

The Pig Farmer's Daughter and Other Tales of
American Justice: Episodes of Racism and Sexism
In the Courts from 1865 to the Present by Mary
Frances Berry

Linda Martin Pybas

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/rrgc>



Part of the [Race and Ethnicity Commons](#)

Recommended Citation

Linda M. Pybas, *The Pig Farmer's Daughter and Other Tales of American Justice: Episodes of Racism and Sexism In the Courts from 1865 to the Present* by Mary Frances Berry, 1 U. Md. L.J. Race Relig. Gender & Class 169 (2001).

Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol1/iss1/9>

This Book Review is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

BOOK REVIEW

THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT. By Mary Frances Berry. New York, NY: First Vintage Books. 1999. Pp. 295. \$13.00.

*Reviewed by Linda Martin Pybas**

I. INTRODUCTION

Says author Berry, when a black man is lynched or executed it is because the “powerful—most usually white males—defined him as an object—the other—whose punishment, whether guilty or not, signs racial subordination through perpetuation of a negative image of black males.”¹ Furthermore she says, when an African American woman’s rape is ignored, it is because she is socially constructed as inferior.² The white woman is socially constructed as “the other” when “no” is construed to mean “yes” because “by definition,” she is “available for [the] white man’s desire.”³ By the existence of these constructs, says Berry, we can observe that “[e]veryone involved is constructed through the angle of vision of the white man’s privileged sight.”⁴

In *The Pig Farmer’s Daughter and Other Tales of American Justice*,⁵ Mary Frances Berry examines the underlying social subtext of several appellate court decisions.⁶ In her introduction, Berry says, “we change the law not by focusing exclusively on formal legal rules but by changing the experiences, and eroding [the] myths and stereotypes that underlie each person’s stories.”⁷ Berry cites the

* J.D. Candidate, University of Maryland School of Law, 2002.

1. MARY FRANCES BERRY, *THE PIG FARMER’S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT* 242 (First Vintage Books 2000) (1999).

2. *Id.*

3. *Id.*

4. *Id.*

5. Hereinafter *The Pig Farmer*.

6. Dr. Mary Frances Berry is the chairperson of the U.S. Civil Rights Commission. She was the Assistant Secretary for Education in the U.S. Department of Health, Education, and Welfare during President Carter’s administration. *Id.* at 1. She has a Ph.D. in History and a J.D. from the University of Michigan. She is a Professor of History at the University of Pennsylvania. <<http://www.history.upenn.edu/faculty/berry.html>>.

7. BERRY, *supra* note 1, at 19.

demise of the civil rights protest movement as leaving the “positive social change with respect to race” stalled.⁸ Moreover, writes Berry, the American court system has long been and continues to be a white-male-oriented institution.⁹ She notes that in order to effectuate change, we all must work to undo the “internalization of the Euro-American master’s narrative.”¹⁰ This narrative makes the white heterosexual male’s experience the norm, and relegates all other “stories” (experiences) as deviant from that norm.¹¹

The Pig Farmer also aims to draw its reader’s attention to storytelling, and to “expand the repertoire of the stories” available for the reader’s use when analyzing case law.¹² She does this by examining state appellate judicial decisions. While examining these decisions, Berry tries to show how the “stories” believed by judges, juries, and lawyers about non-white or non-male or non-heterosexual human beings influence the law and how these beliefs influence the way “justice and injustice are dispensed.”¹³

Berry does a spectacular job of showing the reader her view of the justice system. All lawyers and judges should have to read Berry’s book as a prerequisite to practicing law or sitting on the bench. If nothing else, it would make them think about their decisions and their own experiences as they reflect upon the “stories” about which Berry has written. Yet, in her zealous effort to put her point forward, Berry makes some errors in reasoning.

Chief among these is a tendency to make conclusions about fact patterns where other alternatives might exist for the judges’ decisions. Through Berry’s lens, no matter which way a judge decides he is upholding white male privilege. While one would be hard pressed to argue with her thesis given the volume of evidence presented here, the tendency toward circular reasoning made this reader uneasy about making that conclusion definite. Moreover, though Berry purports this book to be about the state of American justice, she included very few earlier cases decided in the northern states. Though this might not make a difference in her findings, one cannot be sure.

8. *Id.*

9. *Id.* at 247-48, n.24.

10. *Id.* at 19.

11. *Id.* 19-20.

12. *Id.* at 20.

13. *Id.*

II. THE BOOK

A. *The Protection of Home and Hearth:
Sex Outside of Marriage*1. *Extramarital Affairs*

According to Berry, the general narratives that fuel judges' decisions in the area of divorce and extramarital affairs included three notions. First, judges ascribed to the notion that white women were frail beings in need of protection.¹⁴ Second, the judges believed that as long as men kept their affairs discreet, society would tolerate them.¹⁵ And third, judges noted that men have sexual urges, which must be fulfilled; therefore, society tolerates the affairs.¹⁶ Says Berry, often these stories are intersected with prevailing stories about race and social class.¹⁷

Berry explains the narratives she believes were at work in the judges' decisions where race and gender clashed. Says Berry, where a white man had sex with a black woman, this was merely "continuation of an old practice condoned under slavery."¹⁸ In *Turner*, the lower court may have seen sex between a white man and an African American woman as being of little consequence.¹⁹ However, says Berry, the appellate court saw a powerful narrative alive at that time and possibly today which sets forth that chaste, frail white women were (are) in need of the protection of their husbands.²⁰ In other

14. *Id.* at 21.

15. *Id.*

16. *Id.*

17. *Id.* at 21-48. For example, Professor Berry retells the story of *Turner v. Turner*, 44 Ala. 437 (1870), an Alabama divorce case. Here, Ann discovered Matthew was having sex with an African American who was the couple's former slave, named Sally. Despite Ann's insistence that Sally be removed from the home, Matthew refused to remove her, and even threatened to whip his wife for her interfering in his sex life. Sally, "supported by the authority of her master," became insolent to Ann. Matthew forbade his wife to chastise Sally. The high court of Alabama overturned the lower court which had denied Ann alimony or divorce, and granted her divorce. The court established a lien on the Matthew's sizable assets (\$400,000) to keep them from being removed from the state. Ann brought to the marriage only her excellent reputation as a "a chaste . . . useful and obedient wife." See also BERRY, *supra* note 1, at 21-23.

18. BERRY, *supra* note 1, at 23.

19. *Id.* at 22-23.

20. *Id.* at 23. According to Berry, Matthew had deviated from the time-honored tradition of protecting his wife and children from the knowledge of his extra-marital, cross-racial affair. She says by humiliating his wife in the presence of his black concubine and by expecting his

words, Berry believes that while it was acceptable for Turner to sleep with Sally, it was not acceptable for Sally's status to rise above his wife's status in his household or to make the affair public.²¹

2. *Family Values*

In the 1800s, fornication²² between unmarried couples of the same race was punished differently than fornication between unmarried couples of different races.²³ In addition, until 1967 when the Supreme Court of the United States in *Loving v. Virginia* found laws against interracial marriage unconstitutional,²⁴ any state could prohibit interracial relationships.²⁵ The court's decisions of this era reflected a fear that "mongrels born of such marriages would overburden the poor."²⁶ According to Berry, these old narratives have not gone away and still appear in the current affairs of today.²⁷

wife's "submission to Sally," Matthew "had inverted well-established social and racial norms."

21. *Id.* The judges might also have granted the divorce because they felt it was the legally proper thing to do. See also discussion, *infra* p. 178-181.

22. "Fornication" is defined as "[s]exual intercourse other than between married persons." BLACK'S LAW DICTIONARY 451 (6th ed., 1991).

23. BERRY, *supra* note 1, at 32 (citing *Pace and Cox v. State*, 69 Ala. 231 (1881) (upholding the conviction of a black man and a white woman for adultery and fornication). These defendants were sentenced to two years in prison while intraracial fornicators usually only paid a fine. The court noted that finding otherwise might encourage interracial fornicators and produce "a mongrel population and a degraded civilization."

24. BERRY, *supra* note 1, at 44 (quoting *Loving v. Virginia*, 388 U.S. 1 (1967)). The Court found that preventing interracial marriage violated the equal protection clause. Justice Warren called distinctions drawn according to race as "outmoded." America, he said, is now a country "whose institutions are founded upon the doctrine of equality."

25. In the early 1950s 31 states still had interracial marriage bans. By 1967, fourteen states had repealed these laws (including Maryland). BERRY, *supra* note 1, at 44 (citing *Loving*, 388 U.S. 1).

26. BERRY, *supra* note 1, at 35 (quoting *Green v. State*, 58 Ala. 190 (1877) (upholding the conviction of a black man, Green, and a white woman, Atkinson, for violating the ban against interracial marriage. Green and Atkinson lived together while laboring at a plantation. The couple did have a marriage license, signed by a minister and judge. By finding the marriage against the law, the court effectively voided it. A common stereotype prevalent at this time was that mulatto children would be intellectually and physically defective.

27. For example, in a 1965 Moynihan report on black families, it was reported that African American inequality would not be eased until their licentiousness and sexual irresponsibility declined and father-headed families became the rule among the black poor. The past and current public emphasis was on black, unmarried mothers collecting welfare, and single parenthood became the symbol of all that was wrong with America. "Family values" became the Republican mantra. The definition of "family" left out all but the opposite-sexed, same-raced, two-parented type with 2.5 children. BERRY, *supra* note 1, at 45-46 (citing Ronald Reagan, *Ronald Reagan's Call to Action* (NY, Warner 1976)).

*B. The Crime That Had No Name:
Narratives of Gay and Lesbian Sex*

1. Homosexuality and the Law

In this chapter, Berry examines the historical treatment of gays and lesbians under the law. Decade by decade from 1865, she examines the stories which have permeated American culture and the courts. When judges examined homosexuality after the Civil War, they referred to it as an “abominable and detestable crime.”²⁸ One sodomy defendant was described as “a raving, vicious, bull, running at large upon the highways, who should be penned.”²⁹ In the 1800s, sodomy was outlawed by all but five of the thirty-eight states.³⁰ Berry notes that race and class distinctions intersected with sexuality.³¹ These intersections influenced who was arrested and prosecuted for homosexual offenses.³²

2. History

Berry writes that, in the 1930s, the Army and Navy began using testing and induction physicals to keep homosexuals out of the military.³³ According to Berry, the Army claimed to be able to pick out the homosexuals by their “effeminate looks and behavior.”³⁴ During wartime, the demand for soldiers relaxed this exclusion, but only so long as the relationships were kept private and consensual. Thus began the military’s “don’t ask, don’t tell” policy of tolerating gays in the military.³⁵

28. BERRY, *supra* note 1, at 49 (citing *Darling v. State* 47 S.W. 1005 (1898) (describing oral sex as “vile and detestable”); *Prindle v. State*, 31 Tex.Crim.App. 551 (1893); *Medis v. State*, 27 Tex.App. 194 (1889) (finding the defendant who complained of being sodomized as having evidently consented to the “bestial act”)).

29. *Id.*

30. BERRY, *supra* note 1, at 51.

31. *Id.* at 51, 56-57 & 67-68.

32. African Americans and the white poor were over represented among the small number of persons jailed for these offenses. *Id.*

33. *Id.* at 57.

34. Yet, said a *Newsweek* article, “scores of these inverts’ slipped through.” *Id.* (citing *Homosexuals in Uniform*, NEWSWEEK, June 9, 1947, at 54).

35. BERRY, *supra* note 1, at 57 (quoting and citing Alan Bérubè, *Marching to a Different Drummer: Lesbian and Gay GI's in World War II*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 383-94 (Duberman, et. al. eds., New American Library, 1989)).

3. *Change*

According to Berry, in the 1940s and 1950s, the old sin and perversion stories continued. However, courts did begin to look at civil liberty issues absent until then. In *Barton v. State*, the Georgia Supreme Court still denounced homosexual sodomy as “vile” and “distasteful,” but overturned a conviction because it insisted on a “somewhat full” description of the crime.³⁶ Decisions like *Roe v. Wade*,³⁷ *Griswold v. Connecticut*,³⁸ and *Stanley v. Georgia*³⁹ gave gays some hope that the Court would outlaw persecution of homosexual sex. Alas, the hope was short lived.⁴⁰

Berry also noted that gay and lesbian parent-custody disputes “remain caught between new and old stories.”⁴¹ One story considers homosexual partners to be capable of maintaining a loving, caring, non-perverse, or non-coercive home.⁴² The other story worries that gay couples will infect their children with their “disease.”⁴³ Yet another story avoids the issue altogether and decides cases based on contract or property law, rather than family law principles.⁴⁴

36. BERRY, *supra* note 1, at 58 (quoting *Barton v. State*, 53 S.E.2d 707, 708 (1949)). See also BERRY, *supra* note 1, at 68 (citing *Franklin v. State & Joyce v. State*, 257 S.2d. 21 (1971) (overturning the conviction of a man found guilty of a “crime against nature”; the law was held to be “void on its face as unconstitutional for vagueness and uncertainty”).

37. BERRY, *supra* note 1, at 70 (citing 410 U.S. 113 (1975) (holding that privacy rights included a woman’s right to abort her fetus).

38. BERRY, *supra* note 1, at 70 (citing 381 U.S. 479 (1965) (holding that a married person has a right to birth control).

39. BERRY, *supra* note 1, at 70 (citing 394 U.S. 557 (1969) (holding that a person has a right to view pornography in the privacy of her home).

40. BERRY, *supra* note 1, at 70-72 (citing *Bowers v. Hardwick*, 487 U.S. 186 (1986)) where the Court held that the federal right to privacy did not extend to homosexual sex, even in one’s own home. Rather than framing the issue as one involving privacy, the Court framed the issue as the right to engage in homosexual sodomy. The Court used the old argument that history and tradition had prohibited gay sex. As Berry points out, “[t]he *Bowers* case relied on the old narrative of homosexuality as sin and perversion.” “Twenty-five states still outlawed sodomy in 1994.”

41. BERRY, *supra* note 1, at 72-77.

42. *Id.* at 75-76. Berry notes that most states are caught in between these stories, saying that “[b]y 1995, eight states had denied custody to a homosexual parent and five had not.” *Id.* at 76.

43. *Id.* at 73-75.

44. *Id.* at 77 (citing Shirley Elder, *No More Love Match: Navratilova Tells Her Side of Palimony Suit*, DETROIT FREE PRESS, June 18, 1991. Berry writes, the “non-marital cohabitation agreement” between Martina Navratilova and her lover, Judy Nelson, was interpreted “so as to require no sanction of their lesbian relationship.” Even though the dispute was settled out of court, and despite public awareness that the couple were more than just business partners, the “legal result relied solely on contract law.” See also *Martina Settles ‘Palimony’ Suit*, SAN FRANCISCO CHRONICLE, March 14, 1992).

C. Of Concubine and Mistress—Inheritance Rights of African American and Unmarried White Mistresses

1. African American Concubines

Berry points out that African American women and their children inherited only if the white male had provided for them in his will.⁴⁵ Notes Berry, this outcome upset neither the status quo, patriarchy, nor racial subordination stories because by respecting the white male's wishes, the courts were respecting the patriarchy,⁴⁶ and registering their understanding of a white male lusting after the over-sexed and ever-available black female.⁴⁷ When the white male had no will, the African American woman would not fare so well.⁴⁸ According to Berry, because the court was not doing the bidding of the white male in his will, African American women who sued for their inheritances seldom won.⁴⁹

2. White Mistresses

White female mistresses fared worse than their black sisters. Here, says Berry, "[t]he protection of racial paternalism was not an issue, nor was white male lust for interracial sex."⁵⁰ Berry explains the narratives told of white females cavorting with married men, portraying the white females "as if they were prostitutes claiming payment from the dead."⁵¹ Berry points out that here there were "[no] racial or other legal bans [that] prohibited marriage."⁵² According to Berry, if he had no wife, the court figured that if the man had valued his white mistress, he would have married her.⁵³ Either way, the white

45. BERRY, *supra* note 1, at 80-81.

46. *Id.* at 102-03. Berry may be understating the notion that some courts may simply have felt that awarding the intent of the testator was the proper rule of law to follow.

47. *Id.* Berry may also be understating the possibility that a white male and a black female could have a loving, healthy, power-balanced, long-term relationship; and that the judges' decisions simply reflected an equitable decision given the couple's inability to marry.

48. BERRY, *supra* note 1, at 86-87.

49. *Id.* at 86-87,103 (noting that intestacy laws long ignored the rights of illegitimate children to inherit from their biological fathers). African American mothers and their mulatto children had to prove that their lovers (or fathers) had intended for them to inherit or that they were common-law wives (or non-illegitimate children). They were seldom successful. *Id.*

50. *Id.* at 93.

51. *Id.*

52. *Id.* at 94.

53. *Id.*

mistress often lost out. Even if the man had a will, the court often found other legal ways to invalidate it.⁵⁴

Berry opines that there is a growing acceptance in the courts to do away with the old story of the scheming, immoral harlot and replace it with the application of the rule of “implementing the will of the testator.”⁵⁵ Berry states that claims can no longer be overtly invalidated on the basis of race, gender, class, or sex.⁵⁶

D. The Business of Sex—Prostitution

Berry says, “state courts [have] consistently validated the story that prostitution was acceptable because it permitted the expression of male desire with lower-class, immoral women and did not threaten the hierarchies of race, gender, and class subordination.”⁵⁷ For example, Berry relates the case of a black man convicted of soliciting white prostitutes, and discusses how abhorrent the idea of a black man exploiting an innocent white woman is to society.⁵⁸ On the other hand, a black man soliciting a black female prostitute is much less abhorrent.⁵⁹

Moreover, Berry discusses the case of Mollie’s Place, a brothel frequented by judges from Alabama and Mississippi.⁶⁰ Here, only white male clientele and white prostitutes were allowed, and Molly insisted her girls not drink, smoke, or behave indecently.⁶¹ The court always found a reason to dismiss charges against Molly.⁶² Only “behavior which conflicted with this story line with prevailing views of gender roles was punished by the courts.”⁶³ Berry notes that the

54. *Id.* at 94.

55. *Id.* at 100.

56. *Id.* at 103. However, she says, unsuccessful claims brought by unmarried partners are sometimes turned down when judges find wills invalid because they were made under fraud or duress (usually perpetrated by the immoral harlot herself).

57. *Id.* at 107.

58. *Id.* at 104-07. See, e.g., *State v. Shillcutt*, 350 N.W. 686 (1984).

59. BERRY, *supra* note 1, at 107.

60. *Id.* at 107-08 (citing James R. McGovern, *Sporting Life on the Line: Prostitution in Progressive Era Pensacola*, FLORIDA HISTORICAL QUARTERLY 54, 137-38 (1975)).

61. BERRY, *supra* note 1, at 107.

62. *Id.* at 108. For example, the police would conduct periodic raids, fining the brothels with which the police would enrich their own treasuries, but never shutting the places down.

63. *Id.* at 108-09 (quoting *Malta Scarborough v. State*, 46 Ga. 26 (1872)). Berry notes the case of man convicted of soliciting the prostitution of his wife and daughters. The court did not let the man escape liability because he was seldom home because, said the court, “if the women carried on lewdness with ‘his connivance or permission’ and in his presence, he

prevailing narrative was that men could not be expected to control their sexual urges, and without a prostitute as an outlet, he might avail himself of the nearest respectable woman!⁶⁴ After all, even judges frequented Mollie McCoy's.⁶⁵

Berry observes that prostitution issues were different for African American women.⁶⁶ Because black woman could not enter many "respectable" hotels or restaurants, they were more likely to become streetwalkers where they were exposed to local police and thus more easily identified as prostitutes.⁶⁷

E. Promise Her Anything—The Crime of Seduction

Berry notes that actions for seduction⁶⁸ had three purposes: "to avoid private vengeance, to curb male sexual behavior, and to disgrace or harm the violator as much as a fallen woman."⁶⁹ These actions were primarily brought by white women suing white men.⁷⁰ However, where the woman was poorer than the man or where the woman was African American, other narratives played out in the courts.⁷¹

was responsible." The court announced, the "father 'is the head of the family, and can control what is done there.' By not exercising control, he submitted to the downgraded behavior of his wife and daughters.").

64. BERRY, *supra* note 1, at 109-10.

65. *Id.* at 108.

66. *Id.* at 113.

67. *Id.* at 113-14. Moreover, says Berry, in accord with the narrative that says that African Americans are licentious and inferior, the white majority police took little or no notice of cases involving African American prostitutes and their black male clients. Even where blacks ran brothels, the police ignored them. That is until the brothel crossed racial lines.

68. "Seduction" is a criminal or civil sanction whereby the man is charged with making certain promises to induce the woman to have sex with him. This "promise" was usually the expectation that he would marry her. BLACK'S LAW DICTIONARY 945 (6th ed., 1991).

69. *Id.* at 127.

70. *Id.* at 127, 131. Berry also observed that race narratives affected "white" claims in that a white woman or man's contact with a "Negro" might be seen by the courts and juries as evidence that the contestant was not as virtuous as he or she claimed to be. *Id.* at 129-30, 151.

71. *Id.* at 128-30 (citing *Wood v. State*, 48 Ga. 192 (1873) and *Plans Bay State Anti-Balm Act*, N.Y. TIMES, April 3, 1935)). Berry notes that poorer women might be characterized as gold-diggers who sought financial gain despite their consent to the sexual relationship. Further she says, "judges had no problem considering African American and poor women as already soiled," and thus unable to sustain claims against the men accused. See also BERRY, *supra* note 1, at 137. A typical defense cited by the male was that he could not have seduced the woman because she was already promiscuous. The Georgia high court found against a "bad woman at heart" whom it felt "may be burning with lust" and, therefore, who was not a virtuous woman for whom the law of seduction was made. *Id.* at 130 (quoting *Wood*, 48 Ga. at 192). See also BERRY, *supra* note 1, at 137 (noting that in "all eight Southern states which criminalized seduction, women had to be chaste to claim redress under the law").

Berry notes that in the 1800s the compelling narrative emphasized the protection of “the virtue of respectable females,” the family reputation, and a woman’s continuing eligibility for marriage (“fallen” women were no longer marriage material).⁷² Historically, the woman’s father or husband could bring suit against the alleged seducer for damages to his “property.”⁷³ Berry remarks that to escape the dishonor for herself and her family name, “a woman might accept her seducer’s agreement to marry her in exchange for dropping seduction charges.”⁷⁴

In the 1900s, the driving narrative was that of the need for financial support of women and their illegitimate children, who might otherwise become dependent on the government for support.⁷⁵ In the 1930s, many states repealed their seduction statutes.⁷⁶ Reformers, says Berry, accepted a new narrative of a woman who was empowered to resist promises to marry and pressure to have sexual relations.⁷⁷ According to Berry, this view is more words than practice, because courts still decide cases based on the old story of the vulnerable needy female bending to the will of the lascivious male.⁷⁸

F. The Consequences of Sex—Abortion and Child Support

1. Abortion

Berry notes the historical tale of abortion in America. Abortion was not made criminal until 1880.⁷⁹ Furthermore, between

72. BERRY, *supra* note 1, at 127-28 & 135-37.

73. BERRY, *supra* note 1, at 136 (citing Mary Francis Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, JOURNAL OF AMERICAN HISTORY 78 (Dec. 1991). Berry notes that the source of this “wives and daughters as property” notion stems from the common law contract theory, which categorized wives and daughters as servants. Losing the use of your servant, either as a sexual partner or as a home caretaker could result in recoverable losses to the husband or father. After the Civil War, in a few states, a woman could bring a suit on her own behalf. *Id.*

74. BERRY, *supra* note 1, at 142-43 (noting two such results: *Honnett v. Honnett*, 33 Ark. 156 (1878) (in which a man refused to live with his wife, denouncing her and her character to anyone who would listen) and *Jack Thornton v. State*, 20 Tex. 519 (1886) (in which a man, upon finding out he could not divorce his new wife, slit her throat on the way home from the wedding ceremony).

75. BERRY, *supra* note 1, at 147-48.

76. *Id.* (citing *Bay State Bans*, *supra* note 71, at 11).

77. BERRY, *supra* note 1, at 143-44.

78. *Id.* at 144.

79. *Id.* at 154.

1880 and 1973 when *Roe v. Wade*⁸⁰ was decided, safe abortion was problematic.⁸¹ Wealthy women often had access to physicians who were willing, for the right price, to perform abortions. Wealthy women also may never have become pregnant because they had access to birth control, which poorer women did not.⁸² Berry notes that by 1890, most women who obtained abortions were unmarried and poor.⁸³ African American and poor white women often depended on dubious methods, which often ended in injury or death.⁸⁴ The general public, juries, and judges tolerated women who had abortions because says Berry, the story of the “disgraced female” seeking to ameliorate an unplanned pregnancy is a powerful one.⁸⁵

Non-physician abortionists tended to be punished for performing the procedure more often than physicians.⁸⁶ According to Berry, this was due to the power of mostly wealthy, white male physicians who warred against poor, female, or black midwives and homeopaths.⁸⁷ Berry writes, non-physicians who botched abortions, “played the perfect villain[s] in the story that [powerful white] male MD’s told of needing to guard the scientific integrity of the medical profession.”⁸⁸ Berry also notes that as a result of this war, the legal system stepped up its efforts to regulate the practice of abortion.⁸⁹

80. 410 U.S. 113 (1973).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 155. However, statistics on black women’s procurement of abortions at this time are non-existent. Berry points out that this is most likely because black women were so poor they were the least likely to have physicians performing their abortions. Thus also making it less likely for there to be records or prosecutions of these women.

85. *Id.* at 154-155. The judges may also have felt sympathy for the women or felt that the law restricting a woman’s right was wrong.

86. BERRY, *supra* note 1, at 156-57 (citing the case of “Dr.” Morani, a barber, who advertised himself as a licensed physician and performed abortions. A court convicted Morani of second degree murder. *People v. Morani*, 196 Cal. 154 (1925)).

87. BERRY, *supra* note 1, at 156.

88. *Id.* at 156-157. The non-physicians may have been less careful, less likely trained, or more likely to use dubious, dangerous methods.

89. *Id.* at 157-58. Police began raiding abortion clinics, collecting records, and medical instruments. According to Berry, because of the potential invasion of the women’s privacy, this process may have undermined patients’ confidence in their doctors, making them less likely to obtain safe abortions. Berry also notes that in the 1980s and 1990s even after the Supreme Court’s decision in *Roe v. Wade*, abortion opponents still wove a story of abortion as sinful and murderous. Thus “[i]n the 1990s, violence began to constrain abortion rights.” Lack of access to safe clinics, refusal of many medical schools to train doctors in abortion procedures, and threats of violence have all “undermined the [women’s] right to choose.” *Id.* at 161-62.

2. *Child Support*

Berry says there have been several consistent themes in the treatment of men and their financial relationships with their children. First, she says when women brought out-of-wedlock pregnancies to term instead of opting for abortion, birth control, or infanticide, claims brought for support of these children invoked race, gender, and class issues into the courts.⁹⁰ Among these themes is the notion that until recently “out-of-wedlock” births in the African American community infrequently led to legal proceedings.”⁹¹

In 1935, the federal government passed the Aid to Dependent Children (ADC) Act.⁹² Though eligible, few black women received any benefits until the 1960s when the civil rights welfare movement insisted they did.⁹³ After this, says Berry, the white public began “accepting the story that promiscuous, licentious black women who became pregnant out of wedlock [were causing] the explosion of illegitimacy and rais[ing] welfare costs.”⁹⁴ Says Berry, white women whose babies were highly adoptable suffered far less social costs than black women.⁹⁵

Berry notes that in the 1940s, society’s concern, (or, more specifically, white men), about the freedom of the new more independent white women brought stricter sanctions against them for becoming pregnant while not married.⁹⁶

90. *Id.* at 169-71 (citing *State v. Murray*, 63 NC 31 (1868); *Boles v. State*, 10 Ala. App. 184 (1871); and *Christian v. Commonwealth*, 64 Va. 954 (1873)). In *Christian*, says Berry, a rape conviction was reversed because the woman had two illegitimate children, which, said the court, meant the woman “lacked ‘virtuous sensibilities.’” Thus, says Berry, because she was the *sort of woman* who engaged in sex without marriage, often the woman’s credibility as a witness was called into question. The courts did not question the tarnished reputations of the men who engaged in sex this way.

91. BERRY, *supra* note 1, at 169-70. This, says Berry, is because children born of slaves were the property of their masters, and, unless he acknowledged the child, no white man could be designated the father of a black woman’s child.

92. This was part of the Social Security Act and was meant primary to help white widows and their children.

93. BERRY, *supra* note 1, at 172.

94. *Id.* at 172-73.

95. *Id.* at 173 (citing Linda Gordon, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 85, 273 (NY, 1994)).

96. BERRY, *supra* note 1, at 173. According to Berry, the women were often deemed *unfit* mothers whose children should be taken away. This negative reaction led many more unmarried women to put their babies up for adoption. Homes for unwed mothers sprang up around the country. Except for in large northern cities, these homes were segregated by race.

G. Suffer the Children: Incest and Child Rape

Berry says the narrative involving child incest and child rape had evolved from one in which the primary objective was to protect the reputation of the rapist to one in which there is concern for the victim and an interest in punishing the rapist.⁹⁷ Berry says this is because our society has evolved somewhat from a truly patriarchal one.⁹⁸ She notes, however, that we still have some of the old stories, especially that of the seductive female child.⁹⁹

Berry notes that in the 1960s and 1970s, there was a trend in a few states toward decriminalizing incest and other family violence crimes.¹⁰⁰ By the 1980s, this trend subsided.¹⁰¹ Berry cites the women's movement's challenge of male control as leading society and the courts to develop new stories with regard to incest and child rape.¹⁰² Appellate courts, she says, "became less receptive to defenses based on the need to uphold male control."¹⁰³ However, courts have "remained sensitive to the possibility of false charges instigated to punish the father or to gain custody and support in divorce cases."¹⁰⁴ Courts also have begun to carefully examine the child's story when it appears the family may be closing "ranks to insulate the father from charges."¹⁰⁵

97. *Id.* at 179-80. She states, "where once [the incest story] expressed a need to protect the patriarch's property rights, it now identifies the patriarch as a monster." *Id.*

98. *Id.* at 180. Berry notes that though the notion of children as property has subsided, the patriarchy is still alive and well in the notion that there now exist "defenses based on the need to avoid interference with a man's responsibility for control of his wife and children . . ." *Id.* at 191.

99. BERRY, *supra* note 1, at 180. This is a Freudian notion, which puts some of the blame for incest on the child, and denies the reality of reports of incest as "false memories" or "fantasies." *Id.* at 179-80 (citing Sigmund Freud, *Dora: An Analysis of a Case of Hysteria*, P. Rieff, ed. (NY, Cromwell-Collier, 1967)). Says Berry, because this bias exists against the incest victim, a man was more likely to receive punishment for child rape than for incest. Furthermore, when the victim was an African American "the theme of racial promiscuousness embellished the defendant's tale of enticement."

100. *Id.* at 196-97. The idea was that the family needed help healing, rather than punishing the perpetrator.

101. *Id.* at 197.

102. *Id.* at 199.

103. *Id.*

104. *Id.*

105. *Id.* And yet, despite these changes, though reporting has increased, the instance of conviction remains low. Berry describes the court's confusion as: "[a] confused panoply of aims and feelings—desire to maintain the nuclear family as a whole; adherence to the mythical good family; awareness of male sexual aggression; and mother's unwillingness to

H. The Pig Farmer's Daughter—Rape, Rumors of Rape, and White Male Privilege

Rape cases, says Berry, “teach us that race, class, and gender are not simple or straightforward entities or characteristics”¹⁰⁶ Berry states that every rape case required courts to manipulate the legal evidence of rape stories that permeate society.¹⁰⁷ Berry highlights the following rape stories:

- 1) rape convictions required proof of penetration achieved by force or violence, to demonstrate the lack of consent;¹⁰⁸
- 2) the woman should “look like” a rape victim, meaning she ought to appear vulnerable and in need of the court’s protection;¹⁰⁹
- 3) African American women were always seen as “loose” women with no right to refuse sex—so much so, that the rape of an African American woman by a black or white man was for a time in some states a non-indictable offense;¹¹⁰

acknowledge incest.” *Id.* at 201. Their decisions, she says, reflect “the flux in gender and power relationships” currently at work in “public discourse on the subject.” *Id.*

106. *Id.* at 202.

107. *Id.* at 202-03 (explaining the notion that “patriarchy colored judges’ visions when they saw poor white women’s charges of rape . . . [but] race could easily efface class, so that white judges and juries seeing African Americans on the stand saw not the class respectability [they] had struggled to acquire but lustful black animals capable of violent rape or licentious and sexually available black women.” *Id.* What you can see, she says, “overarching all else is that the law preserves class privilege, which usually means white male privilege.” *Id.* at 203.

108. *Id.* at 235 (citing *Rice v. State*, 9 Md.App. 552 (1970)). For example, evidence of injury or witnesses hearing the woman’s screams in protest might make it more likely the man was convicted. Berry also notes that following Susan Brownmiller’s publication of her work, *Against Our Will*, in which the notion of rape was exposed as a crime of violence rather than a crime of sex, prosecutors joined women’s groups in pushing for a change in laws which undermined the need to show that the woman *physically* resisted her attacker to show non-consent. BERRY, *supra* note 1, at 236 (citing *AGAINST OUR WILL: MEN, WOMEN, AND RAPE*, (NY, Random House, 1981)).

109. BERRY, *supra* note 1, at 233-35 (quoting *People v. Gonzalez*, 414 Ill. 205, 111 N.E.2d 631 (1968)). See also, e.g., *People v. Bakutis*, 377 Ill. 205, 36 N.E.2d (1941) & *Iowa v. Pilcher*, 171 N.W.2d 251 (1969). For example, women who had been out drinking or simply out late in the evening were seen as “out looking for a good time and not ‘averse to meeting someone interested in the field of sex.’” BERRY, *supra* note 1, at 234-35. Women who refuse to follow this narrative “were deemed too forward,” and were offered less protection by the courts. *Id.* at 211.

110. BERRY, *supra* note 1, at 28 (citing *George, a Slave v. State*, 37 Miss. 306 (1859)). It also may reflect the women as property notion that affects white and black women.

- 4) “judges remain reluctant to exact severe punishment when white women claim rape by” dates, ex-husbands, or ex-lovers;¹¹¹
- 5) African American men who were convicted of raping white women were sentenced to prison terms three to five times longer than those convicted of other kinds of rape¹¹² and were almost always the only ones to be given the death penalty for rape convictions.¹¹³

III. ANALYSIS

Berry begins her book with an illustration of her own experience with the law as a small child in Nashville.¹¹⁴ Here, she

111. BERRY, *supra* note 1, at 218. The judges remained suspicious that it was the woman who wanted sex. The man simply became aroused by her seduction—arousal which “had to be satiated.” *Id.*

112. Berry contrasts the case of a black man’s conviction of raping a fourteen-year-old white girl with a white man’s rape of an eleven-year-old white girl. Though she says both cases were equally “disgusting,” because of the jury’s racially-motivated fears of the wild, bestial, black man, Junior William’s death penalty conviction was upheld, whereas William Nillson received a twenty-year sentence. The barest of facts are given to support this conclusion; however, given the magnitude of the difference between the death penalty sentencing of black men as opposed to white men, Berry’s notion has some support. However, Berry does not comment on this, but it is worth noting that these cases occurred 13 years apart. Therefore, it is hard to say whether or not other factors may have influenced the judges’ sentencing in these cases. *Id.* at 189-90 (citing *Williams v. State*, 164 Tex.Crim. 347 (1956) & *Nillson v. State*, 477 S.W. 592 (1972)). Berry notes that William’s victim was choked into insensibility, spending 10 days in the hospital. Nillson’s victim was left bloodied and semiconscious.

113. BERRY, *supra* note 1, at 227, 238 (citing Jacquelyn Hall, *The Mind that Burns in Each Body: Women, Rape, and Racial Violence* 328-49, Ann Snitow, et al. eds. POWERS OF DESIRE: THE POLITICS OF SEXUALITY (NY Monthly Review Press, 1983)). Berry also notes the disparate treatment of African American males when charged and convicted of raping a white woman or girl. In fact, though an available punishment in many states for statutory rape, only black men’s death penalty convictions have been upheld by the courts. Of 455 men executed for rape between 1930 and 1968, 405 or 89 percent were black. See also *Furman v. Georgia*, 408 U.S. 238 (1972) (finding the death penalty, as practiced in Florida, Georgia, and Texas unconstitutional because of disparate treatment by race); *Coker v. Georgia*, 433 U.S. 584 (1977) (finding an Eighth Amendment violation in using the death penalty for adult rape charges unless severe bodily harm occurred); see also BERRY, *supra* note 1, at 227-28, 237. Berry also observed that the death penalty was reinstated in 1976 under certain procedural safeguards. Several states reenacted their death penalty statutes, but only Florida, Mississippi, and Tennessee continue to have death available as a punishment for child rape by an adult rapist. Berry attributes this solely to those states having strong continued patriarchal stories. She says, in those states, “the law must sternly punish the invasion of a man’s property in his child by another man.” *Id.* at 189 & 191.

114. *Id.* at 3.

remembers being harassed by police officers on motorcycles who would chase local African American children who were innocently playing in the street.¹¹⁵ She says of her experience, “[m]ost Euro-Americans have not experienced motorcycle policemen trying to run them over White Americans have their own stories, but these do not include African American’s profoundly racist and discriminatory experiences with the law.”¹¹⁶ Says Berry, the police are white persons’ guardians.¹¹⁷ “[White persons] stories presume a system of evenhanded justice and equality before the law.”¹¹⁸ Because this is a true statement one must ask whether a white reviewer can truly understand the race-related argument made here. The answer is—probably not. This is why the reader of this review needs to stay vigilant to the lens with which this reviewer sees her subject.¹¹⁹

Berry’s work is exceptional and highly provocative. Her thesis, that white-male privilege defines almost (if not every) decision made in society and in the courts, is very bold and probably true. This review will first examine these criticisms, then turn to the more praiseworthy aspects of *The Pig Farmer*.

A. Criticisms

1. What About the Law?

Berry has a law degree, but she is not a practicing lawyer.¹²⁰ As such, she might not see case studies through the same lens as a practicing lawyer. She might not appreciate the subtle differences in civil procedure and evidence law that might change what evidence a jury hears. To a historian, the judge’s exclusion of some essential fact might seem like bias. To a trial lawyer, excluding the evidence might

115. *Id.*

116. *Id.* at 5.

117. *Id.*

118. *Id.* at 5-6.

119. This reviewer’s lens is that of white woman who grew up in small town in Massachusetts (later moving to Florida, but whose core values are that of a privileged white “Yankee”). Barbara Flagg notes her belief that “whiteness is a transparent quality.” This “whiteness” may make some who are unaccustomed to other than non-whiteness unable to view that “other’s” existence with the same vision. Barbara Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, in *POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER* 34 (Leslie Bender & Daan Braveman, eds., 1995).

120. Professor Berry is a history professor at University of Pennsylvania. <<http://www.history.edu/faculty/berry.html>>. See also *supra* note 6.

seem more like the judge had concerns about prejudicing the jury. Consider the case of the pig farmer's daughter.

Berry tells the story of Annie Knuppel, a fifteen-year-old, German immigrant living in Texas in 1886 who was a pig farmer's daughter.¹²¹ Annie was returning home from the doctor one day when she was approached from behind and raped.¹²² Annie identified a well-known black man, Albert Johnson, as the perpetrator.¹²³ Berry notes that though this allegation came at a time when the black vote was being suppressed by violence and other means, giving blacks very little political power, Johnson was not lynched.¹²⁴ She notes that at his trial, six witnesses (both black and white) testified to Johnson's character for veracity. She says these witnesses "include[ed] the sheriff, the county attorney, and the judge and ex-judge of the county court."¹²⁵ Further, she notes that in two separate trials, Johnson was convicted.¹²⁶ On two separate instances, the appeals court overturned the convictions.¹²⁷ Berry says the prosecutor decided not to pursue the matter a third time.¹²⁸

Berry points out that the judges were Confederates who had fought in the Civil War for the South.¹²⁹ Despite their potential prejudices against Johnson, Berry notes that their decision can be explained. These judges, she says, found not for Johnson, but for the well-to-do white patrons who had testified on his behalf.¹³⁰ Berry observes that in an earlier case involving a black man, the same judges noted that the defendant was "always a humble, respectful Negro, never disposed to fudge on the rights of the white people."¹³¹ Berry states that the "[l]ocal juries and prosecutors, polarized by race, valued even a poor immigrant white woman's words against a black man—

121. BERRY, *supra* note 1, at 205-08 (citing *Johnson v. State*, 27 Tex.App. 163 (1889). See also *Johnson v. State*, 21 Tex.App. 268 (1888). Berry implies, but does not say, that being a pig farmer's daughter in Texas in the 1880s was a fairly low-status class position.

122. BERRY, *supra* note 1, at 205.

123. *Id.* at 206.

124. *Id.* Lynching was a popular pastime for southern whites at this time. Berry notes that one study reported that between 1880 and 1897 64 persons were lynched. Fifty-one were black men. Twenty-six were for alleged rapes. Lynching often if not always took place without a trial or hearing on the matter. *Id.* at 203-05.

125. *Id.* at 206.

126. *Id.* at 206-07.

127. *Id.* at 207.

128. *Id.*

129. *Id.*

130. *Id.* at 208.

131. *Id.* (quoting *Jones v. State*, 18 Tex.App. 485 (1885)).

but not elite appellate judges, who had competing concerns.¹³² She says “for them, class was the telling issue.”¹³³ Among conflicting stories, they chose to affirm white male privilege and paternalism in race relations.”¹³⁴

While this may have been an accurate depiction of the mentality of the appellate court, Berry’s reasoning is flawed. She says, “[the judges] acknowledged that a rape case arouses public indignation and fires the minds and passions of a community with a desire for vengeance”; therefore, “counsel engaged in the trial should be scrupulously cautious to accord the defendants a fair and impartial trial, as free as possible from excitement and prejudice.”¹³⁵ According to Berry, this fear of prejudice is not why the judges found as they did, but rather that the men who testified for Johnson were prominent white men in the community.¹³⁶ She says this, but cites no reason other than her belief that the judges were following the “good Negro” narrative.¹³⁷ The judges’ comments sound like a fair assessment of the prejudice that likely would happen if a jury heard that there might have been a confession, especially given the all-white jury’s existing potential prejudice toward the black defendant. One could have seen the case as impressive because the judges were interested in assuring impartiality and fairness for the African American defendant, but this criticism perhaps is seen through the lens of white privilege.

Another example of this potential indifference to the law underpinning the case is found in the property distribution cases in Chapter Three. Berry explains that the only reason judges tended to award African American women and children the inheritances given to them by white men via their wills was because these judges were upholding the white man’s privilege to distribute his property.¹³⁸ While this might be true, it is also possible that the judges were merely upholding the law, which makes the intent of the testator the higher

132. BERRY, *supra* note 1, at 208.

133. *Id.*

134. *Id.*

135. *Id.* at 207 (quoting *Johnson v. State*, 27 Tex.App. 163 (1889) (noting that prosecutors over objection by the defense had several times asked Johnson questions about a letter of confession he allegedly had written. No such letter was ever produced at trial. The appellate judges properly felt these questions had unduly prejudiced the jury.).

136. BERRY, *supra* note 1, at 207.

137. *Id.*

138. BERRY, *supra* note 1, at 102-103.

arbiter of a will's conveyances.¹³⁹ Through Berry's lens, which was justifiably focused on injustice, no matter which way the judges decided, they would always be upholding white male privilege.

2. *Judges Could Never Win*

In many instances in the book, Berry notes that the judge who decided a case in a way which benefited the minority member did so, not in the interest of fairness or justice, but solely because the judge was feeling paternally toward the downtrodden soul.¹⁴⁰ In all instances in the book, Berry notes that if a judge decided a case in a way that did not benefit the minority member, he did so because he was ascribing to prejudicial narratives about the minority group.¹⁴¹ Whichever way a judge decided, he was ascribing to the narrative of white-male privilege. This kind of argument is flawed because it is circular and leaves no room for alternatives.

One alternative is that the judge might have decided the case on its merits. Sometimes humans labeled as minority group members are guilty of the crimes committed and deserve the punishment they receive. Another alternative is that the judge was trying to right society's wrong by finding in a "paternalistic" way. Rape victims ought to have their crimes vindicated. Children born in poor families who are abused ought to be protected. A third alternative is that the judge made an error based on some other aspect of the case. For example, the *Turner* case discussed earlier exemplifies this point.¹⁴²

The appellate court overturned the lower court's decision to deny Mrs. Turner's divorce.¹⁴³ Though the narratives that Berry discusses were probably at work, it could also be true that the appellate court felt that granting Mrs. Turner's divorce was the legally proper thing to do given the facts of the case. This was a woman who had

139. "In construing wills, a majority of jurisdictions follow (or purport to follow) the plain meaning rule: a 'plain meaning' in a will cannot be distributed by the introduction of extrinsic evidence that another meaning was intended." JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 409-410 (6th ed., Aspen Law & Business 2000).

140. See, e.g., the pig farmer's daughter case, BERRY, *supra* note 1, at 207-08; discussion *supra* at Part II-H; *Turner v. Turner*, BERRY, *supra* note 1, at 3-4; discussion *infra* at Part III-A-2; and the discussion *supra* at Part II-D on prostitution (perhaps the men disagreed with the law because they did not feel that society ought to punish crimes that are merely "moral" wrongs).

141. The decisions found racial, gender, or class discrimination or, if the defendant was not found responsible, then paternalistic notions were at work.

142. BERRY, *supra* note 1, at 22. See also discussion *supra*, Part II-A-1 & n.17.

143. *Id.*

been severely emotionally and physically abused. To deny her divorce petition would have been unthinkable, even in her era.¹⁴⁴

In the case of the pig farmer's daughter, Berry has her reader emotionally convinced that the judges found against Annie because she was a less valued member of society and Mr. Johnson was portrayed as "good Negro." Yet, intellectually we are left wondering about alternatives for her theory. Perhaps, southern judges did not much like the notion of foreigners moving in on their crop or pig business, taking jobs away from "real" Americans. Or maybe the judges felt Annie was not convincing as a witness. Perhaps Mr. Johnson was an upstanding citizen with an impeccable record for honesty, which the judges could not ignore. According to Berry, the judges were paternalistic because they found for Johnson. However, it is also possible Berry would have labeled the judges racist had they found against Johnson.

3. *Townsfolk Cannot Win Either*

According to Berry, if the actions of a few idiots "outrage" others, the "outraged" ones really are not "outraged," but are covering up for their town or worried about the image of their town.¹⁴⁵ For example, Berry uses the following case to show how immigrant men from northern cities may have tried to raise themselves up above the status of blacks by "becoming white" and then persecuting blacks, sometimes by lynching.¹⁴⁶ Berry retells the story of a particularly troubling case, which occurred in Duluth, Minnesota—a northern city then with 98,000 whites and 485 African Americans.¹⁴⁷ Here, six or seven black men allegedly raped a young woman.¹⁴⁸ A riot ensued in which a crowd broke into the jail and held a "kangaroo court" where three of the men were declared guilty and sentenced to lynching.¹⁴⁹

144. *Id.* Mr. Turner sent his mistress out to get a switch which he planned to use on his wife. He made his wife "stand on the floor before him and his paramour, the colored woman Sally, and cower under the switches." He had a history of wife battering. Mrs. Turner filed for divorce under the grounds of cruelty, abandonment, and adultery.

145. *Id.* at 221.

146. *Id.* at 219.

147. *Id.* at 219-22. This is one of the few northern cases which Berry uses to illustrate her thesis. See discussion *infra* at Part III-A-3.

148. BERRY, *supra* note 1, at 220.

149. *Id.*

The men found guilty were taken out and immediately hanged before the onlookers.¹⁵⁰

Following the execution, Berry tells us that those townsfolk “worried about the image of their town . . . blasted the lynching.” The Rotarians and Kiwanis clubs “call[ed] the lynchings a shocking outrage.”¹⁵¹ Furthermore, Berry notes that Judge Cant Jr. told grand jurors that the lynchings were an “atrocious” example in “open defiance of the law.”¹⁵² While the judge’s subconscious intent may or may not have been as Berry believes, this kind of argument is impossible to reconcile. Either way the judge and the rest of the townsfolk reacted, they are assumed to be acting out of white privilege. If the townsfolk agreed with the lynchers, they are labeled racists, if they do not agree and protest, they are only doing so because the laborers were “not fully white” and therefore they are still racists.¹⁵³

Berry also notes that several groups with African American members expressed their “sadness” with the events. They expressed “no animosity and were thankful for the resolutions of the Kiwanis and other groups.”¹⁵⁴ According to Berry, the African American group probably expressed these kinds of comments because they were afraid to speak out.¹⁵⁵ The rapists were eventually tried in a court of law and found guilty; the lynchers were tried in eight separate trials and none was ever imprisoned.¹⁵⁶ Berry writes, “public sympathy[] lay not with the elites’ efforts to withhold the cloak of whiteness but with the perpetrators.”¹⁵⁷ Through another lens, one can see alternative stories.

The townsfolk might have been genuinely outraged by the conduct of their neighbors. The people might actually have been

150. *Id.* at 221.

151. *Id.* at 221.

152. *Id.*

153. *Id.* Berry states, the “city’s elite [who had denounced the lynching of three men accused but not yet tried for rape] sought to distance itself by arguing that the immigrant laborers involved the lynchings were still not fully white, not possessed of white male privilege.”

154. *Id.* at 221-22.

155. *Id.* at 221 (citing articles from the DULUTH NEWS TRIBUNE, including *Duluth Has Suffered a Disgrace, a Horrible Blot Upon Its Name that It Can Never Outlive* (editorial), June 17, 1920; *Police Warned of Lynch Plot in Advance*, June 18, 1920; *Lynchers Flayed in Charge of Grand Jury*, June 18, 1920; and *Roundup of Lynchers Starts Today*, June 17, 1920).

156. BERRY, *supra* note 1, at 222. Berry discusses at some length the trial of the alleged rapists, but does not discuss the trials of the lynchers. This may be a mistake, because it seems that this could be *the* more troubling result of this case.

157. *Id.* at 222-24.

concerned for the men who were killed. Alternatively, the people might have cared little for these men, but were concerned about the lack of due process, and the possibilities that the lack of due process might have meant for them and their rights. The people might have had a similar bias as the Texas appellate court against foreigners. The men who lynched these poor souls were also immigrants.

4. *Southern State Justice*

Berry used the southern reporters to find cases for her early analysis of post Civil War America.¹⁵⁸ Regardless of the numbers present, not including northern cases in her analysis of post Civil War America could be an error. While it is true that more African Americans were in the South, the problem with leaving the North out of the analysis is that it leaves room for those skeptics who would say these narratives did not exist in the North. Without the analysis, one cannot know for certain.

The South was a much different place from the North following the Civil War. Studying the South after the war and calling it “America” is like studying North Vietnam after its break from South Vietnam, and still calling it Vietnam. One cannot let the values of the vanquished part of a nation stand for the nation’s values as a whole. The southern states had (some still have) federalist leanings. They believed that state’s rights should be protected, and as such might have been less likely to follow the federal laws. Furthermore, the southern states most likely resented being told they could no longer hold their slaves as they wished. This resentment probably spilled into their decisions regarding African American defendants. This resentment might not have been present in the North, resulting in different decisions.

Berry does not mention abolitionist groups from the North and South who fought to bring an end to slavery and worked for the inclusion of African Americans into mainstream society. Berry also does not mention the millions of Americans from the North who

158. BERRY, *supra* note 1, at 244. Berry relates here research methods in a Methodological Note. She states that since most African Americans live in the South until the 1900s, the cases she studies in this book were collected by reading the southern state reporters and *West Century Digest*. More recent cases are gleaned from throughout the nation in *Decennial Digests* and *Westlaw*. Berry used a “random number generator,” and a sample of 10 percent of the cases were picked. She says, “race and gender were almost always identifiable from the court opinions.” She also checked her sources against Census records, National Archives, local police and court records, and newspapers.

fought and died to bring an end to slavery.¹⁵⁹ There is no mention of a president who felt so strongly that people should not be enslaved that he sent his country to war over it. Some of these abolitionists and soldiers and presidents were lawyers, judges, or politicians. Surely, these men and women (black and white) believed in and fought for narratives different from the ones told by Berry. The narratives they believed may have been northern narratives. Are these not "American" narratives as well? One might imagine that they are, but inclusion of them might have undermined Berry's thesis. We do not know because they were not considered here.

One of the biggest repositories of white-male privilege in modern America is the United States Supreme Court. Despite this, Berry spends very little time looking at its decisions. From 1865 to the present, seventy-five justices have sat on the Court. Of those only between eighteen and twenty-five percent¹⁶⁰ were from the South. Until 1954, when *Brown v. Board of Education*¹⁶¹ was decided, the Supreme Court has been less than helpful to the plight of African Americans in this country.¹⁶² By examining some of the cases decided by the Court around the same time, instead of looking only to southern reporters, perhaps Berry could better determine whether the northern judicial mentality at that time was the same or different from that of the southern one.

Berry mentions that she gleaned her more recent cases from *Decennial Digests* and Westlaw. An informal survey of the cases cited in the book revealed that very few are from the North. Though Berry probably is making a distinction between the North and South as they sided in the Civil War, the few cases that are from the "North" are

159. Though there were other political reasons for the war, the abolition of slavery was its chief purpose.

160. The percentage depends on whether one looks at the place of their birth or the place at which they lived and worked when chosen to serve on the Court. For example, two "southern" justices were born in the South, but moved to northern states because they opposed slavery. One justice, Miller, freed his slaves before moving. *The Oyez Project Northwestern University* (visited October 27, 2000), <<http://www.oyez.nwu.edu/justices>>.

161. 347 U.S. 483 (1954).

162. See, e.g., *Civil Rights Cases*, 109 U.S. 3 (1883) (striking the Civil Rights Act of 1875 because it applied solely to private conduct, which went beyond the scope of Congress' power to enforce under § 5 of the Fourteenth Amendment; see also *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding a state law which mandated that railroads maintain separate cars for black and white riders). *Dred Scott v. Sanford*, 60 U.S. (19 How) 393 (1857) (holding that Negroes, whether free or enslaved, are not citizens of the U.S., and as such had no right to sue in federal court).

from the mid-west (e.g., Minnesota or Illinois), and not from the Northeast. For example, the Duluth lynching case illustrates a “northern” case.¹⁶³ However, even there the outraged townspeople and local media denounced the crimes. There was not a public acceptance of the lynching.¹⁶⁴ Because there was no acceptance of the lynchings and because there were so few examples of northern cases, one could surmise that the result in Duluth was an anomalous one and the North was different from the South. However, it is difficult to discern given the paucity of decisions from northern judges or juries included in the book.

5. *Criticism Conclusions*

Because those of us who study the law of equality might already have a bias in favor of minority issues and against the dastardly “white male,” it is easy to *know* that Berry is right about her “stories” and their effect on judges’ decision making. However, not all readers would be so convinced. Berry’s anecdotal report of cases takes place without consideration of the alternatives for her conclusions and presupposes that her story is the one that the judge believed. This works much better when reporting about older cases, where judges’ biases were much more apparent and often explicitly stated. Perhaps this is why Berry reports so few newer cases.

Though Professor Berry has a law degree, she is a sociologist and a historian. From a historical and sociological perspective, one could be convinced that white males rule American culture because sociologists and historians deal in numbers and trends. The numbers and trends in the cases Berry uses lean very heavily toward her thesis. This is why on a gut level one must believe her. Yet, from a legal perspective, one can find holes in her analysis because so many of the facts are not before us. We are asked as readers to make judgments about cases where only the barest of facts are given. As lawyers, where the entire record is not before us, we are trained to reserve judgment. When one questions the motives of the justice system, one can presume fairness and work inward or presume injustice and work outward. Perhaps, the ultimate answer lies in Berry’s description of her and other African Americans’ experiences with the law. Hers is the lens of an African American female who through experience has

163. BERRY, *supra* note 1, at 221. See also discussion, *supra* at Part III-A-3.

164. *Id.*

learned to distrust the law. Through that lens, one can easily see the truth of her writing. Through other lenses, one can not be sure.

B. High Praise

Despite my few criticisms, this is a very important work. It points out a particularly troubling side of society, and correctly holds that the cultural belief systems (stories) can greatly affect judges' decisions. The reader is left with only a little doubt that a significant portion of society, as reflected by the courts, is controlled by the white male privilege. The notion that white male privilege dominates is very topical, especially given the current sociological and legal discussion about this subject.¹⁶⁵ Berry makes her arguments plausibly. The case studies often make the reader angry or sad. The hopeful note for change that concluded almost every chapter gives one hope that all is not lost.

1. Reform Movement

Berry notes that the social reform movements that took place in the aftermath of the Duluth lynching displaced many of the old stories.¹⁶⁶ The widespread practice of lynching has stopped, albeit much too late for Claude Neal and Cleo Wright.¹⁶⁷ Berry observes that the courts have begun to emphasize the need to ensure due process and equality in court proceedings.¹⁶⁸ Berry gives credit to reform groups like the National Association for the Advancement of Colored People (NAACP) and women's groups who worked to make these changes.¹⁶⁹ She cautions, however, that the old stories die hard, and

165. See, e.g., Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women's Studies*, in *POWER, PRIVILEGE, AND THE LAW: A CIVIL RIGHTS READER* 22, 22-33 (Leslie Bender & Daan Bravemen eds., 1995).

166. BERRY, *supra* note 1, at 224-25 (noting that "[d]ue process stories and racial equality stories, and women's autonomy and equality stories, partially broke down the gender and racial subordination stories on which patriarchy depended").

167. *Id.* at 225-27. Berry tells the story of these men who were brutally tortured and lynched in the 1930s and 40s with no process whatsoever for allegedly raping or murdering white women. See, e.g., James McGovern, *Anatomy of a Lynching: The Killing of Claude Neal*, (Baton Rouge, Louisiana State University Press, 1982) and see also Domenic Capeci, *The Lynching of Cleo Wright: Federal Protection of Constitutional Rights During World War II*, 859, *JOURNAL OF AMERICAN HISTORY* 72 (March 1986).

168. BERRY, *supra* note 1, at 237-38.

169. *Id.* at 237.

noted several more recent cases in which the white male power narrative had reared its ugly head.¹⁷⁰ Berry is particularly concerned about the light sentencing she observed despite very brutal rapes and the stacking of juries by peremptory challenges striking blacks and women.¹⁷¹

2. *Current Affairs* . . .

Berry also makes bold statements about recent cases that have become current affairs. For example, she discusses the Clarence Thomas-Anita Hill saga, and the O.J. Simpson trial. Berry notes “that the Anita Hill-Clarence Thomas saga was not about two African Americans.”¹⁷² Rather, because powerful white politicians saw Clarence Thomas as the “white man’s boy,” it was “about the white male privilege to devalue her, and to elevate him, as surely as the rapist of the pig farmer’s daughter”¹⁷³ Berry believes the only difference is “that the stakes were higher”¹⁷⁴ Berry’s argument is very persuasive, but again there are alternatives to her story.

President Bush wanted a conservative justice on the bench. Considering Thurgood Marshall’s retirement would leave the Court without a minority justice, President Bush, concerned with “political correctness,” sought a minority replacement. Thus, the Congress and the President were under pressure to approve Clarence Thomas because he was both conservative and a minority member. This might also have contributed to their appointment of him despite some pretty good evidence that he had in fact sexually harassed Anita Hill. This theory is not offered to completely discount Berry’s theory. Both are probably true.

In the trial of O.J. Simpson, Berry says the all-female, mostly black jury’s decision is further evidence of the effects of one’s experiences on the decisions one makes as a juror.¹⁷⁵ Says Berry, “[t]he . . . trial exemplifies the ways in which different racial experiences with the law produce conflicting stories about the law.”¹⁷⁶

170. *Id.* at 238-41.

171. *Id.* at 239-41 (noting that until *Batson v. Kentucky*, 426 U.S. 79 (1986) and *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994) there was no prohibition against peremptory challenges based on race or sex).

172. BERRY, *supra* note 1, at 242.

173. *Id.* at 242-43.

174. *Id.* at 242-43.

175. *Id.* at 6-8.

176. *Id.* at 6.

This story is also good evidence regarding how one's vision of the world affects one's reaction to it. Berry notes that this jury had a distrust of police.¹⁷⁷ Like Berry, they grew up with a view of police as harassers, not helpers. Observes Berry, the defense team was also aware of this. They were able to play to the jury's experiences, whereas Christopher Darden could not.¹⁷⁸ Mr. Darden was upholding and extolling the white man's law. It did not matter to the jury that he was African American. Berry says, "even without the Fuhrman tapes, race would have been in the room, as it is whenever blacks encounter the legal system."¹⁷⁹

Berry makes another interesting observation in noting that the split in the country's reaction to the jury's decision ran along racial lines. She says this reaction is explainable by noting that the white population's reaction was a product of their surprise that "the minority African American narrative of injustice prevailed." The notion of injustice is a "novel and to many Euro-Americans, shocking, enraging experience."¹⁸⁰ In my opinion, this is an extremely important point because it turns the whiteness vs. otherness scenario on its head. That is, for one moment in time, Euro-Americans were on the outside looking into the African American experience.¹⁸¹ Perhaps, that is why it intrigued the country so intensely for so long.

3. *Hope For Change*

Berry says white males who have become non-racist and non-sexist along with those in the social movement need to work to change the white male stories in order to secure that "every adult has the traditional heterosexual white male freedom to make sexual choices."¹⁸² Again, it is easy to agree with Berry, but also one must think that it is not only the white man who must change his stories about himself. We all must change our perception of ourselves in

177. *Id* at 7 (citing Christopher A. Darden with Jess Walter, IN CONTEMPT 168-69 (Harper Collins 1996)). Christopher Darden described the jury pool as "a nightmare," a "stagnant, shallow pool of bitterness and anger The system itself had forged this jury In the molten anger of a million indignities and injustices, some collective and historical, some deeply personal."

178. BERRY, *supra* note 1, at 8 (noting the failure of the prosecution to convince the jury that the gloves fit or to overcome the problematic blood evidence).

179. *Id.*

180. *Id.*

181. See discussion *supra*, at note 119.

182. BERRY, *supra* note 1, at 243.

relation to the majority stories. For example, the white woman who is raped must, despite strong pressure to stay quiet, scream aloud her indignation at being assaulted.

A recent case in which two men raped a young college woman is illustrative of this viewpoint.¹⁸³ Christy Brzonkala was brutally raped by two men.¹⁸⁴ After the rape, she waited months to tell her story, and then she told a friend who encouraged her to go to the authorities.¹⁸⁵ Christy went to school officials at the college both she and her attackers attended.¹⁸⁶ The college had a policy stating that when a rape was reported the school did not immediately call the police, as it did for every other type of crime that happened on its campus.¹⁸⁷ No school officials or counselors encouraged Christy to go to the police, but instead the school prosecuted the “crime” as an administrative matter.¹⁸⁸ One of the offenders was acquitted for lack of evidence, and the other got a one-hour counseling session and a deferred suspension from school.¹⁸⁹ After the incident, Christy quit school, became clinically depressed, and attempted suicide.¹⁹⁰ While it is very easy and justifiable to be angry with the attackers and the school for their mishandling of Christy’s case, one must also put some responsibility on Christy. She is the mistress of her domain, and must assert her own rights. Christy most likely worried about the reaction of her friends, school, family, and society when she failed to report the rape to the police immediately after it happened. However, if we allow ourselves to feel subordinate, helpless, and deflowered, we most likely will become that.

Christy, like many women, devalued herself when she did not immediately come forward with her rape. Women must themselves

183. *Brzonkala v. Virginia Polytechnic & State Univ., et. al. (Brzonkala I)*, 935 F.Supp. 772 (W.D.Va. 1996).

184. *Id.* at 774.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Brzonkala v. Virginia Polytechnic & State Univ., et. al. (Bronkala II)*, 132 F.3d 949, 955 (4th Cir. 1997), *aff'd* 529 U.S. 598, *U.S. v. Morrison* (2000). He did not confess to the rape, while the other perpetrator did confess. The offender who was punished was a star football player. *Id.* at 960. Both defendants were African American and Christy was white. One could argue that this story resembles the pig farmer’s daughter case in that the player, though black and accused of raping a white girl, was acquitted because he was useful to another one of the great white institutions in this country, the university, and its highly valued icon, football.

190. *Brzonkala I*, 935 F.Supp. at 774.

break free of that mold. White men are not going to break the mold for them. I cannot speak for African Americans, gays, or lesbians. Others must look through those lenses, but perhaps they too could see the strength in their own personal ability to shake free of the white male privilege. What is done by oneself can be most empowering.

Unlike the past in which all-white male judges and juries decided cases, women and minorities are now able to participate in the judicial process. This will hopefully change the landscape of the American justice system in a positive way. All judges should have to read Berry's book as a prerequisite to sitting on the bench. If nothing else, it would make them think about their decisions and their own experiences as they get expressed in the "stories" about which Berry has written. Berry says that changing the law means changing the white male's stories about himself and others.¹⁹¹ She says, "the stories must be changed, if we want a law to presume that every adult has the traditional heterosexual white male freedom to make sexual choices."¹⁹² Hopefully, we will make more strides in that direction in the near future.

However, one recent development leads me to believe that at least in some sense we have not changed at all. A recent article in *The Nation* noted that in an effort to stave off any potential anti-pornography regulations from the George W. Bush administration, "some of the major porn outfits have reached a common conclusion and issued sweeping guidelines to producers and directors" of pornographic films.¹⁹³ Among guidelines such as no blindfolds and no wax dripping, is a guideline that forbids any black men, white women themes." However, the guidelines state that "producers can continue to feature white men having sex with black women."¹⁹⁴ It seems the view of black women as being lascivious wenches who are at the service of white men has changed little. Nor has the notion that a black man having sex with a white woman is rape and is somehow worse than other sexual relations of human beings. White women are still seen, at least by some, as naïve beings who must be protected from the wild, bestial, black male. Comer calls these guidelines an

191. BERRY, *supra* note 1, at 243.

192. *Id.*

193. Mark Comer, *Porn's Compassionate Conservatism*, THE NATION, February 26, 2001, at 26.

194. *Id.*

“era of kinder, gentler smut.”¹⁹⁵ On the contrary, it is not kinder, and reflects society’s continuing deeply held misperception of all beings save for white males.

195. *Id.*