georgia statute prohibiting sex with an individual under the age of sixteen provided the basis for the conviction. Although Dixon was less than three years older than the alleged victim, the Floyd County District Attorney's office nonetheless decided to prosecute the case and the court subsequently applied the statute against Dixon.[120]

Although the Floyd County District Attorney denied that race was a factor in the aggressive prosecutorial posture vis-à-vis Marcus Dixon, the case manifested distinct racial undertones suggesting otherwise.[121] Marian Wright Edelman, president of the Children's Defense Fund, thus commented that "Marcus' case brings back memories of all the black men who were lynched, executed or imprisoned for having relationships with white women."[122] Indeed, the district attorneys took a statute designed to protect children from adult sexual predators and extended it to the context of sex between teenagers. The prosecution of Marcus Dixon rose to such an (over)zealous level because Dixon had transgressed the anti-miscegenation mores condemning sexual relations between black males and white females within a traditional, race-conscious, Southern community.[123] The fact that the accuser was the daughter of an avowed racist and Dixon's legal guardians received consistent threats from the Ku Klux Klan throughout the ordeal merely highlights the disconcerting racial backdrop of the case.[124] Although subsequently overruled on appeal after Marcus Dixon had already served 15 months in prison, the case demonstrated that the taboo of black-white sexual intimacies persists in modern-day society. The sexual demonization of Marcus Dixon, moreover, was neither unique nor singular to his trial. Rather, the cases of Genarlow Wilson[125] and Kobe Bryant,[126] where prosecutors capitalized upon hyper-

118. *See id.*

119. *Id*.

120. *See id.*

121. For example, Joseph Lowery, one of the founding members of the Southern Christian Leadership Convention (SCLC), stated: "If the young lady was black and Marcus Dixon was white, I don't think we would be here." Gary Younge, *Deep South Divided by Rape Case*, THE GUARDIAN, Jan. 23, 2004, *available at* http://www.guardian.co.uk/world/2004/jan/23/usa.garyyounge.

122. *Id.* (quoting Marian Wright Edelman, president of the advocacy group Children's Defense Fund).

123. *See id*.

124. *Id.*

125. *See* Wilson v. Georgia, 631 S.E.2d 391 (Ga. Ct. App. 2006) (holding that videotape and photographs taken from the tape depicting sexual intercourse and oral sex between 17-year-old Genarlow Wilson and a 15-year-old white girl were admissible in the aggravated child molestation prosecution).

sexualized images of black men to portray the defendants as insatiable bucks, reveal the pervasiveness of the problem.

The judicial proceedings involving Dixon, Wilson, and Bryant implicitly indicate that the punishment of black men remains largely seeded in racial conceptualizations rather than the underlying facts of the cases.[127] Indeed, judicial institutions hastily vilify and crucify black male defendants, as illustrated by the fact that sixty percent of the men exonerated by the Innocence Project are blacks wrongly convicted of raping white women.[128] Anthony Powell of Boston, for example, was released in 2004 after serving twelve and a half years in prison for a rape that he did not commit.[129] The woman that accused Powell of raping her at knifepoint in a wooded Roxbury neighborhood initially informed police that her assailant was a clean-shaven young black man, approximately 5-foot-10, weighing 200 pounds, who appeared to have letters shaved onto his scalp. Although Powell fit some aspects of the description, he possessed a significant amount of facial hair and a full head of hair. Nonetheless, when detectives showed the victim a photograph array of a dozen possible suspects, the victim selected Powell. Powell's case thus demonstrates the potential unreliability of eyewitness identification in criminal cases, particularly those involving black male defendants. Of the prisoners exonerated nationwide on the basis of DNA evidence since 1992, more than 80 percent were initially convicted chiefly on the grounds of mistaken eyewitness testimony, often as a result of interracial identification.[130]

Black men have constituted a staggering, disproportionate number of the class of exonerated rape defendants.[131] While only 29 percent of those in prison for rape are black, 65 percent of those exonerated for the crime of rape are black.[132] The Justice Department reports, moreover, that although rapes of white women by black men represent less than 10 percent of all rapes occurring nationwide, where data was available, approximately half of rape exonerations involve black men falsely con-

126. Michael Wolff, *Disorder in the Court,* N.Y. MAG., Oct. 20, 2003, *available at* http://nymag.com/nymetro/news/media/columns/medialife/n_9383/ (describing some of the peculiarities of the preliminary hearing: "There's the blood, the tearing, the throat-hold, the 'Kiss my penis' order. There's Kobe bending her over the back of the chair.").

127. A set of commentators has claimed that "To a great extent, the lack of credibility given the charge of rape today is attributable to the interwoven history of rape and racism where all involved *know* from their own experience . . . that rape has been a technique of social control to maintain the White Patriarchy." JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 35 (1981).

128. Stan Simpson, *Injustice Heaped on Black Men,* HARTFORD COURANT, Apr. 7, 2007, *available at* http://www.nacdl.org/public.nsf/defenseupdates/kentucky012.

129. Jonathan Saltzman, *Inmate's Exoneration Renews Calls for an 'Innocence' Panel,* BOSTON GLOBE, Mar. 9, 2004, at A1.

130. *Id. See also* Adam Liptak, *Study Suspects Thousands of False Convictions*, THE N. Y. TIMES, Apr. 19, 2004, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C05E4DF113BF93AA25757C0A9629C8B63 (citing a University of Michigan study reporting that approximately 90 percent of false convictions in rape cases involved misidentification by witnesses, usually transracial identifications).

131. Liptak, *supra* note 131.

132. *Id.*

victed of raping white women.[133] Although, as previously explicated, mistaken witness identification provides a partial explanation for the disparate treatment, other contributing factors appear intentional rather than mistaken. In particular, false confessions and/or perjury by informants, police officers, and forensic scientists, implicate a layer of purposeful racial discrimination. Such purposeful racial discrimination can arise in situations wherein the tragedy of an alleged rape incites community outrage that, in turn, necessitates the identification and discarding of a "bad apple." Therefore, court and law enforcement officials often scapegoat an innocent black man in order to defuse pressure from the community. The attendant sensationalism and collusion of multiple parties to convict black male defendants accused of raping white women proves that the mob mentality of "legal lynching" still permeates the American criminal justice system.

C. Potential for Racialized Statutory Application

Inasmuch as the criminal justice system still conducts "legal lynching" and chemical castration statutes remain silent on the selection process, race could play a factor in the determination of whether an individual should be subjected to chemical castration. Granted, proponents of chemical castration might argue that the statutes cannot be unconstitutional since the laws do not overtly discriminate on the basis of race and apply equally to all races. This language, however, is reminiscent of *Pace v. Alabama*, which the court explicitly overturned in the 1967 *Loving v. Virginia* decision. A statute's general applicability to blacks and whites on equal terms is thus not enough, in and of itself, to satisfy the Equal Protection Clause. Although chemical castration statutes are facially race-neutral, the Court can still strike down the laws if both discriminatory intent and disparate impact are present.[134] Although there is, to date, scarce evidence that state legislators enacted chemical castration statutes with discriminatory intent, the potentiality of disparate impact is self-evident within an American judicial system that has maintained a tradition of punishing black men disproportionately in sex-related crimes.

At the core, chemical castration statutes prove dangerous and threaten to disturb individual constitutional liberties because they afford broad latitude to the courts in the determination of whether a particular defendant should receive castration. Anytime judicial actors possess broad discretion, the stage is set for the emergence of racial disparities.[135] Under the California chemical castration laws, one of the subsections identifies "lewd or lascivious acts" as falling under the umbrage of the statute.[136] California courts, moreover, have interpreted this catchall of "lewd and

133. *Id.*

134. *See generally* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

135. *See, e.g.*, Charles Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994) (proposing to curb prosecutorial discretion in the use of peremptory challenges because of its racially discriminatory application).

136. *See* CAL. PENAL CODE § 645(c)(2).

lascivious" conduct broadly.[137] The subjectivity of terms such as "lewd and lascivious" welcomes the entrance of racial bias because it invites moral judgments. Within a culture that demonizes black male sexuality, any standard that solicits moral judgments from the community is destined to have a disparate impact upon black men. The language of chemical castration statutes thus affords an aperture for racially discriminatory application.

Past experiences with physical or surgical castration, moreover, hint at the potential for discrimination against black men in the application of chemical castration. Judge Michael T. McSpadden, for example, a Texas state district court judge, incited public controversy when he approved the request of Steven Allen Butler, a 28-year-old black man with an IQ of 69, to receive surgical castration as a sentencing condition for sexually assaulting a thirteen-year-old white girl. In particular, observers accused Judge McSpadden of acting with racial motives because he had never offered castration as a condition of probation to a white offender.[138] Reverend Jesse Jackson, after visiting Butler in the Houston County Jail, stated that "[t]he judge ought to know that this is a remedy that's beneath the dignity and character of American justice."[139] Although the Butler case dealt with surgical castration, it remains indicative of the ways in which the sexual demonization of black men could similarly create racial sentencing disparities within chemical castration regimes.

D. Potential Deleterious Effects of Chemical Castration Upon Black Men

1. Demasculinization - The Effeminization of Black Men

The humiliation, degradation, and mental suffering associated with chemical castration naturally flows from its effeminizing effects. MPA, the drug that the Florida Legislature mandated in its chemical castration regime, is more commonly known on the market as Depo-Provera.[140] De-

137. CAL. PENAL CODE § 288 defines a lewd act as any touching of the body of a person with specific intent to arouse, appeal to, or gratify the sexual desires of either party. *See also* People v. Sharp, 29 Cal. App. 4th 1772, 1792, *cert. denied*, 514 U.S. 1130 (1995) (holding that any touching of any part of the body of a child can be considered a lewd act as long as it is done with the requisite intent to achieve sexual gratification).

138. State Representative Ron Wilson decried racist motives when he stated: "That's the whole issue, Butler's race, that is the issue." As proof, Wilson cited the fact that "in the hundreds of cases that have come before this judge, you have never seen him offer this kind of probation to anyone who is not black." Roberto Suro, *Amid Controversy, Castration Plan in Texas Rape Case* Collapses, N.Y. TIMES, Mar. 17, 1992, at A16.

139. *Id.* The castration plan was subsequently thwarted as both physicians backed out because of the heightened media attention. *See* Makeig & Mason, *Butler's Family Relieved: Controversy Kills Castration Plan: Physicians Won't Do Procedure on Accused Child Rapist*, HOUS. CHRON., May 17, 1992, at A1. Butler was convicted and sentenced to life in prison – the maximum sentence for his offense. *Man Who Chose Castration Is Convicted of Sex Assault*, N.Y. TIMES, Aug. 7, 1992, at A10.

140. *See supra* note 27. Since the approval of Depo-Provera in Canada in 1997, a $700 million class-action lawsuit has been filed against Pfizer by Depo-Provera users who developed osteoporosis. In response, Pfizer argued that it had met its obligation to disclose and discuss the risks of Depo-Provera with the Canadian medical community. There are also allegations that Depo-Provera has been used discrimi-

spite vociferous debate throughout the 1980s and early 1990s, the Food and Drug Administration (FDA) approved the drug in 1992 and it is now marketed primarily as a female contraceptive.[141] The FDA has never specifically approved MPA for chemical castration despite its dramatic effects upon the male body. Indeed, in men, the drug reduces the production of testosterone in the testes and the adrenal glands and, consequently, reduces the level of testosterone circulating throughout the entire body.[142] As testosterone levels decrease, sex drive correspondingly decreases in most men.[143]

The requisite dosage level of MPA for chemical castration administration presents heightened reason for concern. Reports indicate that, while the recommended dose is 150 milligrams every three months for female contraceptive use, most men are given between 300-500 milligrams per week during chemical castration.[144] Studies have proven that prolonged use of MPA, in such doses, can reduce testosterone to the level of a prepubescent boy.[145] Furthermore, MPA suppresses erections, ejaculations, and erotic thoughts.[146] Male reproductive side effects of MPA include impotence, abnormal sperm, lowered ejaculatory volume, loss of body hair, and shrinkage of the prostate and seminal vessels.[147] The phys-

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natorily within the medical industry. *See, e.g.*, Julie F. Kay, Note, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 BROOK. L. REV. 349, 349-50 n.2 (1994) (referencing a discussion on the "experimental use" of Depo-Provera on minority women"); Darci Elaine Burrell, *The Norplant Solution: Norplant and the Control of African-American Motherhood*, 5 UCLA WOMEN'S L.J. 401, 426 n.144 (1995) (noting that there have been charges that doctors have been using Depo-Provera on teenagers and women of color without their consent).

141. Warren E. Leary, *U.S. Approves Injectable Drug as Birth Control*, N.Y. TIMES, Oct. 30, 1992, A1 (reporting the FDA's initial approval in 1992); George R. Huggins & Anne Colson Wentz, *Obstetrics and Gynecology*, 270 JAMA 234, 235 (1993) (tracing the history of MPA approval in the United States where, until 1992, it was banned because of concerns linking the drug to uterine and breast cancer).

142. *See* Raymond A. Lombardo, *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sex Offenders,* 65 FORDHAM L. REV. 2611, 2613 (1997).

143. *See* Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender,* 18 AM. J. CRIM. L. 1, 3 (1990); Fred S. Berlin & Carl F. Meinecke, *Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities, and Preliminary Findings,* 138 AM. J. PSYCHIATRY 601, 603 (1981).

144. Daniel Icenogle, *Sentencing Male Sex Offenders to the Use of Biological Treatments,* 15 J. OF LEGAL MEDICINE 279, 284 (1994).

145. *See* Daniel C. Tsang, *Policing "Perversions": Depo-Provera and John Money's New Sexual Order,* 28 J. HOMOSEXUALITY 397, 399 (1995).

146. *See* Fitzgerald, *supra* note 144, at 7 (explaining that the drug suppresses spontaneous erections but does not result in complete sexual impotence).

147. *See* John T. Melella et. al., *Legal and Ethical Issues in the Use of Antiandrogens in Treating Sex Offenders,* 17 BULL. AM. ACAD. PSYCHIATRY L. 223, 225 (1989). Other side effects include cancer, decreased bone density, birth defects, increased appetite, weight gain, fatigue, depression, hyperglycemia, insomnia, nightmares, breathing difficulty, hot and cold flashes, nausea, leg cramps, irregular gall bladder function, migraines, diverticulitis, hypogonadism, elevated blood pressure, hypertension, phlebitis, and thrombosis. *See id.* Pfizer, a manufacturer of the drug, has added a black box warning to the product, stating that "prolonged use could result in significant side effects, and should not be used long term – over two years." This warning, however, has not prevented the enactment of legislation allowing the drug to

ical, neurological, and sexual effects of MPA upon the male body thus prove devastating.

Although proponents of chemical castration allege that men will not suffer feminizing effects as a result of the treatment, commonsense and past judicial experiences suggest otherwise. In *Long v. Nix*,[148] for example, a transsexual prisoner brought a § 1983 action against prison officials seeking to have the provision of appropriate living conditions and medical treatment. In particular, the prisoner sought continuation of his estrogen treatments, alleging that the treatments helped to feminize him.[149] Similarly, in *Meriwether v. Faulkner*,[150] the transsexual appellant, biologically born as a man, identified as a female after being "chemically castrated" following approximately "nine years of estrogen therapy."[151] The popular use of estrogen treatments amongst transsexuals for the purposes of feminizing themselves implies that, over time, pumping massive doses of female hormones into the male body assist the construction of a feminine identity. Consequently, chemical castration could dangerously alter the biological and psychological foundations of masculinity. As they currently stand, moreover, chemical castration statutes pose a heightened risk because they sometimes permit chemical castration to persist on an indefinite timetable – for as "long as reasonably necessary" or "for life."[152] Such unconstrained, long-term estrogen dumping alters the biological composition of the male body, thereby threatening the maintenance of a masculine identity.

When applied to the particular positionality of black men, chemical castration can thus undercut notions of black masculinity insofar as the drug possesses the potential to effectively demasculinize and effeminize the consumer. In light of the historical effeminization of the black male slave as a method of deconstructing the black family, this possibility becomes even more troublesome. In a courtroom setting predominated by the white male presence of prosecutors, judges, and juries, one could conceptualize the chemical castration sentence as a reassertion of white male hegemony and a modern-day repackaging of physical castration. From this analytical framework, the burgeoning chemical castration regimes could prompt the devolution of courtrooms into modern-day lynch mobs.

2. *Dehumanization – The Racial Domestication of Black Men*

In addition to demasculinization, chemical castration regimes also possess the potential to dehumanize black men altogether, creating a culture of racial domestication. Brennan's concurrence in *Furman v. Geor-*

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be administered for the life of the offender. *See, e.g.*, FLA. STAT. § 794.02352(a). Ironically, fewer side effects result from surgical castration than with chemical castration. Kevin Moran, *Contraceptive Effectively Treats Male Sex Offenders: Drug Found to Lessen Repeat-Behavior Risk,* HOUS. CHRON., Feb. 28, 1993, at C1.

148. 877 F. Supp. 1358 (S.D. Iowa 1995).

149. *See generally id.*; *see also* Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986).

150. 821 F.2d 408 (7th Cir. 1987).

151. *Id.* at 410.

152. *See* FLA. STAT. § 794.0235(2)(a) (2008).

gia[153] notes that society has historically condemned barbaric punishments because "they treat members of the human race as nonhumans, as objects to be toyed with and discarded . . . [and] are thus inconsistent with the fundamental premise of the [Eight Amendment] that even the vilest criminal remains a human being possessed of common human dignity."[154] Brennan's words suggest that the Eighth Amendment is rooted in respect for all mankind – including criminals. Chemical castration, however, singles out particular members of the human race for treatment as nonhumans. To the extent that historical racial biases cloud the "singling out" process, moreover, a disproportionate dehumanization of black men will inevitably result.

Chemical castration possesses the potential to dehumanize black men insofar as it restricts freedom of thought, thereby relegating the chemically-castrated individual to an animal-like status. One of the primary features distinguishing humans is the capacity for rational thought. By confining mental processes, however, chemical castration directly undercuts the distinction between the human and animal kingdom.

Restrictions upon freedom of thought also raise constitutional due process issues concerning the fundamental right to privacy. Indeed, control over one's own reason is a freedom that remains beyond the pale of the state – "it is wholly inconsistent with the philosophy of the [F]irst [A]mendment to grant government the power to control a person's thoughts, including loathsome, noxious, and immoral thoughts."[155] At the core, the First Amendment thus protects the right to receive[156] and generate ideas.[157] Chemical castration, nonetheless, directly targets the thought-creation process by "inhibiting the release of the follicle-stimulating hormone and the lutenizing hormone from the anterior pituitary gland in the brain."[158] The primary virtue and vice of chemical castration thus lies in its ability to control and "shackle" the mind of the sexual offender.[159] The "shackling of the mind" is problematic insofar as the United States Supreme Court, in *Riggins v. Nevada*,[160] found that a protected liberty interest existed in the avoidance of unwanted medical treat-

153. 408 U.S. 238 (1972).

154. *Id.* at 272-73; *see also* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

155. William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues,* 12 U. DAYTON L. REV. 1, 18-19 (1986).

156. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("[i]f the First Amendment means anything, it means that a [s]tate has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

157. *See* Kaimowitz v. Dep't of Mental Health, No. 73-19434 (Mich. Cir. Ct. July 10, 1973), *reprinted in* 1 MENTAL DISABILITY L. REP. 147, 152 (concluding that the right to generate ideas necessarily follows from the right to express ideas).

158. Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 6 (1990), citing PHYSICIANS' DESK REFERENCE, 2123-24 (42nd ed. 1988).

159. *See* Stinneford, *supra* note 95, at 567-68.

160. 504 U.S. 127 (1992).

ment,[161] particularly where an anti-psychotic medication functions to alter the chemical balances in the subject's brain, thereby leading to changes in their cognitive processes.[162] Granted, the intrusion upon this interest must be balanced against the state's interests,[163] namely the interest in protecting its citizenry from sexual abuse and victimization. Nevertheless, the procedure is not the least restrictive means of achieving any avowed state interest. Rather, chemical castration subjects the alleged offenders themselves to a demasculinizing and dehumanizing set of procedures, thereby victimizing the alleged victimizer.

In a dehumanizing nature, some chemical castration statutes also violate the doctrine of informed consent by neglecting to mandate the explanation of potential medical side effects prior to the administration of the drugs.[164] The D.C. Circuit defined the doctrine of informed consent as "the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .'"[165] The doctrine of informed consent is thus grounded in notions of personal autonomy and the belief that individuals ought to remain free from non-consensual interference with their bodies.[166] When chemical castration statutes fail to mandate informed consent, the potential for dehumanization is magnified insofar as offenders are treated like animals whose bodies can be experimented upon in any fashion, irrespective of whether consent has been granted.

The biological alteration inherent in chemical castration would dehumanize black men, in part, because it parallels animal experimentation. While MPA, technically, is not an "experimental drug" because it has been approved for use in women, the FDA has not specifically approved the drug for chemical castration or any other use in men and no clinical trials have determined whether MPA is safe and effective for long-term use in men.[167] Thus, chemical castration statutes effectively authorize the State to conduct experimentation on the bodies of black men.

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161. The United States Supreme Court has recognized the significant liberty interest in refusing unwanted medical treatment. *See, e.g.*, Washington v. Harper, 494 U.S. 210 (1990); Cruzan v. Director, 497 U.S. 261 (1990).

162. *See Riggins*, 504 U.S. at 134-36 (suggesting that the decision to force a convicted prisoner to take antipsychotic drugs that altered their cognitive process is impermissible absent a finding of an overriding justification and a determination of medical appropriateness).

163. *Cruzan*, 497 U.S. at 279.

164. *See, e.g.*, FLA. STAT. § 794.0235 (2008); IOWA CODE § 903B.10 (2008).

165. Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972).

166. *See* Schloendorf v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914) (Justice Cardozo states: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault for which he is liable in damages.").

167. *See* Stinneford, *supra* note 95, at 572. Although the FDA has not approved MPA for use in men, doctors may prescribe a drug for unapproved uses under the Food, Drug, and Cosmetic Act after it has already been approved for another, albeit unrelated, use. *Id.*

In light of the historical positioning of black male bodies on the auction block as objectified commodities that are "up for grabs," chemical castration presents the possibility of a regression back to plantation etiquette. Under the Fourteenth Amendment, which was invoked to protect the civil rights of former slaves whose bodies had been subjected to the whims of whites, issues of bodily integrity are paramount. Indeed, the United States Supreme Court has held that the right to bodily integrity is absolutely fundamental to a due process analysis.[168] In particular, the Court has interpreted the Fourteenth Amendment to implicate a right to privacy that protects an individual's decisional autonomy concerning childbearing and contraception.[169] Procreative freedom and the right to refuse intrusive medical treatment are thus inherent to an individual's right to bodily integrity.

Similar to involuntary sterilization, court orders directing periodic injections of MPA possess the potential to render black men animal-like by undercutting the rights of bodily integrity and reproductive autonomy. In *Skinner*, Justice Jackson wrote that "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority – even those who have been guilty of what the majority defines as crimes."[170] Holding that procreation is a right of fundamental import, the Supreme Court has stated that "[t]he rights to conceive and to raise one's children have been deemed 'essential' . . . 'basic' civil rights of man . . . and [r]ights far more precious . . . than property rights."[171] Acknowledging that the right to procreate represents one of the basic, fundamental civil rights of humanity, the Court has thus recognized that legislation infringing on this right invokes strict scrutiny.[172] Courts should thus subject chemical castration to heightened constitutional scrutiny inasmuch as the procedure effectively "neuters" men.

The potential "neutering" of black men constitutes another manner in which chemical castration could promote racial domestication. Although a plausible argument exists that chemical castration is less intrusive on the ability to procreate because it is less invasive and permanent than surgical castration, this argument is misguided. Even where the infringement upon the right of procreation is merely temporary,[173] it nonetheless

168. *See Skinner*, 316 U.S. at 546.

169. *See* Carey v. Population Serv. Int'l, 431 U.S. 678, 684-85 (1978) (noting that the constitutional privacy protection implicit in the Fourteenth Amendment extends to decisions regarding childbearing); *Eisenstadt v. Baird*, 405 U.S. 438, 452-53 (1972) (holding that the right to privacy encompasses the right of unmarried persons to utilize contraception).

170. *Skinner*, 316 U.S. at 546 (Jackson, J., concurring).

171. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that an unwed father was entitled to a fitness hearing before his children could be removed in a dependency proceeding).

172. *See* Paul v. Davis, 424 U.S. 693, 713 (1976).

173. Jason Rucknell argues that "some evidence exists chemical castration does not result in a total deprivation of a patient's sex drive during the treatment because some men have reported an ability to perform sexually and even reproduce while undergoing MPA treatment. Therefore, by classifying chemical castration as a temporary restriction on procreative ability, instead of a total deprivation, a court could apply

constitutes a complete ban on procreation throughout the period of treatment. Furthermore, some states – like Florida – afford courts with the authority to order the administration of chemical castration drugs indefinitely, including for life,[174] creating a real possibility for a permanent procreation ban.

Chemical castration regimes that interfere with the fundamental right to procreate cannot pass constitutional muster. When fundamental rights are involved, statutes must satisfy strict scrutiny, meaning that they must be narrowly tailored to serve a compelling government interest.[175] Although a state possesses a compelling interest in the safety of its citizens, the existing chemical castration statutes are not narrowly tailored to achieve this compelling governmental interest. In particular, chemical castration often proves an ineffective remedy because the crime of rape is not always rooted in the act of sex itself;[176] rather, rape is frequently grounded in notions of power and violence. Chemical castration, on the other hand, operates under the faulty assumption that, by removing a man's ability to have an erection, the State can simultaneously remove his desire and capacity to rape. Sadistic rapists, however, eroticize physical force and achieve sexual gratification from the physical resistance of the victim rather than the sexual act itself, illustrating that rape is sometimes focused on power rather than sex.[177] Chemical castration thus proves ineffective in reducing recidivism amongst sex offenders whose sexual urges are motivated by internal feelings of anger, violence, domination, or power.[178] With this category of offenders, impotence simply forces them to find some other instrument or weapon that they can utilize to violate and assault their victims. Since chemical castration, as currently administered, would not reduce recidivism rates within these categories of sex offenders, the respective statues are not narrowly tailored and thus unconstitutional.

Chemical castration also offends the spirit of the Constitution by contravening the Founding Fathers' intent to avoid creating an oppressive, tyrannical government. Chemical castration places the government in a god-like stance over the American citizenry, allowing the government to re-create the human body. Harvard Law Professor Laurence Tribe has stated that "[t]here should be an overwhelming presumption against hav-

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a lower level of scrutiny." Jason O. Rucknell, *Abuse It and Lose It: A Look at California's Mandatory Chemical Castration Law*, 28 PAC. L.J. 547, 567-68 (1997). One might also consider chemical castration "temporary" because, upon cessation of MPA treatment, testosterone levels typically revert to normal levels in seven to ten days. *See* Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 7 (1990).

174. *See* FLA. STAT. § 794.0235(2)(a) (1997).
175. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1984).
176. Not all sex offenders have paraphilias and many paraphilias are not sex offenders because they do not act upon their forbidden urges. *See* J. Michael Bailey and Aaron S. Greenberg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 NW. U. L. REV. 1225, 1227 (1998).
177. *See* Don Reisenberg, *Motivations Studies and Treatments Devised in Attempt to Change Rapists' Behavior*, 257 JAMA 899, 899 (1987).
178. Douglas J. Besharov & Andrew Vachhs, *At Issue: Is Castration an Acceptable Punishment?*, 78 A.B.A. J., July 1992, at 42.

ing the long arm of the government touch the human body and the human psyche in intimate ways."[179] The sentiments underlying this remark prove particularly trenchant when analyzed against the backdrop of black male historical experiences. Indeed, black male bodies have undergone a litany of traumatizing experiences, enduring use and abuse throughout the sordid history of the United States. American political and legal institutions should thus remain especially hesitant to take any actions that would incite déjà vu of past sufferings. The government should thus refrain from chemical castration and other intrusive ways of touching the black male mind and body that would trigger the memory of previous legal and social dehumanization.

3. Invisibilisation – The De-Individualization of Black Men

As a result of implicit racial biases and prejudices, chemical castration statutes also possess the potential to promote the invisibilisation of black men. The pervasive racial preconceptions and misconceptions cloud the perception of prosecutors, judges, and juries alike. In particular, insofar as hypersexualized images of black masculinity mold the conceptualization of the entire group, "colorblind" sentencing becomes practically impossible and the individual defendant becomes invisible and indistinguishable from the cloud of a "group" or a "type." After categorizing, classifying and typifying defendants, the judicial factfinders and decisionmakers thus render discretionary judgments that are based on the "color of their skin" rather than the "content of their character."[180]

Studies have demonstrated that most Americans possess implicit biases that instantly correlate "blackness"[181] with negative attributes.[182] Within the sociolegal context, such implicit biases promote the use of

179. R. Lacayo & A. Sachs, *Sentences Inscribed on Flesh: The Prospect of Castration for a Sex Offender Raises Questions About When the Law Can Invade the Body*, TIME, Mar. 23, 1992, at 54.

180. *See* King, *supra* note 70.

181. "Blackness" must be contrasted with "whiteness," which has been described as both the "obvious and hidden norm against which most things are measured and is preferred in institutional settings that perpetuate themselves even in the absence of overt or conscious racist intent." Athena D. Mutua, *A Telling Difference: Dominance: Strength, and Black Masculinities, in* PROGRESSIVE BLACK MASCULINITIES 8 (Athena D. Matua ed., 2006). Frantz Fanon described the dichotomy between the pure and righteous construction of whiteness and the immoral and demonic construction of blackness. *See* FRANTZ FANON, BLACK SKIN, WHITE MASKS 188, 192 (1952) ("The collective conscious . . . is purely the sum of prejudices, myths, collective attitudes of a given group. In the collective unconscious, black = ugliness, sin, darkness, immorality. In other words, he who is Negro is immoral.").

182. *See, e.g.*, Project Implicit, Implicit Association Test, *available at* https://implicit.harvard.edu/implicit (inviting individuals to participate in an online research program that tests unconscious racial preferences and biases). *See also* Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12 (reporting that, although many Americans believe they are not prejudiced, the Implicit Association Test is providing powerful evidence that a majority of Americans actually are). *But see* Amy Wax & Philip E. Tetlock, *We're All Racists at Heart*, WALL ST. J., Dec. 1, 2005, at A16 (arguing that split-second associations may merely reflect awareness of cultural stereotypes rather than unconscious bias and thus are not accurate predictors of discriminatory behavior).

"color as a proxy for dangerousness."[183] These racialized proxies spring from the socialization process, which features increasing mass media distribution of hypersexualized black male images.[184] Inasmuch as race serves as a proxy for dangerousness, moreover, chemical castration statutes afford yet another opportunity for actors within the legal system to group, categorize, and invisibilise black men. In this sense, the protagonist of Ralph Ellison's *Invisible Man*[185] remains a figment of *non*fiction. Furthermore, the blindness of the legal system with respect to black men echoes the eerie sentiments expressed by Langston Hughes poem describing Justitia, stating: "That Justice is a blind goddess / Is a thing to which we black are wise. / Her bandage hides two festering sores / That once perhaps were eyes."[186] Like the blind goddess, the lack of eligibility guidelines or standards creates a scenario wherein the chemical castration regime must blindly fumble around. In the blind grappling for standards, judicial actors might resort to old racialized instincts and thereby utilize group biases to determine individual cases involving black male defendants. The invisibilisation of black male individuals within the legal system thus further complicates the potential side effects of chemical castration.

V. THE FINAL PASSAGE: CIRCUMCISING CHEMICAL CASTRATION LAWS

On their face, chemical castration statutes appear race-neutral. By remaining silent on issues of race, however, chemical castration laws afford a space to the voice of implicit bias.[187] In a society where the fear of interracial relationships has painted the canvass of rape law, chemical castration statutes prove dangerous. The imposition of any form of castration upon a black man must be viewed in light of the nation's sordid past – a past tainted by the brutal physical and sociological castration that white slavemasters imposed upon black men.

Chemical castration merely constitutes a thread in a collateral set of attacks poised to reinstate the "lynch mob." The procedural history of the *Kennedy v. Louisiana*[188] case, for example, which stood before the United States Supreme Court this past year, possesses a faint glimmer of the mob mentality of yesteryear. The Louisiana Supreme Court had previously interpreted the United States Supreme Court's 1977 *Coker v. Georgia*[189] decision barring capital punishment for rape to be inapplicable when the victim is a child under the age of twelve.[190] Patrick Kennedy, a 43-year old black man who faced the death penalty under the new Louisiana laws, filed an appeal. The case demonstrated the interplay between race, sex, and punishment. Indeed, it was not coincidental that Patrick

183. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 136 (1997).
184. *See* Dines, *supra* note 115 and accompanying text.
185. *See* ELLISON, *supra* note 9 and accompanying text.
186. *See* HUGHES, *supra* note 79.
187. *See* KENNEDY, *supra* note 184 and accompanying text.
188. 128 S.Ct. 2641 (holding that it is unconstitutional to impose the death penalty for the crime of raping a child where the victim did not die and death was not intended).
189. 433 U.S. 584 (1977).
190. State v. Kennedy, 957 So. 2d 757, 788-89 (La. 2007).

Kennedy, a black man, was the first man in forty years to receive a death penalty sentence for the crime of rape; rather, Patrick Kennedy had merely assumed the mantle of previous black male scapegoats. Between 1930 and 1967, according to a Justice Department report, blacks comprised 89 percent of those executed in this country for rape.[191] Included in this number were fourteen men from Louisiana, all of whom were black.[192]

In light of these statistics, it is unsurprising that Louisiana has now implemented a chemical castration regime. Indeed, chemical castration can be interpreted as one thread in a larger movement to re-institutionalize the pre-*Coker* establishment. A growing mob still clamors for reconsideration of the *Kennedy v. Louisiana* case. Eighty-five Republicans in the House of Representatives asked the Supreme Court to reconsider its *Kennedy* ruling, stating that the majority erroneously based its decision that the Louisiana law did not comport with "evolving standards of decency," in part, on the assumption that there was no federal death penalty for the rape of the child.[193] As evidence that the Louisiana law comported with evolving standards of decency, the disgruntled contingent cited Congress' "revis[ion of] the sex-crimes section of the Uniform Code of Military Justice in 2006 to add child rape" to the list of offenses punishable in the military by death.[194] Therefore, despite a seeming resolution, an unresolved loophole looms within the majority opinion.

Furthermore, on June 25, 2008, the same day that the United States Supreme Court reversed the Louisiana Supreme Court's ruling, Louisiana Governor Bobby Jindal retaliated by signing legislation that strengthened the state's chemical castration laws.[195] As enacted, the new statute extends the scope of chemical castration to encompass crimes that do not even rise to the level of rape, including second degree sexual battery that involves inappropriate touching.[196] Unsurprisingly, a black man – Patrick Kennedy – has thus provided the impetus for a chemical castration backlash. Hopefully, in an act of judicial defiance, Louisiana courts resist the temptation to enforce the discretionary portion of the chemical castration laws, which bear the potential to wreak havoc upon the black male community in Louisiana – a community that has already suffered enough devastation and decimation at the hands of Hurricane Katrina.[197] The en-

191. *See* David G. Savage, *Death for Rape, an Echo of the Past*, A.B.A. J., April 2008, *available at* http://www.abajournal.com/magazine/death_for_rape_an_echo_of_the_past/; David G. Savage, *Justices to weigh capital rape case*, NEWS & OBSERVER, Jan. 5, 2008, *available at* http://www.newsobserver.com/nation_world/story/861746.html.

192. *Justices to weigh capital rape case, supra* note 192.

193. David Stout, *Justices Are Asked to Reconsider*, N.Y. TIMES, July 11, 2008, at A12.

194. *See id.* This, however, is misleading, as child rape was not added. *See* The Uniform Code of Military Justice, 10 U.S.C. § 920 (2000) (already allowing punishment by death for child rape, as well as adult rape) (amended 2006).

195. S. 144, 2008 Leg., Reg. Sess. (La. 2008).

196. LA. REV. STAT. ANN. § 14:43.6 (2008) (affording judges discretion to order chemical castration after a first conviction and mandating an order of chemical castration after a second conviction of second degree sexual battery).

197. *See* James Dao, *Study Says 80% of New Orleans Blacks May Not Return*, N.Y. TIMES, Jan. 27, 2006, *available at* http://www.s4.brown.edu/katrina/news/NYT.htm (predicting that much of New Orleans' black population might not return to the city be-

tire nation must remain vigilant, lest it adopt policies that further incite racial eugenics.

In light of "the evolving standards of decency that mark the progress of a maturing society,"[198] chemical castration laws create cause for alarm. A host of scholarly commentators have recommended various methods of circumscribing the laws so that they are narrowly tailored to achieve the state interest in protecting its citizens. Some commentators have suggested that chemical castration should never be an involuntary, required course of action or that the sexual offender should receive an evaluation from a licensed health care professional to assess his amenability to treatment, thereby limiting treatment to sexually-motivated nonviolent pedophiles.[199] Such proposed revisions to chemical castration statutes, however, fail to address the root of the problem – racial bias.

Discretion on the part of prosecutors, judges, juries, medical experts, physicians, and health care professionals provides an environment for racial bias to fester. Given the history of the interplay between race and rape law within the United States, moreover, voluntary and involuntary use of chemical castration laws will have a disparate impact upon black men. Since American society still conceptualizes black men as hypersexual and hyperagressive, as evidenced by the disproportionate prosecution and sentencing of black men for rape and sexual assault, the nation is unprepared to embark upon the chemical castration venture. Chemical castration threatens to demasculinize, dehumanize, and invisiblize black men, further perpetuating cycles of gendered racism and subordinated masculinity. Until a reconceptualization of black masculinity is complete, a moratorium should be placed on chemical castration, lest American society revert to its lynch mob mentality by championing a "Race-to-Castrate" regime.

> *Whereas the white man regards his manhood as an ordained right, the Black man is engaged in a never ending battle for its possession. For the Black man attaining any portion of manhood is an active process. He must penetrate barriers and overcome opposition in order to assume a masculine posture.*[200]

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cause they will be unable to afford the relocation costs or will establish roots in other cities); Lisa de Moraes, *Kanye West's Torrent of Criticism, Live on NBC*, WASH. POST, Sept. 3, 2005, at C01 (containing transcript of rapper Kanye West's performance at a Katrina fundraiser, where he stated: "I hate the way they portray us in the media. You see a black family, it says 'They're looting.' You see a white family, it says, 'They're looking for food.' And, you know, it's been five days [waiting for federal help] because most of the people are black.").

198. Trop v. Dulles, 356 U.S. 86, 101 (1958).

199. *See, e.g.*, Tanya Simpson, *"If Your Hand Causes You to Sin. . .": Florida's Chemical Castration Statute Misses the Mark*, 34 FLA. ST. U. L. REV. 1221 (2007); Flack, *supra* note 95.

200. DORIS Y. WILKINSON & RONALD L. TAYLOR, THE BLACK MALE IN AMERICA: PERSPECTIVES ON HIS STATUS IN CONTEMPORARY SOCIETY 137 (1977) (quoting an unidentified psychologist).