This is to certify that the

dissertation entitled

Law, Culture, and Sexual Censure:
Sex Crime Prosecutions in a Midwest County
Circuit Court, 1850-1950

presented by

Kathleen Ruth Parker

has been accepted towards fulfillment
of the requirements for

~~Ph.D.~~ degree in ~~English (American~~ Studies)

William B. Hudson Jr.
Major professor

Date March 31, 1993

LAW, CULTURE, AND SEXUAL CENSURE: SEX CRIME PROSECUTIONS IN A MIDWEST COUNTY CIRCUIT COURT, 1850-1950

Volume I

By

Kathleen Ruth Parker

A DISSERTATION

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

Department of English (American Studies)

1993

ABSTRACT

LAW, CULTURE, AND SEXUAL CENSURE:
SEX CRIME PROSECUTIONS IN A MIDWEST COUNTY CIRCUIT COURT,
1850-1950

By

Kathleen Ruth Parker

This study is an analysis of the 544 forced-sex crime cases that were adjudicated by the Circuit Court of Ingham County, Michigan in the period from 1850 to 1950. Structured in three parts, it is a study that seeks to tie patterns in the court's treatment of sex crime cases to cultural beliefs about women, men, sexuality, and power.

First, a quantitative analysis reveals this court's heavy emphasis on cases with underage victims and its minimal emphasis on cases with overage victims. Conviction rates, though varying with each charge, are seen to have increased over time as sentence severity lessened.

Second, borrowing from Gary LaFree's use of labelling theory to investigate the social construction of sexual assault, the court's responses to the reported behavior patterns (or "typifications") are shown to be signs of societal assumptions about sexual behavior. In cases of forcible rape, extralegal factors are seen to affect the outcomes of the cases. In cases of statutory rape, the law was based on a nineteenth-century reform impetus to protect young girls from being led into prostitution, but was not enforced on those terms until the medical discovery in the mid-1890s of the serious effects of venereal disease. In cases of attempted rape, there was a higher conviction rate

for these charges because the nature of the offense often meant a third-party witness interrupted the assault. In cases of incest and indecent liberties, children were not deemed "competent" witnesses because they could not take an "oath", reflecting the centuries-long legal reliance on religious conviction to ensure accounts of truth.

Third, by integrating the work of legal scholars Martha Minow, Barbara Shapiro, Deborah Rhode, and Richard Posner, a theoretical framework is constructed by which it is seen that the "evidence"--whether testimony from a child, adolescent, adult victim, or medical expert--was constructed for the jury by courtroom agents to reflect a male perspective.

With attention to dimensions of class and race, the historical contours of sex crime prosecution found in this study are brought to bear, in the end, on current relevant issues in sex crime prosecution.

IN LOVING MEMORY OF MY MOTHER

IN LOVING TRIBUTE TO MY DAD

ACKNOWLEDGMENTS

I wish to thank a number of people who supported me in my effort to research and write this study. I am forever indebted to Professor William Hixson for his high standards, consistent interest, historical insight, and skillful editorial assistance. I am grateful to Professor Joyce Ladenson for her feminist vision, unending optimism, and personal encouragement. I want to thank Professors Lisa Fine in women's history and Victor Jew in legal history for the time they each spent reading the completed manuscript and formulating their constructive words of advice for furthering this work. For his continued faith in my work, I thank Professor James McClintock, Director of American Studies; for the two fellowships that gave me time for research and writing, I extend my appreciation to the College of Arts and Letters at Michigan State University.

Additionally, I want to express my appreciation to Dave Johnson, the State Archivist, Lee Barnett, Reference Archivist, and the staff members of the State of Michigan Archives for their commitment of time and resources to this project. As my work proceeded, they gave priority to the 1920-1950 case files, which as yet had not been catalogued.

Finally, there are my friends, who fed me numerous meals without counting; and my family, whose abiding presence, love, and good-natured acceptance of my time constraints made this project possible as nothing else could. I am deeply grateful to my father, who filled in the

financial gaps as needed and choked up with emotion when I announced my successful finish; to my late mother, whose death two years ago precluded her witnessing the moment she always trusted would come; to my sister, whose chief support was her ability to listen; to my son Tom, who followed me around the country for the sake of my dreams; and to my daughter Alecia, who came to love history for herself and bought me roses.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

INTRODUCTION

> Day after day, week after week, the jury has filed in, settling back for endless tides of arcane questioning as the four defense lawyers mounted separate assaults on the state's case, grilling witnesses at length and lingering on such minutiae as who typed a given report and precisely how where and why an array of colored pencils was laid out by a pyschiatric nurse who specialized in rape trauma syndrome. Over time, the essential issue of the case--sexual assault--was obscured in that mountain of detail.
>
> Catherine S. Manegold, New York Times
> January 19, 1993 1

So ran the description of a Glen Ridge, New Jersey court case--four young men, now in their early twenties, accused of committing sex acts with a seventeen-year old girl who functions mentally at the level of an early grade school child. Recognizing that the sensational nature of this case is not representative of most sex crime cases today--for most of them are handled out of court--Manegold's article is nonetheless a telling commentary on the courtroom treatment accorded sex crime accusations among those who bear the socially-sanctioned responsibilities of prosecuting or defending those so accused.

Manegold's tone is decidedly critical. There seems to be little dispute in this case over the facts of the alleged offense. A group of high school football players induced a young girl to disrobe in front of them on the pretext that if she did so, she could have a date with one of them; before the afternoon was over, they had in turn inserted into her vagina the end of a bat, a stick, and a broom handle. All involved

in the case agree that these young men did in fact perform the described acts upon the complainant. As Anna Quindlen wrote in mid-December at an earlier stage in the proceedings, "It's an old story, why the slow girl did these things, and it has nothing to do with female sexuality. She wanted to be wanted." 2 What Quindlen describes so poignantly about this "child's" motivations for complying is another aspect of the case that few would dispute. Yet, as a legal matter, Manegold notes, this case is not about the "incident itself"; rather, it is about the "nature" of the incident.

In a formulaic display of legal strategy, evidential artifact, and verbal representation, the New Jersey sex crime trial is about meaning. In a gruesomely banal sense, this trial is another legal articulation of the multi-layered, socially contested meaning of sexual autonomy for women and for men. It is what sex crime trials have played out with great ceremony and form before--bringing the socially-inscribed definitions of sexual autonomy (or lack thereof) to bear upon the law. The difficulty in this case, as in others, has had to do with the conflict over those definitions. It seems, in short, that the legal meaning of sexual autonomy for women is predicated on a social meaning that is strangely unrelated to the sexual realities women face in their daily lives. While a plethora of studies report on the socio-logical, criminological, and legal difficulties that characterize the practice of rape law, their focus is notably singular. Sex crime law demands that the complainant--the offended party--prove that she was not complicit in the offense done to her. Given the absence of a <u>corpus</u>

delecti, such proof is hard to come by, and even when available (in the form of bruises, semen, etc.), meets with skepticism in the court.

Meanwhile, complaints of rape are on the rise; indeed, while statistics are hard to acquire and harder still to verify, Allan Johnson estimates that a girl of twelve is as likely to be raped as she is to contract cancer (about 25%) or to be divorced (approximately 36%) in her lifetime. 3 Rape is a crime that threatens arbitrary emotional and physical harm to women in a way not comparable to any threat faced by men on the same scale. Moreover, the potential enormity of the personal and physical violation occasioned by rape is compounded by antagonistic social and legal institutions that question such victimization and create a response pattern that undermines all legal avenues of recourse. In attempts to secure justice, rape victims confront what seems like an insurmountably biased legal apparatus, and they are at pains to convince judge and jury that they are to be believed.

There is a long history, to be sure, that precedes the current practice of sex crime law enforcement and prosecution, but very little of it has been examined or recorded. In rather scattered fashion, the few existing histories of rape expose some of the issues this study will address. Theodore N. Ferdinand's study of criminal patterns in Boston from 1849 to 1951 is based on the annual arrest reports of the Boston police for seven major crimes, one of which was rape. The data in his study reveal a gradual increase in the rate of forcible rape relative to population growth over this period, but there were fluctuations downward for periods of depression and war with somewhat surprising trends upward

for periods of prosperity. 4 On the other hand, Barbara S. Lindemann's study of the dispositions of 43 rape cases that came before the Massachusetts Superior Court of Judicature between 1698 and 1773 concludes, contrary to Ferdinand, that "neither wars, troop movements, economic fluctuations, increases in the numbers of rootless poor, geographical expansion, population growth, nor changes in sexual mores affected rape rates in eighteenth-century Massachusetts." Additionally, she found that there was a greater chance of punishment if the offender was of a low social order, that conviction rates were higher if victims were married or were minors, and, Lindemann reasons, that rape reports were not prosecuted at all unless all in the community "acknowledged that the attacker had no right to the woman sexually." 5

In a fascinating study of 125 rape and rape-related court cases over a thirty-year period in the Canadian West, (British Columbia, Saskatchewan, and Alberta), Terry L. Chapman discovered that from 1890 to 1920 there was no sentencing at all. In her discussion of seven representative cases, Chapman shows that the primary issue was the consent of the woman, which in turn was linked to a number of factors: the reputation and moral character of the woman, the promptness with which the rape was reported, the existence of corroborative evidence, and the age of the witness providing testimony (a child's testimony not being sufficient to obtain a conviction). Chapman asks the central question: "Did enforcers condone sex crimes against women?", and answers it affirmatively. She points out the irony that while women were thought to endure sex only for procreation and men were believed to

be struggling for control of their ever-present lust, any woman who wanted to prosecute her rapist had to go to great lengths to disprove the notion that somehow she wanted it. 6

Jan Sundin's study of efforts to control extra-marital sexuality in Sweden, c.1600-1850, notes that the criminalization of unmarried motherhood in the mid-seventeenth century coincided with women's initial challenges to male authority. Official efforts to control extra-marital sexual behavior lessened in the mid-eighteenth century when social stratification was becoming more apparent, the number of illegitimate births was increasing, and it was becoming harder to detect male perpetrators in urban areas. Nevertheless, the punishment of unmarried pregnant women continued until roughly 1810, long after the punishment of males for such offenses ceased. 7

Probably the best-known history of rape is Susan Brownmiller's Against Our Will: Men, Women and Rape. This 1975 book raised much-needed awareness of the ubiquity and brutality of rape as a social phenomenon across time and culture. Drawing from court records, secondary writings, interviews, and other materials, Brownmiller convincingly exposes the pervasiveness and cultural acceptability of rape, the reluctance on the part of men in positions of authority to alter a status quo that trivializes rape, and the myths that unrealistically glamorize the rapist and dehumanize the victim. 8 Her thesis that rape is a "conscious process of intimidation by which all men keep all women in a state of fear" aroused the skepticism of conventional historians, many of whom dismissed her work on the basis of

its impressionistic and polemical approach. 9 More recently, however, Steven P. Pistono admonished historians to look past the anger in Brownmiller's work and recognize her valid arguments that rape was a property crime in ancient societies, and that it is a crime of violence. 10 Pistono concludes that, despite the need for a more systematic analysis of developments, Brownmiller's work is "a truly groundbreaking pioneering effort in social history". 11

Finally, in an insightful essay on the effects of the long-term sexual subjection of black women to white men, Darlene Clark Hine argues that black women created a culture of dissemblance among themselves. They came to display a kind of meticulous morality, all the while protecting from public scrutiny any speculation about their historical role as the objects of sexual exploitation by white men. Such exploitation, socially sanctioned during slavery and continuing at least into the early twentieth century throughout much of the South, left in its wake stereotypes that characterized black women as Jezebels who were sexually promiscuous by nature. The effect of this has been to invalidate black women's complaints of rape, especially if the offender is white. While Hine's focus is on race, she raises a significant question that is applicable to the experience of rape for all women. That question critically points to the disparity between public perceptions of rape and the privately internalized reality of rape.

The findings of these studies are important, and in large part are substantiated by the analysis undertaken in this work. It assumes that the practice of sex crime law in the Circuit Court of Ingham County,

Michigan, from 1850 to 1950, may be taken to represent how other counties in the Midwest responded to sex crime complaints over this period of time. This study specifically examines 544 sex crime cases culled from the criminal files of that court. Integrating these primary materials--the case files, court calendars, prison records, census data, laws, key Michigan Supreme Court decisions, and newspaper accounts--with relevant secondary materials on the legal, social, and sexual developments that occurred during this period, it is methodologically integrative. Indeed, this is the first attempt to examine the sex crime trials of a single court over a one-hundred year period, and so uses sociological, criminological, economic, and cultural perspectives to interpret what would otherwise appear to be the routine actions of the court. Significantly, the population served by this court is diverse, supporting a three-part cultural and economic base: the state capital and government offices, a large automotive production facility, and the largest university in the state. This context will take on more importance when we note the socio-economic status of the defendants and their accusers.

The cases in this study are comprised of four charges that are legally distinct from each other: forcible rape, statutory rape, assault with intent to rape, and indecent liberties. In a quantitative assessment of the court's overall behavior, Chapter One maps out the patterns in charging, convicting, and sentencing that were evident across all cases on a per decade basis. This aggregate analysis provides the blueprint for the court's response to sex crimes. Highly

detailed, yet rich and provocative in the information it implies, this chapter is fundamental to understanding where the court centered its attention.

Chapters Two, Three, and Four examine the historiographical and sociological factors that are significant respectively to each of the charges. Borrowing from Gary LaFree's theory of the social construction of sexual assault, Chapter Two attempts to identify the social assumptions that influenced the court in its treatment of complaints of forcible rape and assault with intent to rape. Here, the issues scrutinized so insistently by the court become windows to prevailing notions about women, men, sexuality, and power. Chapter Three deconstructs the court's preponderant attention to cases of statutory rape, recognizing that they fall into three categories, loosely defined in contradistinction to the law, by indications of the victim's consent. The high number of these cases and the high conviction rates that characterize them are not true measures of the seriousness attributed these cases, however, since they were also accompanied by the lowest average sentence minimums for all the sex crimes studied. Chapter Four examines the court's treatment of cases involving child victims: cases of early incest (a statutory rape charge) and indecent liberties. Here it will be seen that the young age of the victim could work to her favor but could also work against her. While young victims were accorded more sympathy in the court, their testimony was regarded more skeptically, ostensibly because of the often familial character of the victim/offender relationship, and because a child was considered

unable to take an oath. Taken together, these three chapters demonstrate that complaints for sex offenses were decided more on the basis of extra-legal factors than on the basis of strict interpretation of the law.

Departing from the line of inquiry utilized in the previous chapters, Chapter Five uses the work of feminist legal critics--Martha Minow, Deborah Rhode, and others--to fashion a framework for analysis of the courtroom discourse. Keeping in mind that Lockean foundations of evidence based the worth of evidence in actual experience (as opposed to superstition), this chapter attempts to adduce how the court defined the evidence in these sex crime cases. Through the use of theory and example, it becomes clear that the court constructed the meaning of the evidence--usually consisting of testimony from a child, an adolescent, a woman, or a physician--from the perspective of men.

Chapter Six is a summary that is more than a summary. Reflecting in greater detail on the combined dimensions of gender, race, and class in these cases, and relating the findings of the study as a whole to current issues in rape prosecution since the 1974 enactment of the Michigan Criminal Sexual Conduct Code, this chapter is a reminder that meaning, as constructed yesterday, persists today, in spite of changes in the law.

There is no other study that investigates sex crime trials with the reach of time or scope of analysis that this one provides. It is a study that tries to take nothing for granted. To uncritically subsume at the outset women's treatment by the courts under the general rubric

of patriarchy would risk losing track of distinctly identifiable forms of misrepresentation of women and girls by the legal system. Instead, it is only careful observation that reveals rape to be a gender-defined crime, prosecuted under social assumptions that disadvantage women. When we continue to see (as in the New Jersey case) that the meaning of sexual assault rests on nonrepresentative male-derived notions of female consent, this study contributes to our understanding of specific relevant antecedents. In other words, this analysis identifies the distinct ways in which the legal system defined sex crimes on male terms, showing with extensive particularity how the integrity of women as individuals was subverted and how the court's responsibility for enforcing the law to protect women was altogether miscast.

I: "PROBABLE CAUSE TO BELIEVE": A MEASURE OF THE COURT'S RESPONSE

> The only purpose of an examination is to discover if an offense has been committed and if there is reasonable cause to believe [the defendant] is the one responsible. [The victim] has testified the offense was committed and has identified [the defendant] as the man who did it... It would have to be decided by the Circuit Court, because there would be this question of fact to be decided. I do not decide whether you are guilty or not. All I decide is whether the offense has been committed and there is cause to believe you are the one who committed it.
>
> Justice of the Peace Louis Coash, to a defendant being bound over for trial in the Circuit Court, 1944. 1

Introduction: Entree to the Circuit Court

On February 25, 1851, a complaint was filed in the Village of Mason in Ingham County charging that "John Critchett, upon one Amanda Sitts, a female of ten years and more, violently and feloniously did make an assault, and...then and there did violently and feloniously ravish and carnally know the said Amanda Sitts against her will and against the peace of the people of the State of Michigan and their dignity." 2 The first thing that strikes our attention is Amanda's age. Since she was "10 years and more", she was at or over the age when her willingness to consent to sexual intercourse was legally relevant; therefore, it was necessary to specify in the complaint that this assault had taken place "against her will".

We know little else about this case, except that in the examination,

Amanda stated the offense had taken place on January 5, 1851 in the evening, and the trial was held March 11, 1851. Critchett was convicted and sentenced to serve seven years at the State Prison in Jackson. In an appeal for a new trial, Critchett's lawyer argued that his client had been unaware at the time of the trial that he needed to "return his statement", something he apparently had failed to do; further, Critchett's lawyer contended, Amanda had made statements in her testimony that were contradictory. There is no more information in the file beyond these few facts, and there is no record of a second trial, but a brief note states that Critchett was pardoned on June 1, 1853, presumably by then-Acting Governor Andrew Parsons and released. 3

There is considerably more information available regarding the 1899 case against Jason Gowen. Nearly fifty years after the Critchett case, Gowen was charged with "feloniously, unlawfully, and carnally knowing one Fanny Culp, a female child under the age of 16, to wit 15." 4 Significant aspects of this case, revealed in the pre-trial examination transcript, are that Fanny was home alone when Jason came over on his bicycle. She invited him inside and while there, he compelled her to have intercourse with him. She said nothing of it to anyone but the next day, when her mother found bloodstains on her clothing, Fanny explained what happened. Fanny's mother filed a complaint with the authorities. Testimony given by Fanny and her family members was not under oath because they were Mennonites, but this was apparently not a contentious issue for the defense. A local physician testified under cross-examination that Fanny had indeed been vaginally bruised, but

that the blood stains on her clothing could have been due to her menstruating. Referring to conflicting birth entries in two separate family Bibles, the defense attorney argued that Fanny might actually have been sixteen and not fifteen at the time of the offense, a defense made possible and necessary by the 1897 change in the law raising the age of consent to sixteen. Under redirect examination, Fanny's mother stated that Fanny had had her period two to three weeks before the offense and then again a week after it, thus discrediting the doctor's theory concerning the bloodstained clothing. The justice of the peace bound Gowen over for circuit court trial; the circuit court calendar reports that he was acquitted in January, 1900. 5

Nearly a half-century later, on July 31, 1947, a father complained to the justice of the peace that forty-three-year old Martin E. Leseney had assaulted his seven year-old daughter Karen and thereby "committed indecent liberties without intending to rape" her. 6 The testimony in this case revealed that Karen's mother had noticed the child had had vaginal irritations for about two and a half years, and had trouble going to the bathroom and eating and sleeping. Finally a neighbor called and told her she had seen Karen with the accused a number of times. When confronted, Karen told her mother what had been going on; Karen's mother could not repeat the content of that confidence as testimony, however, because it was considered hearsay evidence. In keeping with courtroom rules, Karen told about the offense in court, and apparently the jury believed her story. Leseney was sentenced to three years of probation and fined $300.00 to be paid right away. The terms

of probation stipulated that he never associate with any young girls, and never go any place where alcoholic liquor was sold; further, he was directed to see a psychiatrist for an examination and follow the recommendation obtained from that examination.

These examples serve to introduce the 544 forced-sex offense cases processed in the Ingham County Circuit Court between 1850 and 1950. Each is in some way indicative of the elements common to specific types of cases within a certain time. The first is representative of the forcible rape cases that came to the court in the nineteenth century, illustrating the very young age of the victims in such cases before the age of consent was raised. Further, it shows how the defense might use a technical misunderstanding experienced on the part of an ignorant and naive defendant to force a rectification in the court's processing of the charges against him. Finally, the fact that Amanda's statements were cited as contradictory suggests the credibility of her account was still questioned even after the guilt of the accused had been determined by a jury. This action, making a concession on behalf of the vulnerability of the accused and at the same time disallowing any concession on behalf of the vulnerability of the victim, was part of a defense pattern that was prevalent in all subsequent cases.

The second example illustrates how a statutory rape charge could be defended on the basis of factors other than those related to victim resistance. Proof of the victim's age and speculations as to the direct relevance of corroborating evidence were all part of the effort to disprove the claimed offense in the absence of any legal reliance on

proof of resistance. Taking place at the turn of the century and shortly after the age of consent was raised to sixteen, this defendant, Jason Gowen, was among the first to be tried on the statutory rape charge.

The third example, taken from late in the period under study, reveals some of the issues that were relevant to the less serious sex offense of indecent liberties. First, we see how young children tended to keep silent about the abuse for a long time; second, we see how the court required little girls to testify to the offense in court; and third, we see how a sentence of probation was a clue to the court's response to this charge at this time.

Finally, the fact that all three of these sample cases involved very young victims is not entirely coincidental. As will be seen in the extensive analyses that follow, the court's preoccupation with trying the offenders of young victims was nearly exclusive, and in that sense, these victims are highly representative of the victims in the sample more generally.

The documents that have been preserved in the case files of the Ingham County Circuit Court disclose the information relevant to each case, as the offenses were presented in a pre-trial examination before the justice of the peace. They also provide insight into the legal processes followed within the context of the local judicial system. The following discussion describes how these case documents outline the ordering of prosecutorial stages, which is of some interest in and of itself; further, such preliminary familiarization will be useful for

understanding the references this study will make to individual case circumstances.

I. The Prosecutorial Process: Case and Outcome Patterns

1. A Description of the Case Files

Each case began with a signed formal complaint, hand-written until around 1890 and after that typed on a standard form. The complaint was directed to the justice of the peace of the designated county; it stated the name of the person filing the complaint, the name of the accused offender, and the name of the person who was offended (not necessarily the same as the person making the formal complaint). It also included the date on which the offense took place, the date the complaint was being made, the name of the township in which the offense allegedly took place, and the charge that was being made against the designated offender. Because of the nature of the law with regard to sex offenses, the age of the victim relative to the legal age of consent was stipulated, an element essential to a rape charge, but not generally considered necessary to the processing of other criminal charges. The complaint was followed by a warrant, usually made out the same day, in which the justice of the peace reiterated the charge from the complaint and instructed the sheriff to apprehend the accused so that the alleged offender could be brought in and charged with the offense.

Once the accused was apprehended, a pre-trial examination was conducted in the office or courtroom of the justice of the peace. This

person was an official elected for a four-year term, as provided in the State Constitution. All of the justices of the peace in this sample were men, but according to law they did not have to be attorneys. 7 Nonetheless, the examinations before these justices were structured very much like a trial, and the justice acted very much like a trial judge. The accused was represented by a defense attorney and the complaining witness (the rape victim) by the prosecuting attorney; the prosecuting attorney directed questions to the complaining witness, in answer to which she related the circumstances of the offense; the defense attorney followed with cross examination questions that were typically designed to discredit her testimony and thus cast doubt on the defendant's guilt or at least mitigate his culpability. The amount of time given to the cross-examination was always much more extensive than that given to direct questioning; the questions usually became increasingly intimate and exhaustive, and the tone increasingly argumentative, cynical, and antagonistic. The transcripts of these examinations provide the basis for this study of courtroom treatments of rape. 8

Upon completion of such an examination, the justice of the peace submitted a "Justice's Return". This was his official determination that there was "probable cause to believe" an offense "not cognizable by me" had been committed by the accused upon the complaining witness. The language in these returns is peculiarly cast to effect what seems a <u>double entendre</u>. The use of the phrase "not cognizable by me" refers legally to the limits of this magistrate's jurisdiction, but also implies the degree to which the criminal act was not "knowable" to a

justice of the peace, indicating that such an offense could only be properly weighed by a judge and jury. Thus, the justice of the peace served a gatekeeping role, which becomes for this study a major element in uncovering the characteristics of individual rape complaints warranting trial at the circuit court level.

The return stated that the accused was to be bound over for trial in front of a jury and specified a bond amount that was to be paid if he wanted to avoid waiting in the municipal jail for his trial date, anywhere from a day to three months, depending on how soon the court had scheduled its next term. The bond amounts varied arbitrarily, but did seem to depend on the seriousness of the crime, the age of the victim, and the accused's ability to pay. Not unexpectedly, bond amounts increased in general over time, from $500 for rape in the 1870s, to $5000-$6000 for rape in the 1920s, although dropping down to roughly $2500 in the 1930s and 1940s. The general pattern of decreasing bond amounts (with the exception of the late 1920s when they were at their highest) seems at first to be a reflection of contemporary monetary values, but may also demonstrate prevailing beliefs about the retaining capability of high bond amounts, a disinclination to house certain offenders, or the instituting of bonding agencies, which made bond payment more readily possible regardless of the amount. It may also be that bond amounts dropped noticeably in the 1930s because of the Depression.

Finally, the justice's return indicated a trial date, instructing the accused to appear to hear and give answer to the "Information", or

formal charge, read by the prosecuting attorney at the opening of the jury trial. Each file contained a copy of this formal charge, and usually it read verbatim like the charge in the complaint, although sometimes it was amended to add a second count or second charge against the accused. 9 If, for some reason, the prosecuting attorney decided not to prosecute, there would be no information in the file, but rather a statement of nolle prosequi, in which the prosecutor stated his reasons for declining to prosecute the case. 10 These reasons varied from a conclusion that the problem was "a family matter", to the discovery that the defendant and the victim had gotten married, to the recognition that there was not enough evidence to warrant bringing a case to the attention of a jury. One thing seems clear: if the prosecuting attorney determined that a case should not be prosecuted, the judge was left with little choice but to acquiesce in that decision. In this way, the prosecuting attorney effected a level of control one step beyond the justice of the peace in determining which cases made it to trial.

It should be noted at this point that the pre-trial examination transcripts provide a record of court activity conducted before the justices of the peace, who were not, needless to say, the trial judges. The trial outcomes were not a result of what happened in the pre-trial examinations, but were the culmination of action taken in the circuit court trial. The examination activities of the justice of the peace closely parallel those of the trial judge, however, and his interactions with the prosecuting attorney, defense attorneys, the complainant, and

the accused, become for this study the basis on which to assess the role of the judge. One cannot talk about the examining justice and the presiding trial judge in any individual case without keeping in mind their respective positions. Nonetheless, because their roles were in effect so similar, this study will often present them as serving the same function. Finally, though the trial transcripts are not available, it seems safe to assume that the preliminary examinations were similar in content to the trials that followed them. In fact, to the extent that the pre-trial transcripts show the issues that led to cases being accepted or rejected for trial, they probably reveal as much (or more) about the overall view of the court system toward forced-sex crimes as the trial transcripts themselves.

Beginning in the late 1920s, two additional kinds of documents appear in the files. If the accused was convicted, a pre-sentence investigation was conducted by county probationary authorities, who would personally interview the offender and check into his background. These reports yielded highly detailed accounts of the offender's past. Predictably, they revealed as much about the societal values and assumptions upon which the investigations rested as they did about the defendant. For example, every PSI reported on whether or not the offender had attended Sunday school or had been a Boy Scout; each official who conducted an investigation concluded with his or her own subjective appraisal of the offender's mode of response, his sexual inclinations, his home circumstances, and his apparent mental state. The motivation for collecting this information was apparently to assist

the judge in sentencing. Indeed, if a judge did sentence a convicted offender to prison, he would incorporate information from the PSI report in his statement to prison authorities about the incoming inmate.

This second document, called the Judge's Statement, first appeared in the late 1920s with the advent of the PSI reports. It provided the judge's personal assessment of the offender, including a brief summary of the circumstances of his offense and some justification for sending him to prison. It is in these letters that we first encounter characterizations that refer to the offender's "feeble-mindedness", "low or nonexistent moral standards", "low order of social responsibility", "sodden mentality", or "that class of degenerates which has no sense of decency", etc. These comments are particularly revealing of where the sympathies of the judges lay, and hint at larger societal beliefs about what personality factors correlated with sexual deviance.

Except when these judge's statements are present, case dispositions cannot generally be determined from the documents in the files. Fortunately, trial outcomes are noted in the court calendars, which are available for this collection of court records beginning in 1874. 11 Regrettably, out of the total of 544 cases studied here, there is no final disposition recorded for 52 of them. Beyond that, the seven court calendars spanning this 100-year period served as a ready index to the appropriate case files and suggested early in the research process what criminal charges to consider. The laws of the State of Michigan defined four sex-related crimes: forcible rape (termed forcible rape, not because the term "rape" does not imply force in itself but because the

designation "forcible" distinguishes it from statutory rape, which does not legally hinge on force or threat of force); statutory rape; assault with intent to rape; and indecent liberties. The language of the law for forcible and statutory rape changed only with respect to the age of consent over the course of the 100 years of this study. Otherwise, it read the same in 1948 as it did in 1846:

> If any person shall ravish and carnally know any female of the age of ten years or more [raised to fourteen years in 1887 and to sixteen years in 1897], by force and against her will, or shall unlawfully and carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the state prison for life, or for any term of years; and such carnal knowledge shall be deemed complete upon proof of penetration only [changed to "proof of penetration, however slight" in 1948]. 12

The law designating the age of consent at ten years was not changed, as shown above, until 1887, at which time the Michigan legislature raised the age limit to fourteen, and finally, in 1897, to sixteen, which is where it remained for the duration of the sample. 13 Further, the law of 1913 limited prosecution for statutory rape to males over fourteen who had sexual intercourse with females between fourteen and sixteen. 14 For purposes of clarification, the consent limit established the age below which a female person was not considered legally or morally responsible for her participation in a sexual act, and above which she was assumed capable of consenting and therefore responsible for her participation. Thus, by law, "carnal knowledge" had to be accomplished by force and against the will of a female at or over the age of consent to be considered rape; rape of a female under the age of consent conspicuously left the element of force out. As will

be seen, this protection was not always maintained under courtroom interrogation, and the resistance of under-age girls, even children, routinely became the object of scrutiny.

As with the law for rape, the law for assault with intent to rape changed only slightly in wording and not at all in substance over the period of this study. In 1846, this law read as follows:

> If any person shall assault any female with intent to commit the crime of rape, he shall be deemed a felonious assaulter, and shall be punished by imprisonment in the state prison not more than ten years, or by fine not exceeding one thousand dollars. 15

By 1948, the phrase "deemed a felonious assaulter" had been altered to read "guilty of a felony", and the maximum fine amount of one thousand dollars had been raised to five thousand dollars. The practical aspects of enforcing this law were similar to those of enforcing the law for rape, except that penile penetration of the vagina did not have to be proved, and the age of the victim was not an issue. Parenthetically, the fact that this charge could apply to victims of any age in part distinguished it from the charge for indecent liberties, which was applicable only to victims under a specified age.

The law against committing indecent liberties with a female child was first enacted in 1887. It was listed under the heading "Indecency and Immorality" and provided:

> Any male person or persons over the age of fourteen years, who shall assault a female child under the age of fourteen years, and shall take indecent and improper liberties with the person of such child, shall be guilty of a felony, punishable by imprisonment in the state prison not more than ten years or by fine of not more than five thousand dollars. 16

The age limit for both the assaulter and the victim was raised to

sixteen in 1925; until this time, young boys of fourteen and fifteen were not deemed legally responsible for engaging in indecent liberties, and after this date, young girls of fourteen and fifteen were deemed to need legal protection from indecent liberties. This was a crime that usually consisted of partially disrobing a child, and fondling the genitals, breasts, or buttocks, almost never with the use of force because the child was too young to understand what was going on. Frequently too, it involved inducements of candy or small amounts of money.

As early as the first cases in this collection, the word "assault" was incorporated in the formal complaint into the naming of each offense. In that sense, there was evidently public understanding and enduring legal acknowledgement of the intimately and injuriously invasive nature of sexual crimes against women and girls. Yet, the actual functioning of these sexual assault laws over time contradicted that view. First, socially internalized definitions of these charges became codified in the courtroom, reflecting a cultural equivocation that simultaneously sanctioned sexual protection for women and doubted women's self-reported sexual victimization. Further, the assumptions behind these sexual assault laws served both to constrain and exaggerate courtroom rhetoric, which in turn perpetuated distorted ideas about women, men, and sexuality. It is this mutually reinforcing scheme of activity that characterized the role of the court in its sometimes uncertain efforts to define and enforce sexual assault laws in a century of great cultural change.

The discussion that follows seeks to expose and examine the aggregate patterns in charging, convicting, and sentencing that emerge out of this sample of 100 years of rape prosecutions. I have somewhat arbitrarily structured the data into ten-year segments as it seemed the least cumbersome of methods. I also hoped it would allow for ease of comparison with other identifiable frames of reference in the American past, such as census data. Additional aspects of the sample, such as the relationship of the accused to the victim, the factors related to victim resistance, the socio-economic status of the defendant and victim, and the race of the accused, will conclude the effort in this chapter to identify the significant patterns that may be found to exist within the context of larger social, legal, and moral developments.

2. Data Summary

Upon first observation of this sample of 100 years of rape prosecutions, one feels the need to get a sense of proportion. How did the number of rape prosecutions here compare to the population in the county over which this court had jurisdiction? How did this number of sexual assault cases compare with the number of non-sexual bodily injury assault cases? First, the impossibility of determining how many crimes of any kind never made it to court is a limitation this study is forced to concede. And, in light of what is known about the large number of sexual assault cases that have traditionally not made it to the prosecution stage, this study will take it as a given that many were turned away at various investigative levels. 17 Still, admitting these

limitations, there is much that can be learned by assessing the sexual assault cases that came into this court. This inquiry begins by examining the relative positions of sexual and nonsexual assault cases, thereby getting a picture of the proportion of sex-related crimes to population and to non-sex-related crimes. [See Figure 1. Comparison of Sexual and Non-Sexual Assault.]

In 1870, for example, the population of Ingham County was reported to be 25,268. In the ten years that followed, eight cases of various forms of sexual assault came before the court, a number that seems small in light of the fact that the same court processed thirty-six cases of various forms of non-sexual bodily assault during that time. This imbalance reversed itself, however, in the period 1911 to 1920. With the 1910 census recorded at 53,310, there were thirty-nine cases of non-sexual bodily assault and fifty-five cases of sexual assault. By 1940 the population of the county was recorded at 130,616, and the number of rape and sex-related crimes tried in the circuit court in the ensuing decade was 167 with only 91 cases of non-sexual bodily assault coming to trial. 18 This trend of an increasing rate of sex-related crimes and a decreasing rate of violent assault crimes relative to population growth gives a preliminary sense of a growing prosecutorial emphasis (and actual incidence) on sex-related crimes and a decreasing prosecutorial emphasis (and actual incidence) on non-sex-related crimes, evidenced in greater court activity for the former than the latter.

Probably the most striking feature of the sexual assault cases prosecuted in Ingham County over this 100-year period is the

disproportionately high number of statutory rape cases in relation to the low number of forcible rape cases (the victim being over the age of consent, and force being required as an element of the crime). Indeed, 326 (59.9 percent) of the total of 544 cases fall into the category of statutory rape. This statistic immediately suggests some measure of the priority given to protecting young girls and children from sexual assault, particularly when it is seen in contrast to the forty (7.4 percent) forcible rape cases. In effect, the rape of adult women appears be a crime that was prosecuted very infrequently, and one is left to speculate that perhaps the reasons for that had something to do with how prosecutable (that is, how winnable) these cases were perceived to be by law enforcement officers, prosecuting attorneys, and potential complaining witnesses. It seems, in fact, they were not considered winnable at all.

The pattern of statutory rape cases shows dramatic increases over the ten decades in the number of cases, particularly after the 1887 rise in the age of consent. The number of cases over this time increases from two in the decade 1881-1890 to thirteen in the decade 1891-1900, remains steady at thirteen in the years 1901-1910, jumps to thirty-eight in the period 1911-1920, explodes to 117 cases in the period 1921-1930, drops down to forty-nine cases (less than half the previous decade) during 1931-1940, and resumes a high level again of ninety-five cases in 1941-1950. [See Table 2. Distribution of all Charges for Each Decade.] The overall upward trend across the decades is consistent with studies that show the incidence of rape on the rise.

For example, the findings here resemble those of Theodore Ferdinand, who demonstrated in his study of Boston police files that reported rape was a crime that had consistently risen at a rate greater than the rate of population growth in the twentieth century. 19 But the untypical tripling of cases in this sample in the decade of the 1920s bears special attention and will be a subject for closer examination in the chapters that follow. [See Figure 3. Number of Cases for Each Charge.]

Notably, the conviction rates for the statutory rape cases are relatively high: 30.8 percent in 1891-1900; 53.8 percent in 1901-1910; 73.7 percent in 1911-1920; 64 percent in 1921-1930, 71.4 percent in 1931-1940, and 81.1 percent in 1941-1949. Of all 326 statutory rape cases, 226, or 69.4 percent resulted in convictions, with the remaining cases distributed as follows: sixteen acquittal (4.9 percent), fifty-six nolle prosequi (17.1 percent), and twenty-eight unknown outcome (8.6 percent). [See Figure 4. Outcome Distribution: Statutory Rape.] The pattern that becomes apparent here, and is repeated with the other charges as well, is that nolle prosequi outcomes are always from two to four times more frequent than acquittals. Apparently prosecutors preferred to decline prosecution rather than pursue prosecution of a case that appeared destined for jury acquittal. 20 The implication, of course, is that prosecutors were very careful about the cases they chose to prosecute. This pattern existed throughout the sample for all four charges: for all cases not ending in conviction, setting aside those with unknown outcomes, forty-four resulted in acquittal, and 101 were nolle prossed by the prosecutor. [See Figure 8.

Conviction Rates for Each Charge.]

Turning to the forty forcible rape cases, in which a woman over the age of consent filed a charge for "carnal knowledge by force and against her will", the outcomes are somewhat more evenly distributed than in the cases for statutory rape. Here, fifteen (37.5 percent) of the forty ended in conviction; five cases (12.5 percent) ended in acquittal; thirteen cases (32.5 percent) resulted in nolle prosequi; and seven cases (17.5 percent) show unknown outcome. [See Figure 5. Outcome Distribution: Forcible Rape.] Clearly, there was a remarkable disinclination to prosecute cases of forcible rape; further, the outcomes reveal a greater reluctance of juries to find a man accused of raping an adult woman guilty than to find a man accused of raping a young girl under the age of consent guilty. Less than half of forcible rape cases ended in conviction, and of these, nearly 30% were discontinued by the prosecuting attorney before they could be brought to a jury for consideration.

The distribution of these cases over the entire period shows three from 1850-1860, three from 1861-1870, four from 1871-1880, four from 1881-1890, one from 1891-1900, then four, three, and three respectively in succeeding decades, with finally an increase to six cases in 1931-1940, and nine cases in 1941-1950. [Refer again to Table 2.] At first glance, this may seem like an uneventful, albeit increasing, spread of the numbers, but one does want to ask why there were was only one case of forcible rape brought to this court during the last ten years of the nineteenth century. Preliminary speculation begins by

supposing that the 1887 change in the age of consent threw prosecuting attorneys off balance. In other words, under the earlier law, a child of twelve qualified as an adult and therefore her complaint could be prosecuted under the forcible rape charge. After the change, the law viewed her as a child, and her case could be prosecuted under the statutory rape charge. Not incidentally, the number of statutory rape cases in the 1890s was thirteen times what it was in the 1880s. The fact that for these ten years there was only one charge for forcible rape filed under the raised age of consent stipulation suggests that prosecutors were not fully convinced that a female "fourteen and over" was a legitimate victim of rape. Further, it is of interest that the high jump in statutory rape cases in the 1880s and 1920s is not duplicated with cases of forcible rape in those periods. Whatever factors were contributing to that mushrooming of statutory rape court activity did not apparently affect the impetus to adjudicate a comparable increase in cases of forcible rape. Ultimately, the conclusion seems inescapable that the law against raping females under the age of consent was implemented far more often than was the law against raping females over the age of consent, and indeed these numbers suggest the latter was very rarely tested in the courtroom.

Cases of assault with intent to commit the crime of rape totaled seventy-four (13.6 percent of all the cases). Of these, forty-eight (64.8 percent) ended in conviction; three (4.1 percent) ended in acquittal; thirteen (17.6 percent) led to nolle prosequi; and ten (13.5 percent) show unknown outcomes. [See Figure 6. Outcome Distribution:

Assault with Intent to Rape.] The fact that there were no cases of this type prior to 1871, indicates there was little or no effort to enforce the law against this offense until late in the nineteenth century. The numbers in each of the five decades beginning in 1871 remain small (five or less), but as with the statutory rape pattern, there is a dramatic increase to twenty-one cases in the 1920s, followed by a drop to twelve in the 1930s, and an increase to twenty-six in the 1940s. It seems probable that the large increase in assault with intent to rape cases in the 1920s may be attributable to the same factors that account for the increase in statutory rape cases during that decade. Indeed, since the ages of the victims in the assault with intent cases during that time were all (save one) under the age of consent, it seems likely that the 1920's court was particularly concerned with sexual abuses (or sexual activities) that involved young girls and adolescents. Moreover, while age was not legally a factor in the law for assault with intent to rape, fifty-five of the seventy-four complaining witnesses in that category were under the age of consent. This reiterates the earlier point that the rape laws of Michigan were consistently not implemented in this county in cases where adult women claimed to have been violated. While we have no way of knowing how many complaints by adult women were turned away as unfounded, their obvious courtroom absence leads one to believe that there must have been many.

There was a total of 104 cases of indecent liberties, which accounts for 19.1 percent of the sex-related charges brought to this

court in the 100 years under study. Of these, seventy-eight ended in conviction. [See Figure 7. Outcome Distribution: Indecent Liberties.] This 65.4 percent conviction rate for sex crimes against underage females is comparable to the 69.4 percent conviction rate for statutory rape and substantiates again the conclusion that there was a greater willingness to prosecute and convict accused offenders of young girls and adolescents under the age of consent than those who had allegedly offended adult women. The first case for indecent liberties did not turn up until 1889, reflecting the fact that there was no law against such behavior until 1887. 21 The fact that another ten years passed by before a second case of this nature came into the court raises questions as to why there was so little activity in response to this law. The enactment of the law at this time clearly coincides with the raising of the age of consent for rape in the same year, both measures aimed at establishing greater legal protection for female children. In spite of this, however, the frequency of cases for indecent liberties remained small in the decades up to 1920; then, in keeping with the apparent heightened attention to sex crimes involving females under the age of consent, they jumped substantially to twenty-five in the period 1921-1930, followed by another increase to thirty in the period 1931-1940, a number which increased yet again to thirty-seven in the period 1941-1950. [See again Table 2. Distribution of All Charges for Each Decade.] Thus for the charge of indecent liberties, as with charges for statutory rape and assault with intent to rape, the decade of the 1920s emerges as a time of more than double the

activity of the previous decade.

3. Cross-Sections of Each Decade

Turning from analyses of the data for each charge to cross-sections of the data for each decade reveals summary sketches of this court's activity in response to sex-related crimes against women. Again, utilizing a decade by decade approach is admittedly contrived, but it does allow for ready comparison of crime figures with census data, reported every ten years beginning in 1840 for the State of Michigan. I use the census figure for the beginning of each decade in order to be assured of that number of people living in the county for the duration of the ensuing ten years. [See Table 10. Summary of each decade.]

From 1850 to 1860, there were three cases for incest, both of which were termed forcible rape since the victim was at or over ten years, the age of consent at that time. In one case the outcome was a conviction and in the other two nolle prosequi, so there was a 33% conviction rate for this decade, an observation admittedly limited in value because of the very small size of the sample. As a matter of gauging the number of cases in reference to the population, the three cases here equal .034% of the 1850 census figure of 8631.

From 1861 to 1870, the picture is not much different. There are three sex-related cases here, all for forcible rape, the age of consent still being ten years. With only one conviction, the conviction rate for this decade is 33.3 percent. The three cases here, relative to the population, equal .017 percent of the 1860 census figure of 17,435. Thus, the percentage of cases relative to the population in the 1860s is

slightly lower than it is in the 1850s.

But there is a marked increase in the number of cases in the 1870s. From 1871 to 1880, the court heard eight sex-related cases: four cases were for assault with intent to rape, one of which resulted in conviction; and four were for rape of females over the age of consent, still at ten years, one of which resulted in conviction. Thus there is an 25.0 percent conviction rate for all of the sex-related cases in the 1870s. The number of cases in this decade is a figure equal to .032 percent of the 1870 census figure of 25,268. It can be said, then, that the number of sex-related crimes tried in the court in the 1870s relative to the population growth was more than double that of each of the two previous decades.

In the decade of the 1880s, when the census figure was 33,676, the total number of sex-related crimes processed in the court was eight; four were for forcible rape with no convictions, one for statutory rape with no conviction; two for assault with intent to rape with a conviction; one case for indecent liberties, which resulted in a nolle prosequi. Here, there is a conviction rate of 12.5 percent (a decrease from the 25.0 percent rate of the 1870s).

But the number of cases regains its earlier status in the 1890s and sets the stage for steady increases through the end of the 1920s. From 1891 to 1900, there was a total of seventeen cases: one for forcible rape, thirteen for statutory rape, two for assault with intent to rape, and one for indecent liberties. Convictions resulted in four statutory rape charges, in one of the two assault with intent charges, and in the

single indecent liberties charge. Thus the conviction rate in the 1890s for all sex-related cases was 35.3 percent, a higher conviction rate than had been achieved in any previous decade. With regard to these convictions, it is important to remember that the age of consent had been raised to fourteen in 1887, and that five of these seven convictions involved victims under the age of consent. This change in the law no doubt facilitated obtaining these convictions. Finally, the percentage of cases relative to the 1890 population was .045 percent, a rate higher than those of any other decade.

From 1901 to 1910, twenty-five sex-related cases represent .063 percent of the 1900 census figure of 39,818, a decided increase from the previous decade. Four cases were for forcible rape, ending in one conviction; thirteen were for statutory rape, resulting in seven convictions; two were for assault with intent to rape, both resulting in convictions, and six were for indecent liberties with four convictions. Thus, the first decade after the 1897 climb in the age of consent to sixteen emerged with nearly the same number of statutory rape cases as in the decade before, but with one and a half times as many sex-related cases overall as in the previous decade relative to population figures. Finally, this decade shows a conviction rate of 56.0 percent for the sex-related crimes that made it into court.

The years from 1911 to 1920 demonstrate a continued increase in the rate of cases relative to population figures. The case total is fifty-five, which is .103 percent of the 1910 population figure of 53,310, manifesting an increase one and a half times the number of

cases relative to population figures in the previous decade. These fifty-five cases are comprised of three forcible rape cases, none of which led to conviction; thirty-eight statutory rape cases, twenty-eight which ended in conviction; five cases of assault with intent to rape, which led to three convictions; and nine cases of indecent liberties, ending in six convictions. Thus, in this ten-year period spanning the enactment of progressive social and economic reforms and the nation's involvement in World War I, there was a doubling of sex-related cases tried in court, and a 10.0 percent increase in conviction rate, from 56.0 to 67.3 percent.

The most dramatic increase in cases occurred in the 1920s. Here, 161 cases comprised .197 percent of the 1920 population figure of 81,554. It is important to recognize that this population figure is more than one and a half times the population figure of the preceding ten years, but the percent of sex-related cases relative to population is almost double what it was in the previous decade. The vast majority of these 161 cases were comprised of 117 statutory rape cases, seventy-five of which resulted in convictions. The remaining cases included three for forcible rape, with two convictions; twenty-one for assault with intent to rape, with twelve convictions; and twenty for indecent liberties, with thirteen convictions. Thus there was an overall conviction rate of 63.4 percent for sex-related crimes in the 1920s, a figure comparable to that of the previous ten-year period.

The jump in cases in the 1920s is underscored by the drop in cases in the 1930s. During this period, the court apparently tried only

ninety-seven sex-related cases, a figure which is .083 percent of the 1930 population figure of 116,587. So while the population grew by over 35,000 from the previous decade, the number of sex-related crimes dropped by sixty-four. Still, the conviction rate remained steady at 62.9 percent: six forcible rape charges led to two convictions; forty-nine statutory rape cases resulted in thirty-five convictions; twelve assault with intent to rape cases resulted in ten convictions; and thirty indecent liberties charges led to fourteen convictions. The decade of the 1930s can be characterized as one in which the 1920s' conviction rates were sustained, but there is certainly a noticeable reduction in the number of sex-related cases that were prosecuted in contrast to the very high increase experienced in the 1920s. This is yet another pattern that coincides with Theodore Ferdinand's findings: rape cases increased in Boston during periods of prosperity and decreased during periods of economic depression. 22

Finally, from 1941 to 1950, there were 167 sex-related cases brought before the court. Of these, nine were for forcible rape, with seven convictions; ninety-five were for statutory rape, with seventy-seven convictions; twenty-six were for assault with intent to rape, with nineteen convictions; thirty-seven were for indecent liberties, with thirty-one convictions. The conviction rate for this period was 79.8 percent, a proportion higher than that of any other decade prior to this. The percentage of the cases relative to the 1940 population of 130,616 is .127 percent, which is a proportion much greater than that of the 1930s (.083 percent), but still not as high as that of the 1920s

(.197 percent).

What do these cross-sections of the decades reveal? The level of court activity devoted to sex crimes was minimal and sporadic in the mid- to late- nineteenth century. It experienced a big growth in the number of cases in the periods of the 1870s and 1890s, sustained after that until the 1920s, when the numbers achieved their highest point. At the same time, conviction rates maintained a stable position in the 60 percent range from 1900 to 1941; in the 1940s, the conviction rate jumped sharply to just under 80 percent.

Thus three aspects of this review of the data are significantly irregular. First, there is the mushrooming of sex crimes in the 1920s with cases of statutory rape predominating; second, there is the drop in sex crimes in the 1930s, consisting primarily of a drop in statutory rapes; and third, there is the increased conviction rate in the 1940s. These findings must be seen in light of sentencing patterns, however, in order to better understand their implications.

4. Sentencing Patterns

Accounting for the incidence of cases and their respective conviction rates provides some idea of the attention accorded to each of these crimes. Judgments as to the seriousness of that attention may be tempered, however, when sentencing patterns are factored in. In the case of indecent liberties, the fact that the 1920s' numbers remained high in subsequent decades may indicate a persistant recognition of the critical nature of this crime; the fact that the conviction rate was

high (65 percent) suggests it was perceived by juries to be harmful and deserving of punishment. Yet, the sentencing patterns that accompanied the convictions for indecent liberties qualify these conclusions. [See Table 9. Known Sentence Ranges for Sex-Crime Convictions.]

Of the twenty convictions for indecent liberties in the decade of the 1920s, thirteen resulted in prison term sentences; of the fourteen convictions in the 1930s, eleven resulted in prison terms, one in a 90-day jail term, and two in probation orders. Of the thirty-one convictions in the 1940s, fourteen led to probation orders, and only six resulted in prison terms, with two offenders serving short terms in the local jail. Thus, while there were more cases for indecent liberties brought into the court in these later decades, a higher percentage of these resulted in lighter sentences.

The sentencing patterns for the other charges require examination here as well. In particular the sentencing dissimilarities between convictions for statutory rape and rape of an adult woman are striking. First, there was only one order for probation in cases where offenders were convicted of raping an adult woman; indeed, of the fifteen total convictions for this crime, two resulted in life sentences (in the late 1920s), one received a prison term of ten to twenty years, another seven years, and the rest received from one- to five-year prison terms. The shorter prison terms emerged in the 1930s and 1940s, the latter decade additionally occasioned by two offenders being sent to the State Mental Hospital at Kalamazoo. It seems that, in spite of the overwhelming skepticism accorded adult women's reports of sexual victimiza-

tion, if these victims were able to convince a jury of the truth of their story, the circumstances were so awful that a prison term for the offender was virtually assured. In that the lengths of the sentences for forcible rape were markedly shorter in the later decades, this sentencing paradigm was analogous to that for indecent liberties.

For statutory rape, making sense of sentence patterns poses some difficulty. The most obvious finding here is that the percentage of probationary sentences increased from just under 29.6 percent of convictions in the period from 1911-1920, to 32 percent in the 1920s, and, except for a drop to 8.8 percent in the 1930s, continued to increase to a high point of 51 percent of convictions in the 1940s. Indeed, in general, it can be said that probationary sentences for statutory rape convictions were more numerous than for any other charge. Second, while there were four sentences of life imprisonment and ten sentences of seven and a half years minimum in the 1920s, and five life sentences with seven sentences of seven and a half years or more minimum in the 1930s, there were only two sentences for life imprisonment in the 1940s and seven sentences of seven and a half years or more in the 1940s. Further, prison terms moved from ten years in the 1870s, fifteen years in the 1880s, an average of 4.29 years in 1911-1920, to an average of 4.5 years in 1941-1949. If probations are factored in, then the average number of years for convicted offenders of statutory rape was only 2.4. What these figures seem to suggest is a trend toward lighter sentencing for statutory rape, paralleling that for rape and indecent liberties. Such a perception needs clarification,

however, for the unmistakable characteristic of statutory rape sentencing is its extraordinary variability.

Statutory rape is a charge that, until the 1974 enactment of the Michigan Criminal Sexual Conduct Code (which basically defined incremental levels of forced sexual assault under four "degrees" of criminal sexual conduct), lumped together as equal under the law incest with a child, underage consensual sexual activity, and forced intercourse with a stranger or acquaintance. To properly assess statutory rape sentences, one must look more carefully at how sentencing was linked to these markedly disparate, but officially undifferentiated subcategories. In particular it seems that the commonly understood contrast between incest with an underage child and consensual intercourse in the context of a quasi-romantic relationship illustrates this point. For statutory rapes in which the offender was the father, uncle, or brother of the victim, the sentences were nearly always lengthy. Generally they varied from prison terms of seven-to-fifteen years, to fifteen-to-twenty-five years, to life. Of thirty-nine known convictions for incest with a female child, there were nine (21.4 percent) life sentences and only one order of probation (for brother-sister incest). Remarkably there were only nine cases of incest that did not result in a conviction. In statutory rape cases that involved consensual sexual intercourse, prison term sentences ran from one-to-ten years in the 1920s to one-to-three years in the 1940s. Additionally, these fifty-one convictions resulted in eighteen (35 percent) orders for probation, a decidedly higher figure than the

probation count for incest convictions. There can be little doubt from these sentencing disparities that, under the seemingly singular charge for statutory rape, two socially unacceptable offenses were met with widely divergent legal responses. In short, incest was far more severely punished than was underage consensual sexual intercourse.

The sentences for assault with intent to rape surprisingly exhibit the same level of severity as those for forcible rape, falling for the most part in the five- to ten-year minimum range. The main difference was that there were no life sentences for this charge. The most severe penalty was twenty to forty years, given out in the 1920s; a total of six orders for probation were awarded, and in three cases, the first occuring in the 1920s, the defendants were not sentenced but were ordered held for indeterminate periods of time in the State Mental Hospital. The prison terms were five years (one) in the 1870s, six years (one) in the 1890s, and averaged 6.3 years in the 1920s, 4.7 years in the 1930s, and 2.65 years in the 1940s. These averages are for prison terms only and are not reflective of the number of orders for probation. The trend here is one of decreasing severity, especially marked in the 1940s, which again, duplicates the sentencing trend for the other three charges.

What can one say at this point about the patterns that have presented themselves in these cases? First, the marked increase in the number and rate of cases relative to population over time, already made evident in the summary of the decades, and the trend toward lighter sentencing, especially evident in the 1940s, is reiterated here.

Further, it is apparent that an emphasis on protecting child victims of sexual abuse achieved some impetus in the 1880s with the 1887 enactment of the law for indecent liberties and the rise in the age of consent from ten to fourteen, occasioning a major expansion in the cases for statutory rape in the subsequent ten-year period. The social and legal censure of incest was generally always severe, but sentence patterns do reveal an ameliorated legal response to it by the 1940s. Finally, it appears there was deep skepticism toward women victims of sexual assault, presumably motivated at least in part by the assumption that, if women were capable of consenting (as the law implied), they very likely did so. Related to this kind of thinking, cases of underage consensual sexual intercourse presented a perplexing dilemma for all courtroom agents and for jurors. The social distinctions between incest, forced sexual intercourse with an underage girl, and underage consensual sexual activity required discriminations that the law did not explicitly accommodate. Consequently, the means by which societal notions of misconduct could be secured in the implementation of rape law rested on that vague statutory provision allowing for punishment by "imprisonment...for life, or for any term of years." The point here is this: the severity of sentences may be the best index to the degree of social censure brought to bear upon a crime. Understanding how the court effected this kind of discretion is both basic and crucial to a proper interpretation of the court's treatment of sex crimes.

5. A Comparison of Sexual and Non-Sexual Assault Cases

Earlier in this chapter, a brief comparison of the sexual assault and non-sexual assault cases that came before this court revealed an imbalance in favor of non-sexual assault cases in the period from 1870 to 1910. After 1910, that imbalance reversed itself, and showed that prosecutors spent more of their time on sexual assault than on non-sexual assault cases in this court. Knowledge of that statistic provides a glimpse of how the sexual assault cases in this sample compared with other crimes of bodily injury, primarily from the standpoint of incidence relative to population. For this purpose, I collected data on four crimes of personal bodily injury, which are, in order of increasing severity: (1) assault and battery, (2) assault with intent to do great bodily harm less than murder (including assault to rob and assault with a deadly weapon), (3) assault to murder, and (4) murder. A close examination of these assault cases together with sexual assaults uncovers a level of information about the treatment of sexual assault crimes that could not be had without such a comparative analysis.

What seems to be the clearest indication of how much court activity was taken up with sexual assault cases, relative to non-sexual assault cases, is the proportion of each to the population figures. Having already determined that the number of sexual assault cases was low in the late nineteenth century relative to non-sexual assault cases, a study of Table 11 provides individual percentages relative to population

figures for the 1870s and for each decade thereafter. The thirty-six non-sexual assault cases of the 1870s equal .142 percent of the census figure for 1870, and the eight sexual assault cases for that same period equal .032 percent of that same census figure. Thus the sexual assault rate is less than one-fourth that of the non-sexual assault rate for that decade.

By the decade of the 1890s, the sexual assault-to-population rate was .045 percent, which is exactly half the non-sexual assault-to-population rate of .090 percent. One may speculate that law enforcement was becoming more effective concerning non-sexual assaults and that society was thus becoming more civilized. 23 With regard to the comparatively low proportion of sexual assaults at this time, it seems to belie the growing concern that operated in American communities at many levels for enforcing protections against the abuse of children and for ending vice. 24

From 1910 to 1920, the emphasis is reversed, as evidenced with a sexual assault-to-population rate of .103 percent and a non-sexual assault-to-population rate of .073 percent. This sign of a trend toward a greater proportion of sexual-assault cases became magnified as years passed, but was especially exaggerated in the 1920s. Here, for sexual assault, the rate of cases relative to population was .197 percent; for non-sexual assault, the rate was .077; the sexual assault to non-sexual assault ratio in the 1920s was two and a half to one. One can begin to see that if violent crimes of bodily injury during this time were less frequent because a more ordered society was in place, crimes of sexual

assault were more numerous because sexual abuse was becoming more prevalent. Such a conclusion may need to be qualified, however, given what we already know about the high incidence of consensual sexual intercourse cases filed under statutory rape complaints during this decade. Could it be the court was simply responding to a perceived need to punish young men who engaged in casual intercourse with consenting adolescent girls? If this was so, then the higher number of sex crimes over bodily injury crimes is better understood. This is a matter that will be addressed more fully in the chapters that follow. At this point, it is important to recognize how the extent to which the high number of sexual assault cases in the 1920s is underscored by the low number of non-sexual assault cases during this time.

Conversely, the drop in the number of sexual assault cases in the 1930s is made more remarkable because of the comparatively stable number of non-sexual assault cases. The rate of the latter relative to the 1930 population figure is .076 percent; the rate of the former relative to the population is .083 percent, a precipitous drop from its level of .197 percent in the 1920s. Then, in the 1940s, while the bodily assault rate again remained steady at .070 percent of the 1940 population figure, the sexual assault rate rose to .127 percent of the population. The question that arises is: why does the amount of court activity for non-sexual assaults remain stable over this period of thirty years while the rate of sexual assaults is so irregular and volatile? Possible answers to this question will be pursued as this study progresses.

For now, the patterns that emerge here offer at least these conclusions: (1) The overall growth in sexual assault cases, disproportionate to population figures, and the concurrent overall decline in nonsexual assault cases replicates the pattern Ferdinand discovered in his study of Boston crime figures. It also substantiates the argument that violence in general, relative to population growth, decreased, and that sexual violence increased at a level disproportionately greater than population growth. 25 (2) The 200 percent increase in sexual assault cases in the 1920s is anomalous in comparison to the nonsexual assault growth of 61 percent. Clearly, the 1920s was a time of greatly increased activity in this criminal court for both types of assault cases. But the vastly greater number of sexual assault cases in that period is a unique phenomenon, made even more remarkable by the fact that the 1930s shows a 40 percent drop in sexual assault cases and a concommitant 41 percent increase in nonsexual assault cases. (3) The rate of nonsexual assault cases, while somewhat fluctuating in the early decades of this sample, remains at a stable level of from .070 to .077 percent of the population for four decades beginning in 1910. As the population grew, the rate of growth in nonsexual assault cases grew also--but not in a manner disproportionate to population growth. This pattern was not true for sexual assault cases, which showed a great increase in the 1920s, a sizable decrease in the 1930s, and a comparable increase again in the 1940s.

It is difficult to compare conviction rates for sexual and nonsexual assault cases in the early decades because there were so few cases. But

beginning with the 1890s, conviction rates for the two groups of assault cases were remarkably similar. [Refer to Table 1. Comparison of Sexual and Non-Sexual Assault.] In the 1890s, the rate for sexual assault was 35.3 percent, the rate for nonsexual assault was 23.5 percent. After that, both categories show rates close to (or slightly above) 60 percent until the 1940s, when they both show a nearly identical increase to nearly 80.0 percent or above. That both types of cases show such similar conviction rates over time may say something about the rational capacities of prosecuting attorneys to predict jury responses; that both types of assault cases show marked conviction rate increases to 80 percent in the 1940s must be assessed in the context of observable patterns in sentencing for both.

6. Sentencing Patterns: A Comparison of Sexual Assault and Non-Sexual Assault Cases

This study has already established that the sentencing trend over time for sexual assault cases was toward lighter sentences with the most severe sentences reserved for incest offenders. For those convicted of non-sexual bodily assaults, sentences were the harshest for convicted murderers. Using the period of the 1930s and 1940s, a time when the conviction rate increased for all cases of assault, it is possible to see that, for cases of bodily assault, sentencing is fairly predictable for the charge of assault and battery (usually a short term in jail or a fine) and for the charge of murder (usually a very long prison term or more likely life imprisonment). [See Table 12. Range of Sentences for Non-Sexual Assault Convictions.] The most discretion was

exercised in regard to sentencing for the charge of assault with intent to do great bodily harm or assault to murder. Here, a pattern emerges in which the percentage of probationary sentences increased from 33 percent in the 1930s to 43.4 percent in the 1940s. The average minimum sentence shows very little change, however, going from 4.98 years in the 1930s to 4.4 years in the 1940s. So, for nonsexual bodily assault, the conviction rate was much higher in the 1940s than in all previous decades, but sentencing severity remained relatively unchanged. This is significant to the extent that it underscores the fact that sentence severity for sexual assault in this period was noticeably lessened. We have seen already how the conviction rate for sexual assault cases went up to 80 percent in the 1940s and how that increase was linked to decreasing severity in sentencing. It seems that, at least for this court, the severity of sentences was lessened in the 1940s only in cases of sexual assault, but not in cases of non-sexual bodily assault.

II: Taking a Case to Court: The Odds for the Prosecution

1. Resistance, Corroboration, and Credibility

In the literature on rape prosecutions, there are clearly certain factors that are known to influence a prosecutor's willingness to prosecute and a jury's willingness to convict. This chapter will briefly assess the prevalence of some of those factors in this sample as a prelude to closer examination of them in selected courtroom transcripts.

Through a statistical analysis of 445 rape complaints in Washington in the period from 1972 to 1977, Wallace Loh, Associate Professor of Law and Psychology at the University of Washington Law School, identified, five factors that influence decision-making in the prosecution of forcible rape. 26 These factors are, in descending order of importance:

(1) physical force;
(2) social interaction between victim and accused prior to the alleged offense;
(3) corroborative evidence;
(4) victim credibility;
(5) race.

For statutory rape, the five factors are similar but the order of items is altered slightly to account for a lesser emphasis on physical force and a lesser emphasis on victim credibility (ie. the credibility of both victim and suspect come under scrutiny in cases of statutory rape). The five factors that influence decision-making for statutory rape cases, in descending order of importance, are:

(1) corroborative evidence;
(2) opportunities for prior social interaction between the victim and the accused;
(3) non-aggravated physical force;
(4) suspect and victim credibility;
(5) race.

These factors are important to the degree that they are perceived by prosecutors to enhance the jury's willingness to believe the complainant's account of her victimization by the accused. Similar findings are reported by Hubert S. Feild of Auburn University and Leigh B. Bienen of the Department of the Public Advocate of the State of New Jersey. Their eight-item analysis of the factors most often identified to affect jury decision-making in rape trials demonstrated that

victim characteristics, such as age, behavior before and after the offense, physical appearance (bruises, disheveled appearance), prior sexual history with the defendant and others, race, and severity of outcome (degree of physical force) affect jury member decision-making. 27

The present study analyzes these factors of resistance--physical force, corroborative evidence, previous sexual behavior, and opportunities for prior social interaction--as they relate to perceptions of consent. Race, a sociological factor that is thought to sway sympathies against non-white participants, is also investigated in relationship to its effect on courtroom interaction, trial outcomes, and the sentencing of convicted offenders.

With regard to factors of resistance, eleven of the fifteen convictions for forcible rape in Ingham County provide information regarding resistance; eight of these show force/resistance to be a major contributor to getting a conviction. Two convictions that do not seem due to evidence of force are cases of long-term incest with a daughter past the age of consent at the time of prosecution. Cases in which the use of force was clearly evident were cases in which the defendant wielded a gun or knife, threatened to shoot the victim, tore at the victim's clothing, scratched the victim's face, beat up the victim quite badly, or chose to rape a woman who was a cripple. In cases of acquittal of forcible rape, the lack of sufficient resistance seemed to be the major obstacle to securing a conviction in nine cases out of the fourteen that provided such information. Cases demonstrating a lack of

resistance were cases in which no one heard the victim's shouts; in which the victim was seen as an outdoor girl who should have been able to resist (though she only weighed ninety-six pounds); in which the victim had previously had sexual relations with another man (though in this instance, she was abducted and also beaten); or in which an ex-wife had used a contraceptive jelly when her former husband forced her to have sex with him. In the cases of forcible rape, resistance on the part of the victim and force on the part of the assailant were key barometers in establishing whether the act had in fact taken place "against her will".

In statutory rape cases, the emphasis on corroborative evidence was greater than the emphasis on resistance, but both remained elements in the decision to convict. Again, there were distinctions between cases of incest, forced sex, and underage consensual sexual intercourse that make it difficult to generalize. Even in cases of long-term incest, issues of resistance were downplayed, but not eliminated. In cases of underage consensual intercourse, once consent was assumed, corroborating factors such as the presence of gonorrhea or pregnancy, the past delinquency problems of the victim or the accused, the duration of the relationship, and mitigating factors such as the mentality of the victim and accused, and their respective home situations, influenced the severity of the sentence.

In non-incestuous statutory rape cases in which a female child or adolescent was forced to have intercourse unwillingly, again, corroborating factors were the primary focus in the courtroom

testimony. The testimony of physicians as t the extent of injuries, how much the victim remembered as to what she saw or felt relative to penetration of her "privates", and how hard she cried when it happened, were part of the repertoire of grounds for evaluating the worth of the victim's complaint and the veracity and seriousness of the defendant's alleged offense.

In spite of the fact that the law made consent irrelevant in these cases, issues of resistance and force still surfaced in both direct and cross-examination testimony. For example, in the rape of a twelve-year old girl, for which the defendant was convicted and sentenced to Jackson Prison for one year, the point was made that she did not strike him, "even though her arms were free". 28 In another case of statutory rape of a thirteen-year old girl by a boarder in the home, the issue that she made no outcry was raised, but explained by her testimony that he (the defendant) told her that her mother would send her away if she told her about the intercourse. He was convicted and sentenced to Jackson Prison for three-to-ten years. 29 Still another example demonstrates how in many cases of statutory rape, the issue of resistance was raised but was not the crucial determinant of conviction. One defense attorney's cross examination made much ado over the appearance of consent in a fifteen-year old statutory rape victim, pointing out that she had had sex twice before, that she now had venereal disease, and that she was one step away from prostitution. Thus, a great deal of attention was given to the possibility of her consent; nevertheless, the accused in this case was convicted and sentenced to Jackson Prison for

two-to-five years. 30

Many believe that rapes by strangers are more easily prosecutable because the victim is less likely to have consented. Thus one would expect to see a greater number of stranger rape cases being brought to the court. Such was not the case in this sample. To the extent that this information is provided, there were only fifty cases of stranger assault in the entire sample. By contrast, there were 194 cases of acquaintance assault (which could include consensual relationships, or assault by a boarder, family friend, or neighbor). [See Figure 13. Comparison of Stranger and Acquaintance Assaults.] I suspect there are two reasons for the disparity in numbers. First, strangers were harder to apprehend than acquaintances. They would have been harder to identify in the first place, and harder to find in the second. In the early decades, until the 1920s, there were only seven cases of stranger assault brought into this court. Roger Lane's study of crime in Philadelphia noted:

> "Philadelphia's nineteenth-century detective service...was geared almost entirely to the recovery of stolen property, usually from an underworld with which the detectives enjoyed a number of profitably corrupt connections. Wholly without technological aids--no photos, fingerprints, or laboratory analysis--the police were often impotent."

It is not unreasonable to assume that such limited technological capability was also prevalent for the Ingham County law enforcement apparatus. 31 A second theory about the imbalance in favor of acquaintance assaults simply refers again to the preponderance of consensual statutory rape cases that make up such a large percentage of the cases. The category of acquaintance assaults includes 139 cases

of statutory rape. This is an interesting statistic because it not only explains the high number of acquaintance assaults; it also hints at a link between acquaintance assault and the court's concern with the social control of sexually active underage girls.

It is no surprise to find that the 194 cases of acquaintance assault show 125 convictions, or a conviction rate of 64.4 percent, with an average minimum sentence length of only 2.2 years. These figures coincide with the conviction rates and sentence lengths for statutory rape cases already discussed in an earlier part of this chapter. In contrast, the fifty stranger assaults showed twenty-seven convictions with a 52.9 percent conviction rate, and an average minimum sentence of 6.7 years. Thus, where there is only a slight disparity in conviction rates for acquaintance and stranger rape, there is a large disparity in sentencing. One disclaimer can be made in that both groups of cases include a fair number of long prison terms and some life imprisonments, but that impression of equitable sentencing is quickly dispelled by the further observation that sentences for stranger assault included only two probations (7.4 percent) and acquaintance assault sentences included 103 probations (82 percent).

What does this say about acquaintance versus stranger assault? First, the notion that it is easier to try a stranger rape case and win it must be qualified in light of the results in this sample. Acquaintance assault cases primarily consisted of statutory rape, in which the earlier observed pattern of high conviction rate and lighter sentencing prevailed. Second, assaults by strangers were not often

tried in the courtroom, and if they were, there was only a 50 percent chance of securing a conviction. In any case, if the accused stranger was apprehended, brought to trial, and convicted, the juries and judges awarded much more severe sentences in cases of stranger rape than in cases of acquaintance rape. A probable reason was that acquaintance assault was perceived as likely to be characterized by consent or by behaviors that could be construed as giving consent. 32

2. Socio-Economic Status of the Defendants and Victims

The socio-economic status of the defendants is disproportionately weighted with people in lower-class positions. They were laborers or farm hands, and very often were boarders who owned no property of their own. There was no lack of class-related pejoratives used by court agents to describe the procession of defendants who came in for trial. The array of descriptors used by judges, defense attorneys, and probation authorities is reproduced in Table 14. Typically, the terms used to describe these defendants included: illiterate, transient, moral pervert, degenerate, worthless to society, lazy, unsteady, drunken, feeble-minded, and the worst type of moron. Individually, they came from poor environments, had I.Q.'s measuring at 60 or 89, or had a sodden mentality. Further, they were described as having no sense of morality or as psychopathic. It was only in rare instances that the defendants were wealthy, prominent, honest, decent men who owned their own home or managed a business, who had attended college, or who had refined parents. The initial impression is that the upstanding types

fared better in the disposition of their cases, but this idea was only partly substantiated upon closer inspection. The cases against college students (one for assault with intent to rape and one for indecent liberties) were nolle prossed or ended with a sentence of probation, never a prison term; but a journalist with six years of college was sentenced to Jackson Prison for five to ten years for assault with intent to rape in 1939. Business owners and managers were found not guilty in 1881 (of assault with intent to rape, in 1927 of statutory rape, and another such person's case was nolle prossed in 1929 for forcible rape; but a man who owned 120 acres of land was sentenced in 1925 to six to ten years at Jackson Prison for incest with one of his six children. Though this may seem like a tough sentence for a man of substantial property, it was actually quite lenient compared to the ten to twenty-year sentence given the following year on an incest conviction to a man who had no property. He had, in fact, been boarding with his three daughters at the home of a farmer, where they all slept in the same room.

The conclusion one must draw from a review of these descriptors of defendants is that they are overwhelmingly representative of the lower socio-economic segment of the community. It may be that the middle- and upper-class men did not commit forced-sex offenses; or that women in this group were less likely to report sex crimes perpetrated against them. More probably prosecutors perceived that accused persons from lower socio-economic groups were more likely to commit sex crimes. Case outcomes demonstrate, to a qualified extent, more leniency in

sentencing toward middle-class defendants, but do not demonstrate a uniformly severe sentencing pattern for lower-class defendants. Clearly, other factors affected sentencing besides socio-economic class or character, but such findings as those described above show an unmistakable pattern in which predominantly lower-class defendants came under the scrutiny of middle-class courtroom agents.

Two further defendant classifications must be noted as to how they affect our understanding of the rape cases that came before the court. The increased operation of the automobile industry in the 1920s and the industrial expansion occasioned generally in the 1940s by the war brought substantial increases in migrants from the South. They included both nonwhites and white mountain dwellers from Kentucky and Arkansas. There seems to have been little sympathy for either of these groups, but the disparagement accorded the Southern hill people was more pronounced than it was for nonwhites. Of the fifteen cases identified with defendants from the mountains of the South, twelve occurred in the years between 1939 and 1949. Among these, eleven defendants were found guilty, resulting in a 91.6 percent conviction rate, which is much higher than the 80 percent conviction rates for all cases for that period of time. Among the four earlier Southern migrant defendants in the 1920s and 1930s, three were found guilty, a 75 percent conviction rate, and the conviction rate for all sixteen such cases is even higher at 87.5 percent. Thus, it seems the incidence and conviction rates for such defendants, especially in the 1940s when their numbers in the community were at their highest, may be a significant indicator of how

these people were viewed in the community generally.

3. Race of Defendant and Victim

The issue of race is critical because of contemporary evidence that indicates there is a bias against black defendants in the criminal justice system. 33 In this sample of 544 cases, there were ten cases in which the race of the defendant was identified as black ("colored", "negro"), and one case in which the defendant was identified as Mexican. Among the complaining witnesses in these eleven cases, four were white, three were black, two were Syrian, and two are not identified as to race or nationality. There were no cases in which a black complaining witness filed a charge against a white defendant. This should not be surprising, since, historically, black victim with white defendant combinations have never been considered prosecutable. Indeed historians have shown there has been a long history, during slavery and beyond, of sexual exploitation of black women by white men, carried out with impunity. This research indicates it would be unlikely to find cases of black victims and white defendents in any rape cases, regardless of geographic area of the country, and that supposition is born out in this sample. 34

Of the eleven cases with non-white defendants, nine ended in conviction, one in acquittal, and one with nolle prosequi. Subsequent to one of the convictions (in 1902), an appeal on technical grounds resulted in the granting of a new trial; the complaining witness declined to endure the ordeal of a second trial, so this case was nolle prossed by the prosecuting attorney after all. [See Table 16. Cases with

Non-White Defendants.]

This small number of non-white defendants represents only 2.02 percent of all defendants in the sample as whole. This may seem like a very small percentage, but that initial impression is deceiving. The black population in Ingham County was very slight, and did not begin to show much growth until the years between 1910 and 1920. [See Table 17. Proportion of Black Defendant Cases Related to Black Population.] In the thirty years from 1910 to 1940, the black population more than quadrupled in the migration of black people from the South to work in the fast-growing automobile production facility here. Yet, even with these expanding numbers, the black population was not large. The key factor to pay attention to here is that eight, or 72.7 percent, of the black defendant cases came to court in the last decade of the study, and that the percentage of black defendant cases relative to the black population of that decade is considerably higher than the overall percentage of all cases relative to the total population. The eight black defendant cases represent a figure that is .464 percent of the black population reported in the 1940 census for this county; the comparable percentage of cases for all defendants relative to the total population is only .126 percent. [See again Table 17.] Thus, the proportion of black defendant cases to black population was over three times the proportion of all cases to total population in the county for the 1940s.

The overall conviction rate for this group of cases was 81.8 percent, not counting the case that was successfully appealed. As a

result of that successful appeal and subsequent nolle prosequi, the conviction rate dropped to 72.7 percent. For the 1940s, the decade in which most of these cases were tried, there was a conviction rate of 87.5 percent, a figure 7.5 percent higher than the overall conviction rate for all sexual assault charges in that period. In regard to sentencing, there were no black defendants sentenced until 1930. [See Table 18. Sentencing of Convicted Non-White Defendants.] The sentences that were handed down to black offenders from 1930 to 1950 do not show a consistent pattern. It is true that the two most severe sentences (for ten to fifteen years) given to black defendants occurred when the victim was white; but in two other such cases, one result was a nolle prosequi and the other a sentence of two to five years in prison. The average minimum time for prison terms in the 1940s was 5.58 years, a longer time than the analogous average of 4.9 minimum years for all sentences for that period. Further, there was only one sentence of probation for convicted black offenders, or 14.2 percent; the number of probations for all cases during this decade was thirty-seven out of seventy-four convictions, or fifty percent.

It is risky to generalize from so small a sample of non-white defendants, all but one of which were black, but there are some results that may be worth noting. Focusing particularly on the 1940s, when most of the cases took place, the proportion of black defendant cases to the black population was clearly greater than the proportion of all cases to the total population for that time. Further, the conviction rate for black defendants was higher, and the average minimum prison term

sentence was longer than that for convicted offenders generally.

However much these conclusions may be limited by the size of the sample, they indicate a trend that is nonetheless consistent with current observations of the treatment of accused black sex offenders. Finally, it may be of interest to note the apparent lack of effort to officially record the race of the defendants in any of the documents. This item of information is usually known only because someone penciled it in on the complaint, or it was noted in the pre-sentence investigations, or the judges referred to it in their statements to the prison authorities. It is possible there were more cases with black defendants, but that cannot be determined from these records. The few cases that are identifiable as having non-white defendants will receive closer analysis in the chapters that follow; in spite of the overall trend toward disproportionate representation and heavier sentencing, the case-specific ways in which the legal system responded to non-white defendants will be seen to have been inconsistently exceptional. Sometimes the attitude toward nonwhite defendants was patronizing and indulgent, sometimes disparaging and condemnatory. Not surprisingly, in regard to both responses, racial stereotypes clearly played a role in the formation of opinions about nonwhite defendants.

Conclusion

In an effort to begin to unravel a tangle of blurred and often conflicting impressions about the rape prosecutions conducted in this court, this chapter has identified a number of distinct characteristics relative to the courtroom treatment of rape. First, from a practical

standpoint, it provided a preliminary view of how the court system worked, revealing the processes by which complaint, warrant, examination, and trial led to eventual judgment. The combined significance of the justice of the peace and the prosecuting attorney was that, by deciding which complaints warranted a trial, they determined the agenda for the court. The significance of the defense attorney, in his efforts to exonerate his client, was to challenge the basis on which there was "probable cause to believe" the sexual assault had taken place. There will be more discussion on the roles of these figures in Chapter Five of this book.

The emergence of pre-sentence investigations is a surprising feature that added a new dimension to the processing of the cases after the late-1920s. These reports are evidence of a new cadre of extra-legal professionals who could not have existed in earlier years. The existence of these individuals demonstrates the arrival of social work as a profession in the 1920s, and imply a more holistic approach to the treatment of criminals.

This chapter also reviewed rape and rape-related laws, providing an understanding of the distinctions in the law that played a crucial role in the functioning of these laws. There was also a recognition of areas where the law made no distinctions, as in the case of statutory rape. Here, judges were left to make distinctions based on discretionary interpretations of culpability and award sentences accordingly.

Close examination of the data yielded key findings. First, the very low number of forcible rape cases and the very high number of statutory

rape cases point together to an overemphasis on protecting young children from sexual abuse and/or consensual sexual activity and an almost total disregard for the sexual abuse of adult women. The configuration of the distribution of cases for statutory rape and indecent liberties, together with the rise in the age of consent in 1887 and the enactment of the indecent liberties law the same year, suggests there was much concern about the sexual protection of young girls and adolescents in the 1880s and 1890s. This concern is seen to have arisen again in the 1920s with another mushrooming of cases involving young victims, and with the raising of the age of consent for indecent liberties from fourteen to sixteen in 1925. During this time, the number of cases involving women over the age of consent experienced no significant increase.

The longitudinal pattern of sexual assault cases shows a gradual increase in the late nineteenth century, picking up speed in the 1890s and expanding dramatically in the twentieth century, experiencing a sharp rise in the 1920s, a decline in the 1930s, and a return to high numbers in the 1940s. A conviction rate of just over 60 percent remained in force for forty years, beginning in 1900. The increased conviction rate of 80 percent in the 1940s was somehow linked to a lessening in the sentences issued in that decade, evidenced particularly in a higher percentage of probations and numerous occasions of release from probation to serve in the armed forces during the war. This phenomenon raises the question as to how much sympathy the war generated for young men--a sympathy that translated into more lenient

trea

of

pat

ass

of

per

sim

More

dup

rape

seen

resi

secu

elem

impo

beca

liab

rela

seen

four

sent

for

Ques

treatment for transgressors of rape and rape-related laws.

The patterns of sexual assault cases that emerge from this sample of court activity are made distinct by virtue of their difference from patterns of nonsexual assault cases. The increased emphasis on sexual assault cases in the twentieth century is even more pronounced because of the decreased emphasis on nonsexual assault cases in the same period. Further, the high jump in sex-related assaults in the 1920s is simply not evident in other bodily injury assaults during that decade. Moreover, the lessening of sentences for sex crimes in the 1940s is not duplicated in sentencing for assaults that do not involve sexual abuse.

The factors that inhibited prosecution and conviction in rape and rape-related offenses is evidenced throughout this sample. As will be seen in greater detail in the chapters ahead, proof of victim resistance and use of force by the perpetrator were essential to securing a conviction in forcible rape; in statutory rape, these elements were still considered, but corroborating evidence was also important, and once that was established, the credibility of the victim became another variable on which rested the measure of offender liability. A major component in determining victim credibility was the relationship of the offender to the victim, and in this sample, it is seen that acquaintance rapes outnumbered stranger rapes by about four-to-one. Conviction rates in the two groups are comparable, but the sentencing patterns reveal that much more severe sentences were the norm for stranger rapes. Clearly the credibility of the victim was more questioned in complaints where the offender was an acquaintance; the

poss

circu

sub.e

Prel

conv

gener

analy

expec

treat

aggre

rape

multi

deve

thems

from

conte

indi

perce

each

agent

are s

be co

possibility of consent may have been more easily inferred from circumstances involving prior acquaintance. These issues will be the subject of further scrutiny in the chapters that follow.

Factors involving race appeared in eleven cases in this sample. Preliminary examination shows that black defendants were more readily convicted and received slightly longer sentences than all defendents generally. These cases will be analyzed more closely as they pertain to analyses of the charge-specific cases in the chapters ahead. It is expected they will reveal what may be race-specific aspects of the treatment of sex offenders in this court.

Taken together, the findings presented in this chapter generate an aggregate impression of court proceedings relative to the prosecution of rape cases. Yet, in their entirety they are only the first step in a multi-layered effort to better understand the function of rape law as it developed in this court. The patterns revealed here, provocative in themselves, need to be situated in the social, legal, and moral contexts from which they evolved.

How this court's treatment of sex crimes may be more fully contextualized requires first a closer look at the circumstances of individual cases and the ways in which those circumstances were perceived by the court. The next three chapters review the cases for each charge in order to find out what really mattered to courtroom agents and juries. It will be seen that the analyses in each chapter are structured differently according to the elements that were found to be common to each charge. It is hoped these variations in presentation

will not be confusing to the reader, but will instead be noted as relevant to the substance of the findings. Ultimately, the effort to determine the issues that were of most consequence for each charge will provide a fuller sense of how these rape prosecution patterns were related to larger cultural concerns.

II. LAW AND DISCRETION: EXTRA-EVIDENTIAL FACTORS IN RAPE CASE OUTCOMES

> Numerous victim, defendant, and case characteristics were found to influence jurors' verdicts in the rape trial...the jury maintains a certain degree of discretion and autonomy. To this extent, the jury may disregard the facts in a rape case and rule on the basis of extraneous information.
>
> Hubert Feild and Leigh B. Bienen
> Jurors and Rape 1

> But juries are allies of male defendents and enemies of female complainants for reasons that run deeper than their poor grasp of the law or their predominantly male composition. They are composed of citizens who believe the many myths about rape, and they judge the female according to these myths.
>
> Susan Brownmiller
> Against Our Will: Men, Women and Rape 2

Introduction: Behavior Typifications in Court

In her book-length examination of women, sex, and the law, professor Rosemarie Tong states that "the law has traditionally operated on the assumption that all sexual intercourse is consensual unless proven otherwise--preferably by a show of strenuous resistance on the alleged victim's part". 3 Viewed in that light, the task of the prosecutor in rape cases is to convince the jurors that their assumptions about the willingness of the victim to participate in the alleged sex act may be in error. It has generally been assumed in rape trials that the decision any jury ultimately makes rests less on the actual facts of a

case than it does on legally immaterial circumstances and the way these circumstances are perceived by the jury.

While the findings of individual case studies vary, many of them have demonstrated this idea that a number of factors tangential to the law affect the processing of rape cases. Loh's study, referred to earlier, looked at 445 rape complaints in Washington in the period from 1972 to 1977 and assessed the impact of a 1975 reform rape statute. That statute categorized forced sex offenses according to four degrees of criminal sexual conduct, and more significantly, aimed to eliminate prosecutorial focus on the victim's sexual history and place proof of victim resistance in a context of perceived threats to bodily harm. But Loh found that the new statute made no change on the factors prosecutors still relied on for conviction: use of physical force, corroborative evidence, victim credibility, and race. 4 The relevance of his study to this discussion is its conclusion that extra-evidential factors continue to affect rape trial outcomes, regardless of changes in the law.

In a second study, Feild and Bienen specified the "extra-evidential factors" that affect trial outcomes. Citing the findings of previous jury research literature, their eight-item analysis of the factors most often identified by others to affect jury decision-making in rape trials demonstrated again the contingent nature of rape law. To summarize very briefly, Feild and Bienen found, with comparable results for white and black jurors, that the variables that have had the strongest influence on court rulings have to do with the race of both the defendant and the

victim, the physical attractiveness of the defendant and victim, and the prior sexual experience of the victim. The results pertaining to white jurors are particularly relevant to the present study because the Ingham County jurors were more likely than not to have been white, since the Ingham County population was comprised until the 1940s of so few blacks. [See Table 17. Proportion of Black Defendants to Population.] With white jurors, Field and Bienen found that white victim cases resulted in harsher sentences than black victim cases, regardless of the defendant's race, that sexually experienced victim cases resulted in lighter sentences regardless of the defendant's race, that sexually inexperienced unattractive victim cases resulted in more severe sentences for black defendants than for white defendants, and that precipitory rapes ended in less severe sentences than nonprecipitory rapes (precipitory referring to rapes that were perceived to have been provoked by the woman). Also, attitudes toward rape itself were more influential than juror characteristics, and generally, all jurors treated opposite-race defendants more severely than same-race defendants. 5 Ultimately, Field and Bienen concluded that a combination of juror and case variables are important in studying rape trials.

Acknowledging the force of extra-evidential factors on jury decision-making, University of New Mexico sociologist Gary LaFree goes on to inquire how society and the legal universe understand what constitutes the crime of rape. He asks: "How do legal agents decide that a crime has occurred?" 6 This sociological approach to the study of rape begins with the premise that the definition of a crime is

constructed through social interaction, and in that context "reactions to rape are a window to assumptions about gender relations". Citing numerous studies that demonstrate inconsistencies in the handling of rape cases by police and the criminal justice system, LaFree proposes that legal responses to the crime of rape are conditioned by consciously or unconsciously held social beliefs acquired through social interaction. Using theories of symbolic interaction developed in the 1920s and 1930s, supporters of labeling theory applied interactionism to the study of law in the 1960s, reasoning that legal decisions are based less on actual behavior than on socially constructed definitions of behavior. He uses the term, "typifications", developed by philosopher Alfred Schutz to describe socially constructed definitions of behavior. Schutz, says LaFree, "argues that people process new information by comparing it to previously processed information and uncovering similarities between the two." Thus, LaFree points out, people come to "anticipate certain behavior on the part of a familiar entity" when they encounter it again. 8 Thus, typifications about the behavior of an alleged victim, her sexuality, her past and present associations, her account of the attack, and the characteristics of her alleged assailant become the basis for evaluating her claimed victimization in court.

LaFree studied a set of forced-sex offenses reported to Indianapolis police for three years in the early 1970s, and also a set of 152 forced-sex offenses adjudicated by the Indianapolis courts in 1970, 1973, and 1975, and found that the outcome of cases was substantially dependent on a number of extra-legal circumstances,

supporting the labeling idea that official definitions of crime are indeed based on socially constructed meanings. For example, a major determinant of arrest, prosecution, and trial outcome was victim nonconformity. In other words, if the alleged victim's behavior was such that she did not conform to typifications about women who would not be expected to consent to such a sexual act, her complaint was ignored by the police, rejected by the prosecutor, or resulted in an acquittal for the defendent if the case did go to court.

LaFree related two dissimilar examples of rape trials to illustrate how these typifications can function. In the first case, the victim was a young, unmarried woman who allegedly drank, used drugs, had sexual relations with her boyfriend, and was sexually assaulted by two men who picked her up when she was hitchhiking. Despite the fact that she was reported to have appeared at a nearby house disheveled, hysterical and incoherent following the attack, the jury determined that her accused attackers were not guilty. In a second case, two intruders broke into the home of an Asian-American family, raping both the 35-year old wife, who was also the mother of two children in the home, and her 18-year old niece, who had been living with the family for four years. The assailant was identified by his voice, which was recognized by the family members to be that of the boyfriend of the niece's best friend's sister. On the basis of voice identification alone, tested subsequently on tape with conflicting and questionable results, the jury found the accused guilty and sentenced him to thirty years in the state penitentiary. Referring to the first case, LaFree notes that a good

deal of the testimony, especially in cross examination, was about the victim's life-style and behavior. In the second case, in which in contrast to the first the assault took place in the victim's home, the questions were never raised in court as to whether the victim drank, used drugs or was sexually active. The first victim did not conform to typifications about women who would be thought of as not likely to have consented. Therefore she was perceived as not having been victimized, and her assailants were perceived as not deserving of punishment. 9 This, incidentally, is a theme that will be replayed in the Ingham County cases: in what would become a circular bind for the victim, the more she was perceived to be an unresisting woman, the more intense was the scrutiny of her character, and vice versa.

These observations support the proposition that extralegal factors do have an impact on jury responses to rape cases. In the following analysis of the Ingham County forced-sex offense cases, it will not be my purpose to reiterate the legal or extralegal case characteristics that LaFree and others have found to influence case outcomes. That would indeed be a cumbersome task since findings have varied so much. Nor will it be the purpose of this chapter merely to confirm LaFree's conclusions about the relevance of labeling theory. Rather, I shall use the theoretical framework with which LaFree interprets the Indianapolis data as a given--that rape is a crime that is adjudicated today substantially on the basis of socially constructed assumptions that are extraneous to the legal definition of rape and other forced-sex offense charges.

Applying such a theoretical approach to the Ingham County cases, this study seeks to understand how forced-sex offenses were defined historically--both by law and by custom. Attempting to "read" the cases in this way will result in determining the extra-legal factors that seem to have been influential in the adjudication process. Further, it may be possible to infer what assumptions about women, young girls, men, family roles, sexuality, and morals were operating.

Such speculation runs the risk of imposing present-day connections between action, thought, and subconscious reality onto the consciousness of people whose place and time was far removed from our own. 10 There is also the danger of taking courtroom discourse at its face value. Insofar as courtroom speech may be characterized by rhetorical flourish, reductivism, equivocation, or cynicism, one must be cautious about what one understands it to represent. 11 Particular care in this regard must be exercised in making too-easy inferences from the presentations of the facts constructed so facily by defense attorneys. To expand briefly on this point, Kim Lane Scheppele writes in her review of Susan Estrich's Real Rape that the truth of a rape event is usually "constructed" in the courtroom in an effort to separate fact from fiction. But in the end, she explains, "the jury resolves questions of fact, using its own standards about which version of reality to adopt." 12

Having offered these caveats, I suggest that what LaFree argues--that all rapes are not treated equally by the legal system and that legally irrelevant factors affect case treatment--will hold up historically for the rape cases under study here. I propose that the

Ingham County cases serve as a stunning index of the way forced-sex offenses were socially constructed; and further, that to the extent that they were a measure of broader cultural attitudes, they reveal much about an evolving context of notions about femininity, masculinity, sexuality, and power.

The structure of this analysis is both charge-specific and developmental. The questions it addresses are these: What legal and extralegal factors were common to charges of forcible rape, assault with intent to rape, statutory rape, and indecent liberties? Were those factors the same over time or did they change? Relative to labeling theory, how did those factors influence courtroom processing and outcomes? Finally, what underlying social assumptions did these extralegal case characteristics reflect, and what social assumptions can be said to have conditioned the definition and courtroom treatment of forced-sex offenses?

The present chapter discusses both forcible rape and assault with intent to rape cases. Of the four charges under consideration, these are the only two that deal with victims over the age of consent and thus, are particularly revealing of the courtroom treatment of adult forced-sex offense victims. Assault with intent to rape is a charge that is not age-specific, as will be made clear in that analysis; therefore, victims of that charge range from young children to older adults. Because of that aspect of its nature, the courtroom treatments accorded victims of this charge serve to highlight the differences in prevailing attitudes toward consentable victims and victims whose

consent was legally moot. The chapter that follows this focuses on the statutory rape cases, but excludes incest, which is reserved for a fourth chapter that deals with forced-sex offenses against children. Structuring this analysis according to these distinctions will be seen, I believe, to be of value. For each of the separate charges, there were unique aspects in the court's response that reveal identifiably dissimilar sets of expectations. This charge-specific analysis avoids the danger of blurring those highly informative differences.

I. Forcible Rape: Courtroom Definitions of Nonconsent

1. Extralegal Factors: The Law as a Starting Point

Remembering that the number of forcible rape cases in this sample totaled forty, or 7.4 percent of all forced-sex offenses, one may easily assume that either women of consenting age did not report being raped, or that law enforcement authorities did not make arrests, or that prosecutors were highly reluctant to prosecute these cases. Perhaps all three of these possibilities were operating, and the question then is why the cases that are here made it to the prosecutor's office at all. It will be recalled that Loh and others have maintained that prosecuting attorneys file charges only in cases where there is a high chance of conviction. 13 If this reasoning can be applied historically, what was it about these few cases, only 37.5 percent of which ended in conviction, that made prosecutors reasonably sure a jury would convict? Further, what case elements may have been linked to case outcomes, thus

providing an index to the factors that may have influenced juries?

Twenty cases were selected for study on the basis of their capacity to represent the forcible rape cases that were tried in court and the circumstances that led to guilty verdicts, acquittals, or dismissals. This inquiry takes as its starting point the basic elements of the law. Under Michigan law, the charge in forcible-rape cases was that the defendant did "ravish and carnally know any female of the age of ten years or more [raised to fourteen years in 1887, and to sixteen years in 1897], by force and against her will...and such carnal knowledge shall be deemed complete upon proof of penetration only" [changed to "proof of penetration, however slight" in 1948]. 14 What should be obvious is that the key factor in forcible rape was force, taken to be the sign that the woman resisted the sexual intercourse, and that indeed, she had not consented. The following case descriptions will demonstrate how the presence or absence of victim resistance, as presented and perceived in the courtroom, was linked to trial outcome.

2. Forcible Rape Cases Before 1897

There were only fourteen forcible rape charges brought to court before 1897, all of which occurred before the change in the age of consent from ten years to fourteen (in 1887). The known ages of the victims ranged from twelve to thirty-five, with the majority of them falling between thirteen and sixteen. Except for three cases, the relationships of victim to assailant were such that they violated intra-familial sex taboos. More specifically, the cases of forcible rape prior to the change in the age of consent [to sixteen years] in

1897 were limited primarily to situations of incest with an over-age daughter, niece, or sister-in-law, or to situations of adultery. And, since the persons most likely to file charges were parents or husbands, it would appear that the "wronged" persons included the fathers and husbands of the victims. The impetus for filing a complaint seems to have been due most often to occasions in which the husband learned of his wife's infidelity, or a daughter or sister became pregnant or contracted gonorrhea. There were no cases of forcible rape by a stranger before 1897, which is in keeping with the point made earlier, that law enforcement at that time had not reached the level of efficiency making possible the apprehension of unknown assailants. 15 Further, forcible rapes by strangers may not have been considered worthy of prosecution in the same way that violation of intra-familial sex boundaries was. Finally, to the extent that women usually lived with a husband, father, or brother at this time and were not publicly as visible or available as women would become later, it may be that forcible rapes by family members were more common because of proximity and rapes by strangers or even acquaintances were simply quite rare. Two cases described below illustrate the familial character of rape complaints examined during this time.

On February 22, 1857, Albert Comer was arrested on a charge of having carnal intercourse with his twelve-year-old daughter, Sarah. In examination before the justice of the peace, Sarah testified that her father had come in at 3:00 one afternoon to where she was sitting on a chest. He took her by the shoulder, threw her down on the chest, and

then had "carnal intercourse" with her. She claimed she had "hollered" and resisted, but he had promised her a new dress if she did not tell anyone. The next day she got a new dress, but after about five weeks, she finally told her sister-in-law about the incident and then told her mother. A note in the file indicates that her story was "stated on February 22 in the presence of Albert Comer." 16 This is a very early case in which the records are unfortunately incomplete; no notation of the outcome of this case was made and no information on this defendant exists in the State of Michigan prison files. Even without knowing the outcome, however, it is possible to see in this instance that incestuous sexual intercourse was viewed as a clear violation of forcible rape law. At only twelve years of age, this victim was legally assumed capable of consent, and therefore it was incumbent upon her to convince the court she had resisted.

On January 31, 1873, Charles M. Webb was charged with assault and carnal knowledge of his brother's wife, Betsey. In this case, Betsey's complaint was dropped and the prosecutor addressed a letter to the Court indicating his reasons for "not filing an information": (1) that "the complaining witness and the injured party his wife are both unwilling to proceed further in the case"; and (2) that "I do not think the public interests demand a prosecution under the circumstances against the wishes of the party injured; especially in this case where the matter is a family matter, the defendant being the brother of the complainant". It is important to note that the husband of the injured party is the complainant, and it is at least partly on his authority that the case

against
definit
to her
I
that sa
Because
dropped
circums
this ca
pattern
reluct
he had
during
what th
Witness
on nume
Kitchen
Charlie
Si
may be
that si
testimo
acquitt
notwiths
defendan

against his wife's assailant was dropped. 17 Clearly, the extralegal definition of rape in 1873 allowed that rape of a wife included injury to her husband.

Interestingly, Charles Webb was brought to trial a second time that same year, this time on a two-count charge for rape and bastardy. Because the newborn infant died at birth, the bastardy charge was dropped. The related charge for rape was pursued nonetheless, and the circumstances that unfolded in the ensuing pre-trial examination reveal this case to be one of the three exceptions to the intra-familial pattern of rape cases before 1897. Sarah recounted that she had gone reluctantly for a buggy ride into the woods with Charles. Once there, he had attacked her on the ground. She claimed she had made no outcry during the attack because other boys might come and she did not know what they would do, but she nonetheless fought Charles with her hands. Witnesses contradicted her story saying they had seen Sarah with Charles on numerous occasions "laughing and carrying on on the bed in the kitchen." One woman reported Sarah to have said she "would go with Charlie Webb every chance she got," in defiance of her parents. 18

Since there is no record of the outcome of this case, conclusions may be drawn from it only very tentatively. It seems likely however, that since the rape charge was linked to a bastardy charge, and the testimony was probably perceived by the jury to be conflicting, an acquittal was more likely than a conviction. Sarah's version notwithstanding, the witnessed accounts of her behavior with the defendant may have seemed to indicate her consent. Certainly too, her

pregnancy may have marked her as a woman LaFree would term "nonconforming" to the social expectations for women who were deemed worthy of protection under extra-legal definitions of the law.

In a fourth case, again an intra-familial forced-sex offense, Charles Sitts was charged with having carnal knowledge of his twenty-year old niece one summer night in 1884 when she stayed alone at the house where he was living. In her testimony, Ella stated her Uncle Charles had come into bed with her very early in the morning, held her hands together, and forcing her legs apart, had had intercourse with her. He warned her, "If you tell your folks, I will choke you." The next morning she told her family, whereupon they went to the county court in the village of Mason to make a complaint. In cross-examination, Ella was asked what her intention had been in staying with her uncle. She responded that she had thought her sister Addie would be there and she did not want Addie to stay with their Uncle Charles alone. The reason for her protective action becomes clearer with the defense attorney's next question: "Did you not threaten to have Charley arrested for the same offense two years ago?" Her answer: "I did threaten--my folks thought I had better not." Apparently, a prior experience had taught her what Uncle Charlie's inclinations were.

Much of the testimony served to undermine her claim. There were reportedly no torn clothes, and no blood stains. No one had heard her scream. Her thirteen-year old cousin, Johnny, who had visited her at her Uncle's that evening claimed she did not appear to have been afraid that night, even though she had told him she was. When he saw her the

next morning, he claimed not to have noticed she had been crying. There was testimony in support of Ella to counter these statements. Addie, Ella's sister, claimed to have found Ella trembling at breakfast, and stated "she had been crying for some time when I came in--her eyes were red." Meanwhile, testimony of the arresting officer revealed that Uncle Charles was found hiding under some hay in the barn two days after the complaint was filed. Again, there is no record of the outcome, but a measure of the Court's sympathy in this case may be indicated in that the bond amount for recognizance was comparatively low at $200.00, at a time when most bond amounts were $500.00. 19

This seems a particularly sad case in which a young girl went to her uncle's house to protect her sister Addie from what she feared he might do, remembering all too well what he had done to her once before. The fact that she had threatened to complain before, however, was used by the defense to discredit the truth of her story, in effect directing attention to the possible habitual nature of her unsubstantiated complaints and dismissing the indicated habitual nature of her uncle's assaults. The premise that sustained suspicions of this nature was codified later in a 1912 common law statute referring to statutory rape. Given the Sitts case transcript, such an understanding of the law seems to have been applicable in practice to forcible rape complainants in 1884 as well.

> In a trial for statutory rape, it was error to exclude evidence offered to impeach the prosecutrix and not to show her unchastity, to the effect that she had previously made the same complaint against other men, and then admitted the falsity thereof. People v. Wilson (1912). 20

T

early

men "

prope

fema

viola

Will

rais

thir

Flor

have

had

When

when

baby

char

afte

tal

mea

and

wif

tri

in-

The significance of the Sitts case is that it reveals the court's early suspicion of female persons who might be making complaints against men "habitually", which was taken to mean indiscriminantly and without proper cause. Further, this case of forcible rape of a consentable female illustrates again the pre-1897 judicatory emphasis on intrafamily violation of sexual boundaries.

Of the three cases that were non-familial, the 1889 case against William Cline is perhaps most instructive of why it was necessary to raise the age of consent. Fifteen-year-old Flora German worked for thirty-five-year old Cline as an office employee. In her testimony, Flora spoke of how Cline had been indecent to her, had said she "should have a gentleman friend who was married because unmarried men tell," and had forced her to have intercourse with him on the couch in the office. When she found herself pregnant, Cline gave her money to go to Canada, where she could have the baby; then he would come there and bring the baby home to his wife as an adopted child. Flora determined to bring charges against her assailant, by which measure he deduced she was after his money. It becomes clear in the testimony that Flora was being talked about by the others in the office as having a bad character; meanwhile Cline's wife was "annoying" the defense attorney a great deal and other women in Mason were pleading with him on behalf of Cline's wife. In the end, the charges against Cline were dismissed before a trial could be held. 21

The prosecutor wrote a letter to the court, which is very informative. In his investigations, he discovered that Flora German had

"good female associates" and that there were reports that Cline had had improper relations with her. He was convinced, so he claimed, that Cline "was the chief cause of [Flora's] ruin." He ultimately concluded that if Cline had been before any other justice in Lansing, he would have been held for trial. Thus, Cline was allowed to go free, perhaps on the basis of one justice's opinion, and if the testimony may be credited, probably this justice came to believe the "stories" about Flora German were true. This case reveals a number of things: first, the tendency to believe a respectable businessman overrode any inclination to believe the claim of a young girl against him; second, the situation for a young girl who became pregnant under such circumstances was grim indeed, and in that regard, Flora's victimization was greatly compounded; and third, it demonstrates that in 1889, the age of consent limit of fourteen years eliminated girls of Flora German's age from the protection of the law. It was perhaps one of many such cases that provoked state legislatures to raise the age of consent again in 1897. For Flora, needing to prove nonconsent was a condition of conviction that was impossible to meet.

In her study of rape in eighteenth-century Massachusetts, Barbara Lindemann remarks that "the only cases that would be reported and prosecuted were those in which the community acknowledged that the attacker had no right to the woman sexually." 22 It seems that in late nineteenth-century Ingham County, a similar code of acceptance prevailed with regard to forcible rape. With three exceptions before 1897, authorities pressed charges only when the offender crossed intra-family

sex boundaries, violating his own daughter, or his brother's daughter or wife. Moreover, in only one case, in 1851, did the justice of the peace bind the accused over for trial.

Taken together the variables that seem to have been key to the trial outcomes in forcible rape cases before 1897 constitute a litany of rationales for either excusing the sexual assault, disclaiming its occurrence, or denying fault to the accused. Of all twelve cases before 1897, only one resulted in known conviction, in 1851, and that offender was subsequently pardoned by the governor on the basis of the offender's claim that he had not known he had to file his papers by a certain date. In 1873, the cases against Charles Webb were nolle prossed because the offended woman and her husband dropped charges against the accused, the bastard child conceived from the act of intercourse died, and the question of her resistance remained in doubt because there were witnesses who said she had been involved romantically with the accused. The outcomes in the 1857 case against Albert Comer and the 1884 case against Charles Sitts remain unknown, but it seems likely from the lack of proof of resistance in either case, and from the fact that neither man shows up in any of the Michigan prison records, that both defendants were likely not convicted. The case against William Cline was dropped because there was no way to prove her resistance, a necessary component of successful prosecution when the victim was fifteen and the age of consent was fourteen.

The record of rape cases before 1897 shows that the legal system truly avoided the prospect of convincing a jury that a consenting-age

female, whether she was ten years old or twenty, had been forced to have intercourse against her will. Virtually the only cases that even came before the justice of the peace for examination either involved a socially proscribed injury claimed by the victim's male protector, ie. her father or husband, or were linked by pregnancy to the more provable charge of bastardy. Moreover, the only known case to have gone to trial at all was an 1851 case of incest with a twelve-year old child, who was at that time of consenting age. In that case, the conviction was later overturned by the Michigan Supreme Court. 23 After 1897, the forcible rape cases that came into this court continued to exhibit the need to prove force, but exclusion of all but intra-familial complaints lost its hold.

3. Forcible Rapes after 1897

Of the twenty-six cases of forcible rape tried between 1897 and 1950, fourteen, or 50.0 percent ended in conviction. Nine of these cases came to the court in the 1940s, and the rest were spread out thinly over the previous forty years. Indeed, the rate of forcible rape cases did not rise substantially until the 1930s, during which period there were six cases. Of the total fifteen convictions, seven of them were decided in the 1940s, and two of these were for homosexual rape. 24 Fifteen of the twenty-six forcible rape cases tried between 1897 and 1950 are examined here for factors relating to resistance and corroborative evidence. As will be seen, in no other group of cases is the emphasis on the victim's resistance so boldly pronounced.

The victims in these cases were mostly between sixteen and twenty-five years of age; there were two older women, however, whose ages were not given. These cases were not as dominated by intra-familial relationships, as were those before 1897. In these cases, the relationships of the accused to the victims included five fathers, three employers, three acquaintances, one stranger, one son-in-law, and one ex-husband. Additional general observations may be made by way of introducing these cases. For example, the character of the victim was questioned to discredit her as a witness in nearly every instance. Second, cases in which corroborating evidence apparently contributed to sustaining convictions were not particularly common. Some examples of the few that did were situations in which an identifying card was recovered by the victim from the front seat of the assailant's car, leading to his apprehension and arrest; and in two instances, weapons were recovered, a revolver in 1903 and a knife in 1945. Situations in which corroborative evidence was either not forthcoming or seemed of little consequence were in fact more numerous than those in which such evidence was utilized. In a 1907 case, the victim had contracted gonorrhea from the attack, but this fact was apparently disregarded since the defendant was acquitted in spite it. In a 1919 case, even though the victim's waist (blouse) and clothes were "all tore off" and her hair was full of burdock when she appeared at the police station, the prosecutor nonetheless filed for a nolle prosequi.

The court's sympathy for the victim was evident in a few cases: in one, the defendant was a black, non-local porter and the victim was a

white, overweight, naive seventeen-year old girl and a revolver had been used by the porter to threaten her; in three other such cases, the victim was either crippled, or had had polio as a child and was therefore unable to move very fast, or had lost her right leg as a child and been the object of severe neglect by her father/rapist. (As a point of clarification, some of the forcible rape cases could also be classified as incest but are included here because the daughters were of consenting age.) These were the exceptions, however. For the most part, the overriding sentiment, always evident in at least the cross-examination rhetoric, was to be unsympathetic to the claimed nonconsent of the victim, precluding any show of congeniality or compassion for her in the courtroom.

Proving nonconsent meant proving that the victim had resisted her assailant to the degree required by Michigan common law. The defining precedent on victim resistance had been provided in an 1872 case:

> To warrant a conviction for rape, the jury must be satisfied that the connection was had by force and against the will of the prosecutrix, and that there was the utmost reluctance and resistance, or that her will was overcome by fear of the defendant, and that the terror of his threats was so extreme as to preclude resistance.
> Don Moran v. People. 25

The use of the descriptor "utmost" was reiterated in 1942, but a modest disclaimer was added in 1943.

> Generally, the degree of resistance required to be shown in rape cases is "resistance to the utmost".
> People v. Geddes (1942). 26

> The degree of resistance required to be shown in rape cases is resistance to the utmost, but failure to resist is excused if the will of the prosecutrix was overcome by fear.
> People v. Myers (1943). 27

For the period of this study, the law simply did not allow that the requirement of "resistance to the utmost" might risk serious injury or the threat of death. In direct and cross-examination testimony, complaining witnesses were always asked if they had resisted, many times having to reiterate all the ways they had resisted and to what degree. In a case in which a woman argued that she could not resist because of the manner in which her attacker held her on the floor, the defense attorney responded, "That isn't what I asked. The fact is you did not resist." She replied then, "No." 28 Thus, the victim's claims of nonconsent were challenged with exhaustive questions about her act of resisting or with insinuating questions about her social behaviors and associations, implying that she might be the type of person who would likely not resist.

In the following excerpts of testimony on resistance, the complaining witnesses are prodded about any possible details of their reactions to the onset and duration of the offense. In a 1903 case, seventeen-year old Carmen Rifner was asked:

Q. Before you got up out of the chair, didn't he ask you to let him see your legs and didn't you pull your skirts clear up?
A. No sir. He never asked me that.
Q. Did you take your skirts up at all?
A. No sir.
Q. Not at all?
A. No sir.
Q. You didn't go over to the door at all?
A. I did, and tried to get out but the door was locked and he had the key in his pocket.
Q. Did you tell him to let you out?
A. Yes.
Q. And he would not do it?
A. No.
Q. Then what did you do?

A. I commenced to bawl.
Q. Didn't you scream at all then?
A. Yes sir, I screamed. But he said if I didn't shut up, he would kill me.
Q. And you tried every way you could to keep him from having intercourse with you, did you?
A. Yes sir.
Q. Used all the force it was possible to use?
A. Yes sir. 29

The questions put to Carmen about her resistance to David Harris continued in much the same vein, until finally the prosecuting attorney objected, reminding the court that Harris had had a revolver, absolving the question of Carmen's resistance.

In another example of resistance testimony, twenty-five year old Florence reported that her would-be employer Ora Wiley "took his fist and pounded me in there [her groin] and held my leg down" because "I would not let him do nothing." Ora raped Florence in a wheatfield they were crossing on their way to a house she was going to clean for him. The year was 1919. The defense attorney asked Florence:

Q. Did you at any time cease fighting him off?
A. You mean, did I stop?
Q. Yes.
A. No I was fighting all the time.
Q. About how long did he keep you there, Mrs. Miller?
A. Well I should judge he had me on the ground about an hour fighting with me. 30

Then, in subsequent questioning of Florence by the court:

Q. Did you scream more than once?
A. I must have screamed six or seven times. Every time he took his hand off my mouth I hollered.
Q. As loud as you could?
A. Yes sir.
Q. There was nobody close at the time?
A. I didn't see anybody... 31

The charge against Ora Wiley was <u>nolle prossed</u> at the request of the

prosecuting attorney, who explained to the court that he could not "in honor ask a jury of twelve men to convict the above named defendent of the charge against him." It would seem, the prosecutor's honor rested on an understanding that if no one had seen her resist and no one had heard her screams, twelve men could not be asked to believe her story.

Similar resistance testimony is elicited in 1936 from sixteen-year old Ellabelle, who complained that her stepfather, William Fulton, had had sexual intercourse with her. She reported that Fulton had come home and found her sitting with her boyfriend, whereupon he threw the boyfriend out and then raped her himself. Here the defense attorney linked surrender with desire:

> Q. Do you claim, Ellabelle, that you did everything you could to prevent him from having relations with you?
> A. I did.
> Q. Do you claim it was against your will and without your consent?
> A. (Witness nods her head.)
> Q. At no time, while this was going on, did you surrender to him because you wanted to or because you felt you didn't care?
> A. I did not.
> Q. This is very important. You mean to tell the Court you did everything in your power to prevent it?
> A. I did. 32

The case against William Fulton was nolle prossed on the prosecutor's motion that there was not enough evidence to take the case to court. While ostensibly a forcible rape case, this offense also qualifies as incest. As such, the likely suspicion of the court, often seen in incest cases, may have been to think she was charging her father to protect her boyfriend.

Disproving nonconsent often took the form of insinuating the woman's complicity in the alleged offense. In 1903, Carmen was asked if she did

not make arrangements to meet with David Harris when they separated? When she replied no, the question was rephrased: "When did you make arrangements for him to meet you, where you separated?" Again she insisted that no such arrangements had been made. Her interrogator was still not satisfied. "And didn't you tell him to wait for you, and you would wait for him if you got to the corner first?" he argued. "No sir" she responded. 33

In 1926, the defense attorney cast Myrtle's motives for filing a rape complaint against her father, Ora Collins, into a vengeful light:

Q Your father has scolded you a lot?
A. Yes.
Q. He has threatened to send you to Adrian Reform School?
A. Yes.
Q. Several times?
A. Yes.
Q. Because you were not a good girl?
A. Yes.
Q. Because you were going out that night with a young man?
A. Yes. 34

The possibility that Myrtle was not a good girl, ie. that she was a delinquent girl, was no doubt intended to impress the all-male jury, with the possibility that she was charging her father to get back at him for threatening her, or that her bad character was likely linked to her consent to sex acts with him. The jury apparently believed her testimony, however. Ora Collins was convicted and sentenced to life in prison at Marquette, the highest security prison in the state, a facility reserved primarily for hard core offenders. As will be seen in the chapter on incest, the severity of this sentence was more consistent with incest convictions in general than with convictions for forcible rape.

Each forcible rape case occasioned its own complex of disturbing, often pathetic, and sometimes horrifying human experiences. There are three cases in particular, whose substance compels closer examination of the circumstances that influenced jury decision-making. The first is a 1903 case against David Harris, a black porter who raped a white female traveler after persuading her to walk with him into town from the train depot. The second is a 1907 case against William Cummings for raping his seventeen-year old daughter, Dolly, two weeks before her marriage, a marriage of which her father did not approve. The third is a 1939 case against Edmund Jolls for raping his ex-wife, an offense that occurred in the presence of their three children, at least one of whom reported having lain in his bed crying during the assault. All three of these cases expose in exaggerated relief the extra-evidential issues that affected the decision-making processes of the jury in forcible rape cases.

The case against David Harris received a lot of local press coverage, most likely because the offender was black and the victim was white. 35 The local newspaper generally reported only the most sensational rape cases. Harris was a porter who had engaged seventeen-year old Carmen in conversation at the train depot, persuading her to walk into town with him during her four-hour wait for the next train. He took her to a hotel room where, according to her testimony, her raped her. The key facts in the testimony were first, that he had used a gun to coerce her cooperation once in the hotel room, and second, that a physician attested to Carmen's physical and mental condition,

affirming her opinion that the victim had been raped. The singular aspect of this testimony was that the physician was a woman who did two very anomalous things: she asked to have the courtroom cleared before giving testimony of such an intimate nature, and she stated her belief that the injuries she saw were probably caused by forced sexual intercourse. All the other physicians called upon to testify in these cases were men, none asked to have the courtroom cleared, and all of them hedged on the "possible causes" of whatever vaginal injuries they had treated. Thus the testimony of this lone woman physician stands in marked contrast to the testimony of all other physicians in the sample.

Harris' subsequent trial, conviction, appeal, and release reveal an intriguing set of dynamics. Upon conviction, the defense attorney filed a motion for a new trial, requesting that the guilty verdict be set aside because of a story that the respondent had tried to break out of jail the night of March 10. On March 11, the day the jury deliberated, everyone in town believed he had. Such community hysteria, maintained the defense, had fed the fears and augmented the biases of the jury members at the very moment of their deliberations.

The judge's decision to grant a new trial clearly met with great controversy. He had made this decision in the face of affidavits from jury members who claimed they had been in the police department on their way to the courtroom on March 11, and were deliberately "shielded from any knowledge of the broken bars." There was also an affidavit from James Wallace, who had been in jail with Harris at the time of the supposed jailbreak. Wallace reported that Harris had "lain down and

pretended to be asleep when the police came by and told [him] not to say anything about it or they will send me up for life." 36

Certain things may be concluded from this story. First, there probably was an attempt to break out of jail because of the reported broken bars. Second, the defense attorney must have suspected that call for retrial would lead to dismissal for the very reason that prevailed--the refusal of the victim to endure the entire proceeding again. Third, the judge's action, in combination with the defense attorney's motion, seems to have been playing some kind of conciliatory role to overcome what they perceived to be a racial bias directed against the defendant by the community. Clearly, testimony in the trial had exposed some of the reactions of citizens who had seen Carmen walking with Harris. She reported a drayman had hollered to her from a wagon: "Hey girl, you must think a damn pile of yourself, running around with a black nigger." The defense rhetoric served to repeatedly highlight her naivete in following a black man up to his room: "Didn't he say to you that you were a fool to go up there and fuck that nigger?...Did it occur to you then it was wrong to go up to this colored man's room?" Thus the defense heightened the race issue in the case, drawing great attention to what she should have known better than to do. It must be remembered this was a time of great national tension with regard to the civil rights of black people generally. With all the media attention this case received, my sense is that this judge did not want to be perceived as a racist, nor did the defense attorney want to be perceived as having lost a case against a black defendant on account of any supposed prejudice on his part.

In the end, David Harris pleaded guilty to the lesser charge of assault and battery, the maximum sentence for which was ninety days. Since he had been held in the county jail for the eight-month duration of the trial and appeal process, Harris was now allowed to go free. On September 29, he walked out onto the main street of Mason, presumably ready to resume his life. The State Republican, a long-standing Lansing daily with deep anti-slavery Republican roots in the community, appeared to report on the trial with some sympathy for the defendant. On March 3, 1903, when Harris had first undergone a pre-trial examination, the paper reported he would have to "rest his case with a jury of twelve men," a decision that denied the motion of the prosecutor to quash the information. 37 When the decision on the appeal had been rendered in late September, the State Republican emblazoned the story with a four-part headline:

Liberty for Davis Harris
Pleaded Guilty to Assault and Battery
But Court Decided He Had Had Enough
IN JAIL EIGHT MONTHS
Former Charge Against Negro Dismissed on Prosecutor's Motion 38

Clearly, the prosecutor and jury had accepted the complaint of the victim in this case as true. It may well be their judgement was based on racial considerations, but the defense attorney (who had also been a judge) appears to have been quite determined to resolve this race-specific case without a conviction. As to whether Harris may have been lynched in the weeks following his release, there is no record of any such occurrence in the local paper.

* * *

The reasons the jury acquitted William G. Cummings of rape seem especially related to the impression constructed in cross-examination that Dolly, his seventeen-year old daughter/accuser, did not resist enough. Further, though she claimed that the rape by her father gave her gonorrhea, the symptoms of which appeared within two weeks after the offense and a few days before her marriage, she waited three months from the time of the offense to file a complaint. She explained she had not known it was gonorrhea for all that time because her doctor had told her it was "womb trouble." 39 It should be noted that it was not at all unusual for doctors to withhold a diagnosis of gonorrhea or syphillis from a female patient at this time, often to forestall incriminating her husband, or as in this case, her father. In his history of venereal disease, Allan F. Brandt writes that "doctors argued that to label a patient a venereal carrier inflicted irreparable harm, given the stigma that accompanied these diseases...[or]...that if the nature of a man's infection were fully explained to his spouse, many marriages would be terminated." 40 Thus, it was not surprising that Dolly had been married for three months before she learned of her gonorrhea, and had moved to a city about eighty miles west of her father's home.

Key facts of the testimony include that she did not scream because her father had his hand over her mouth; that she had struggled as much as she could but could not stop him; that she had not told her mother because he said if she did, he would kill her and she believed him; that she had washed the blood stains out of her nightgown without showing it

to her mother; that her father had made sexual advances before, but this was the first time he had penetrated her; and that the first person she told about the rape was her husband when she ultimately learned that she did in fact have gonorrhea. Interestingly, when the defense asked if she would submit to a medical examination, the prosecution objected on the basis that this was "immaterial, irrelevant, insulting, and indecent." The objection was sustained, presumably on the basis that her physician had already testified to her infection, so there was no further need to check for that; also, since married women were expected to have engaged in sexual intercourse, there would have been no purpose served in checking for vaginal penetration. The protestation of the prosecutor, supported by the judge, verbalized what may have been a socially understood value, or what was at least purported to be a value: that to conduct an unnecessary vaginal examination was indecent.

The following portions of Dolly's testimony under cross-examination exhibit the effort of the defense to discredit her claimed resistance.

Q. Didn't you make any effort to stop him?
A. Yes, sir.
Q. When did you make the effort?
A. When he commenced.
Q. You had your feet together?
A. Yes, sir.
Q. How did he get them apart?
A. With his legs.
Q. Couldn't you stop him?
A. No, sir.
Q. Did you change your position in bed any?
A. No, sir.
Q. You stayed as you were?
A. Yes, sir.
Q. On your back?
A. Yes, sir.
Q. You didn't change your position at all?

A. No, sir, I couldn't.
Q. Not from the time he started until he got through?
A. No, sir.
Q. How old are you?
A. 17.
Q. How much do you weigh?
A. I don't know.
Q. Haven't you weighed lately?
A. The last time I was weighed I weighed 96 pounds and a half.
Q. How long ago was that?
A. In August.
Q. Well, you have done work around the house, haven't you?
A. Yes, sir.
Q. Helped outdoors?
A. Not any great amount.
Q. You have been out in the open air?
A. Yes, sir.
Q. And are ordinarily strong?
A. Yes, sir.
Q. Healthy except your sick spells?
A. I have not been real healthy.
Q. Well, except your sick spells you have been up and around?
A. Yes, sir.
Q. And out in the air and done different things helping your father and mother?
A. Yes.
Q. Then there was no physical reason why you could not have resisted your father to your utmost was there?
A. I have been unwell for some time and was very weak and I would have been unable to resist him if I had had my health.
Q. But you did not roll over or change your position at all?
A. No, sir, I couldn't. 41

That jury members would accept a construction of events that portrayed a 96-pound woman able to throw off such an attack by her father begs credulity. On the face of it, it seems that the defense attorney expected the jury to believe this interpretation as it seems he believed it himself. On the other hand, his motives may have been more cynical than that. In planting the seeds of doubt about her resistance, he was trying to break down her credibility as a victim of her father's attack. It may also be he suspected that she was trying to displace the blame for her gonorrhea from her husband onto her father. Given the

social rationale behind the "medical secret" discussed above, the defense attorney may have perceived her desire to protect her husband from blame as a motive for directing a charge against her father.

The jury acquitted William Cummings for rape of his adult daughter, Dolly. Whatever the reasons were, underlying all of these possible grounds for acquittal was the unspoken societal given: that women make up false accusations of rape for reasons that may include getting revenge for some perceived wrong or diverting blame onto an innocent man to protect someone else. Further, since Dolly's complaint was not filed until three months after the offense, and only then after she had learned of her gonorrhea, the belief that genuinely nonconsenting victims would promptly report the attack may have been cause for viewing Dolly's reported attack with suspicion.

* * *

On May 6, 1939, Edmund Jolls showed up unexpectedly at the home of his ex-wife, who had just recently divorced him. The painfully pathetic family dynamic here is characterized by poverty, ignorance, and emotional manipulation, qualities all too often present in the circumstances and relationships in a majority of the cases in the sample. The uniqueness of the case against Edmund Jolls centers on the fact that the offender had once held socially sanctioned, indeed socially mandated, sexual access to the victim, his former wife. Thus, the publicly understood implications of that past relationship, in spite of the divorce, may have been at the root of the prosecutor's request to nolle pros this charge. Bessie, the prosecutrix and former wife,

reported what happened:

> He seemed to be in a sad mood. He said he could not stand it, he was going to commit suicide, he was going to cut his throat... he made the children cry. He turned to Loren [13 years old] and he said "You little shit, when I was your age I was doing a man's work...you take care of the family. You think you can do it? I won't even pay alimony." 42

Bessie recalled that Edmund had wanted something to eat, and that she had protested that he was living on $7.00 a week and that she had only $5.00 for the four of them, so he should go to his own home and eat there. He pleaded "I cannot eat there, I am so broken up. You don't want me to be hungry, do you?" whereupon she fed him three fried eggs and some bread. It was at this point that he grabbed her and said he wanted to have intercourse. When Bessie opened the front door and yelled for help to a boy walking by, Edmund threatened, "Shut up or I will knock you cold." It would seem, from Bessie's report, that this rape was not unlike what Rosemarie Tong describes as typical of rapes by husbands: motivated by hatred or an urge to humiliate, and accompanied by battering. 43

In Bessie's testimony, she stated to prosecuting attorney, Richard Foster, that Edmund had dragged her into the bedroom holding both of her hands and then forced her onto the bed. She admitted she kept a hammer under the bed ever since he once tried to choke her. She recounts that she had filed the complaint in Mason on Sunday, but on Tuesday had returned to see the court officer because "they didn't do anything with him and I didn't feel safe to stay there alone." 44

When the defense attorney cross-examined Bessie, his objective was

to gain sympathy for the defendant, portraying Bessie as the cause of the difficulties at home. He asked why she had sought a divorce and how much money Edmund had given her for expenses and for coal; he noted that Edmund had visited many times before without causing problems, and inevitably converged on the question of her resistance. After a lengthy interrogation as to the manifestations of her resistance, the defense inquired as to Bessie's weight, an issue raised in the Cummings case thirty years earlier. Bessie replied that she weighed ninety pounds; it had earlier been established that Edmund weighed 170. Then, in response to the query, "Did you make an outcry?" the witness justified that she had not: "No, because I saw it wasn't going to do any good." 45

Finally, the decisive issue was raised. A contraceptive jelly had been applied prior the alleged offense taking place, the implication then being that she had consented. Mr. Leighton asked:

> Q. Who said anything about getting this jelly in the first place?
> A. He did.
> Q. Who inserted it?
> A. I did. He made me. He was going to knock me cold.
> Q. Did he use his hands? Did you help him enter?
> A. He did it in the usual fashion. 46

This question led to establishing that the "usual fashion" involved him using his hands, which prompted a question as to why she was not able to get away at that point. Finally, the issue of her possible assistance was raised, again, the inquiries aimed at disproving her claimed resistance.

> Q. Is it not a matter of fact, after he made that statement that night, you said, "If you are bound and determined you might as well. I will go and get something to keep from getting knocked up."
> A. I did not.

Q. Did you take hold of his penis at any time during that time yourself?
A. No, I did not.
Q. To make the entry yourself?
A. I absolutely did not. 47

Following Bessie's very lengthy testimony, her nine-year old son took the witness stand. As was customary for all child witnesses, Carl was asked if he knew what it was to tell the truth. The events that Carl remembered under direct questioning were that his father had visited in the daytime before the night visit, saying he would break the door down if they did not let him in, and that he had seen his father grab his mother and had threatened to rip her robe off if she did not take it off. The child assured the prosecutor that his mother had not told him what to say. Under cross-examination, the defense focused on the mother's role in depriving Carl of time with his father:

Q. You don't see much of [your dad] do you?
A. No.
Q. Your mama doesn't want you to talk to him?
A. No.
Q. She tells you not to talk to him?
A. Yes.
Q. You always liked your daddy when he and your mother got along?
A. Yes. 48

When the older boy, thirteen-year old Loren, took the stand, his story was a replay of Carl's account. The interchange under cross-examination was equally poignant, and just as contrived to portray the child as an innocent victim of the mother's actions against the father.

Q. What did you do when your mother hollered help?
A. I laid in bed and cried.
Q. What did you hear?
A. I heard my dad say, "Do I have to knock you out to get it?
Q. What else?

A. He said he could not stand it anymore.
Q. How did you feel when he said that?
A. I started to cry.
Q. Was your mother crying?
A. She was crying all the time.
.....
Q. Did you cry all the time your dad was there?
A. Yes.
Q. You cried because your dad was going to commit suicide?
A. Because he had mother.
Q. How many times has your mother talked to you about what happened that night?
A. About every day.
Q. Did your mother tell you what to say here today?
A. No.
Q. Did she tell you your dad was not any good?
A. Yes.
Q. Did she tell you not to talk to your dad?
A. Yes. 49

Had a jury been given an opportunity to decide on the guilt or innocence of Edmund Jolls, the issue would not have been whether or not the offense had been committed. Clearly it had. Rather, the issue would have been Edmund's degree of culpability. Could a distraught man, exiled from his home and denied time with his children by a hard-hearted ex-wife, be blamed for wanting the sexual intimacy that had been his "right" as her former husband? Further, could it be reasonably believed she had resisted to the utmost when in fact the use of a contraceptive jelly surely suggested some measure of mutuality?

The prosecuting attorney may have recognized that a jury would have responded to these questions by acquitting Edmund Jolls of the charge of rape. It appears Bessie understood this too. The consequence of the pre-trial examination was that Richard Foster, attorney for the prosecution, filed for <u>nolle prosequi</u>. His request to the court read:

> The complaining witness filed a written request that this cause be dismissed...as a matter of law...there is reasonable doubt as

to the guilt of the respondent upon the offense charged. 50

This was the only case closely related to what we would call spousal rape. It is quite possible Bessie withdrew the charge because she felt guilty or remorseful, as often happens in such situations. It is also possible that the prosecutor convinced her, on the basis of the defense attorney's arguments, that a jury would likely come to view her as consenting, and more, inappropriately vindictive. Whichever, one thing is clear: in Ingham County there were no trials for spousal rape and there were no convictions for rape by a former spouse in this 100-year period of court activity.

4. Review of Forcible Rape Outcomes

A review of selected forcible rape outcomes shows that before 1897, forcible rape law was only applied to cases of intra-familial rape, and that even in those instances, the law functioned as pretense. There were no known convictions, save the one in 1851 that was subsequently overturned by the Michigan Supreme Court on appeal. The criteria that required these victims of ten years or more (until 1887) to resist "to the utmost" (after 1872) made proving forcible rape highly problematic. Proof of such resistance rested on perception alone and perception rested on assumptions about any female's physical ability to resist as well as her willingness not to resist. Thus, whether stranger or acquaintance rapes simply were not reported or were ignored by authorities, the observable fact is that authorities were reluctant to press charges except in intra-familial rape cases, for which assumptions about appropriate sexual access held more authority than

assumptions about consent. In other words, if the legal system would not intervene to protect females from sexual victimization generally, it was at least inclined to intervene on behalf of protecting the sanctity of the family-based social order. Yet, even this inclination was tentative, for as we have seen, prosecutors nearly always filed for dismissals rather than set cases up for anticipated jury acquittal.

After 1897, there was certainly more variability in the cases heard by the court, beginning with a case against a young black man, the very first stranger-rape case handled by this court. The cases that were nolle prossed, that is, the cases in which prosecutors perceived in advance that a jury would not convict, were all characterized by offenses for which there was no third-party witness or agreed-upon sufficient proof of resistance. This was true in the cases against Ora Wiley (1919), Ray Kaufman (1927), William Fulton (1936), and Edmund Jolls (1939). 51 The passage of time does not seem to have altered this pattern.

The cases with "not guilty" verdicts were decided by juries, as opposed to being pre-empted by prosecutors. A jury decided William Cummings (1907) was not guilty because of the three-month delay in reporting and because of insufficient proof of resistance. A jury also returned a not guilty verdict to Lansing Wanamaker (1946), a major contributing factor having been the lack of proof of sufficient resistance. In this particular case, the extra-legal factors present were that the victim was a non-conforming female: she was older (50 years) and divorced, she had met the accused in a bar, and she had

been drinking beer with him at the bar prior to the assault. 52 In all of the cases that cite insufficient resistance, it is taken as a given that the victim's statement attesting to her resistance was, in itself, not sufficient to verify her resistance.

The cases that ended in guilty verdicts are indicators of some factors that drew consensus from both prosecutors and juries as being at least sufficient, if not necessary, for conviction. In the David Harris case (1903), the defendant was a member of a race considered inferior, he had used a gun that was produced as corroborative evidence against him, and he had been seen publicly with his white victim, an unmistakable anomaly in 1903. The case against William Slomka (1909) was another situation of incest and we already know from the pre-1897 cases that violations of intra-familial sex boundaries were perceived worthy of courtroom censure. Slomka was sentenced to a prison term of ten to twenty years, a decidedly severe sentence indicating a great change from the benign pre-1897 response with which the court met incestuous offenses. Indeed, a later incestuous case resulted in even harsher censure when Ora Collins was sentenced in 1927 to life in prison at Marquette for engaging in ongoing incest with his by then consenting-age daughter. 53

There were a few non-familial cases in which identifiable factors had the effect of overriding pre-existing assumptions about females' willingness to consent or their inherent capacity to resist. The guilty verdict in the case against Charles Bankey (1930) seems to have been linked to two pieces of evidence: first, a card with the offender's

correct name on it, which was picked up by the victim from the front seat of his car, thus making identification of him possible; and second, signs of the victim's resistance, such as tears in her clothing and visible bruises on her body. Perhaps more important than either of these factors, however, was the circumstance that her attacker had invited her in the presence of her mother to ride with him to his house on the basis of a ruse that he would employ her to do housework. The jury here was clearly willing to accept that she was not complicit in the offense that subsequently took place in his car. Bankey, like Collins three years earlier, was sentenced to life in prison. 54

In two later cases, the circumstances were such that all assumptions about resistance were rendered powerless. Guilty verdicts were awarded in one case in which the victim was crippled and unable to move (1943), and in another when the victim had had polio and was unable to walk (1945). These two cases demonstrate the easy consensus with which the court assigned blame when none dared question the victim's resistance. 55 The sentences in these two cases, however, reflect a remarkably reduced level of punishment: both defendants were sentenced to prison terms of two and a half to ten years, the judge's assessment of the "particularly vicious" nature of one of the defendants notwithstanding. This tempering of sentence severity seems to have been symptomatic of the period rather than a measure of the court's sympathy to these two defendants. Following a 1946 conviction for incest with a consenting-age daughter (who had lost her right leg below the knee as a child and had been the object of long-term parental

neglect), Clifford Letts was sentenced to a term of four to ten years. 56 It will be remembered that sentence severity was in general greatly lessened by the early to mid-1940s and these examples illustrate that trend. They also prove the courtroom condemnation accorded offenders who attacked physically incapacitated victims.

Thus, after 1897, cases ending in conviction were primarily either situations of ongoing incest that had begun before the daughter reached the age of consent (sixteen as of 1897), or were situations in which responsibility for consent was obviated by the unmistakable physical bodily limitations of the victim. There was officially, in the matter of forcible rape, no allowance made for whatever natural physical limitations of strength or weight women might bear relative to men. Susan Estrich's contemporary critique of the resistance criteria in rape prosecutions argues that the court's reliance on physical force to gain a conviction is problematic because it does not account for the fact that "less force is required to overcome most women than men." 57 Certainly it may be said that this essential fact went unacknowledged in the Ingham County forcible rape cases.

If these cases of forcible rape consistently demonstrate one overrriding feature, it is that observable signs of strenuous resistance were necessary to prove nonconsent. This premise lay within the legal definition of rape and seems to have been rooted in a fundamental typification about the act of forcibly raping a consenting-age female person. This typification may have run something like this: if a consenting-age female person was unwilling to have intercourse, she was

physically capable of resisting the assault to the point where there would be observable signs of her resistance. In the absence of such signs, deeper typifications functioned to presume she was willing to engage in intercourse quite readily, that she would use this complaint in retribution for some perceived personal wrong, that she might name an offender falsely to protect the real attacker, or that she would charge rape to protect her own possibly promiscuous reputation. These conclusions are rather easily drawn, I believe; what is less clear is why these typifications operated as pervasively as they did.

On a fundamental level, "agreed-upon" signs of resistance were by law a necessary requirement for conviction. Yet, considerations beyond the legal definition appear, for all the world, to have been founded on a further premise that lay outside this legal requirement. That premise maintained that observable signs of strenuous resistance, while necessary, were not always sufficient to prove nonconsent. Broadly speaking, a consenting-age female person had to prove more than resistance; at a fundamental level, she had to prove she had rejected the sexuality of a man whose sexuality was, in society's view, appropriately worthy of her rejection. Thus, what we have seen happening in this court, from its nineteenth-century exclusive focus on intra-familial attackers to its mid-twentieth century consideration of non-familial attackers as well, is an evolution in who the court was willing to view as a legitimately "refuse-able" sex partner for a given complaining witness.

I suggest it is from this perspective that the typifications

relative to consent begin to make more sense. For example, in the 1919 case against Ora Wiley, the victim's appearance was observed by police as disheveled and bruised immediately following her being attacked in an open field by her prospective employer. From this, one would expect there was sufficient evidence to substantiate her claim of resistance. The fact that the jury did not accept such a claim suggests they were unwilling to view her as someone who would unequivocably and justifiably reject her attacker. She was, after all, married, which by definition, meant she had already had sexual intercourse. Further, as a married woman, she was seeking employment outside the home, and was allowing herself to be in public with a man other than her husband. Given all of that, it was too easy to suspect this non-conforming woman was using this accusation to distract attention from her own possible infidelity. Such reasoning applies in reverse to cases sustaining a conviction. In the 1930 case against Charles Bankey, the victim's torn clothing and bruises were taken to be further legitimate signs of resistance since other factors pointed to her legitimate refusal of Bankey's advances. Her mother could attest to the fact that she had gone away with him believing his pretext to be true--that he wanted to hire her to do housework.

Thus, the resistance standard, articulated in the law, was in practice subjected to an entire array of socially derived qualifiers that circumscribed the definition of believable resistance. On the face of it, notions of what females might falsely say set up a framework of belief about victims' deceitful capabilities. Taking a longer look at

this begins to suggest the larger reality--that a female's refusal of a man's sexuality was the unacceptable force that fueled the male-dominated legal system's reluctance to take her at her word.

II. Assault with Intent to Rape: A Case Against What Might Have Been

1. Extra-Legal Factors and Perceptions of Intent

Two factors were inherent in the charge of assault with intent to rape. The first was that there was no need to prove actual penetration; but only the intent to penetrate. The second was that the age of the victim was unspecified; therefore the victims in these cases varied in age from young children to elderly women. The effect of needing to prove intent to penetrate was to require proof that the accused had at least exposed his "privates", as genitalia were referred to in courtroom discourse throughout the sample, as well as those of his victim, or was caught in the act of preparing to rape her. The effect of having no legal age restriction was to necessitate the extra-legal application of age of consent distinctions. In other words, by making no comment with regard to age, the law purported to make no age distinction; but in fact, this law functioned quite differently depending on the age of the victim. A clue to the impact of age is seen in the disproportionately high number of victims who were under the age of consent and in the greatly disparate rates of conviction. Specifically, there were a total of fifty-nine cases in which victims were below consenting age; the conviction rate for this group was 75.0 percent. By contrast, there

were only twenty-one cases with victims at consenting age or above, and the conviction rate for these cases was 42.1 percent. [See Table 19. Assault with Intent: Age of Victim and Outcome of Case.] Thus, there were nearly three times as many under-age victims as there were victims of consenting age, and the conviction rate for the former was almost twice that of the latter. These statistics seem to be an unmistakable indication of the greater protection accorded victims under the age of consent as opposed to those of consenting age.

The most common characteristic of the assault narratives in these cases was that the intended rape was not accomplished because of some resistance on the part of the victim. Usually the victim had fled or had created enough of a disturbance to attract the attention of a third party. These "escape" scenarios occasioned two consequences. First, the victim's resistance was more likely to be taken for granted in court, especially if her resistance had resulted in bringing a witness to the scene of the assault. Second, these unexpected witnesses were often able to apprehend assailants who might otherwise have escaped the authorities because they were strangers. Thus, the percentage of stranger-assailants in this group of cases was exceptionally high in comparison to the number of stranger assaults for the entire sample. To be exact, twenty-four of the seventy-four assault with intent cases, or 32.4 percent, can be identified as stranger assaults. It may be recalled that for all cases, the number of known stranger assaults was only fifty out of 544, or 9.2 percent. It would seem then, that the heavy concentration of stranger assailants in this group can be

attributed to the high number of witnesses who appeared on the scene and interrupted the crime.

This leads to yet another insight about this charge. It is plausible, given the number of witnesses who did appear, that these cases represent situations in which the assault was spontaneous in nature. Since there had not been much advance planning, the assailants were more likely to be caught by unpredictable developments, such as the appearance of third parties, the observance of neighbors, or the unexpectedly vehement reaction of their victims. The heavy concentration of stranger assailants in this category offers a striking contrast to the predominance of acquaintance and intra-familial assailants in the categories of forcible rape and statutory rape. Thus this charge may present the scenarios most responsible for contributing to the myth that rapists are usually strangers who attack unknown women in unexpected places.

What may seem obvious is that the successful resistance of some victims contributed to the necessity for this charge. The testimony of these victims was often an elaborate account of how they got away, or how the appearance of a witness served to interrupt the completion of the offense. As will be seen in the following case summaries, however, resistance alone did not assure a conviction. The age of the victim affected the court's response to the degree that victims over the age of consent, in spite of their resistance, often encountered the same measures of scrutiny that victims of forcible rape did. Observing the distinctions made with regard to age seems to be the most appropriate

way to structure this examination and may be the most productive as well, beginning with examples of cases in which the victims were over the age of consent.

2. Attempted Rape of Victims over the Age of Consent

Late at night on August 4, 1881, John Britten came home to the hotel he managed with his wife, Jane. Going upstairs, he found Ira Winslow coming away from the room he shared with his wife. When Britten confronted them both, Jane told her husband that Ira had appeared unexpectedly and had attempted to have intercourse with her. John's response was to question Ira as to whether his wife had been guilty of any crime. Then he asked Jane whether she had given Ira any occasion or reason to come up, and if this was not a "put up job" between the two of them. Ira assured John that Jane was "as clear from him" (Ira) as his wife was from Mr. Britten. In other words, Jane had done no more with Ira than Mr. Britten had done with Winslow's wife, which was presumably nothing. Ira then made reference to money he had in two area banks, proposing to "straighten it all up" in the morning. According to Jane's testimony, John had indignantly told Ira that he did not want his wealth, and although poor, he could work for his living. Jane's story was that Ira had come in just as she was undressing for the night, that she had told him she would "holler" if he did not leave the room, but that she had not screamed because she had been paralyzed with fright. They had "tussled for about three or four minutes" with the light burning and the door open, he had had an emission with his trousers on

but unbuttoned, he had "wiped his person" with his handkerchief, and then left, encountering Jane's husband coming up the stairs as he was going down. 58

Jane's contention was that Ira had sought her out against her wishes. But there were questions to be answered. Why had she gone for a buggy ride with Winslow to Lansing from Williamston Township a few days earlier? When he had met her at the Hudson House one day, how had he known she would be there? What did she do with hotel patrons when she drove them in a wagon, unaccompanied by her husband, to their business destinations? There were questions too about her two previous marriages. How long had she been divorced before she married John Britten? Had there been an existing relationship with Mr. Britten at the time of her divorce? And, as to the night of the alleged offense, how had Winslow known her husband would be away? Why had he arrived and left in his stocking feet, carrying his boots? Fundamentally, had there been a relationship between her and Mr. Winslow prior to this alleged attack? Jane Britten insisted Winslow's attentions were not by her consent and that she had resisted his advances the night of October 4. The jury doubted the truth of her account. On December 6, 1881, the Lansing Republican Triweekly reported in an obscure notice of court doings that the Ingham County Circuit Court had found Ira Winslow not guilty of assault with attempt to rape. 59

What assumptions was the jury inclined to make about Jane Britten? They knew this was a woman whose efforts to help her husband run a hotel required that she occasionally transport hotel patrons alone. Further,

testimony revealed that Winslow had arrived coincidentally at another hotel at the same time she had brought a patron there. Jane's version was that Ira had been following her around; the defense attorney created a version in which prior arrangements had been made between them. The question for the court to consider hinged on whether she was unlawfully attacked against her will or whether she was complicit in an adulterous affair with a wealthy, socially prominent man. The jury members apparently believed the latter was true, based on assumptions they may have held about women who had been divorced, women who were seen in public with men not their husbands, women who did not scream when a man entered their bedroom, and men who were well-to-do and socially prominent. Jane Britten was, in LaFree's terms, a nonconforming woman--but just as importantly, Winslow was a conforming man. It would seem from this case that a nonconforming woman could not accuse a conforming man of forcing himself on her, expect society to believe her, and put him in jail.

In another case involving a married woman, Flossie Sampson claimed to have been assaulted by her employer, James Terrill, who owned a greenhouse. In her testimony, she stated that on May 23, 1929, Flossie was planting asters with James sitting in a chair nearby, when he tried to pull her onto his lap. When she told him to behave himself, he responded explicitly, saying "I would just like to shove it into you about seven inches and then push you another inch." She reminded him that she didn't do that kind of business, that he had a nice woman, and that she had a man. He argued that his woman "did not like it" [having

sexual intercourse]. Before long, he pushed her back onto the bench, putting his weight on her, undoing his pants, and taking his penis out. In the preliminary examination, the defense attorney was skeptical of her claimed resistance:

> Q. And he raised your skirt while in that position, and attempted to pull down your bloomers?
> A. Yes, he did.
> Q. Is that correct?
> A. Yes, sir.
> Q. What were you doing during this time?
> A. I was trying to get loose from him?
> Q. You were trying to get loose from him?
> A. Yes, and I was talking to him?
> Q. And do you tell me that there is a woman on earth in the position you have testified to here that couldn't have gotten away, if she had tried to? 60

In addition to throwing doubt on her claimed nonconsent, the defense attorney questioned her motives for filing the charge. Conjuring up associations about previous sexual encounters with employers, he asked why she had changed jobs several times in the past. Suggesting she was insincere in her stated fear of Mr. Terrill, he asked why she had continued to work for him after he had made earlier suggestive remarks to her. Raising the suspicion that she had conspired with her husband to extort money from Mr. Terrill, he charged that she and her husband had contrived this entire affair thinking it would be worth about $5000.00 before they got through with Terrill. Flossie answered that her motive to continue working was to help support her husband's children by a previous marriage, because he was not earning enough. She adamantly denied the accusation of extortion, confessing she had overcome her initial reluctance to filing a complaint because, as she phrased it, "anybody...that runs a business like Mr. Terrill, that is

hiring young girls, ought to be taken care of." The prosecutor must have decided that a jury would not agree, based on Flossie's word, that Mr. Terrill should be "taken care of." On January 14, 1930, he filed a motion for nolle prosequi, saying there was "insufficient evidence to warrant submitting [the case] to a jury." 61

The cases against Ira Winslow and James Terrill have marked similarities. In both situations, the victims were adult, married women. Both worked outside the home for pay and associated publicly with men other than their husbands. Both had been married previously to other men. And in both situations, the accused was a man of financial means and social position, so that he might be willing to pay his accuser to drop the charge. Indeed, we know that Winslow made such an offer in 1881, and in 1929, the defense at least introduced the suspicion that Flossie had hoped for such an offer from Terrill. Clearly the period of time in which each offense occurred had less to do with bringing such a notion to bear upon court proceedings than did the socio-economic status of the defendant. No thoughts, or even suspicions of extortion were raised when defendants were not in positions of power or economic stability. In both cases, it was fairly easy for legal agents (the jury for Winslow and the prosecutor for Terrill) to doubt the reliability of the victim's complaint. The combinations of circumstances, as described here, seem to have precluded a belief that the victim could justly accuse the well-respected defendant.

One should not conclude from these two cases, however, that the marriage status of the victim precluded eventual conviction. In the case described next, the victim's being married worked to the defendant's disadvantage. On February 16, 1932, the prosecuting attorney stood up and read the two charges filed against Charles Weller. Weller had waived the pre-trial examination, a decision that was often a prelude to conviction in the circuit court. And, indeed, he was found guilty of both charges, the first being "assault with intent to commit the crime of rape upon a female person", and the second being "assault with intent to commit the crime of rape upon a woman, being the wife of Edgar Cole, being a married woman." 62

What is immediately remarkable in the codification of this charge is the perpetration of an assault against the wife of a named husband. Reference was made in the complaint to the law by which this charge was drawn. The wording of this law appears to have embraced almost any situation-specific assault contingency. It read:

> Sec. 87. Assault with intent to commit felony, not otherwise punished--Any person who shall assault another, with intent to commit...any other felony, the punishment of which assault is not otherwise in this act prescribed, shall be guilty of a felony... 63

Other married women had been victims before this, but in no other case had the charge so explicitly articulated the implicit association of the victim's husband with her injury. There is no mistaking that the injury done to Frances as a person was taken by the prosecutor and by Frances' husband to be legally separate from the injury done to Frances as Edgar Cole's wife. They were conveniently able to use Section 87 of

the assault laws to clarify what seemed a necessary part of the charge.

What did the articulation of this second charge mean? May one assume that Edgar Cole perceived himself to have been injured by virtue of the fact that the victim was his wife? Did the fact that Frances was married function to extend the violation of her person to include her husband? How did the fact of her marriage act to socially redefine the boundaries of her sexual accessibility? Did her status as the wife of another man make the sexual violation of her person more egregious, or simply more illicit? These questions raise a number of important issues, for which there can now be no definitive answers. Despite such unresolved conjecture, it is possible to see that, in this case at least, the crime of raping a married woman carried the possibility of being defined on a basis quite distinct from the injury it inherently inflicted on the woman.

Fundamental to this conclusion was the socially understood imperative that a woman's husband had sole sexual access to her. This state of affairs could work for her benefit if the alleged sex act was seen as more egregious; it could undermine perceptions of her victimization if the act was seen as more illicit. Here, the offensiveness of Charles Weller's attempt to rape Frances was exacerbated legally and extra-legally by the fact that she was married. Yet it would be hasty to conclude that Weller's conviction was based solely on his attempted violation of another man's wife. We already know that being married offered no guarantee of sympathy for the victim. 64 An indication of what underlay the jury's decision may be

found in the judge's statement to prison authorities at Jackson. From this statement we learn that Weller was married, had no children of his own, and had been previously convicted of illegal possession of liquor and of being drunk; he had also inflicted bodily injuries on his wife at least two or three times, but she had refused to make a complaint every time. 65 Thus, when Charles Weller entered Jackson prison on February 16, 1932, his culpability as a would-be rapist was augmented by virtue of his transgressions against the written laws and the social expectations defining a husband's proper relationship to his wife. Weller was readily perceived as someone capable of assault with intent to rape; further, he was perceived as a brute, worthy this victim's rejection.

Two additional cases represent the use of this law to protect consenting-age victims who were under twenty and not married. In one case, the victim was a sixteen-year old high school student, and in the other, she was an eighteen-year old single woman who had met the defendant at a tavern.

On the night of November 12, 1938, William Bockbrader spotted sixteen-year old Hattie Burger walking alone across an unlighted baseball field on her way home from a school event. He left his car and began walking toward her. When Hattie saw him following her, she tried to run, but fell down, at which point he grabbed her and fell on top of her. As she got up and tried to run back toward the school, he grabbed her again and proceeded to thrust his hand up her dress. Hattie struggled and screamed, which attracted the attention of a man nearby.

This third party ran up and thus prevented William Bockbrader from completing his intended rape of Hattie. 66

This case is important for what is said and not said. Relative to the point made earlier about victims who resisted and thus somehow prevented the rape from taking place, Hattie's resistance was never questioned by either of the attorneys nor was the fact of the assault. The reason seems obvious: there was a male witness. From the standpoint of the law, this meant that Hattie's nonconsent was never doubted. Therefore all the personal associations and habits of behavior that might have otherwise been linked to the character of a sexually consenting woman were never mentioned in the examination. Hattie was never asked if she went to dances, disobeyed her father, had a drink, or met her assailant in a bar. Instead, the questions asked were aimed at measuring two things: her accuracy in perceiving that William had intended to rape her, and her ability to correctly identify the assailant from her brief encounter with him in the dark.

In cross-examining Hattie, the defense attorney was able to establish that her assailant had lurched toward her as if he was drunk and that, yes, she had smelled some liquor on his breath. Therefore, reasoned the defense, was it not possible that this would-be assailant had merely been confused and fallen on her? Further, since he had not struck her, and since she had been screaming so as not to hear whether he had said anything to her, might she have assumed too much? Hattie assured him that Bockbrader had grabbed her and had not merely fallen on her, and that he had put his hand up under her dress higher than her

knee. Then she was asked if she had only identified him via his clothes, whereupon she responded that no, she had identified him by his forehead and hair too. 67

The trial in Circuit Court was held on January 9, 1939. Bockbrader had pleaded "not guilty" to the charge, but the jury was inclined to believe he was lying. On January 19, William Bockbrader walked into Jackson Prison to begin a seven-and-a-half to ten year term of confinement. His impulsive, ill-conceived attempt to rape high school student Hattie Marie could not be rationalized in the minds of the jurors as anything other than what it had been perceived to be by the victim herself. Her resistance had been sufficient enough to attract a third party--a male witness whose sudden appearance stopped the offense before it was accomplished. Had she not been able to resist enough to stop it herself, if a witness had not been so conveniently nearby, Hattie would likely have been forcibly raped. Since she was sixteen years old at the time, the assumption might have been made in court, had the offender been apprehended and charged, that she was a consentable woman. The social typifications that existed for women of that category would likely have been in operation in the courtroom. From what has been shown about such cases, her account may not have been so easily believed, and the process of eliciting testimony would have been quite different.

In another case in which the victim was a consenting-age teen-age girl, the situation of the offense greatly differed from the Bockbrader attack in an open baseball field, and in that regard, the outcome

differed too. In 1930, William Alford offered to give eighteen-year old Vivian a ride home from the Oak Park Tavern, where they had both been dancing. According to Vivian's testimony in court, they left the tavern at 3:00 a.m., but Alford did not take her directly home. He stopped the car in a field and started to put his hand under her dress, whereupon she jumped out of the car and he chased after her. Having caught up to her easily, he pulled her down, clearly intent on having sexual intercourse with her. She fought him madly and bit his cheek, but when he pinched her leg she had to let go. As she explained it, "I had to let go...a man usually has more grip than a woman anyway." When she started fighting him with her hands, she recounted, "he raised back and hit me in the nose, just as hard as he could...and I put my hands up to my face and he struck me several times with his fist...my nose is still sore and I have trouble with teeth now, in front." Vivian told how she had finally gotten away from her assailant, crying out her vow to call the police, to which Alford fired back: "I don't give a damn!" She knocked at a house and was able to get directions from the person who answered; unfortunately her confused state of mind at the time made it impossible to later locate this person who had been a witness to the blood on her face. 68

In cross-examination, attempts were made to embarrass her with repeated references to the undergarments she had worn the night of the alleged offense:

Q. But that girdle doesn't come down over your private parts.
A. No
Q. And this garment is the only thing between your private parts

and the earth, as I understand it. Is that right?
A. Yes
Q. Here seems to be a little strap, I guess you would call it, across there from one side of this step-in to the other. Was that on the front side?
A. I will show you how they go (takes the garment and holds it up) That's the way it goes, yes; this is the front. The seam goes in the back.
Q. This is the front.
A. Yes. That strap goes underneath, here.
Q. That passes between your legs?
A. Yes.
Q. Oh, yes. That little strap that's on here passed between your legs.
A. Yes.
Q. And the step-ins surround your limbs, each of them, on the outside.
A. Yes. 69

Further questioning focused on how many times she had been to dances (she had been to two others), how many drinks she had had (she confessed she had had two drinks), and what she remembered of the route he had traveled that night. In this portion of the examination, the defense attorney deliberately tried to confuse her about the street names, ostensibly in an attempt to establish her inebriated state of mind at the time of the offense. If she could not remember where she was going at the time, she probably was confused about the details of the offense, and should even be held accountable for letting herself get into such a situation. Finally, the defense attorney asked her if she had been aware of a similar case tried in Mason, insinuating she had borrowed details of her story from the news reports in that case. She retorted that, of course, she had not done that. (My records do not show such a case being tried in Mason.) In the end, the charges against Alford were nolle prossed on the basis that there was "insufficient evidence to obtain a conviction for the charge in the warrant and

complaint". 70

Was Alford's attack on Vivian any less blameworthy than was Bockbrader's attack on Hattie? Common sense would say no. But, by stating there was "insufficient evidence" to convict Alford, the prosecutor was referring to the lack of a third party witness and to the behavior of the complaining witness: she had been drinking and dancing with the accused in a tavern. Such activities still served as reminders of women's movement into "the nighttime culture of commercialized pleasure--from the dance halls...to the sexual liaisons of unmarried couples", as D'Emilio and Freedman characterize single women's new participation in the public sphere in the early decades of the twentieth century. 71 Such a woman, who would willingly place herself in a potentially immoral circumstance, could not legitimately accuse William Alford of rape and expect a jury to put him in prison.

Thus, we have seen that the charge of assault with intent to rape, when made by women of consenting age, led to acquittal or dismissal for many of the same reasons that accompanied such an outcome for the charge of forcible rape. If there was no witness and if the victim was perceived to be a non-conforming woman, the alleged offense was either doubted or was taken to be no offense at all. A non-conforming woman was simply assumed to be lying or exaggerating, and in either case, was taken to be a willing participant. In the 42.1 percent of consenting-age cases where convictions were obtained, the victim was conforming, the defendant was socially displeasing or offensive, or there was a

witness. Did these factors hold true for cases with with underage victims as well? It will be remembered that the latter group of cases ended in conviction nearly twice as often as did those with consenting age victims. The following examples of cases with under-age victims illustrate the factors that most affected outcomes in these situations.

3. Attempted Rape of Victims under the Age of Consent

In Henry Elliott's case in 1886 the factors that constituted proof of his intent to rape eight-year old Kate Wirth were that his pants were unbuttoned, and that a physician verified the assault, reporting that the "parts seemed to have been unnaturally strained at some time." Those were the most immediate relevant facts. Other aspects of this case are that Henry practically incriminated himself by declaring to the arresting officer that he "would not do to [the victim] what was said anymore than to his own child." He offered this in his own defense before the officer had stated the charge against him. 72

In Kate's testimony, she described how she "lived above her daddy's business," that she had known Henry Elliott for some time. She stated that he was a father of two babies, that there was a feed barn nearby, and that he had twice opened his pants and pulled her up to him while in the barn. When he asked her to go to the barn a third time, she refused. Then one day, while upstairs in the Elliotts' house, he held her so tight it hurt, and then had put his hand inside her drawers and up inside her. When questioned in court about why she had been up there with Mr. Elliott in the first place, she replied that she had gone up

there to help put their little boy's shoes on since Mrs. Elliott was gone. Under cross-examination, Katie assured the court that no one had told her what to say. The jury declared Henry Elliott guilty and he was sentenced to three years in Jackson prison. Notably, there were only two convictions for the nine sexual offenses tried in this court in the decade of the 1880s, so Henry's sentence to three years in prison must be seen as a rare win for the prosecution at this time.

What factors served Kate so well? First the fact that she was so young and had been accosted on three separate occasions must have impressed the jury with her vulnerability. Further, the most severe incident had happened when she was doing something of a care-taking nature for the Elliott's child, perhaps suggesting she was a person of responsibility. The accepted understanding about responsible young girls may have been that they could be trusted to tell the truth.

There was a postscript to this case. Following its resolution, a jury member filed an affidavit saying he was not satisfied with the verdict. The State Republican, (once the Lansing Republican) reported on Saturday, November 12, 1886:

> The case of assault with intent to rape, of which Henry Elliott has been convicted, took a sensational whirl Friday night when Attorney Osborn announced that he should move for a new trial this morning. It leaked out upon the street that one of the jurors would make an affidavit to the effect that the verdict of guilty was obtained by misrepresentations in the jury room. 73

The evidence behind this unexpected turn of events is seen in the case file. There were in fact four affidavits. The first was from jury member Jerry C. Gallup, who reported not being satisfied with the verdict and wanting a new trial. The second affidavit, filed on

December 20, was from Alpheus Madden who had heard a juryman--Herman Johnson--speaking to someone about the trial outside on the street, saying, "He's as guilty as a dog. They ought to string him up--they will find him guilty, they can't do anything else." The third affidavit, filed the same day as the second, was from Edward Marple, confirming that he had had the "said conversation with Herman Johnson on the sidewalk on Michigan Avenue near Washington Avenue," an area near the capitol building and the courthouse in Lansing. A fourth affidavit, filed on January 8, 1887, was from the ill-famed Herman Johnson, swearing that the reports about such a conversation were untrue. The motion for a new trial was denied. 74

The effect of this post-trial controversy should not be lost in the recounting of this case. From the State Republican article cited above, it is clear that the possibility of reopening this case excited much consternation:

> When the rumor reached the ear of the father of the injured girl, he boiled over with indignation, and announced to Sheriff McKernan that Elliott should never have a new trial. Had it not been for Constable Maier, he said, he WOULD HAVE SHOT ELLIOTT full of holes long ago. There were implied threats of lynching made at North Lansing, and during the evening Elliott was hastily removed from the lock-up there and placed in the up-town jail. 75

The father of the young victim, Kate, was a key person in this case. As Kate's protector, it was he who signed the complaint. It was his responsibility and right to seek retribution for the injury suffered by his daughter. Moreover, at the root of this familial relationship may have been a socially accepted assumption that served to help secure jury censure of Henry Elliott. He had violated a little girl; but

equally important, he had violated another man's daughter.

In the the case against Merle Zerba, fourteen-year old Valeta had been on a first date with the brother of a man who lived across the street from her home. She went with him to the theatre on the evening of July 22, 1936, and after leaving the theatre at 11:30 p.m., Zerba parked the car and asked Valeta to get out of the car with him and have a beer. She replied that she wanted to go home. He then tried to kiss her several times and pulled up her dress. She got into the back seat to get away from him, but he followed after her, forcing her to have relations with him. Finally, she struck his face and broke his glasses. Her testimony was somewhat confusing as to whether there had been penetration or not, but it appears that when she reminded him she was only fourteen, he swore, turned on the light, and released his hold on her. Eventually she got out of the car and walked down the road; he followed her with the car and tried to get her to get back inside. By this time he was, according to her, not acting as though he was entirely rational:

> A. When I refused he picked me up and forced me into the car--he murmured or mentioned something, I don't recall just how he said it--about trying to do it over again and maybe I would like it, and I was so disgusted I shouted something...and climbed out the other side.
> Q. You got in one side of the car and climbed out--
> A. Yes. ...I know he came around the side and started to struggle with me again, and tried to get me in the car, and that made me more angry than before and I dropped my pocket book on purpose--
> Q. What?
> A. I dropped my pocket book and he went to pick it up and he let go of me and I picked it up myself and started to run...Not very long afterwards he went by me in the car. 76

On December 23, 1936, four months after Valeta had first filed the

complaint for rape, the prosecutor read aloud the information to Merle Zerba in Circuit Court, charging him with assault with intent to rape, a lesser charge than what had originally been made, because of the confusion over penetration in the preliminary examination. Merle pleaded guilty, that is, he was probably advised by his attorney to plead guilty, and was sentenced to three years of probation with the requirement to pay court fees of $50.00. This sentence was comparatively light, which seems most likely to have been due to the fact that the victim was on a date with the offender when the offense occurred, suggesting she was with him voluntarily and may have indicated in some way her willingness to engage in sexual intercourse. Further, this sentence was handed down in 1936, the threshold of a period in which sentences for sex offenses in general became less severe. That there was a conviction at all was due in part to the fact that Valeta was under the age of consent and was aided possibly by the fact that she was noticeably more articulate, and thus perceived more intelligent than other complainants. In that regard, she may have been more readily believed; moreover, her rejection of the sexuality of a rude, foppish young man may have been seen as more acceptably legitimate.

The Elliott and Zerba cases illustrate the relative ease with which convictions were obtained when victims were under the age of consent. A 1912 case against Charles Davis, however, reveals one of the problems the court encountered with very young child victims. Their fear of providing testimony occasionally precluded the possibility of pursuing

the charge. In 1912, ten-year old Goldie became hysterical at the pre-trial examination and withdrew the charges she had made against her father; the prosecutor thus wrote, "she cannot be induced to talk except that she denies in whole the allegations formerly made by her." On this account, the criminal charges against Charles Davis were dropped, and the jury never got to hear about how Davis had used a husking peg to rape his daughter. 77

4. Attempted Rape Involving Non-White Defendants

In 1930, a case involving a black defendant and a Syrian victim reveals something of the race-related assumptions that clearly infused the actions of the court. In this case, forty-three year old Jack Burns had induced thirteen-year old Juanita to ride with him to his house on the promise that he would give her a new car. Juanita stated, "I was afraid, but I didn't know what to do and I wanted the car he was going to get me...he promised me the Ford car at least ten or twelve times." 78 Interestingly, the discourse in this case concentrated on the naivete of the victim in much the same way that it did in the mixed-race case against David Harris in 1903.

Q. When you started upstairs with him did you believe in your mind that he was going to do what he attempted to do?
A. No, I didn't know what he was going to do.
Q. You had heard of men and women having intercourse with each other?
A. Yes.
Q. You knew what that meant?
A. Yes.
Q. It didn't enter your head that was what he wanted to do?
A. No. I didn't know what he was going to do. 79

In the closing moments of the hearing, the defense attorney argued:

> May it please The Court, on this testimony alone here there is conflict. She doesn't know where she was and she tells a story here which appears to have been manufactured. There is one thing outstanding in this testimony--the fact that he promised her a Ford car. As a matter of fact, that's about all she can remember and she has worked it around with this story. This is not sufficient testimony on which this man should be bound on such a serious charge as this. 80

In a gesture of form that was virtually universal, the defense moved to dismiss the case. But Juanita's confusion notwithstanding, the jury believed her account of the assault. The "serious charge" brought against Jack Burns resulted in a conviction, and his sentence of seven-and-a-half to fifteen years in prison was among the most severe for this charge. It seems that the significant factors leading to such an outcome were the defendant's age relative to that of the victim and his race relative to that of the dominant society. Thus, on at least two counts, this defendant was considered unequivocally out of the bounds of social acceptability in his alleged attentions to this very naive adolescent girl, both of which made her more readily believeable than he. The judge in this case wrote to prison authorities:

> Jack Burns, colored, is forty-three years old, married, and his wife lives in New York...He has several times been arrested for investigation but never convicted...He attempted to entice some little Syrian girl into his automobile by giving her candy...He then offered her a Ford car if she would come home with him... The testimony showed that...he pushed her on the bed, pulled down her bloomers and was in the act of intercourse when some one called at the door and he desisted. The testimony was convincing and the jury found him guilty. Afterwards, I had a long talk with the girl and her mother and was convinced that she was telling the truth. He will probably give no trouble in prison but we just don't want him outside. 81

Again, what made one victim's story more "convincing" than another's seems to have had a lot to do with courtroom perceptions of

the individuals involved. If Jack Burns had been eighteen or twenty and white, if Juanita had been sixteen instead of thirteen, one can easily imagine that the jury may not have found her story so believable. At the very least, it seems unlikely that a younger white male would have received as severe a penalty as Burns received. Moreover, another aspect to consider is whether Burns might have been judged less severely had his victim been black. In their history of American sexual behavior, John D'Emilio and Estelle Freedman point out that historically,

> the disposition of rape cases depended strongly upon the status of both the victim and the assailant... men of higher social standing...were less likely to be brought to trial for rape or attempted rape, while lower-class and nonwhite men accused of rape could expect harsher treatment by the courts... The harshest penalties for sexual assault applied to blacks who attacked white women. 82

While is it inappropriate to make a generalization on the basis of the Jack Burns case alone, his punishment offers an example that surely fits the pattern others have discovered with regard to the legal system's treatment of nonwhite defendants: they have historically fared worse in court than white defendants, in particular in black defendant/white victim cases. 83

5. Assault with Intent to Rape: A Review of the Outcomes

Looking first at a few simple statistics, it is important to note that the entire sample of seventy-six assault with intent to rape cases, there were only three known jury acquittals: one in the 1870s, one in the 1890s, and one in the 1920s. By contrast, there were fifty known

jury convictions, thirteen dismissals, and ten unknown outcomes. It seems prosecutors rarely took risky cases in this category to court; this is especially apparent when comparing the 3.9 percent jury acquittals with the 17.1 percent cases nolle prossed by the prosecutor. Further, it seems that when prosecutors did take a case to a jury, the ensuing conviction was almost predictable; this is borne out in a comparison of the 3.9 percent acquittal rate with the 65.8 percent conviction rate. Still, it is important to remember how these percentages break down relative to the ages of the victims. Again, for cases with victims of consenting age, the conviction rate was only 42.1 percent; for cases with victims below consenting age, the conviction rate was only 75 percent. Thus, we know that by almost a two-to-one margin, the offenders of victims under the age of consent were more likely to be deemed blameworthy.

These defendants who attacked victims under the age of consent were not only more often convicted, they also suffered more severe penalties than did offenders of consenting-age victims. Again, these conviction rates and sentence patterns are a indication that victims under the age of consent were more readily protectable, and those who were over the age of consent were not so quickly viewed as worthy of protection. The latter were questioned on a number of issues, usually aimed at exposing their suspected complicity, ulterior motives, or immoral behavior before the assault. A review of case conditions reveals some of the factors by which defendants were either convicted, acquitted, or dismissed; as these conditions demonstrate, very distinct patterns become clear

relative to the age of the victim.

An examination of the cases with consenting-age victims in which convictions were not obtained, reveals that at least four of these victims were married. Thus, being married was no guarantor of greater protection for the victim. Indeed, the condition of being married simply shifted the usual suspicion of the court from the woman's suspected promiscuity to her possible infidelity. This was seen with Jane Britten in the 1881 case against Ira Winslow and with Gladys Smith in a 1941 case that was not explicitly discussed, against LeRay Ellerbrook. 81 Britten was suspected of being involved romantically with Winslow, and Smith was thought to have solicited Ellerbrook's attentions prior to the alleged offense because they had been seen together socially with other friends on other occasions. In the case against James Terrill, the suspicion was raised that the victim, Flossie Sampson, had conspired with her husband to make the charge in an effort to extort money from the accused, who was Flossie's employer. This is not to say that the state of being married automatically precluded conviction of these victims' assailants. It is just that, with the exception of Charles Weller, no defendant was seen as more guilty because the victim was married. 85 Two additional features characterize these cases in which consenting-age victims received no court sympathy. One is seen in the 1930 case against William Alford, in which the victim had been drinking and dancing with the defendant prior to the assault. Another is seen in two cases in which the defendents were men of financial means, occupational position, and social stability. In

such cases, the defendant was either acquitted or the charges were nolle prossed. 86 The conclusion that one may draw from these cases involving consenting-age victims is similar to the observation made in cases of forcible rape: the conditions accompanying acquittal or nolle prosequi seem to point to the ever ready assumption that the women making these charges were lying.

The factors that had the effect of overriding this ready assumption about consenting-age victims can be identified in cases ending in conviction beginning in 1930. Before that, the only such conviction (in 1903) was a case in which the defendant waived his right to a pre-trial examination, so there was no transcript in the file by which to ascertain the details of the case. In the 1930 case against Martin Root, the defendant tried to compel the victim to go away with him in his car. His sentence was for five to ten years in prison. 87 In the 1934 case against Floyd Ferley, the defendant had attempted to rape his mother, after being goaded by his neighbors; he was described by the judge as a "moron" and sentenced to three to ten years in prison. In 1935, three Michigan Agricultural College students were charged with the attempted rape of a seventeen-year old girl; the circumstance was such that they became witnesses to each other's crime, and two who were found guilty were sentenced to five-year periods of probation. 88 Their student status may have saved them from receiving prison term sentences.

In the cases against William Bockbrader (1938), William Nichols (1940), and Lawrence Gingras (1944), the victim's ability to attract the attention of a witness made it possible to find them guilty. 89 The

Gingras case in particular may be contrasted to the Alford case of 1930 on the issue of victim behavior. In both of these cases, the victim had been drinking with the defendant at a tavern prior to the offense. In 1930, Alford's case was nolle prossed; there had been no witness. In 1944, Gingras was found guilty by a jury; here the victim's screams had attracted the neighbors. Still, Gingras' sentence was for only two and a half to ten years, a considerable contrast to the sentence of seven and a half to ten years given to William Bockbrader only eight years before.

The differences in these two outcomes highlight assumptions that may have been assigned to a victim who was a high school student being attacked by a stranger versus assumptions assigned to a victim who had been drinking with her prospective assailant prior to the offense. Clearly, those assumptions about the victim affected the degree of blame assigned to the defendant. Finally, in one curious case against Charles Barrett (1941), the offender impulsively attacked a young woman on the street late at night. In this case, he pleaded guilty and expressed his regret that it had happened; the judge noted that the defendant's parents were of "fine breeding" and admonished the young offender to appreciate the fact that his parents had solicited leniency from the court. The "leniency" manifested itself in a sentence of two to ten years in prison, the lightest prison sentence for offenders of consenting-age victims for this charge.

Thus, for consenting-age victims, convictions were simply not obtained if there was no witness. Once guilt was established via a

witness, sentences varied depending on the blameworthiness of the defendant and the perceived protection-worthiness of the victim. The fact that he may have been a "moron" or drunk added to his guilt as a would-be rapist; the fact that he was from a family of "fine breeding" ameliorated his offense. For victims, there seems to have been some measure of how "worthy" they were of protection. If a victim was walking home from a high school function, she was "innocent" and therefore more worthy of protection by the law. A victim who had been drinking was "not innocent" in the same way and therefore she was seen as less worthy of protection. In spite of these plainly obvious differences, the even more obvious fact is that both victims suffered the exact same offense. The unmistakable conclusion must be drawn that the court defined on the basis of its own discretion the viability of the respective offenses relative to all those "other" factors discussed above. It was a discretion rooted in social assumptions about men, women, status, and traditional values. Like victims of forcible rape, consenting-age victims of attempted rape had to "qualify" as victims who could legitimately, by virtue of their social status and sexual innocence, reject the advances of a man who was perceived as publicly worthy of their rejection, usually by virtue of his socially unacceptable characteristics that were unrelated to the offense itself.

As you may remember, the conviction rate for offenders of under-age victims was nearly double that for offenders of consenting-age victims, which is the surest indication of the court's greater sympathy for under-age victims. Individual case conditions reveal how that

sympathy was played out. In 1886, Henry Elliott was sentenced to three years in prison, largely it seems, on the basis of a physician's testimony as to the victim's "strained parts" and on the word of the eight-year old victim herself, in spite of the fact that there does not appear to have been anyone who actually saw the offense take place. 90 In other cases, the unexpected appearance of a witness did count for the surety of conviction. In 1927, Earl Ostrander attempted to rape his twelve-year old daughter as she lay sleeping in the back seat of his car while he worked the night shift at the local brick factory. He was compelled to desist when his activities roused his son, who had been sleeping in the front seat unbeknownst to him. Ostrander received a sentence of eighteen months to ten years in prison. 91 In 1939, when John Sullivan broke into the bathroom window of an adjoining apartment at 1:00 a.m. and attempted to rape twelve-year old Mary Neller, her outcries awakened her grandparents, who then were able to identify Sullivan. Sullivan was sentenced to five to ten years in prison. 92 And when Mitchell Narducci attempted to force nine-year old Betty Mae Gay to have intercourse with him near a low-lying bridge in 1947, she did not get away until he had torn off all of her clothes. She raced home, stopping only to cover herself with two branches from a shrub. Fifteen witnesses testified to having seen her, and Narducci was sentenced to three to ten years in prison. 93

An eleven-year old boy figured as the key third-party witness in what was perhaps one of the most heinous cases in this group. In the 1928 case against George Murphy, this offender apparently attacked a

seven-year old girl near the site of a dump pile; she had recently been released from a tuberculosis hospital so was not well. The judge described the offense in these words:

> He...attempted to rape her succeeding in part. Afterwards he did other acts of indecency and degeneracy with her and then went away. The girl was ill in bed for some time and of course has not yet recovered from the shock. 94

Murphy was caught because he made the mistake of returning to the scene of the crime a few days later, where a boy who had been with the little girl recognized him, and the victim's father got the police to arrest him. No one had to convince a jury of Murphy's guilt; he pleaded guilty and was sentenced to twenty to forty years in the state prison at Marquette. The extreme severity of this sentence reached far beyond the limits defined by law as appropriate for this crime. There was no additional charge cited on the information beside the one for "intent to carnally know", but it seems clear the court was censuring something it considered much more serious than that. No doubt the unspecified "acts of degeneracy" were responsible for what the court believed required an additional thirty years in prison.

Undesirable defendant characteristics, as articulated by the judges in their statements to prison authorities, seem to have played a role in the sentences that were handed down to convicted offenders. Clarence Hills, sentenced in 1914 to a term of five to ten years for attempted rape of fourteen-year old Gladice Costigan, was described as having a "prior history of bad behavior." Indeed, the judge recommended that Clarence serve the maximum of ten years, an unprecedented recommendation for this court. The prison records for Jackson prison indicate Hills

was not released until 1924, a full ten years later, per the 1914 recommendation. 95 George Murphy's severe sentence, discussed above, may have also been conditioned by his past history of having stolen ten cars and having spent evenings at a spot where he could watch "men and women engage in petting parties which eventuate in immoral conduct." The judge who wrote those words about Murphy described him in 1928 as "undoubtedly sub-normal mentally and degenerate morally." Again, Murphy's sentence, at twenty to forty years, was the most severe of all in this group. 96 Elmer Bravender, sentenced in 1935 to nine and a half to ten years in prison for attempted rape of an eight-year old girl, was assessed by the judge to be "feeble-minded" and showing "no regret or shame". 97

Thus it seems three features emerge as being the most common attributes of these cases in which offenders were convicted of attempting to rape female persons under the age of consent. First, there was the element of a witness who could at least identify the assailant, if not apprehend him. Second, the often severe injury done to the victim, readily recognizable because of her lack of prior sexual experience and because of the emotional trauma she experienced, enhanced her believability. Third, in the absence of needing to establish character flaws in the victims, as was done so routinely with those of consenting-age, the most obvious factor that captured the attention of the court was the deviant character of the offenders. These things seem to have been related to finding alleged offenders guilty and to determining just punishment.

Two cases that did not end in conviction show case elements that may have contributed to the defendant's eventual release. In 1896, a jury found seventy-year old Henry Johnson not guilty of the attempted rape of ten-year old Elsie Dacoms. Her testimony told how Henry had locked himself with her and another young girl in a bedroom where he tried to rape them both. When he was finished, he wiped them both between their legs with his handkerchief, warning them not to tell anyone or he would kill them. Two weeks later, the two girls revealed what had happened; Elsie's testimony suggests there was more than an attempted rape. She stated: "Mr. Johnson hurt me when he was on top of me and had his thing in me...and I cried." Elsie was questioned as to whether she was reciting what someone else told her to say, and that suspicion, along with the two-week delay in telling of the assault, may account for the jury's decision. Henry Johnson was found not guilty of attempted rape on January 25, 1897. 98

In the last example, the 1912 charge against Charles Davis for assaulting his daughter, ten-year old Goldia, was nolle prossed. Briefly mentioned earlier, this more detailed examination reveals how the testimony of a young child witness could impede the chances of obtaining a conviction. The excerpt below begins to demonstrate something of the poignant tragedy of such cases:

Q. What did he do with the round thing he took out of his pants?
A. He put it between my legs and pushed hard.
Q. Did it hurt you?
A. Yes.
Q. Did you cry?
A. Yes.
Q. What did he say?

A. He said be gritty and everything would be all right.
Q. And then did he still push hard some more?
A. Yes.
.....
Q. Who did you tell about it?
A. Nobody.
Q. Did you tell your sister Neva?
A. I told her Mama found my panties on the floor next morning all blood.
Q. Didn't you tell her what your papa did to you?
A. I guess she knew...
Q. What makes you think she did.
A. Because I guess he served her that way when she was little.
Q. Did she tell you that?
A. Yes. 99

The apparent tragedy of this case may be inferred from the eventual withdrawal of testimony by both Goldia and her sister, Neva. When asked about an earlier statement to her husband that she had been raped by her father with a husking peg, Neva lamely claimed she did not now remember her father doing it, that such an incident must have "slipped her mind." Further, Neva claimed not to remember ever talking with her sister about the entire matter. It appears someone influenced Neva, or both girls, to squelch the truth about their father. In the prosecutor's request for a nolle prosequi, the prosecutor wrote:

> That the said [Golden] Pauline Davis the child with whom the liberties are alleged to have been taken becomes hysterical when questioned regarding the matter and cannot be induced to talk except that she denies in whole the allegations formerly made by her.
> For the reason above set forth together with the fact that no other testimony is obtainable which can be introduced tending to prove the respondent's guilt until said Pauline Davis shall have testified to the same, this request is respectfully made. [Dated April 4, 1912.] 100

Who was trying to protect the father? The missing person, the one who first found the "panties on the floor all blood," was the mother. It is not implausible to assume that she worked to protect her husband

and the viability of her family by discouraging her daughters from revealing the "family secret." 101 This is an important matter that will receive further attention in the chapter on incest, but for the point that needs to be made here, the identity of the person who silenced these daughters is moot. Rather, the issue of emphasis here is the prosecutor's willingness to accept the emotional withdrawal of testimony by a very young primary witness and the evasive disclaimers of the corroborating witness as a reasonable basis for dropping the case. Whether out of ignorance or pragmatic expedience, these behaviors were not taken as the signs of an entangling, pathological, and sexually abusive family situation enlightened hindsight suggests they were. The prosecutor did not act on any such insight, nor did the judge, who granted the nolle prosequi. Golden Pauline remained undefended and her father's "sexual integrity" preserved.

Conclusion

Cases of assault with intent to rape showed less courtroom emphasis on the resistance of the victim when she was very young, or when a witness appeared. The cases in which consent was questioned remain confined to situations involving consenting-age victims or to situations involving a prior relationship between the victim and her assailant. Every case in which consent was doubted coincided with questions as to the victim's character.

Significantly, almost one-third of the assault with intent to rape cases were perpetrated by strangers, showing the highly spontaneous

nature of this particular offense. This statistic also coincides with the fact that if stranger assailants were apprehended at all, it was usually during the commission of the act, as when third parties interrupted. The importance of this variable is doubly underscored when one notes that, of the cases in this group perpetrated by strangers, 91.6 percent ended in conviction. If it can be assumed that most of these strangers were apprehended because of the interjection of a witness/rescuer onto the scene of the crime, then one begins to grasp the overwhelming value outside witnesses played in the obtaining of convictions. This insight serves as well to put the supposed credibility of stranger assaults in a different light. The historically higher conviction rate for stranger-assailants has generally been attributed to an understanding that these situations were least likely to involve a consenting victim. The higher conviction rate for stanger assailants may also be due, as shown in these Ingham County cases, to the fact that a stranger-assailant's presence in court was possible solely because a third-party witness saw him perpetrate the crime.

Overall, these cases reveal a majority of victims under the age of consent, which says that assailants of young girls were either more prevalent or that complaints against them were taken more seriously. It is particularly apparent that the conviction rate for assailants of victims under sixteen years was higher in the 1920s at 64.3 percent than it was for assailants of victims over sixteen years, at 20 percent, for the same decade. While the conviction rate for assailants of victims over the age of consent remains high in the 1930s (85.7 percent) and in

the 1940s (100 percent), the disparity between conviction rates for assailants of underage versus overage victims in the 1930s and 1940s is not so marked. Thus, the 1920s emerges ostensibly as a time of heightened concern for the protection of underage females from sexual assault.

In summary, the charge of assault with intent to rape can be seen as a barometer of the factors that the court found useful for conviction in virtually all crimes of a sexual nature. This charge uniquely makes no legal distinction for the age of the victim, but as can be seen in the foregoing discussion, extra-legal considerations relative to victim age came to bear on the outcomes of these cases, often reflecting the assumptions for age already codified in the charges of forcible rape and statutory rape. Such assumptions, when identified, point to the typifications which served to define the crime of assault with intent to rape.

The fact that juries were more willing to convict when the victim was young and seen as defenseless suggests that grown women were considered less vulnerable to attack or were reasoned as more likely to participate in sexual activity willingly. The fact that men of position or authority were easily acquitted, as in the cases of Ira Winslow in 1881, William Cline in 1889, and James Terrill in 1929, suggests that the community was very reluctant to consider men who were part of mainstream society capable of rape, or to consider them worthy of punishment. Conversely, the fact that men who were mentally subnormal or socially deviant, as in the cases of Clarence Hills in 1914, Earl

Ostrander in 1927, and Floyd Ferley in 1934, were so easily convicted suggests that men who were outside the mainstream and lacking in social respectability and economic worth were more likely to be considered capable of rape and thus more legitimately punishable.

Finally, the fact that convictions were more easily had, or that sentences were at least more severe, in cases where there was a third witness points to the very pervasive cynicism accorded the primary accounts of the victims themselves. Again, as was found with forcible rape, the assumptions about character appear to be manifestations of an exercise in building rationalizations. Unless presented with an incontrovertible set of circumstances, the truth of which could not be re-constructed in any other way, the "guilt" of any given would-be rapist was perceived in the same way as the "guilt" of any given rapist: through a lens that exaggerated the sexual vulnerability of men and denied the sexual indefensibility of women.

This chapter opened with a theory for understanding the extra-legal factors that appear to have been of such consequence in the adjudication of forced-sex offenses. The theoretical construct that views extra-legal case influences as an index to social assumptions that serve to define a crime has up to now been applied to cases of forcible rape and assault with intent to rape. The findings of this work do indeed substantiate notions of the impact of extra-legal factors and do also provide some clues to the social assumptions that directed the construction of the courtroom proceedings. What is important to recognize is that generally these assumptions functioned

unselfconsiously as the backdrop against which culture-bound concerns were sincerely raised. For instance, the desire to protect young girls from sexual attack asumed rightly that they were vulnerable. Further, the need to examine a woman's accusation was vital to the fair prosecution of the defendant, for to send an innocent man to prison on the basis of a false accusation was the ultimate horror the court was bound to avoid.

On the other hand, there was another level at which assumptions were utilized consciously, and even exploited cynically, to create caricatures of culture-threatening, non-conforming women and culture-upholding, conforming men. The thing that made it possible to believe a young girl's two accusations against her uncle were false instead of legitimate could only have been rooted in a framework of belief that assumed a young girl would be that irresponsible and vindictive. Similarly, Flora German's victimization at the hands of her employer was made to look like he was the unsuspecting victim of her scheming selfish ends; Dolly Cummings was seen to be casting the blame for her gonorrhea onto her father, an accusation made to appear as though it was brought on by her need to protect her new husband from blame; Bessie Jolls complaint against her ex-husband's attack was made to look as though she had victimized him, unfairly keeping him away from his children and denying him access to the home they had once shared; Jane Britten's late-night assailant was made out to be a paramour she had invited up to her room; Flossie's attack by her employer at the greenhouse was made to portray her as a scheming, greedy employee.

In each of these situations, the female accuser did not meet culturally prescribed notions of what was a conforming woman; she did not fit the norm for a properly subservient woman. The fact that she dared break with the cultural mandate for submissiveness to men made her an open target to a kind of malign attack in court that would never have been considered appropriate or good manners in any other circumstances.

Beneath the readily transparent social expectations that figured so importantly in these cases, there lay at a deeper level a gender-based imperative that both necessitated and magnified the use of socially-derived expectations to adjudicate sex crimes. This imperative was driven by the need to protect male sexuality from unwarranted female attack; in practical terms, it meant protecting legitimate male sexuality from nonlegitimate female rejection. To this end, the court manipulated social assumptions in ways that were all too often unrestrained and pernicious. The effect of such a practice was to ensure one thing: sex crimes would remain defined on middle-class, white male terms.

III. STATUTORY RAPE: NOT A LAW TO PROTECT PROSTITUTES

> Of course, the purpose of this law is to protect the chastity of children under the age of sixteen...I don't think the law was ever intended to protect prostitutes or anyone of that kind. They bring a complaining witness in here who admits she has had intercourse with four men and charge each man with statutory rape. It would seem to me there should be some line of demarkation somewhere...
>
> Statement of a defense attorney, 1926 1

> I understand my son is there in jail for rape I can't understand. When he was such a good boy at home... you know the nature of some girls these days. They can get boys or men in trouble and then they laugh about it. I don't believe he is guilty of such crime, so please don't keep him in prison.
>
> Excerpt of a letter to an Ingham County judge from a defendant's mother, 1943 2

Introduction: A Rationale for the Age of Consent

In her discussion of the groups that advocated reform in the later decades of the nineteenth century, Barbara Epstein points out the social crisis by which there was a "preoccupation on the part of popular movements with questions of family and sexual morality." 3 It was in this period, it will be recalled, that the legislature of the State of Michigan raised the age of consent in 1887, making it unlawful to have sex with any female person under the age of fourteen, and in 1895 raising the age to under sixteen. 4 Such legislative action was by no means limited to Michigan; indeed, similar action was taken in thirty-two states, all of which had long-standing statutes that maintained the age of consent at an incomprehensibly low level of ten

years (seven years in Delaware, twelve years in Kentucky, Louisiana, Mississippi, and West Virginia). 5 Thus Michigan may be seen as having participated in a progressive impulse that was remarkable in David Pivar's words for its "scope" and "popularity".

The question that is of importance for this study is why this widespread initiative was taken--or more precisely, to what was it a reaction? Previously it had been generally accepted that the act of sexual intercourse with a female past the age of ten (or twelve) was unlawful only if she refused. This age limit may appear absurd to us now, but seemed reasonable then on the basis of a popular conception that young females would naturally refuse and that therefore the existing law protected them. If that was so, I would suggest that the new law was not instituted to protect young girls from unwanted sexual attack, since the old law was regarded as already capable of doing that. From the standpoint of protecting adolescent girls from forced sexual intercourse, the legislative change that made having sexual intercourse with a young girl unlawful, regardless of whether she was willing or not, was in fact a legal modification that represented a far greater shift in public thinking.

What may be surprising is that the motivations to make sexual intercourse with any adolescent female illegal appear not to have been linked to the child protection movement, which was more concerned with placing abandoned children in asylums and apprenticeships, wiping out the employment of children as performers, or investigating baby farms for infanticide practices. 6 Rather, the motivation to raise the age of

consent was more directly part of the "social purity" movement's desire to discourage young males from engaging adolescent females in premature sexual intercourse, because such an experience was believed to be a prelude to a young girl's becoming a prostitute. 7 As was noted, this movement was highly successful: most states did in fact change their rape laws to accommodate the "social purity" rationale. Another very powerful factor, however, may have provided the motivation for prosecuting men who engaged in sexual activity with adolescent girls, one based more on a pragmatic and self-protective rationale than on any moral or ideological crusade. The significant event that gave the courts public support for prosecuting such men may well have been the scientific discovery in the early 1890s of the long-term lethal effects of venereal disease.

In his description of the effect this discovery had on early Victorians, John C. Burnham writes:

> Syphilis had long been known as a dangerous disease. Generally those afflicted knew that they had it and took treatment until the obvious symptoms disappeared. The other major venereal disease, gonorrhea, was regarded as little dangerous as a bad cold. Both maladies were considered by early Victorians to be the result of immorality, and there was widespread opinion that God utilized these diseases to punish sin. As a result, sympathy for those affected was rare. ...[Then] medical technology brought to light horrifying facts about these illnesses. Syphilis had complications that no one had suspected; it lay behind major diseases of every organ...[and] a grisly form of mental illness that caused "almost mortal terror" among physicians... Gonorrhea also turned out to be a dangerous and deadly infection, the cause of diseases the nature of which medical authorities had heretofore not guessed. 8

Burnham states that the alarm among physicians became especially acute when they realized that the long-term victims of these venereal

diseases were the wives and children of men who "took advantage of the double standard." Wives could acquire the disease from their infected husbands in sexual intercourse; they could pass it on to their children in childbirth; moreover, so it was believed, anyone in the household or community could take on the microorganisms responsible for the illness through a familiar kiss, or the shared use of personal items such as a drinking cup or a towel. The result was that "by the turn of the twentieth century, what had only a few decades earlier seemed just one of many public health problems, emerged as an intolerable menace to society." 9

In a discussion that similarly points out the horrors of venereal disease, Allan Brandt writes that one of the common tragedies of gonorrhea was its ability to cause blindness to infants as they passed through an infected mother's birth canal. For women, it turned out, the symptoms of this disease were not confined to the urinary tract, as once thought. Rather, gonorrheal infections could spread throughout the entire reproductive system, causing a woman to become sterile or condemning her to "a lifelong invalidism." One doctor estimated that 60 to 80 percent of pelvic inflamations requiring a hysterectomy were due to gonorrhea. 10

Thus, the sexual double standard that had traditionally indulged men in their supposed need to have sex before marriage (and sometimes outside it) began to be questioned as it had not been before. Such a standard had been predicated on the notion that men's sexual passions were uncontrollable; in fact, the literature of the period indicates a

"belief, even taught by physicians, that sustained continence is injurious to a man's health." 11 Women, in contrast, simply did not experience such passions--and there was something wrong with them if they did. While the "social purity" reformers had always decried the double standard, general intolerance for it was drastically magnified with the discovery that such sexual freedom for men had the potential to condemn innocent women and children to a lifetime of suffering from what had by then come to be seen as a terrifying disease. This new awareness heightened the "social purity" movement's condemnation of the sexual double standard and led to the combined efforts of the social purity and social hygiene forces to end prostitution and stop the spread of venereal disease. 12

In this way, the discovery of the long-term effects of venereal disease served to further legitimize the effort to make sexual intercourse with any adolescent girl illegal, regardless of her consent. The deeper significance of this effort may be illuminated when one takes a closer look at the reality of the sexual double standard.

Until well into the twentieth century, remnants of the nineteenth century's notion of the ideal woman remained firmly in place. Women were to be pure, chaste, religious, and domestic; they were both sexually delicate and devoid of desire, and "sexual brutality was considered a heinous crime". 13 As to chastity, it was essential to a young woman's acceptance in society. Barbara Welter's characterization remains the classic articulation of the nineteenth-century ideal:

> A "fallen woman" was a "fallen angel", unworthy of the celestial

> company of her sex. To contemplate the loss of purity brought tears; to be guilty of such a crime, in the women's magazines, brought madness or death.... the marriage night was the single great event of a woman's life, when she bestowed her greatest treasure upon her husband. Therefore all True Women were urged, in the strongest possible terms, to maintain their virtue..." 14

It was within such a milieu that young girls were exhorted to prevent young men from enticing them into having sexual intercourse. Yet the double standard allowed that men were "by nature more sensual" than women, and that, as a sex, men "would sin and sin again, they could not help it." 15 A nineteenth-century author had advised his female readers not to let a man "take liberties incompatible with her delicacy." "If you do, you will be left in silent sadness to bewail your credibility, imbecility, duplicity, and premature prostitution". 16 Thus, the sexual double standard placed an extraordinarily high premium on women's virtue at the same time that it excused men's infidelity; the pedestal on which a woman's purity stood was most precarious indeed.

It is with that in mind that the legal effort to protect the purity in adolescent girls was a step toward making that pedestal more secure. The efforts of the social purity workers and the social hygienists to raise the age of consent made it possible to prosecute men for leading unwitting young girls into social ruin, potentially setting them on the road to prostitution. 17 In this way, prostitutes, and wayward females perceived to be headed in that direction, were depicted as the victims, rather than the criminals. 18

One other facet of late nineteenth-century sexual expectations may

have functioned to shift the ideological focus from one of scrutinizing women's sexual promiscuity to protecting women's sexual vulnerability. In a riveting case study of community responses to illegitimacy in upstate New York from 1890 to 1920, Joan Brumberg observes that, "added to the general message about premarital chastity, there was a concern for physical and emotional readiness that was not present in colonial times." She recounts that among evangelical women, a low age of sexual initiation was felt to be heathen. Further, she states, "late nineteenth-century physicians generally proscribed marriage for girls before age twenty because they believed their pelvic development was incomplete until then." 19 Thus, by the latter part of the nineteenth century, there appears to have developed a consensus that the age of sexual viability was believed to occur later in a young girl's life than had previously been thought.

Ultimately, the impetus for raising the age of consent may have been partially related to protecting young girls from a physically premature and possible injurious sexual experience, but only remotely intended to protect young girls from sexual attack. As we have seen, the primary purpose for raising the age of consent was to discourage young men from engaging adolescent girls in sexual intercourse in the belief that such activity was likely to lead them into prostitution. Such an eventuality was socially ruinous in itself; but clearly the discovery of the connection between venereal disease and its long-term consequences dramatically raised the stakes against both prostitution and the double standard. Raising the age of consent was a pragmatic

move because it aimed to mitigate a social health problem; it was an ideologically significant move in that it challenged the long-time social indulgence accorded male sexual freedom. It was the first official attempt to target men as culpable figures among the causes of the social and medical problems deriving from prostitution. Clearly, there had been no attempt to foil the male-supported prostitution arrangement before, nor would there be any further steps taken until the 1911 law against pandering was enacted. 20 Even then, this law still did not provide for the prosecution of male clients of adult prostitutes. The unmistakable conclusion is this: raising the age of consent was essentially a conservative measure rooted a radical concept--that men should be held legally responsible for their sexual incontinence with women. Based on this discussion, it may rightly be wondered whether the age of consent law would have been prosecuted at all, had there been no risk to society of venereal disease.

1. The Early Responses of the Court: Defining the Law in Practice

Using this information as the larger backdrop for the small stage on which the Ingham County statutory rape cases were tried provides the cultural framework for an analysis of this court's responses to the rape of underage females. The notions that motivated this statutory change no doubt infused the court's interpretation of the law's legal directive. For the purposes of this study, then, the social stimulus operating behind the statutory rape law at this time is instructive for its capacity to explain the social assumptions that manifested themselves in the composition of the cases, the courtroom scenarios, and

the

four

this

twe

the

for

not

gir

to

be

Mar

was

cla

in

was

wo

Jo

th

the case outcomes.

Before 1887, the year when the age of consent was first set at fourteen, there had never been any cases of statutory rape brought to this court; indeed, the youngest victims of rape had ranged in age from twelve (1857) to fifteen (1871), but of course these victims were past the age of consent limit of ten years, so their cases fell into the forcible rape category. The first official case of statutory rape was not brought to this court until 1889. The victim was a nine-year old girl who had been accompanied home from school by a man who was unknown to her. 21 Katy had naively confided to Edwin Marietta that she would be home alone after school. Once inside her house with her, Edwin Marietta threw her on the bed and apparently raped her, although there was some question of the fact of the offense, since Katy repeatedly claimed not to have felt any pain. The outcome of the case is indicated in one word written in the court calendar where the defendant's sentence was usually indicated. On this page was written: "suicide". 22

The episode of unknown trauma this penciled notation signified would have been left buried in the past forever had not the Lansing Journal Daily recorded at least a reporter's view of what happened to this "young Lansing businessman":

> He obtained bail...and fled to Canada on money furnished him by Mrs. Emma Parker, a handsome young married woman with whom he had a liaison. Mrs. Parker left Monday to join Marietta. She was arrested in Detroit by Lansing officers and induced to write a letter to Marietta decoying him across the river to the American side. He was promptly arrested on his arrival but managed to take strychnine while in the police station and died in terrible agony on the train while being brought to Lansing. 23

Though Marietta was never tried in the Circuit Court, it appears he believed he would be convicted. The nature of this case would suggest it was not the type of situation reformers had in mind when they advocated a change in the age of consent. First, this victim was only nine and would have been protected under the old law. Second, this was not the situation of a young adolescent being enticed unwittingly into a sexual relationship that would lead to promiscuity and social ruin. The types of cases reformers envisioned had not yet to come into this court.

Between 1887 and 1895, a period in which the age of consent was fourteen, there was only one case of statutory rape, in 1890, ending in nolle prosequi; there is no other information on this case. In 1896, there were two cases of statutory rape, both ending in conviction and severe sentences. In one, the victim was nine years old and the sentence was for twenty years in prison; in the other, the victim was eleven years old and the sentence was for fifteen years in prison. The sentences in these last two cases suggest the court perceived these offenses to be of a very serious nature. But given the pattern of subsequent court responses, it is safe to assume that these cases still did not fit the scenario envisioned by the reformers who wanted to protect adolescent girls from being led prematurely into a life of prostitution.

It seems the "type" of victim that reformers felt needed protection under this law did not come to this court until 1897, two years after the law's jurisdiction had been expanded to include all female persons under sixteen. It was not until this time that this court began

prosecuting the young men who had engaged in casual sexual intercourse with young girls of thirteen, fourteen, and fifteen years of age. Between 1897 and 1904, there were eleven such cases tried in this court. By way of contrast, there was one additional case involving the brutal rape of a six-year old girl. A closer look at these representative cases provides an idea of the range of definitions that were now possible under the statutory rape law.

In March of 1898 charges were brought against both Ernest Carr and Ernest Whitney that they "did make an assault and carnally know and abuse one Lilah Jackson, a female person under the age of sixteen, to wit fourteen years of age". 24 Some of Lilah's friends testified that they had seen the respondents with Lilah at her home, but none had seen any "improper familiarities" occur, despite the fact that there was an all-night party or two. Lilah admitted to having had sex with each of the respondents, but claimed it had happened only once with each one. There had been other men too, and she had, she acknowledged, pleaded guilty to being a juvenile disorderly. As to the presence of alcohol, she did not know whether the defendant (Carr) had been drunk or not, and remembered she had had a little beer but was not drunk. Now in court, a Lansing physician testified that Lilah was suffering from gonorrhea, a condition she believed she contracted from her sexual encounter with Carr. Yet the same physician testified to having "found no disease about this defendant."

In the end, both cases ended in <u>nolle prosequi</u>. In his request to the court not to file an information, the prosecutor wrote that the

"proofs are insufficient to secure a conviction." Certainly, Lilah was an adolescent whose behavior and situation fit the vision of those reformers who wanted to save young women from promiscuity, social ruin, and a lifetime of disease. According to the new rationale for statutory rape law, the proper role of the court was to prosecute and punish these young men for being the cause of Lilah's ruin. One has the feeling, however, that the court felt mocked as Lilah stated, "I have had intercourse with Ernest Carr. I don't know how long ago--a long time. I won't say where it was because I have forgot..." 25 It appears the court was not willing to lay the responsibility for what it saw as Lilah's willful promiscuity at the feet of these young men.

The case against Jason Gowen, presented in the introductory portion of Chapter One, is a significant statutory rape case, and as such, is offered again with some added detail. You may recall that Gowen appeared before the justice of the peace of Williamston Township in October of 1899 on the charge that he "did feloniously, unlawfully, and carnally know one Fanny Culp, a female child under the age of sixteen, to wit, fifteen years old." 26 Fanny was one of nine children in a Mennonite family, and since no other records of her birth existed, the family Bible was used in court as proof of her birthdate, a matter of paramount importance in all cases of statutory rape. In this situation, Fanny had met Jason at a masquerade dance, after which he had walked her home. They paused to sit on the post office steps, which was when Jason first tried to put his hand up her dress. Later, along the side of the road they had intercourse. Following this first incident, Jason called

at her home when the family was not around and had intercourse with her again. Two items of evidence were of significance: there had been blood stains on the skirt Fanny wore to the dance, and a physician's examination revealed there was a rupture on the sides of the vaginal canal near the entrance, "showing that there had been stretching, an entrance into those parts, lacerating the soft tissues." Such evidence was easily discounted, however, because both the blood stains and the tenderness and sensitivity of the vaginal canal were attributed by the doctor to Fanny's menstrual period, which he understood had begun that very day. 27

Fanny's mother, it will be remembered, protested that her daughter had experienced her period only two or three weeks prior to the offense. Thus, her point was that neither the blood stains nor the vaginal tenderness could have been due to her menstruating at the time of the alleged incident. Fanny asserted that she had tried to get away from Jason and had not wanted him to visit her later. In answer to what should have been an irrelevant question, she insisted she had tried to get up out of the chair in which he had held her. Finally, Fanny noted, Jason told her he had done this same thing with other girls.

If the prosecutor may be credited with bringing this case to trial in the spirit of the amended law, the jury may be recognized as acting in the spirit of the old assumptions. Only three years earlier, the forcible rape law would have required a fifteen-year old girl to prove resistance to the utmost. This jury was not ready to accept anything less if they were to find a man guilty of rape. They rendered a verdict

of not guilty. In practice, then, the court did not hold Gowen responsible for engaging Fanny Culp in premature sexual activity or for leading her to social ruin.

When Samuel Beach appeared in court in August of 1901, he faced two charges: one for carnally knowing six-year old Grace Metz and a second charge for taking indecent liberties with her. Often prosecutors listed a second, lesser charge as a backup in case they could not secure conviction on the more serious offense. This case illustrates that frequent practice. It also illustrates one of the perceptual problems that could occur when the victim was a young child. In regard to this matter, the outcome of the Beach case was both tragic and unsettling. If the circuit court jury indicated greater resolve in deciding where justice lay in this "traditional" (ie. violent and injurious) case of statutory rape, the workings of the state's legal hierarchy reminded all legal agents and victims of the impregnable permanence of a tradition-bound belief: to regard the testimony of children with great suspicion.

Six-year old Gracie's testimony began simply enough when she told how her parents had left her and her two young brothers in the care of Sam Beach for an afternoon. She explained how Sam sent the boys away, and that while she was alone with him in the bedroom, he had taken hold of her and had "played with [her] hind end". She added, "He hurt my hind end. He put what he took out of his britches into me." Under cross examination, she countered all the questions typically asked to discredit the testimony of a young child: "Ma did not tell me what to say, only not to cry. She did not tell me she would whip me if I did

not tell that Sam had done this...My father never played with me the way Sam did. He never hurt me the way Sam did." 28

The third-party witness to the offense was eight-year old Jesse Metz, Gracie's brother. He testified that he had found Gracie crying and saying "Quit! Get off of me." Jesse stated: "He was playing with little Gracie's hind end...He had his hand on Gracie right where he put his thing...I heard Sam tell Grace not to tell." The children did not tell their mother what happened until the next day when she noticed Gracie was walking with obvious discomfort. In her testimony the mother assured the defense attorney that she had not told Gracie what to say nor had she asked Sam for some furniture. Gracie's father, operating on some kind of wish to avoid further trouble perhaps, admitted he had gone to see Sam in jail. He explained, "I wanted it settled and thrown out of court. I tried to stop it...but it is not for me to do. [The prosecutor] would not stop it. I would have stopped it if I could." 29

The outcome of this case was that in October of 1901, the jury found Beach guilty and sentenced him to seven years at the state prison at Ionia. But that was not the end of the matter. Beach's case was appealed to the Michigan Supreme Court, which considered it in a session in March of 1902. The decision of the Michigan Supreme Court in case number 19070 read:

> in said record and proceedings, and in giving of Judgment in said Circuit Court, there is manifest error...that the judgment and sentence of said Circuit Court for the County of Ingham be and the same is hereby set aside and vacated and the cause remanded to the court below for a new trial. 30

In the prosecuting attorney's April 5 request to the Circuit Court

for a

the tw

retria

would

prosec

the ob

object

of co

class

accus

and

stru

larg

defe

The

defe

of c

amou

to t

anal

a fur

the c

how

It wi

for a nolle prosequi, he noted that since the Supreme Court held that the two children were not competent witnesses, there could be no retrial. "Without the testimony of these two witnesses, the people would have no testimony upon which to ask for a prosecution." The prosecutor had apparently struggled to get this case into court against the objections of the girl's father; he could not struggle against the objections of the higher court ruling. Sam Beach was a free man.

What may readily be inferred from these examples is that the nature of courtroom cases of statutory rape varied greatly. They may be classified on the basis of one salient feature: the relationship of the accused to the victim. This primary predictor of courtroom treatment and case outcome is the most useful characteristic from which to structure an analysis of the rest of the statutory rape sample. The largest group of cases is comprised of 106 cases in which the victim and defendant were involved in an ongoing consensual sexual relationship. The second group is comprised of about forty-seven cases involving defendants who had been acquainted with the victim, but the appearance of consent is more equivocal. The third group is the smallest, amounting to only eight cases involving assailants who were strangers to the victim, and consent was clearly not present at all. This analysis looks at how the court's responses to statutory rape cases were a function of its perceptions of the relationship between the victim and the defendant. The strategies utilized by the court will demonstrate how it employed the definition reformers had given to statutory rape. It will be seen that the court carefully differentiated this new

definition from its own pre-existing belief that "true rape" was predicated on force and physical vulnerability, not moral laxity.

2. Consensual Sexual Intercourse as Statutory Rape

There were 106 identifiable cases of statutory rape that occurred in the context of an ongoing, ostensibly romantic relationship. This figure amounts to 32.5 percent of the 326 statutory rape cases in the sample, or nearly one-third; when compared with the forty-seven cases involving acquaintance assailants (14.4 percent) and the eight cases involving stranger assailants (2.5 percent), one can see the extent of attention given by the court to situations of unlawful sexual intercourse taking place with consenting adolescent girls. [See Table 20.] (It should be noted that the remainder of cases, approximately 168, are comprised of incest cases, which will be discussed separately, and those for which there was no information available.

The circumstances in these cases of consensual sexual intercourse did not conform to the "traditional" rationale that was premised on protecting female persons from forced sexual attack. As was already pointed out, the reform rationale for these cases was to discourage young men from leading unwitting adolescent girls into premature sexual activity and possible prostitution, a fate which had become, by the mid-1890s, a social prescription for personal and potential community endangerment. In effect, from the perspective these cases provide, the change in the law simply made sexual activity with adolescent teen-age girls unlawful. It is no accident then that the "victims" in this group were, with few exceptions, fourteen- and fifteen-year old girls; it is

not surprising that the element most common to these cases was the court's perception of female adolescent delinquency.

One frequent circumstance that is found in these cases is a public dance scenario. Very often the defendant and complaining witness first met at a dance. The 1899 case against Jason Gowen is typical for its time. It will be recalled Jason met Fanny, a fifteen-year old girl, at a masquerade dance. 31 Commercialized amusements and public dances were a new fact of working-class social life in major cities and in smaller towns too. They were especially of interest to those who worked for wage labor, offering a kind of meeting place for men and women away from family and community constraints in a setting unparalleled in previous generations. 32 Kathy Peiss explains why the need to have courting space away from home was necessary, especially in poor families:

> Courtship proved difficult in homes where families and boarders crowded into a few small rooms, and the 'parlor' served as kitchen, dining room, and bedroom. Instead, many working-class daughters socialized on street corners, rendezvoused in cafes, and courted on trolley cars...[A] reformer found that girls whose parents forbade men's visits to the home managed to escape into the streets and dance halls to meet them. 33

The element of the public dance meeting is significant in that it is indicative of the kind of social behavior that attracted the attention of the court. After all, as Peiss notes, as these "young women demanded greater independence in the realm of 'personal life'... this new freedom spilled over into their sexual practices." 34

The social fears that linked potential sexual misbehavior with public dancing were evident in the 1880s in Lydia Pinkham's Private

Text

ovar

beha

nair

pos

and

"Or

As

hel

Peo

tha

and

pavi

cars

Textbook, which warned that one of the causes of inflammation of the ovaries was "excessive dancing." 35 By the 1920s, it seems dance behavior was monitored closely to insure that proper dance behavior was maintained at all times. In Lansing dance halls, regulations were posted at this time that "made explicit the fears that the new dances and new morals of the post-war decade could lead to sexual license." By "Order of the Chief of Police," these regulations stipulated:

1. No shadow or spotlight dances allowed.
2. Moonlight dances allowed where a single light is used to illuminate the Hall. Lights may be shaded to give Hall dimmed illuminated effect.
3. All unnecessary shoulder or body movement or gratusque [sic] dance positively prohibited.
4. Pivot reverse and running on the floor prohibited.
5. All unnecessary hesitation, rocking from one foot to the other and see-sawing back and forth of the dancers will be prohibited.
6. No loud talking, undue familiarity or suggestive remarks unbecoming any lady or gentleman will be tolerated.

As to the positions of the dancers, the orders directed:

1. Right hand of gentleman must not be placed below the waist nor over the shoulder nor around the lady's neck, nor lady's left arm around gentleman's neck, nor lady's left arm around gentleman's neck. Lady's right hand and gentleman's left hand clasped and extended at least six inches from the body, and must not be folded and lay across the chest of dancers.
2. Heads of dancers must not Touch. 36

By the 1920s, the dances most frequently cited in this sample were held at Pine Lake, a park area about three miles north of the city. People usually got there by taking the "interurban", an electric trolley that, beginning around 1905, shuttled from the city to the lake area and back again. According to one local observer, the Pine Lake dance pavillion was "the place to go back in those days!" 37 Of course, when cars became more readily available in the 1920s, the interurban

succumbed to disuse and was finally taken out of service in the end of that decade. 38 Thus it was that in the case against Louis Stanley, Emma testified that Louis had gotten "fresh with her" in the car on the way home from a dance at Pine Lake. She had accepted a ride from him, she reported, because she had not felt too well and had not wanted to wait for the interurban to take her back to town. 39 In a 1932 case against LeRoy Nestell, the facts were that he had had sexual intercourse with fourteen-year old Leatha "not with any force" on the way home from a dance. The judge's statement to the prison authorities at Ionia, where he sentenced Nestell for one to ten years, read: "Like all young men, he loves to go to dances and have a good time." 40 Thus, for these cases, the rape scenario often involved two young people who had gone to a dance or met there and engaged in sexual intercourse on the way home. The commonality of this factor confirms the "dating" nature of the relationship between the accused and the victim, and the importance such public amusements played in the lives of these couples.

Sometimes, however, these relationships exhibited a more flagrant show of commitment than casual dating would imply, as some partners perceived themselves to be in love or presented themselves to the outside world as married to each other. In 1888, Abram Durling and fifteen-year old Lottie spent the night in a hotel as husband and wife after having met at a fair. Durling was charged with (and ultimately acquitted of) "carnally ruining" Lottie, a female who had previously been "chaste." Her complaint was that he had promised to marry her and then reneged; she would never have consented to have intercourse with

him, she claimed, had she known he was not going to marry her. 41 This experience of a romantic betrayal as the prelude to illicit sexual intercourse has been documented in other case studies. In particular, Joan Brumberg found that the unwed pregnant girls who came to the Anchorage (a home for pregnant unmarried teens) in upstate New York in the 1890s often explained their predicament in terms of a "failed courtship." What she writes about those situations is highly applicable in these cases of unlawful adolescent sexual activity:

> The persistent use of the terms "betrayed under promise of marriage" conveys a great deal about the dashed expectations of girls and their psychological orientation at the time they became sexually active. 42

Another Ingham County case illustrates such pretense to attachment, when in 1914, the probation officer wrote about convicted offender Paul Kurn and his "victim" that: "the unusual and aggravating fact in his case is that the girl and he represented to the public that they were married." He recommended that the respondent be placed on probation "on account of his prior good reputation and because the girl and her relatives were equally at fault..." 43 In a third example, a 1928 case against Millard Foreman, fifteen-year old Edith reported that Millard had asked her to run away with him, promising her money, a new dress and a new pair of shoes. 44 This case is representative of not only the perpetrator's stated intention; it is also typical of the gullibility exhibited by these victims. More fundamentally, it indicates the often characteristic level of emotional and material deprivation that made this girl (and others) exceedingly vulnerable

to a young man's usually unrealistic promises of extended commitment, gifts, and protection.

For a 1934 offense, the file materials reveal that thirty-year old James Conran had made acquaintance with thirteen-year old Margaret, and after some unspecified time, had intercourse with her. They had gone together on a hitchhiking trip and were gone for three weeks. Upon their return, they were apprehended and Conran was found guilty of statutory rape by a jury; he was given a relatively long sentence of five to ten years in Jackson Prison. 45 In 1942, defendant Regenal Haynes was charged with having engaged in sexual intercourse with Berneal Zigler; he had been sexually active with her for over two years, beginning from the time she was twelve years old. He claimed he loved her and "did not want her to run around with any other girls." Their activities were finally discovered when she became pregnant and subsequently had to be hospitalized for complications resulting from an illegal abortion Haynes tried to perform on her. In his statement to prison authorities, the judge described Berneal as "rather attractive and quite sensible appearing...a good student." These attributes, he allowed, made it "somewhat difficult to explain the situation." 46

His comments are very telling for what they say about his, and society's, views about the young girls whom the court was charged to protect from ruin. It was perhaps because of the victim's good character that this judge saw fit to sentence Haynes to Jackson Prison for seven and a half to fifteen years, a very severe sentence for this group of cases. If the judge was acting on the social purity reformers'

impetus for raising the age of consent, he was punishing the defendant for leading a "good" young girl to social ruin, her goodness making the crime that much worse. Then too, this sentence may also have been due to the accused's having performed the illegal abortion, an action that was socially and legally heinous, but was also no doubt perceived as a further threat to the "good" victim's personal and physical welfare.

A third case, a 1946 charge against Robert Lair, reveals a situation in which the defendant insisted to the court that he had not forced fourteen-year old Betty to have intercourse with him. 47 Rather, he protested, she had willingly had sexual intercourse with him at his home several times, and then left town with him right after New Year's Day to go by bus to Detroit, Columbus, and Chicago, finally staying with him for two weeks at the home of a farmer and his wife. They returned to Lansing when Betty received word of her mother's death, and upon their return, detectives arrived to take them both into custody. Robert stated to the judge, "I didn't know Betty was only fourteen." Robert was found guilty of statutory rape and given a light sentence of two years probation. The court may have been sympathetic to him because he was the sole support of his mother and father, neither of whom was well. Betty, who had been involved with Lair since she was ten years old, was confined to a detention home for girls. 48 Ostensibly, this action was taken toward the victim with a corrective, protective intent, and not out of an urge to punish.

In a 1948 charge against Gordon Zeigler, the defendant and the fifteen-year old complaining witness did in fact get married. This

action made it necessary for the prosecution to request a nolle prosequi, as "no evidence of the crime could be presented to a jury." 49 From such an outcome, it is logical to conclude that it was lawful at this time to marry a young girl of fifteen but not lawful to have sexual intercourse with her outside of marriage. A newspaper report of a later case indicates why marriage had the effect that it did on the outcome of such a case. On February 5, 1949, the State Journal noted that the "cause", a statutory rape charge, could not be pursued further if indeed the victim had married the accused, because, as the article reported, "the girl cannot now testify in the case without her husband's consent." 50 Thus one way to escape criminal charges for statutory rape was to marry your accuser. In effect, this outcome was confirmation of the presence still, in 1948, of the social agenda behind statutory rape law: to discourage males from engaging in sexual intercourse with consenting under-age females and not incidentally to control the perceived promiscuous behavior of unmarried young girls.

A 1944 case against James G. Tingley offers a unique item of evidence that further exemplifies this agenda. Tingley wrote a love letter to fourteen-year old Dorothy in which he expressed what was apparently perceived by courtroom agents as his anticipated sexual involvement with her. Someone (a defense attorney perhaps?) had bracketed these words in Tingley's letter: "I can just see the swell times ahead for us in the near future. You and I together caressing each other with our love and affections." 51 It seems this declaration of his affection was regarded as evidence of his likely guilt in

committing unlawful sexual intercourse with an underage female. Still, this "evidence" must not have been considered conclusive because the case against Tingley ended in a jury disagreement.

Generally speaking, although the public discovery of such romantic sexual involvements often brought the male participants into court as perpetrators of statutory rape, prosecution of the charges was stunning for its absence of severe punitive resolve. The assumptions upon which these cases were founded aimed at an array of social issues: to balance the sexual double standard by discouraging male sexual irresponsibility, to protect naive young girls from becoming "public women" who could get venereal disease and be the source from which it could be passed on to others. Often, however, the social mandate to protect young females from the perils of promiscuity became a legal license to control promiscuity, with the court's censure aimed as much at adolescent girls as it was at the young men who were officially subject to the law.

Given the consensual nature of these cases, there was no instance in which the victim initiated a complaint to the authorities. How the unlawful sexual activity of males with underage females came to the attention of law enforcement authorities seems to have been prompted by a family or community awareness that the female's behavior was deviating in some way from accepted norms. The predominant signs of what was seen as female delinquency could include pregnancy, gonorrhea, frequent late night absences from home, truancy from school, and improperly familiar dating involvements that interfered with expected family obligations. In that a young girl's behavior triggered a formal complaint by parents,

social workers, or law enforcement figures against a given male individual, the process of assessing his culpability inevitably included scrutiny of hers as well.

Surprisingly, and ironically (given the social rationale for cases of this nature), only two victims in this group of cases were found in court to be infected with gonorrhea. In 1898, a physician testified that Lilah Jackson, who had filed complaints against two defendants, Ernest Carr and Ernest Whitney, was suffering from gonorrhea. The questioning directed to Lilah was aimed primarily at discovering which of the defendants gave her the disease, but this was largely an irrelevant exercise. Neither defendant was reported in testimony to have been found infected. Lilah had pleaded guilty to being a "juvenile disorderly," she acknowledged, and the charges against both male defendents were nolle prossed. 52 Incidentally, as was typical for that time, Lilah's physician did not tell her at first that she had gonorrhea. In what was, as we know, a routine medical deception, he told her only that she had a "chancre", which may account for why the complaint was not filed until six weeks after the alleged offense.

The second instance of venereal disease in this group occurred in 1932, when LeRoy Nestell engaged fourteen-year old Leatha Geisenhaver in sexual intercourse "not with her consent, but not with any force" on the way home from a dance. The judge's observations of this situation point out that Nestell had refused an offer of probation if he would help pay for Leatha's medical treatments. This judge noted, "He and his friends treated the matter as a kind of joke"; the offender's cavalier attitude

may have been as responsible for Nestell's sentence of one to ten years in prison as was his offense. 53

In the case of Lilah Jackson and Ernest Carr, the presence of gonorrhea served to incriminate the female; in the case of Leatha Geisenhaver and LeRoy Nestell, it further incriminated the male. Not only had Nestell engaged in unlawful sexual intercourse, he had also given his very young partner what was still a serious disease. These two cases, one in 1898 and one in 1930, demonstrate a variance in attitude toward the victim's venereal disease. This difference may have been due to attitude changes over time, but more likely may have been due to the attributions of blame assigned the victim in each case. Clearly, a victim who had had sex with several defendants merited less sympathy than did a naive victim who had only had sex once apparently with one defendant.

Pregnancy occurred among this group of 106 cases at least six times, with the first incident occurring in 1923. In these cases, its discovery was undoubtedly the impetus for reporting the crime to the authorities. In the William Secor case in 1922, anticipation of fifteen-year old Pearl's testimony led the prosecuting attorney to move that the courtroom be cleared, "this being a matter to do with the morals of the community." 54 Under oath, Pearl subsequently acknowledged she was now "in trouble", that is, she had been "in the family way" for about six months. Her testimony shows that she had had intercourse with at least two other men during that summer besides the defendant, and that her relationships with all three were casual.

Q. Is that the first time you had intercourse with anybody?
A. No, sir.
Q. How many times had you had intercourse with someone else before this time with the defendant?
A. Twice.
Q. What?
A Twice.
Q. Twice with some other person besides the defendant, or twice with two other people?
A. Twice with two other people.
Q. Were they married people?
A. One was; I don't know whether theother one was, or not.
Q. You haven't found that out.
A. No.
.....
Q. You had intercourse with one of the other fellows the same day you had intercourse with this man, the defendant, at night?
A. Yes. 55

In effect, the end sought in these three trials was to determine which of the three defendants was responsible for her pregnancy. The outcome for Secor was that he was found guilty and sentenced to Jackson Prison for one to ten years; one other defendant was acquitted and the other's charges were nolle prossed.

In a 1922 case against Elmer Verguson, Helen testified that she had had sexual intercourse with Elmer over a period of four months, which culminated in her being pregnant. In the trial, Helen's resistance was questioned at length, despite her being under the age of consent:

Q. Did you lie still on the bed?
A. No.
Q. You fought him all the while?
A. Yes, I tried to help myself, but couldn't.
Q. Did he take your dress clear off?
A. Yes.
Q. When he put his privates into you, did it hurt you?
A. Yes.
Q. Did you make quite a fuss?
A. Yes. 54

The process of questioning Helen's resistance may have had the

effect of simply directing the jury's attention to what may have been perceived as her careless and immoral behavior. Legally, it should have been immaterial. Noting that the charges were not filed against Verguson until after the child was born, a curious aspect of this case is found in Helen's mother's attitude toward her daughter's pregnancy. Revealing her own level of ignorance, she noted that Helen had not looked pregnant, she had only "looked fleshy" before the birth. But, she assured the court, "it was a nice big baby." 57

By contrast, in a 1924 case against Willard Fleming, fifteen-year old Nellie's father and mother exhibited the more usual parental anxiety toward their daughter's pre-marital pregnancy. Here, Nellie's parents were in conflict with each other over whether she should resolve her pregnancy predicament by marrying Willard. Nellie, with support from her mother, wanted the marriage; her father refused to allow it. The following excerpt from the mother's testimony, given under cross-examination, is a reminder of the painful social stigma that accompanied these situations in which young unmarried girls found themselves pregnant.

> Q. Have you talked with [her father] as to her condition?
> A. Oh, yes, but it won't make any difference; that's why this arises.
> Q. Nellie is in a family way?
> A. Yes.
> Q. He would rather have her go on and have a bastard child and have the disgrace rather than have her marry this young man?
> A. I guess he would. I have tried to talk with him but he wouldn't listen to me.
> Q. You tried to get him to let them get married?
> A. Yes, I talked to him the night he came over here.
> Q. She has never had any other young man that has been fooling with her.

A. No, sir.
Q. She is a nice girl--outside of this young man.
A. Yes, so far as I know about. 58

It is apparent that, had this father consented to his daughter marrying Willard Fleming, the statutory rape charge would never have been made. It seems the father's desire was to have Fleming punished and physically removed from proximity to his daughter. Willard's conviction for statutory rape got him a five-year sentence of probation, which may have stipulated that he stay away from Nellie.

Another case illustrates that when statutory rape charges evolved out of a situation involving a premarital pregnancy, the alternative to conviction could include making a financial settlement. In 1932, fifteen-year old Letha Waldron dropped the charge of statutory rape against Wesley Morrison after a settlement for support of the child she was carrying was reached. 59 What is seen in the Morrison and Fleming cases is the way in which filing a charge for statutory rape was one recourse to resolving an accidental pregnancy dilemma; in these cases, the law was used to fulfill a purpose quite apart from punishing an act of forcible sexual intercourse with an innocent underage female. Rather, it functioned as intended to intervene in situations of premature female adolescent promiscuity, and in an after-the-fact manner, it was used by the court as a means to pressure a young man into marrying the young girl with whom he had been sexually irresponsible.

The condition of gonorrhea or pregnancy acted as proof of the defendant's crime, but it was also a sign of the victim's lost chastity and lost virtue. In this sense these conditions were evidence of her

social role as a juvenile delinquent. But the adolescent girls in these cases did not need to be pregnant or have gonorrhea in order to be characterized as delinquent girls. Indeed, references to the girls in these 106 cases as delinquent are nearly universal, distinguished individually only by the disparaging case-specific remarks of attorneys, judges, or probation officers.

A sampling of these characterizations might begin with Minnie, about whom the probation officer wrote in 1914, "the girl does not seem to have borne as good a reputation as respondent prior to this offense." Then there was Sarah, who, it was pointed out in testimony in 1921, had run away from home, and had already had a baby and been divorced. Another was Pearl, who was now pregnant as a result of her sexual involvement with William. She had already had sex with two other men over the summer, and the main issue of the court case was to determine the father of her child. Margaret acknowledged she had escaped in 1928 from the juvenile detention home, which, she stated, was the main reason she had hoped to avoid sexual involvements that might cause her to be returned to the home. Frances, a complaining witness against Patrick in 1931, had spent some time in the Adrian School for Girls previous to the trial. The possibility that her testimony against Patrick might serve to incriminate her and send her back to Adrian was a tactic employed by the defense to intimidate her into denying the fact of the offense. In 1942, there was Barbara, whose parents reportedly had experienced serious difficulty keeping her at home because she was out so much with the defendant. Also in 1942, there was Margaret, about whom the

probation officer gathered statements from the community; such statements expressed the belief that Margaret was the aggressor in the case and that community sympathy was on the side of the defendant. Finally, there was Geraldine, about whom very little information was available, except for the fact that she had been charged with being a sex delinquent and was sent to the Adrian School for Girls at the same time in 1943 that Otto, the person she accused of rape, was released from probation to serve in the army. 60

These "bad" characters gave real meaning to the purity reformers' idea of who the statutory rape law could save. The need to save the fallen was especially heightened, however, when there were multiple defendants for one complaining witness. 61 These were situations in which one girl, who had engaged in sexual intercourse with two or more men in close succession, came into court as the complaining witness against all of the men in separate cases. There were twelve such groups of cases, which altogether charged forty-five respondents. Talitha, who was the complaining witness against four individual men in 1922, was described as someone who was homeless; further, she had been born an "illegitimate child." Geraldine, who was the complaining witness in multiple-defendant cases in 1926, confessed she had had sex with a number of different men because she "wanted to be a good sport." Claribell, a complaining witness against five separate defendants in 1928, was brought in by police for driving away an automobile not her own, and for running away from home. A delinquent petition had been signed against her by her neighbors. Finally, there was Helen, who in

1938 readily asserted she had only had sexual relations with six men, the very six she had named in the six separate lawsuits for which she was the complaining witness. Helen's mother pointedly observed to the pre-sentence investigator that all the boys were bragging about the fact that they were going to be placed on probation. She complained, "if the boys were on the outside looking in," she did not feel it was fair to have her daughter in a detention home. Subsequently the boys were all given short prison terms. 62

The story of Eleanora, who in 1926 became the complaining witness against four men, provides a disturbingly representative portrait of these "fallen" adolescent girls. 63 This fifteen-year old had been sexually active with four men. It appears from the testimony in these four cases that Eleanora had been living a very transient life on extremely limited personal financial resources. She explained she had asked one of the defendants for some money for a place to stay because she had had no place to stay on that night. This individual gave her some money, had intercourse with her, and then left, promising to return in the morning, a promise he did not keep. 64 In one of the transcripts from this group of cases, Eleanora reported she had stayed five nights with one of the defendants because she "didn't have no place." She had told him she was seventeen, a lie that was significant in that it exonerated the defendant's liability for having had intercourse with her. Asked why she told him that, Eleanora replied: "I just felt like it, that's all." 65

Much controversy arose in one of the "Eleanora" cases over the

admissability of evidence that Eleanora's birth certificate gave no record of any father. Curiously, the prosecution objected to the admissability of such evidence, saying it was not admissable for cross examination in statutory rape cases. 66 There is an implication in this objection that such information would have been admissable in a case of forcible rape with a woman over the age of consent; perhaps illegitimate birth circumstances could have served as a pretext for undermining an over-age victim's character, credibility, and claims of nonconsent. For Eleanora's complaint, in which nonconsent should legally not have been of consequence, the prosecution moved to protect his client from whatever innuendo the defense attorney intended by interjecting such a remote and essentially irrelevant piece of information into the court record.

It appears that the defense attorney felt a great amount of frustration over these cases, where it seemed so obvious to him that the "victim" had not been a victim at all, but a fully consenting partner, and maybe even a perpetrator. In his motion to dismiss the case, he revealed his perception of the conflict between the law and social reality:

> MR. ROWLETTE: In this case I move to dismiss the complaint and warrant and discharge the defendant in the case against John Wilson. Of course, the purpose of this law is to protect the chastity of children under the age of sixteen, and inasmuch as the complaining witness in this case is the same witness as in the case of Harold Winnings, I think it clearly shows here that we are carrying the proposition too far. I don't think the law ever was intended to protect prostitutes or anyone of that kind. They bring a complaining witness in here who admits she has had intercourse with four men and has been sexually active with all of them and charge each man with statutory rape. It would seem to me there should be some line of demarcation somewhere...

> THE COURT: Of course, you know the law makes a distinction in the case of a girl under sixteen years of age; I do not think because she has submitted to this more than once it would lessen the offense, so I grant the prosecutor's motion and bind John Wilson over for trial... 67

The quandary here had to do with conflicting socially constructed definitions of sexual assault. On the one hand, there was the old pre-reform definition, that envisioned rape as an assault against which a young girl or woman would wholeheartedly resist. Under the amended law, defining the rape of a girl under a certain age as unlawful sexual intercourse regardless of her consent would enable the court to protect young females from being led into lives of ruin. The adjudicatory difficulty lay in the gap between the theory behind the new law and the assumptions that fed a view of reality in regard to the female's responsibility for her own compliance. Thus, to use this law to punish a man when perceptions of the woman's role suggested she was equally responsible for provoking or perpetuating the offense posed a great conflict. It caught defense attorneys and judges in what they perceived to be a disjunction between the law as it was stated and the law as it was operationalized. In practical terms, they did not see themselves saving vulnerable girls from sexual attack, nor did they see themselves saving unwitting girls from prostitution; as a practical matter, they feared the law forced the court into the position of punishing young men who had sex with girls who, in their minds, were prostitutes already.

Judge Hayden's statement to prison authorities in a multiple defendent situation in 1938 expressed the conflict that existed among authorities as to how such a crime should be judged. Though I quoted a

portion of this remarkable reflection earlier, it bears repeating in part here:

> I have given this case most careful and thoughtful consideration and between the two extremes of thought: [those who think] that life [imprisonment] is not too severe for anyone who does this thing, and those on the other hand who do not think they should be punished at all, it is very difficult to arrive at the proper conclusion... If the law means anything at all it cannot be ignored and as the legislature has seen fit to make it among the most serious of crimes it cannot be winked at and the offenders overlooked. 68

After acknowledging his own doubts about how to rule in cases of this nature, this judge sentenced the five boys who had been having intercourse on a regular basis with fourteen-year old Helen to prison terms of one to three years each. According to the record, these boys had been bragging that they would get probation, and it seems their punishment may have been due at least as much to their smugness as it was to their sexual misdeeds. In this case at least, the newly tailored definition of statutory rape equated the victim's legitimacy with her perceived social ruin instead of her perceived resistance, and assessed a defendent's culpability according to his lack of remorse as opposed to proof of the force he used.

Ultimately, one cannot escape the fact that the court acted out a form of compliance with the best intentions of the reformers. There were, indeed, an inordinate number of cases of this type tried in this court. It does seem, however, that most of the time there was little understanding of the very real positions of vulnerability these girls faced. Such extenuating circumstances as extreme poverty, lack of parental stability, or personal insecurity and naivete were only

infrequently recognized by the Court as factors contributing to an entire web of emotional and sexual compliance. In the following excerpt of testimony from a 1927 case, fifteen-year old Jewell West relates the circumstances under which she "agreed" to have sexual intercourse with John Keltner.

> Q. How did this come about Jewell?
> A. Well, you mean--
> Q. Just what led up to it?
> A. Well, he had his arm around me and I had my head kind of lying on his shoulder and I put my hand up to his face and it was all wet and I asked him what was wrong with it and he said, well, I should know. Well, I didn't know what it was and I asked him to tell me and he told me that men had passions, you know--and he said when he got in with a girl he liked, he couldn't control himself, and I said he could control himself with me for I didn't do such things, and he said well, he would see whether I would, or not, and so, I had my arm-- first, he said he was going to get back in the back seat, and he got back there, and when he got back there I wanted to go back home and he had hold of my arm, this way, like, and it hurt so, and when I got back there he kept coaxing me and pulling up my dress, and he kept on coaxing me and so I began to cry and he just-- you know-- and he pulled up my dress and finally got my drawers down, and when I commenced to cry, commenced crying, and then he did-- you know, did it; and after he got off from me my head commenced to hurt and I asked him to take me home and it made him mad because I was crying and he took me back home a fast as his car could go and that was the first night... 69

The jury found John Keltner not guilty of statutory rape. The offense had occurred in the context of a date the first time; and, Jewell had had sexual intercourse with him in a second meeting two nights later. Whatever way the jury viewed Jewell's compliance, one thing seems certain: the outcome ignored the emotional manipulation this young girl experienced. Thus, while in most of these cases, victim reluctance was not readily apparent, this instance at least serves to

demonstrate the extent to which young girls were in fact unwittingly compromised, just as the reformers feared. Yet, probably the surest indicator that the court had no real enthusiasm for enforcing the law on reformers' terms is seen in the outcomes for these cases. Even with the law's injunction to ignore the nonresistance of underage girls, it seems the court's censure in such cases was formulated in terms of the lowest average minimum sentence for any group of offenders in the sample.

The 67.9 percent conviction rate for these cases compares favorably with the overall conviction rate of 61 percent for the sample of all statutory rapes. It would seem, on this basis, that the court made a genuine attempt to employ the law as vigorously in these cases as it did in any of the others. In fact, it would appear these cases were more likely to end in conviction than statutory rape cases generally by a margin of 6.9 percent. The conviction rate, however, is not a sole indicator of the court's sentiments. To get a more accurate measure of the court's attitude, one must take into account the sentencing patterns as well. The legal system's leniency in these consensual cases of statutory rape is most evident in this fact: of seventy-two convictions, all but four resulted in either probation or prison term minimums of three and a half years or less. The combination of the high conviction rate and low sentence average suggest that the protection from promiscuity rationale made it easier to obtain a conviction at the same time that it prescribed a light reprimand to offenders.

Certain case-specific factors contributed to the determinations made

by the court. For starters, prison term sentences, as opposed to terms of probation, were generally more likely to result if the defendant was much older than the complaining witness. For example, in 1925, two defendants, one of whom was twenty-seven and the other fifty, had been having intercourse with a fifteen-year old girl; both defendants were sentenced to prison terms of three to ten years. 70 In a 1928 case, a thirty-eight year old respondent who was from Kentucky had been having sex with a fifteen-year old girl; his sentence was for fifteen months to ten years in prison. 71 In a 1934 case in which the defendant was thirty and the victim was fourteen, the defendant received a sentence of five to ten years in prison. 72

It seems certain that age disparity was a factor in the one life imprisonment sentence in this group of cases. This sentence was given to a forty-three year old defendant who had been having sexual intercourse with a thirteen-year old girl who was deemed mentally low. The severity of this sentence may have been due to the great age disparity, and also to the defendant's long record of petty offenses. The judge wrote: the defendant failed "to show appreciation of the significance of his crime." 73

Finally, in 1944, a thirty-five year old offender received a sentence of three-and-a-half to ten years in Jackson Prison for having had unlawful intercourse with a fifteen-year old girl. Besides the age factor, this prison sentence was probably linked to the fact that the offender had two prior felony convictions and a bastardy conviction. 74

Apparently, in these cases of perceived "mutual" sexual intercourse,

the court's censure was more severe when those relationships stepped outside the boundaries of what was considered "mutual" by acceptable social standards. Age differences of more than ten years exceeded those standards and demanded a more pronounced legal reproach than was deemed appropriate for unlawful sexual intercourse between persons of comparable age. A greater age disparity may have suggested a lesser likelihood of mutuality, intensifying attributions of blame toward the defendant, a true irony in that the level of mutuality was legally immaterial.

Prison term sentences (ie. sentences that were more severe than terms of probation) were also more likely to result if there was something about the defendant that was of perceived bad character, or, if there was something about the complaining witness that was of perceived good character.

In 1922, there was a case in which the defendant's mother tried to intimidate the victim into denying her charge, so in a sense, the victim was doubly victimized by both the defendant and his family. This defendant's sentence was for five to fifteen years in Ionia State Reformatory. 75 In another case in 1922, the defendant received a prison term sentence of eight to fifteen years in Jackson Prison. This sentence may have been as severe as it was because the defendant got the complaining witness pregnant and then married someone else, doubly demonstrating his lack of responsibility. 76

In some cases, probation was denied because of a defendant's previous crime record or because he demonstrated no sense of guilt

before the law. In a case in 1942, the offender was denied probation in favor of a two-and-a-half to five year prison sentence because he had had a previous conviction. 77 Later that same year, another offender was denied probation in favor of a two to five year prison term because he refused to pay for the victim's medical treatments for the venereal disease he had given her. 78

Thus, beyond establishing the fact of the offense, it seems the court relied on aspects of the defendant's character to determine how flagrant and reprehensible his crime was. But again, aspects of the victim's character could also affect case outcomes. The reader may remember the case in 1941, in which the judge described the victim as a bright, attractive, and good student. Such qualities seem to have generated enough sympathy for the her to warrant a sentence of seven and a half years in prison for the defendant. 79

In a situation in 1942, the judge recorded that the complaining witness was the adopted daughter of prominent parents who wanted her to go to college. Since, as the judge noted, the complaining witness and the defendant were "infatuated with each other," it seems likely the sentence of three-and-a-half to ten years was given more to keep him away from the girl, at the behest of her parents, than to require just punishment for this crime. 80

Lighter sentencing, on the other hand, was often a function of the victim's bad character. As perceived by the court, her character was measured in terms of her delinquency and her willingness to participate in the offense. In two cases in 1921, two separate defendants were

awarded short one-year prison stays. In both cases, the complaining witnesses were considered delinquents, one a runaway from home, and the other sent subsequently to a detention home for delinquent girls. 81 In 1928, the defendant received a sentence of two years' probation in a case in which the complaining witness had admittedly engaged in sexual intercourse with him two times after the initial offense. 82 In 1941, a defendant was convicted of having sexual intercourse with the victim all summer; his light sentence of two years probation may have been due in part to the victim's confession of having been promiscuous with other boys. 83 The following year, this court put a convicted offender on probation in a case in which a member of the community signed an affidavit stating his opinion that "the girl was the aggressor." The probation officer wrote, "community sympathy is on [the defendant's] side". 84 Later that same year a two-year probation term was awarded to an offender about whom the probation officer stated "he has fine parents." As to the twelve-year old complaining witness in this case, the same report noted she was "prematurely developed" and termed her "a delinquent child." 85 Finally, in a 1944 case, the investigating officer wrote: "she has been permitted to run the streets of Lansing whenever she pleased and my interview with her convinced me that she is the kind of girl who would go out with anyone and would have no hesitancy in having sexual relations." Not surprisingly, this defendent received a sentence of three years probation, from which he was released, incidentally, seven months later to serve in the army (a not uncommon development during the period of World War II). 86

Turning now to those situations in which two or more defendants were alleged to have been sexually active with one complaining witness, trials were conducted sequentially, and sentences were awarded respectively for each defendant. By the very nature of these cases, these were the victims who, probably more so than any others, experienced courtroom sympathy solely on the basis of their naive vulnerability to social ruin. Of the thirteen identifiable groups of multiple defendant cases, twelve resulted in probation sentences for nearly all of the defendants. The very few prison terms awarded were for one year minimums, with the exception of one three-year minimum term. 87 Significantly, the only case in which all the defendants in a multiple-defendant group received prison terms (for one to three years at Jackson) was the group case cited earlier in which the complaining witness' mother protested that these boys should not be allowed to go free while her daughter was being held in a detention home. 88 It may be that her complaint accounted for what was essentially a unique break in multiple-defendant outcomes.

In examining briefly the 32.1 percent of cases in this group that did not result in conviction, one must first be reminded that were no convictions in cases of this type until 1901. There just seems to have been little willingness to punish a man who had sexual intercourse with an underage consenting girl. Indeed, the 1901 conviction resulted in a deferred sentence, a monument, I believe, to the great ambivalence with which the court approached this first guilty verdict. 89

The circumstances in the "no-conviction" cases after 1920 differed

from the "conviction" cases only insofar as extenuating circumstances were resolved satisfactorily between the parties. There were cases in which the victim was pregnant and the purpose of the trial was to determine who the father was, or to "settle the matter of support for the bastard child." 90 A 1922 dismissal occurred in a case in which there was considerable badgering of the complaining witness by the defense attorney, in part because she had had sexual intercourse with two separate defendants and could not remember where the incidents of intercourse had taken place. 91 One 1927 defendant was found not guilty because, even though the victim had resisted the first time, she had offered no resistance to having intercourse with him the second time. 92 None of these cases offer any circumstance that was uniquely unlike those found in the cases ending in conviction. But there was one 1948 case in which the defendant and complaining witness got married; this resolution had the power to pre-empt legal retribution in a way that little else could. Given the event of the marriage, the prosecutor requested the case be nolle prossed. 93

To summarize, in the situations in which financial settlements were reached between the parties, child support was arranged, or the parties married, the results were always dismissals. Further, other cases ending in acquittal could generally be characterized by what was absent: there were no great age disparities between the defendant and the victim, nor were there any remarkably objectionable defendant character traits.

In conclusion, one thing seems clear: the courtroom treatment of

these cases rested on a set of assumptions quite different from those for forcible rape. When adolescent girls, by their own admission, willingly consented to sexual intercourse in the context of an ongoing relationship, the law functioned to punish the man on the premise that he was leading her to moral ruin and contributing to societal endangerment. On the basis of this rationale, however, courtroom agents were hard pressed to find cause for severe punishment of the offender. One may rightly ask if the court took seriously the breach of the law by young males who engaged in consensual sexual intercourse with adolescent girls. Case outcomes show that they did not. Unless the defendant was at least ten years older than the victim or was of a character that was particulary reprehensible, or the victim was seen as exceptionally vulnerable, nearly 70 percent of the time, the court awarded light sentences--very short stays in prison or periods of probation. In all other cases, the court chose either not to convict or not to prosecute at all.

3. Statutory Rape Involving an Acquaintance

The line between statutory rape involving acquaintances and statutory rape involving people in romantic relationships is very fine--and often blurred to the point of being indistinguishable. In the overlap between these two groups, the age range of the victims was very similar, although acquaintance cases did also include some very young girls, not present in the relationship cases. As in the latter group, the victims of acquaintance statutory rape were liable to gonorrheal infections, pre-marital pregnancy, and perceived female adolescent

delinquency. The distinguishing feature of acquaintance cases is that the victim knew the defendant prior to the offense--in a non-intimate way. He was a household boarder, neighbor, employer, or local shopkeeper. At some point he engaged the victim in sexual intercourse, and the fact that she claimed the act was against her will characteristically drew the attention of the court. In relationship cases, it will be recalled, the court took it for granted that the victim had consented, and thus, adjudicated those cases on the basis of a rationale that obviated the issue of consent. In acquaintance cases, the victim claimed nonconsent, and the defense took the position of needing to disprove the truth of that claim.

Thus, the rationale that demanded consensual relationship cases be adjudicated on the basis of a desire to protect young girls from prostitution was not strongly in evidence here. Rather, the court approached acquaintance cases from a forcible rape rationale--first, needing to prove the fact of the offense; second, needing to prove nonconsent; third, needing to raise questions as to the motive for filing the charge--all elements that were clearly de-emphasized in the relationship cases. Indeed, in those situations, the fact of the offense was all too blatantly apparent, and consent was not open to question since the victim generally readily admitted her willing participation. Further, in relationship cases, suspicions as to the motive for filing a charge were rarely raised as the initiator of the charge was usually not the victim but a member of the community law enforcement apparatus. It was appropriate in acquaintance statutory

rape cases to establish the fact of the offense and scrutinize the motive for making an accusation. But it was inappropriate in these cases to disprove the victim's claims of nonconsent. Routinely, defense attorneys engaged in excruciatingly detailed inquiries into the victim's character, the particularistic aspects of the verbal and situational interactions between her and the accused prior to the offense, and the reliability of her claims of resistance. The whole business of ascertaining the extent to which the acquaintanceship between the victim and the accused may have made consent prior to the offense possible formed much of the basis for judging the merits of a case and determining its disposition.

There were roughly only half the number of identified acquaintance cases as there were relationship cases--47 as opposed to 106--which again highlights the amount of attention the court gave to the latter. In acquaintance cases, there were thirty-four convictions, thus the conviction rate was higher, at 78.7 percent, than was the conviction rate of 67.9 percent for relationship cases. The average minimum sentence for acquaintance cases was 3.36 years, which was considerably longer than the average minimum sentence of 1.44 years for relationship cases. The initial impression one may take from these numbers is that, though the court gave more attention to relationship cases, its condemnation of the convicted offenders in the acquaintance cases was overall much more severe. With consent being the most consistently significant difference characterizing these two groups of cases, one understands at the outset of this examination of acquaintance cases that

the court attributed less blame to offenders with whom the victim had consented than it did to those with whom she had not. By law, there should have been no distinction; by social definition of the law, there was a great deal of distinction.

I have selected cases according to the degree of court censure evidenced in the outcome: (1) those that were nolle prossed or ended in acquittal; (2) those that ended in mild to moderate sentences; and (3) those that ended in moderately severe to severe sentences. The individual case factors that may have contributed to the outcomes will be important in terms of how they reflected the values of those who were in societal positions to make these judgments. Moving through these categories reveals a continuum along which case circumstances at one end called for exoneration and at the other end, called for extreme reproach. This discussion begins by looking at the cases in which prosecutors were led to pre-empt prosecution or juries were led to acquit.

In August of 1908, Joseph May (an alias for Joe Turfey) was accused of having ravished and carnally known one Mary Kuyser, a female child who was eleven years old. 94 In Mary's testimony, she recounted that Joe, who lived in back of their "place," had come into their house one morning after her father had gone to work. She described the event--she had been in her papa's bed when Joe came in. He had come into bed with her; she had "cried quite a little" when Joe "put his private parts into [hers]" because it hurt. She stated that Joe had tried to get into bed with her on other previous occasions too, but that her brothers had been

there and had told him to leave. Joe's defense, provided via an Assyrian/English interpreter, was that he had never been inside the Kyser house and that he had witnesses who accompanied him every morning when he went to look for work. Further, he stated, Mary had asked for cigarettes and an orange, and he named other people (Assyrians, the transcript noted) who had seen her smoking. The prosecutor had filed an information on September 26, apparently intending to pursue the charges. On October 8, however, he requested a nolle prosequi, convinced, it seems, that the case was not prosecutable after all. Joe Turfey's witnesses may have been particularly credible or there was apparently some thought that Mary was making the story up. Further, this defendant may have seemed particularly vulnerable because he could not speak English. Ultimately, the suspicion seems to have been that Mary was falsely accusing this man, and the case was dropped.

Five days after Christmas in 1917, Rudolph Slimak, who had been awaiting trial in the Ingham County jail since late October, learned that the prosecutor in his case had filed a request to nolle pros the charges against him. 95 Having been accused of carnally knowing thirteen-year old Sophia Pajetka, he had waived pre-trial examination, which suggests he believed he had little hope of acquittal. Yet the prosecutor had discovered that the father of the victim owed the defendant a large sum of money and explained "[the father] had endeavored to intimidate this respondent and thereby induce him to cancel the debt." Therefore, he reasoned, "there was no testimony of any value except that of the girl, and I am satisfied that under the

circumstances the respondent should not be required to stand trial for this offense." 96 This prosecutor acknowledged he had asked for a continuance because he suspected the complaining witness had not been acting in good faith. His discovery of the debt, together with his belief that this witness could not be trusted on her own merits, were sufficient reasons in his mind for dropping the case. And so it was.

The 1929 case against Alex McIntyre was an unusual one in that the victim had had a history of mental illness. 97 Living at home with her mother at the time of the offense, Melva Freeman had once spent an extended period of time in a state mental hospital. The offense took place with the boarder at her mother's house. By her own admission, Melva had written many letters of romantic interest to McIntyre and had asked him several times if he would marry her. Though he never answered her letters, she explained that she continued to write them because she would "get rather lonesome". Finally, she had gone into his room to visit him, asked him to make love to her, and spoke of the event in terms of his "conquering her". Using a vocabulary that decidedly diverged from the complete lack of sophistication seen in other witnesses, Melva spoke of this sexual encounter knowledgeably and in graphic detail. 98 If ever there was an unwitting victim (of her own fantasies), this was one; but the prosecutor in the end felt compelled to give up the charge. His March 1, 1930 motion for a nolle prosequi read:

> ...the complaining witness in this case having completely lost her mind and having been returned to the... State Hospital..., there is no witness left able to testify to facts sufficient to

obtain a conviction before a jury. 99

One can only speculate, in retrospect, about the effect these proceedings had on Melva. But the perception of the prosecuting attorney that she had completely "lost her mind" suggests the reactions of others to Melva's vulnerability in this entire episode were sympathetic only to the extent that her confinement was necessary to protect her from herself. On this basis, the actions of Alex McIntyre were excused.

The charges for statutory rape were nolle prossed in another case on the basis of what might be termed a perceived cultural miscommunication. In 1942, Herman Saravia, a Mexican defendant, was exonerated of all guilt when it was determined he had falsely pled guilty "to protect" the young victim from what he expected would end in retribution for her because she had lied, he maintained, about the offense. In a deposition submitted by a notary public on Saravia's behalf, it was stated that the defendant had "never before been arrested or convicted of any crime.. that he was fearful of the arresting officers...did not know the meaning of the term [rape]...but, had no idea of the seriousness of the charge..." 100 He had, the statement continued, feared that Darlene Corey would be punished for lying and that she might be taken away from her mother if he denied the charge. In the end, the entire confession he had given earlier was taken as a fabrication, with "his nationality and inability to read or write English" was given as the primary basis for excusing his ignorance and misunderstanding of the matter. It may be supposed the basis for taking Darlene's story as a

fabrication was that she was a girl.

Thus, in all of these dismissals, there were "reasons" to drop the charges against the defendant. There were witnesses who provided an alibi for the accused; there was the matter of suspecting a father's ulterior motive for filing the charge; there was the pragmatic matter of a victim who had become unavailable due to losing her mind; and there was the allowance made for an English-deficient defendant, who was able, in spite of having made a full confession, to persuade the prosecutor he had not committed the offense after all. Taken together, these dismissals yield important impressions as to what stood as reasonable grounds for repudiating the claimed victimization of a young girl. While no courtroom agent would have thought this process was in any way dishonest, the effect of these efforts to rationalize the truth of an event seem to have upheld a legal structure that was as protective of the defendant as it was cavalier toward the victim.

In contrast to these cases, there were other situations in which the jury was willing to believe the victim and punish the offender. The extent to which these sentences were light, however, demonstrates not unexpectedly that, given the proof of an offense, there were factors mitigating the court's level of redress. In 1907, Sidney Hinds waived examination when charged with assaulting and carnally knowing fourteen-year old Mary Simpson. 101 Therefore, there is no information as to what actually happened between Sidney and Mary. But Sidney was clearly the subject of great sympathy in the community. Sixteen letters from people in his hometown of Midland were submitted to the court on

his behalf. Contained in these pleas for leniency were statements to the effect that Sidney's father was a "crippled druggist" dependent on the support of Sidney and his brother; that "from a little boy, his habits and life were always good;" that "his parents were exemplary people;" and that he was "considered by everyone...[to be]...honest and industrious." In what was an especially even-handed and reflective letter, the secretary of the Midland Board of Education wrote, "I cannot believe that this boy is bad, but think he must be the victim of a statute that is a good law but which sometimes punishes an innocent boy." Subsequent to Hinds' conviction, the probation officer wrote up his investigation of the case, stating:

> He says he lost control of himself and committed the crime for which he is now very sorry. With what I know of this case and after reading the numerous communications in his behalf I am inclined to believe him without criminal intent and that he is a proper subject for probation. 102

Thus, thanks perhaps to the support of a Midland county clerk, sheriff, newspaper publisher, postmaster, and city attorney, and to Sidney Hinds's own attitude of remorse, a term (undisclosed length) of probation was deemed sufficient punishment for the crime the jury agreed he had indeed committed.

In the 1919 charges against Clarence Rocha, the jury apparently accepted as fact the testimony of the victim, twelve-year old Edith Allen, that Rocha had made an entrance of "two or three inches...with his organ." 103 But there were questions as to her resistance and to her motivation for filing the charge. Under cross-examination she revealed the extent to which she resisted Rocha's advances:

Q. He forced you down there [beside the bridge], you didn't want to go?
A. No.
Q. Did you call for help?
A. No.
Q. You thought you were capable of taking care of yourself? ...you didn't call for help or-- but he dragged you along?
A. Yes.
Q. Did you walk along?
A. He forced me to walk along.
Q. You didn't try to resist him very much?
A. No.
.....
Q. Did you struggle any after you got on the ground?
A. Yes sir.
Q. Did you strike him or scratch his face?
A. No, I didn't scratch his face or strike him.
Q. Your arms were free so you could use them if you wanted to?
A. Yes. 104

Thus, the nonresistance of a twelve-year old victim was thrown onto the table for scrutiny, in open disregard of the stipulations in the law for consent. As to the question of this victim's motive for filing the charge, the defense attorney wondered, had she not wanted to settle some score with the defendant's wife?

Q. Now Mrs. Rocha threatened to have you confined to the Reformatory at Adrian?
A. Yes.
Q. And that is because you were riding around with different men?
A. I was not riding around with any men at all.
Q. Never rode with anyone?
A. Just my daddy.
.....
Q. You never got on the wagon with a drayman and rode with any drayman at all?
A. No.
Q. You never - you know what flirting is?
A. No.
Q. You never waved your hand at any of them.
A. No.
Q. When Mrs. Rocha said she was going to send you to Adrian you didn't like that very well, did you?
A. No.
Q. You made up your mind, you would get even with her?
A. Yes.

Q. She didn't talk very good to you did she?
A. No.
Q. Made you pretty mad?
A. Yes.
Q. And didn't she slap you?
A. She did that last week, either last week or the week before.
Q. Was that before you talked to the Chief?
A. Yes. 105

The resolution to this case was that Clarence Rocha was found guilty and sentenced to serve one year in the county jail. The account of his having forced Edith into having sexual intercourse with him down by a bridge was taken by the jury to be truthful. It seems the jury was not convinced of the argument that Edith may have had an ulterior motive for bringing the charge. Ultimately consideration of her admitted lack of resistance, while wholly inconsequential by law, may have had the effect of lessening the blame attributed to the offender.

Then there was the case in 1941 against Andrew White, a black porter who was convicted of having carnal knowledge with Essie Dean Williams, a fifteen-year old girl who was also black. 106 White waived examination so here is another case that provides little detailed information. But the probation officer's report notes that Andrew had become acquainted with Essie in June of 1941 and had had sexual relations with her by August. By his own admission, Andrew allowed that Essie was one of about twenty girls with whom he had had sex. He claimed she did not object very much, and that she had told him she was seventeen--to assure him presumably, that having sex with her would not be unlawful. In spite of these signs of her consent, I have included this case in this group of cases because there does not seem to have been an ongoing relationship between them. Additionally, the attitude

articulated toward this black defendant may give some indication of attitudes toward black defendants generally. The probation officer wrote:

> Andrew White is quite black. He is a dabber [sic] sort of Beau Brummel who loves to wear loud clothing and has quite a supply... He has a very exulted [sic] opinion of himself, especially insofar as his ability to make women go wild over him. 107

He recommended:

> While Andy is eligible to probation, I cannot bring myself to the conclusion that this is the remedy. I really feel that he needs disciplining and needs it quite badly. 108

The judge's response to the officer's recommendation was to sentence Andy to a term of eighteen months to ten years to Ionia Prison. He wrote to prison authorities with some hint of righteous condescension:

> ...he has little if any sense of morality...he has had improper relations with at least twenty young colored girls. It would seem that for the good of society and his associates in particular, it is necessary to impress on him that the course of conduct in which he has indulged in the past can not and will not be tolerated in the future. 109

With this expression of moral distaste for White's behavior, it is surprising that the sentence he received was not more severe. One step beyond probation, this sentence may be a measure of the punishment accorded black men whose sexual affiliations, while unlawful, were confined to black girls.

In May of 1943, when the case of Vondah Lee Bellah had come before the Circuit Court of Ingham County, the following letter arrived from Bellah's mother. (I have reproduced it here in its entirety, with

spelling and grammatical errors intact.) It was addressed to the judge:

> Dear Sir
>
> I understand my son is there in jail for rape I can't understand. When he was such a good boy at home. didn't drank. and was easy to get along with ever body - but usually that is tha kind that gets the blame if anything happens. With such terible ware on and for his mothers sake wont you please let him come home to help me on the farm and we need him so ... you know the nature of some girls these days They can get boys or men in trouble this way then they laugh about it. he is a good kid and would do anything for you. but mabe he hasnt got a chance. So I hope god answers my prayers and sends him home to mother. for he needs to be working. I dont believe he is guilty of such crime. and he sure has had a hard time in his life. so please dont keep him in prison that way hoping you let him come home - and I sure would apperciat it from his mother
>
> Mrs. Leona Bearden
> Jacksonville, Ark. 110

It is difficult not to sympathize with this mother's plea. At its most basic level, it imparts a poignant sense of the hurt often suffered by the family members of the defendants in these cases. Again and again, the record shows that these young men were the only source of support for elderly parents, younger siblings, or wives and children. This is not to say they should have been spared punishment to avoid painful separations from those who depended on them; but this aspect of these cases, generally peripheral to the courtroom experience, was clearly one that hit economically marginal families the hardest.

This letter is important on another level because it articulates the fear of many regarding the "nature of some girls" and the way those girls would "get boys or men in trouble" and then "laugh about it". Especially in light of the foregoing discussion, one cannot ignore the possibility that there were underage girls only too ready to engage in sexual intercourse with young men in spite of the legal censure they

knew it could incur. Certainly in some cases, the liability for breaking this law fell on both parties equally. Acknowledging this possibility, however, does not obviate the responsibility of the men and boys who took advantage of a young girl's naivete or emotional and physical vulnerability. Lest this point be missed, we can turn from the letter Bellah's mother wrote to the judge and get quite another perspective on Bellah's case from the the judge's letter to prison authorities at Jackson. Having sentenced him there for a period of three and a half to ten years, this judge wrote:

> This man was tried by jury...and found guilty of statutory rape. The testimony, in substance, showed that he took the girl, who was at that time 14 years of age, from a house where they were having a sort of party, for a motorcycle ride into a deserted spot and had intercourse with her, during the course of which he roughed her up severely and broke both lenses of her glasses. She afterwards started home on foot and there is no question but that there was a fight between them, and that he was not only guilty of statutory rape, but of rape by force as well under the circumstances... This man Bellah, is not a very high type...from his conduct during the trial and his talk has a very low concept of conduct and morals... 111

As for Lorraine, the victim in this case and the girl whose "nature", Vondah's mother feared, had led him into this trouble, the judge wrote:

> The girl, while not of the most intelligent type, nevertheless had not been a bad girl as matters go, but we also yesterday convicted another and older man of rape on her, by which she is pregnant, and which two occasions she claims are the only times she ever had intercourse. 112

So, "as matters go," Lorraine was not so "bad" as Vondah's mother might have suspected. And, on the other hand, her son was not "such [a] good boy" as she believed. No one came out looking good in this

situation. But there can be no question, the "nature of girls" notwithstanding, that this young man would have been by law guilty of statutory rape, whether he had broken Lorraine's glasses or not. The element of force seems to have impressed the judge with the added seriousness of Bellah's offense, as he made clear the fact that this behavior was more than statutory rape--it was akin to forcible rape as well. Such perceptions may account for why the pleas of this offender's mother were ultimately ignored, and a moderate prison term was awarded as opposed to a term of probation.

Of the thirty-seven guilty verdicts in this group of cases, there were only six cases with sentences of five-year minimums or more. Five of these six comparatively severe sentences were awarded in the years between 1927 and 1942, indicating this was a period of harsher sentencing for acquaintance statutory rape. The sixth severe sentence was awarded in 1949. Thus the examples described below are taken from that fifteen-year period of 1927-1942. Again, as with the earlier examples, these stories provide a window to the specific case issues that proscribed a level of condemnation from the court. Here we begin to see what kinds of acquaintance statutory rapes were judged as worse than the others.

The case against Pat Moran in 1931 was really for sodomy, termed the "abominable and detestable crime against nature." 113 This sixty-year old man had allegedly raped an eleven-year old boy twice. The second time, his offense was witnessed by a telephone wire serviceman who viewed the event from his perch up on a telephone pole. When he saw

what was going on, he climbed down the pole, grabbed Moran and called the police. A doctor reported in testimony that an examination of the assaulted boy, conducted the same day as the offense, led him to conclude that the boy's injuries were the result of anal intercourse. Given the presence of a witness to the offense, any other conclusion by the doctor would have been absurd. The judge sentenced Moran, who had earlier done some time in Sing Sing and in a Florida prison on two separate burglary charges, to Jackson Prison for five to fifteen years. A penalty of such severity was only the second of its kind for acquaintance statutory rape, and seems to have been due to the offender's prior criminal record and to the court's view of sodomy. Clearly, the court viewed the perpetration of this offense on a boy with at least as much disapprobation as it viewed statutory rape perpetrated on a girl; indeed the degree of reproach for the former was apparently greater than for most cases of the latter.

The most severe sentence in this group of acquaintance statutory rape cases went to thirty-eight year old Ed Fagan, who in 1931, was convicted of raping fifteen-year old Opal Lipps. 114 Opal had been living with her grandmother but "worked out" as a housekeeper two days a week. Ed Fagan was staying at the home where she worked, and they had gone for walks together, exchanging kisses that led to Fagan's removing her bloomers and having sexual intercourse with her. She stated in court, "I let him--what else could I do?" She added that she had cried; she was "afraid because [she] had done such a thing." Once convicted, Fagan was sentenced to spend the next fifteen to thirty years at the

state prison at Marquette. The extreme severity of this sentence is somewhat of a mystery, but the fact that Fagan had already been convicted in the 1920s for indecent liberties, for which he had done some time in Jackson Prison, may have been key to this judge's strong reprisal. Further, Opal may have appeared to the court as a particularly "innocent" victim, quite obviously not of the type that would have consented, as did Mary Simpson, Edith Allen, Essie Williams, or Lorraine.....

According to the testimony in Fred Powell's case, his wife was very frequently absent from home, and it was during these absences that Powell would hire young girls to come in and care for his children. 115 One of these girls was thirteen-year old Ruth Smith, who found herself the subject of Fred's sexual advances while in his home. At his 1935 trial, Powell was found guilty and sentenced to seven and a half to fifteen years at Jackson Prison. The judge noted in his letter, "the respondent has been guilty of light conduct toward other girls, amounting to indecent liberties." Thus, the circumstances in this case were very similar to those in the Fagan case--a girl who had been hired to work at another home was sexually assaulted by a man living in the home where she was employed. In both of these cases, the court clearly recognized the victimization of these particular girls as believeable and valid. They were recognized as not having invited the encounter nor as having consented.

At the time that charges were brought against twenty-eight year old Andy Puckett, he had been having sexual intercourse with Beulah Cousino

for three years. It was now September of 1941, and she was by then thirteen. 116 Puckett waived pre-trial examination, therefore, as in cases like this, the details of the situation must be gotten from the probation officer's report or the judge's statement. Both of these documents, in this case especially, may be seen as representing a generalized perception of a certain population within the community.

As to the defendant, the probation officer's report noted:

> I am informed by people who know that Andy is an untruthful person... He is of the usual Kentucky Mountain shiftless type. When I asked him where he was born, he said not born in any town, but in the mountains of Kentucky. ...His financial balance sheet shows that he is $18.00 worse off than nothing...[He has] a wife ...she is pregnant and expects to have a baby in May this year. 117

Subsequent to reading this report, the judge determined that a sentence of seven and a half to fifteen years in prison was appropriate for this defendant. He wrote to the authorities:

> This man...has been a thorn in the flesh around Stockbridge for some time past, fighting, breaking liquor bottles on the street, drunkenness, and so forth. He has three convictions for drunk and disorderly and one...for contributing to the delinquency of a minor. 118

The judge further described how the defendant's father, brother, and sister-in-law had tried to get a material witness for the prosecution to perjure herself. When he then talked to this witness personally, he heard "a story of threats and promises which made a perfect pattern in the history of the case." Thus, he was convinced of the defendant's guilt. In his mind, this individual's "crime," three years of ongoing unlawful sexual intercourse, was reprehensible on its own merits. Beyond that, however, this offender's other behaviors fit

those of a "type": the southern, hill-country migrants who had moved north in such alarming numbers during the war. In the end, Andy may have deserved the severe punishment he got, but one may consider that it was not merely a punishment for the crime of statutory rape.

Finally, we are not able to know much about the circumstances of Willie Everett's offense in 1941, but from the materials that are available, we do know some things about Everett himself. 118 This thirty-six year old man was described by the probation officer as very "nervous, highly emotional...[and] talkative during the interview". He was a Roman Catholic who quoted the Bible at great length and believed in the power of prayer. In his life patterns he had been holding forth against rather perilous odds for a very long time. His mother had died when he was thirteen, he had not seen his father since he was eleven, and he had made his living as an itinerant cook and gardener, moving back and forth between Florida and Michigan for a number of years.

According to the judge's statement, Everett "attempted to place the enticement at [the girl's] door, but admitted frankly...that he, partly at least, consummated the act and commented at length, religiously and otherwise, upon how low a man must be to do this sort of thing." The judge expressed his concern that "some might feel that a more severe sentence" should be given in this case, "in view of the racial situation". Everett was black and his victim was white, a twelve-year old girl of "low mentality", who did not "appear to know too much about what went on...". Satisfied that the offense had been committed "insofar as the statute contemplates," and "taking all the circumstances

into consideration," wrote the judge, a sentence of ten to fifteen years in prison was, in his mind, "about right." 120 Thus, in spite of this defendant's ingratiating expressions of humility and apparent remorse, he met with little sympathy from this judge. The crime that the statute "contemplated" had been met over time with widely varying measures of retribution; in this case, as in others, the level of retribution was readily contingent upon matters extraneous to the offense--the "racial situation," for instance.

With the exception of Wille Everett, the other four defendants receiving severe sentences had at least one thing in common: all had a history of previous offenses, sexual or otherwise. Further, there was evidence in each of these cases that the victim either had not consented or was so young at the start of a long-term sexual involvement that she was readily taken to be an unwilling participant, in spite of already being an acquaintance with the accused. Beyond these factors, each of the offenders was characterized by some deviant personal trait or behavior pattern that made him seem more reprehensible than the other acquaintance offenders.

To conclude this analysis of acquaintance statutory rape, if outcome variability can be used as a measure of the court's way of defining this offense, then surely we are able to see that acquaintance statutory rape was a crime that carried very different meanings in the minds of courtroom agents. Most of the time, there were reasons for doubting the fact of the offense, if not its seriousness. These reasons usually had something to do with attributions of bad character,

complicity, or consent directed toward the victim. It may be she smoked, was perceived to be running around with men generally, went out of her mind, or was thought to have filed the charge out of ulterior motives.

In rare instances, the fact of the offense was not doubted and its seriousness was not questioned. The reasons for that were always tied to some perceived socially unacceptable character problem with the defendant. Beyond that, the willingness of the court to take these offenses more seriously appears to have been a time-bound response. The frequency with which lengthy prison terms were awarded between 1927 and 1942 was not apparent during any other time for offenses of this category. It seems the indulgence with which the court had met acquaintance statutory rape offenders in the past was, during this period, held in reserve. From 1942 on, however, the earlier pattern resumed, with a slight alteration. In these last eight years of the sample, it may be seen that as more defendents were convicted, more routinely than ever before, they were sentenced to periods of probation or very short prison terms.

A final conclusion must be that, in general, statutory rape with acquaintances was taken more seriously during a time in which severely depressed economic conditions prevailed. In this period, the impetus to treat convicted offenders with grave condemnation was stronger than it was at any other time. By contrast, the general pattern of very light sentencing during this country's involvement in World War II, evidenced by a high percentage of probation and short-term prison sentences, and

by the number of releases from probation to serve in the army, indicates a greater willingness to excuse the sexual transgressions of these offenders. Such a pattern of legal indulgence may perhaps be viewed as coming out of a larger milieu of social forbearance conceded young men nationally at this time. The practice of releasing prisoners from probation to allow them to serve in the army should not be seen, however, as simply granting them a pass to freedom. That option was sanctioned, according to one local contemporary, a law officer in this county in the 1940s, as a rehabilitative measure. "You can have a choice," so it was put to certain offenders. "You can sit in prison or you can go into the army and make a man of yourself." 121 It seems the more popular choice was the latter alternative.

At this point, it may be seen that courtroom treatments of statutory rape were constructed on the basis of very distinct definitions of that crime. These meanings were rooted in assumptions about unlawful sexual intercourse taking place between two persons who knew each other, constrained in part by a reform appeal that bound the court to fulfill an injunction to save wayward adolescent girls. The degree to which courtroom perceptions of the victim's consent ameliorated its punitive response toward the defendant in relationship and acquaintance cases becomes even more pronounced when compared with the stranger assailant cases of statutory rape. In a brief look at the treatment of defendants who were acknowledged not to have been acquainted with the victim prior to the offense, we are able to see just how crucially this circumstance affected outcomes.

4. Statutory Rape Involving a Stranger

As was dramatically shown earlier, the total number of identifiable stranger assaults in the sample, across all four charges, was only fifty, twenty-seven of which ended in conviction. The striking thing about this statistic, as was pointed out, is the very small number of stranger assaults brought into this court. The number of stranger assailants charged with statutory rape was only ten, which comprises only 3.03 percent of the total of statutory rape cases. When we consider that 9.2 percent of the total sample of cases can be identified to have been perpetrated by strangers, then we can realize the disproportionately small number of stranger assailants brought to trial in the statutory rape category. This statistic may say two things. First, it coincides with the earlier finding that stranger assaults were tried infrequently, due primarily to practical enforcement difficulties that, in statutory rape cases, were exacerbated by identification problems with very young victims. As will be seen here, the majority of apprehended strangers were witnessed by a third party. Second, it points, by way of contrast, to the greater practical emphasis on using the statutory rape law to discourage young men from engaging the adolescent girls they usually knew in premature sexual activity.

Of the eight known cases of statutory rape involving a stranger assailant, four were <u>nolle prossed</u> and four resulted in conviction. The characteristic that most immediately distinguishes the courtroom treatment of stranger assailants of underage females is the severe

sentencing given to those found guilty. The average minimum sentence, counting life terms as thirty years, was 21.0 years, an astoundingly longer period of time than either the average minimum term of 3.36 years for acquaintance cases or the 1.44 years for relationship cases. [See Table 21. Average Minimum Prison Terms for Statutory Rape Convictions.] It seems the blameworthiness of convicted statutory rape stranger assailants was perceived by courtroom agents, in reponse to assumptions operating to define such blameworthiness, to be of much greater magnitude than that accorded convicted acquaintance assailants.

The first attribution of high blameworthiness to stranger assailants may be credited to the assumption that with strangers, there was little likelihood of prior consent. In spite of the fact that consent was not material to the offense, the courtroom discourse, as we have seen, proved otherwise. The second attribution of blame could be attributed to a witness to the offense. As was the case with stranger assailants in cases of attempted rape, statutory rape convictions in which the offense was prepetrated by a stranger were linked to the presence of a third-party witness, who made possible the apprehension of the offender and the proof of the offense to the jury. The following cases illustrate these points.

In the 1926 case against Charles Kregear, there was no examination transcript because he pleaded guilty. 122 But an article in the State Journal told enough of the brutal details of the crime to confirm that Kregear was very likely a stranger to his victim. The article read:

> The attack took place Monday. Kregear was said to have picked the girl up in his auto as she was on her way home from school. Taking

> her to a secluded spot, he attacked her, choking her and stuffing a gag in her mouth, as well as threatening to kill her if she screamed, according to the girl's story to officers. 123

The article reported that Kregear had been apprehended by a deputy sheriff "who traced him through the last three figures of the license number of his automobile, which were '888'". The child, ten-year old Beulah, had remembered the license number and was able to describe some things about the man. A clue to the outrage of the court over this offense may be found in the fact that the complaint, warrant, arrest, apprehension, trial, and sentencing all took place in one day. By the afternoon of November 4, Kregear was sentenced to spend the rest of his life at the State Prison in Marquette. A further measure of the court's condemnation of Kregear is seen in a 1940 denial of his request for Executive Clemency. Indeed, Charles Kregear was not paroled until October, 1955, twenty-nine years after his trial. 124

Clearly, in this case, the definition of statutory rape embodied very nearly the worst possibilities this crime would allow. There was simply no question here: the court could only perceive this attack as vicious and worthy of the most severe punishment permitted by law. It is an example of how the court probably reflected popular conceptions of the most necessary use of the statute. At this extreme, however, such conceptions rested more on a notion of forcible rape than statutory rape, and the punishment demonstrates how significant the element of force was in the adjudication of statutory rape law.

At about 5:00 a.m. on August 24, 1934, a farm family from nearby Williamston was delivering vegetables to the city farm market in

Lansing; thirteen-year old Phyliss was driving the truck. 125 A man who presented himself as a police officer drove up and signaled for the family to stop. After learning that Phyliss did not have a driver's license, he explained that she would have to come with him. Before her parents could collect themselves enough to object, Norman Hall had driven off with Phyliss at a speed faster than her parents could follow. Her mother testified:

> Well, we always look on officers as upholding the law and I don't know--I can never, to my dying day, see why I ever let the child out of my hands, but I did-- I says "Hadn't I better go?" and this man says, "No, it won't be necessary." And before I could calm myself he had slammed the door and on he went. We knew right away there was something--we knew it, but she slipped right through our fingers...and that's all of my story. He took her. 126

Eventually, Hall stopped the car, pulled Phyliss out, and forced her into a barn where he raped her. He then drove her up to the Lansing/Williamston Road and told her to get out, whereupon she walked to Lansing, arriving there about 9:00 a.m. Norman Hall was tried in Ingham County Circuit Court, found guilty of statutory rape, and was sentenced to life imprisonment at Marquette, a facility in Michigan's Upper Peninsula reserved customarily for hard core offenders. 127

In examination, Phyliss confirmed that, yes, she had pleaded with Hall to let her go; yes, she had seen his "privates"; and yes, he had inserted his "privates" into hers. This testimony was not challenged, nor was her character questioned in any way. There was no need to employ whatever assumptions prevailed in 1934 about the character of underage females who consented to sexual activity. The fact of her forced kidnapping, taking place as it did under the confused and

gullible eyes of her parents, was proof of lack of consent. Moreover, she was a thirteen-year old girl who was seen to have been helping her parents make a livelihood on the farm; such a girl was likely to be viewed as responsible and thus believable.

These facts contributed no doubt to the jury's verdict. Additional facts may have contributed to the severity of the sentence. First, Hall had impersonated a police officer, which was a felony offense. Second the judge's statement indicates the respondent had "previously been convicted of minor offenses, including assault and battery on his wife...and for driving away an automobile without authority." He stated that the current offense had been "revolting in its details" and that he was "impressed that the respondent deserved the maximum penalty." Thus, while the felony of impersonating a police officer and the "minor" offense of wife-beating, together with stealing a car, were not legally integral to the offense of statutory rape, they likely helped convince the judge to put Hall away for life.

In 1942, twenty-one year old Alfred Sessions noticed three young teen-age girls walking home from a carnival; he stopped his car, got out, walked over to the girls, and forced them to walk into a nearby field. 128 Threatening them with a small hand gun, he demanded they take off their pants. He then proceeded to rape one girl after the other, then going back to rape the first again, remarking that she was the best. Finally, prompted by his stated intent to take them away with him in his car, one of the girls jumped up and ran to the street, where she stopped a passing motorist. The driver who stopped pursued the

girls' attacker, caught him, and took him into police custody.

As with other stranger-assailant cases in which a witness interrupted the attack and was able to identify or apprehend the offender, there was no need to question the fact of the attack or the victim's consent. Instead of structuring his inquiry along those lines, then, this defense attorney sought to mitigate the defendant's guilt. Did the girls talk toogether and decide what to report in court? Had they seen his penis? How did they know he had put his penis inside? How long did it hurt? When did it stop hurting? Had he acted as though he had been drinking? These questions appear to have emerged out of a suspicion that the young girls had designed an exaggerated account of the story the details of which they could each substantiate in court. Such a suspicion would have been founded on two assumptions: (1) that young girls are capable of imagining such things; and (2) that young girls are capable of being that devious. As to whether or not they had seen his penis and felt it penetrate them, the law stipulated that only penile penetration constitued rape; the assumption would have been that these young girls may not have known the difference between his penis and his fingers. The questions as to how long it hurt likely played to doubts about whether or not they had in fact been raped and victimized. If the act had not hurt, then the perception would have been that they may not really have been raped and certainly not victimized. The questions about the defendant's having been drinking was aimed at discrediting his intent to rape, an element essential to establishing guilt.

The defendant, for his part, claimed he had been habitually under the influence of liquor during the past year and must have been so intoxicated, he could not remember the incident. The jury was not swayed. Sessions was convicted of the charge of statutory rape against one of the girls and sentenced to twelve to twenty-four years at the State Prison in Jackson. 129 The charges brought by the other two girls were nolle prossed, apparently because there was some question as to whether he had sufficiently penetrated them to call it rape. It may have been the court's belief, too, that one lengthy sentence would adequately punish Sessions for his triple offense.

Thus, taking these cases as examples of statutory rape perpetrated by a person fully unacquainted with the victim, we can understand what it was about these situations that merited such a particularly strong legal response. With stranger-assailant cases, the emphasis on the victim's character--so integral to the defense of the accused in acquaintance cases--was simply not an issue for consideration. There can be no doubt that convicted stranger-assailants were the subjects of far greater legal censure, usually because their assault was assumed to have been forced, but also because there was often a witness to corroborate the claim of the victim.

One particularly compelling case from 1932 provides an idea of what happened in a stranger case in which there was no witness. There were two victims in this story, both seven-year old girls, who had encountered sixty-four year old Fred King in an abandoned house. They had gone inside to get some loose plaster to use for a hopscotch chalk.

King had gone inside to urinate. 130 Lois, the only victim who was willing to talk on the stand, testified that King had made them take off their panties and then, as she put it, "he stuck his pee into ours." She had not told her mother about it at first because she was scared. King had warned them both, "If you tell your mother, you will see what happens." 131

The key piece of evidence in this case was the fact that both girls had developed very serious gonorrheal infections simulataneously. A local doctor examined Lois first and then referred her to a specialist in Ann Arbor. The local doctor testified:

> Q. You made then a complete examination of the youngster's privates?
> A. I did.
> Q. And did you find evidence of fairly recent penetration?
> A. No, there was no penetration but there was very marked inflamation around the introitus.
> Q. Sufficient discharge to destroy any evidence of recent penetration there of the parts?
> A. Well, I don't believe-- I don't think upon examination there was--- it was so tender and so painful, the girl screamed when an effort was made to examine the fore part in order to sufficiently see whether there had been any penetration of the organ.
> .....
> Q. Let me ask you this. If a grown man had inserted his penis or any part of it, into the vaginal opening of this little child, might that have caused the inflamation and soreness that you found there...?
> A. Why, I hardly believe so...
> Q. In other words, penetration alone, without some auxiliary factor, would not have been sufficient to cause the condition you found there?
> A. It would not. 132

Subsequent cross-examination of the specialist from Ann Arbor was aimed at discrediting the fact of infection as proof of the offense.

> Q. Doctor, what are some of the various ways in which a child

can contract gonorrhea?
A. A child of this age? They can contract this infection from toilet seats, both types, towels, clothing, beds, any utensil that is commonly used by other people so infected, or, from physical contact.
Q. Would a bruise of any kind...make the patient more readily susceptible of the disease?
A. Well, at least, theoretically, it would, and all little girls are remarkably susceptible... If they used a toilet seat where it was lit up they would be infected.
.....
Q. It does not necessarily follow...that this gonorrheal infection must have been acquired from the source of which she complained--that is, it may have been acquired in any number of different ways?
A. Would you like a statistical answer on that?
Q. Yes.
A. In 146 cases of my service at Ann Arbor--I had charge of this ward--only two of them were contracted from rape--recognizing that any intercourse with a child was rape--there were only two, --it is a very easy way to contract the disease, and most of them--
Q. But it is far from being the only way.
A. Yes. 133

No one had seen the offense take place and, in the face of such an adept medical re-construction of this distressing sign of abuse, the prosecutor chose not to take this case before a jury. Thus did medical testimony serve to exonerate the defendant, Fred King. And two seven-year old girls lived with the memory of this sexual encounter and the scourge of gonorrhea, with no anti-bacterial cure yet in sight in 1932.

In effect, the combined facts of the victims' very young age and the absence of a third-party witness served to allow the defense to undermine their story, making it seem inconceivable that they would be telling the truth. This case, then, further corroborates the theory developed earlier in the discussion of attempted rape cases, that stranger rapes end up in court because of a witness and exhibit a high

conviction rate when they do, also because of the witness. This case also reiterates the 1901 position of the Michigan Supreme Court when it determined that the testimony of very young children was not "competent" in a trial for rape. 134 Thirty-one years later, not much had changed in that regard.

Conclusion

This chapter opened with a discussion of the background and impetus for raising the age of consent in the 1880s and 1890s. Looking at the work of the social purity reformers, it becomes clear that this legislative move was a response to a social urge to protect young girls from early sexual involvements, seen as an act leading toward prostitution. The medical discovery in the mid-1890s that venereal disease was the long-term cause of so many serious health problems may very well have provided the motivation and social support for the court to prosecute men for indulging in sexual intercourse with girls under the consenting age. The fact that cases of this type do not show up in significant numbers until after that discovery sustains this conclusion.

In practice, the adjudication of rape cases under this statute exhibited a great range of response from the court, which was generally predicated on the prior relationship of the accused to the victim. This study categorized these relationships according to the three most readily apparent types: ongoing mutual relationships, casual acquaintances, or complete strangers. By looking at cases that exemplified each of these relationship types, it was possible to see

that the court approached these types of cases very differently, seeming to apply a separate set of assumptions to the situations in each group. For example, taking Lilah Jackson's complaint against Ernest Carr to court required a rationale based on the reform mandate to prevent men from engaging willing young females in sexual intercourse. The same rationale was necessary with the complaints of Helen, Nellie, Letha, Minnie, Geraldine, and Eleanora.

A different rationale prevailed, however, when defendants and victims were casual acquaintances who were not perceived to have been in an ongoing relationship with each other. The most obvious aspect of the court's response to these cases, as opposed to the others, was its insistence on questioning the claimed resistence of the victim. This approach reflected the reasoning used in forcible rape law and subjected the adjudicative process to a deliberate appraisal of matters inconsequential to statutory rape law, such as the victim's consent and perceptions of her character. Thus, Edith's perceived insufficient resistance to Clarence Rocha's sexual assault may have contributed to his receiving a very light penalty of one year in the county jail, and the perceived strenuous resistance of Lorraine to Vonda Bellah's forcing her to have sex may have contributed to his receiving a moderate sentence of three and a half to ten years in a state prison. The category characterized by assailants who were strangers to their victims operated on the forcible rape rationale also; since the nature of the offense was that it was often both aggravated and witnessed by a third party, the element of force was taken for granted. For example,

Beulah's victimization at the hands of Charles Kregear resulted in a life-term prison sentence for him; Phyliss' abduction and rape, the former act witnessed by her parents, led to a life-term prison sentence as well for Norman Hall.

A measure of how the court, and society, viewed convicted offenders in the context of each of these categories may be seen in the outcomes of the cases. The court gave a lot of attention, after 1897, to cases in which the accused and victim had been in an ongoing relationship that included what the court perceived to be mutual sexual intercourse. This fact, together with the conviction rate of 67.9 percent among these cases, suggests the court demonstrated a concern for enforcing the statutory rape law in the manner advocated by the reformers. Accordingly, the court took it for granted that the victim had consented and was willing to hold the male partner responsible for perpetrating the act. Sentences, however, indicate the court was reluctant to punish men very severely for engaging in unlawful sexual activity of this kind. Average minimum prison terms, counting probations as zero and life terms as thirty, were .95 years for the period from 1897 to 1910, .416 years for the period of 1911 to 1920, .924 years for 1921 to 1930, 4.4 years for 1931-1940, and .81 years for 1941 to 1950. These averages are markedly lower than the averages for acquaintance or stranger cases, as will be seen in the discussion that follows. One point that must be noted in particular is the increase in the 1930s to a sentence average that was four times higher than the average for any other decade before or after it. This would indicate a sentiment existed during that time

to support heavier sentencing in cases such as these.

When the accused and victim were casual acquaintances prior to the assault, the court was more concerned with scrutinizing the fact of the offense, the victim's motive for filing the charge, and the extent to which the victim had consented, all of which were moot concerns in the cases in which the victim acknowledged her willing participation in the act. The 78.7 percent of acquaintance defendants who were convicted suggests the court was even more sympathetic to enforcing the law here than it was with cases involving ongoing relationships. Further, the higher average minimum sentences in acquaintance cases is another indication that the court regarded these offenses more seriously. In the period from 1897 to 1910, there was only one sentence for probation, but when prison terms started, the average minimum was 1.5 years for the period of 1911 to 1920, 2.8 years for 1920 to 1930, 6.64 years from 1931 to 1940, and 2.43 years from 1941 to 1950. These averages are considerably higher than those in relationship cases, and suggest the court's condemnation was greater when there was more reason to believe the victim had not consented. Also, the noted increase in the sentence minimum in the 1930s, over two times what it was in the decades before and after, attests to the fact that during this time, the condemnation of men found guilty in these cases, as in the others, was much harsher than it was at any other time.

For the cases in which the perpetrator was a stranger to the victim, the conviction rate was 50 percent, a figure much lower than in the other cases. This statistic should be qualified by acknowledging

that one nolle prosequi was due to the defendant's suicide, and two others were due to the conviction of an offender in one count of a triple offense. The average minimum sentence of 21.0 years, reflective of two life terms and two terms of twelve to twenty years, is a truer indicator of the court's extraordinary denunciation of convicted stranger offenders. Reiterating the pattern of severity relative to time, it is seen here too that the average minimum sentence increased in the 1930s: from 21.0 years in the 1920s, to 30 years in the 1930s, and dropping to 12 years in the 1940s. Though any generalization drawn from these few cases should be qualified because of the small sample size, it is clear that the court maintained a more severe posture toward stranger offenses in the 1930s than before or after.

The significant conclusion relative to patterns in sentence severity must be that stranger offenders received the strongest penalties because their crimes were witnessed and because their perpetration of the crime was perceived to be absolutely without the victim's consent. The moderate penalties given to acquaintance offenders, in contrast to the very mild penalties given to relationship offenders, were in evidence because any sign that the victim did not consent led to greater attributions of blame toward the defendant. The only basis for adjudicating relationship cases--to save adolescent girls from promiscuity and possible prostitution--never had more than nominal support. So, in spite of the reformers' rationale, the lingering societal notion of needing to preserve the male prerogative to have sexual intercourse at will and maintain the double standard was not

fundamentally challenged. As for rape itself, the more popular conception held that this was a crime perpetrated with brutal force, and as such, did not happen very often. Statutory rape, defined as the law to protect girls from early adolescent sexual intercourse regardless of their consent, tempered any emphasis on the criminal wrongdoing of the male with a concomitant focus on the delinquency of the female. In practice, the long-term effect of the court's stratified response to statutory rape was to institute a legal mechanism to control female promiscuity and, only occasionally, to punish men for forcible rape, a crime that could always have been adjudicated under the old law anyway.

What cannot be missed, finally, is the unmistakable finding that the court's attitudes toward female promiscuity and male incontinence varied perceptibly over time, as evidenced in the dramatic change in distribution of these three types of cases throughout the 1920s, 1930s, and 1940s. The most compelling statistic is seen in the concentration of relationship cases in the 1920s, a feature that was not duplicated among acquaintance and stranger cases for that period. It may be that, with the increased independence and exposure in the public sphere that women were experiencing in that time, this court's greater emphasis on relationship cases represented a reactionary sentiment that attempted to restore the pure-woman standard to public life.

What happened in the 1930s serves to demonstrate a break with that reactionary move. Indeed, the substantial drop in relationship cases, from twenty-seven in the 1920s to thirteen in the 1930s, and the accompanying jump in sentence severity for this period, from an average

sentence minimum of .724 years in the 1920s to 4.4 years in the 1930s, indicate a mood characterized by less concern with controlling female promiscuity and more willingness to severely punish male sexual incontinence. The 1940s agenda, evidenced in a 60 percent increase in relationship cases and a 300 percent increase in acquaintance cases, combined with greatly moderated sentence severity in both categories, seems to have been one of greater attention to statutory rape generally but also one of more indulgence toward the offenders. Thus, given what we know about the cases that received more severe sentences, it is not inconcieveable to make a connection between these patterns and the changing tenor of those times. It may, indeed, be surmised that in periods of prosperity, such as the 1920s and 1940s, there was much more emphasis on controlling sexual promiscuity; on the other hand, in the economically depressed period of the 1930s, the emphasis temporarily shifted to protecting females from forced sexual offenses. This marked shift away from the amount of time and resources devoted to cases with consenting females may simply have been a measure of the degree to which legal staffs and funding was in short supply during the Depression.

If there is one sure thing this analysis has shown, it is that the statutory rape law was never as simply defined in practice as the wording of it might suggest. It is just not accurate to assume that this law was designed to protect young girls from unwanted sexual attack. As pointed out earlier, the old law was fully capable of doing that. The consent provision in statutory rape law was aimed at protecting girls who might be put into a position of having to choose

not to have sexual intercourse. This law sought to protect them from having to make that choice. In theory, the law institutionalized paternalistically what came out of a protective social ideology. In practice, however, the process of protecting girls from their choosing to have intercourse often had the effect of preventing them from making such a choice.

This is the dilemma Frances Olsen describes in the conflict between freedom and security--"the central problem of the sexuality debate is that women are oppressed by moralistic controls society places on women's sexual expression, yet women are oppressed by violence and sexual aggression that society allows in the name of sexual freedom." 135 Olsen's analysis contends that the protections afforded young women under the statutory rape law present an example of the advantages and disadvantages of a "rights" basis for law--while women rightly object "when their vulnerability is used to deny them opportunities," if the law did not exist, such "freedom from state oppression might mean domination by private individuals." 136

In the end, the great preponderance of cases that focused on girls who chose to have sexual intercourse decidedly affected the way the court defined statutory rape. It is probable that such a long-term preoccupation with mutual consent cases contributed to a perception that trivialized rape complaints generally and further infused public consciousness with the notion that girls really wanted to be raped after all.

IV: SEX CRIMES AGAINST CHILDREN: INCEST AND INDECENT LIBERTIES

> The respondent has been tried before the jury on a charge of statutory rape, as set out in the information, and has been convicted. The complaining witness was at the time of the commission of the offense eleven years of age, and was the step-daughter of respondent. According to her testimony in open court, which testimony the jury obviously believed, respondent had relations with the girl on a number of occasions. The testimony of a physician who had examined the prosecutrix tended to corroborate her claim that the relation had continued over some period of time. A complaint to the officers was first made by respondent's wife, the mother of the girl.
>
> Judge's statement to prison authorities (1944) 1

Introduction

Before the current understanding of the scope and seriousness of female child sexual abuse, the criminal justice system processed what is now suspected to have been very few sex crimes against children relative to actual incidence. Indeed, it was really not until the early 1970s that there was any conscious realization of the problems inherent in adjudicating this crime--problems that had contributed to severe under-reporting by victims, mishandling by law-enforcement and judicial agents, and pervasive misunderstanding of the antecedents and dynamics of child sexual abuse and rape. 2

Several recent studies have documented the incidence of incest and other childhood sexual encounters with the use of adult retrospective accounts. These studies reiterate again and again the finding that

higher than expected numbers of women have had sexual encounters in their childhood with an adult male. Further, of those who subsequently recounted such experiences, the percentage who had reported it to the authorities was alarmingly low. 3 As Kee MacFarlane has stated so succinctly, "The reported incidence of sexual abuse is appropriately referred to as the "tip of the iceberg." 4 Thus, it is highly probable that the Ingham County cases of incest and child molestation that come to the attention of the authorities can only be representative and are not even close to being an indication of incidence in the county generally.

The following analyses of the sex crimes against female children that came into the Ingham Court are comprised of two types of cases--incestuous rape, which will be discussed first, and indecent liberties, which will follow. As will be seen, the difficulties present in these cases overlap to the extent that the credibility of the child witness is the element key to successful prosecution. Lucy Berliner reflects on this crucial matter:

> The nature of the adversary system means that the credibility of the victim witness will be challenged at every point by the opposing counsel. There are legal requirements for competency, which must be met when the victim is a child... In a system which limits and structures the type and amount of information presented in court, these cases are extrmemly difficult to prove. 5

Thus the degree to which a child's testimony is perceived by a prosecutor and/or jury to be accurate and believable is the hinge on which hangs the judgement and disposition of these cases. This analysis attempts to see just how this court responded to the testimonies of

these children and pubescent teenagers. From a historical point of view, how the court's definition changed and reflected cultural conditions in the period from 1850 to 1950 yields insights into current legal responses to sex crimes against children as they reflect the cultural context within which they now occur.

I: Incestuous Rape: The Sex Crimes of the Fathers

1. Incidence and the Law

In what is probably the most accessible history of child abuse in the United States, Linda Gordon reveals the sordid and poignant incest accounts found in the files of the Massachusetts Society for the Prevention of Cruelty to Children from 1880 to 1960. 6 Her analysis of these records provides a thought-provoking perspective on this intra-familial form of rape. Describing incest as that "most heinous of transgressions," she also acknowledges its "ordinariness" as an abuse that occurs with some regularity in the families of rather unextraordinary people. 7 Present research corroborates this view. In a study of the sexual victimization of adolescents, Ann Wolbert Burgess notes that incest occurs far more often than people once thought, and Judith Herman reports that while exact percentages vary with different sample groups, incest is reported in interviews with women to have been experienced much more commonly than was previously expected. 8 Specifically, Herman cites the studies done by Alfred Kinsey and associates in the 1950s, remarking that "the results, largely ignored at the time, indicated that female children are regularly

subjected to sexual approaches by adult males who are part of their intimate social world." 9 Comparing Kinsey's sample of white, urban, college-educated women with Diana Russell's 1983 study of 900 randomly selected women, she surmises that Kinsey's results are underrepresentative of the population generally. Indeed, only 1.0 percent of the women in Kinsey's sample but 4.6 percent of the women in Russell's sample reported experiences of incest as children. 10

This study of the incest cases tried in court will not therefore attempt to estimate the prevalence of incest in Ingham County: the findings of others provide a sense of the pervasive incidence of this crime. Furthermore, in her 1983 survey, Russell discovered that only 2.0 percent of the women who gave a history of sexual abuse by a family member indicated that the incidents had been reported to the police. 11 Using that as a basis for generalization, it is a likely conclusion that the fifty-three incest cases tried in the Ingham County Circuit Court between 1850 and 1950 amount to only a fraction of the actual incidence of that crime in the county.

The reasons for such gross under-reporting have been well-documented, beginning with the fact that children and adolescents are extremely reluctant to report sexual abuse to the non-offending parent or to another significant adult. 12 First, they may anticipate that their claim will not be believed, or they may fear immediate retribution by the offending parent. 13 Also, they may fear the larger consequences to the family, which may have been hinted at by the offending parent: "your mother will have a nervous breakdown," "I'll be put in jail," or

"You'll be sent away." 14 Even when the secret comes out, mothers, who are almost never the offending parent, are extremely reluctant to report the crime to the authorities. 15 They must consider the embarrassment to the family and the possible loss of their husbands if they are prosecuted and convicted. 16 There is also the very real prospect of the daughter's removal from the family and the husband's retaliation against the remaining family members to consider. 17 Herman sums up well the dilemma for mothers in incestuous families:

> Economically dependent, socially isolated, battered, ill, or encumbered with the care of many small children, mothers in incestuous families are generally not in a position to consider independent survival, and must therefore preserve their marriage at all costs, even if the cost includes the conscious or unconscious sacrifice of a daughter. 18

Thus, as a preface to the historical study of the Ingham County incest cases, this brief discussion of incidence and underreporting presents a view both of the constraints that prevailed to keep these cases from coming to the attention of authorities earlier and the personal and familial stresses that dramatically infused the courtroom discourse. As will be seen, these victims were among the most reluctant to give testimony and to become emotional under the strain of responding to zealous defense attorneys. Exhibiting feelings of fear, shame, and guilt, these witnesses acted out the very reactions others have seen occur with incest victims today. As courtroom testimonies, the stories they told are a familiar complement to the incest scenarios described in accounts gained previously only from the "clinical reports of families in which incest was detected, and retrospective accounts given by

daughters in later life." 19

This study seeks primarily to focus on the court's response to the crime of incestuous rape, but the nature of the case study makes reflection on the incestuous relationships themselves nearly unavoidable. Incest itself, then, will become a necessary part of the effort to understand the treatment of it by the court. What will first be seen, as Gordon's research suggests, is that the features that characterize incest have not changed much over time. 20 Indeed, these cases reveal a consistency of circumstance that tell as much about incestous behavior patterns as they do about what attracted the attention of the court. Case after case unveiled tales of fathers' wretched sexual violation of their daughters' bodies, of daughters' troubled naivete and reluctant submission; testimonies tellingly betrayed these children's mixed emotions of anger, guilt, and affection; and case after case reiterated the characteristic condition of daughters who were powerless by virtue of sex, age, and economic and emotional dependency to alter the arrangement. The distorted sexual assumptions and expectations that were acted out in the behavior patterns of these incest offenders were indeed grievous and were generally responded to as such by the court. It will necessarily be a part of this analysis, then, to look at the factors that were common to the incest relationships, and to see these factors in terms of how they affected the response of the court to the crime of incestuous rape. In ways that will soon become apparent, these victims received more courtroom sympathy than most other sexual assault victims in the sample.

It is necessary to emphasize that there was no law that specifically and exclusively applied to incest. It was considered a criminal action that came under the legal sanctions against rape or statutory rape, depending on the age of the victim. This chapter will look exclusively at the incest cases involving underage girls, as the incest cases involving over-age daughters were already included in the discussion of forcible rape cases. It will be remembered that for all rape convictions the law stipulated imprisonment for an indeterminate period of years, and that the court indicated the level of its disapproval via a broad range in punitive severity. The penal response to incest cases in this sample appears to be a decisive measure of the court's strong sentiment regarding incestuous rape.

Of all the sexual assault cases tried in the Ingham County Circuit Court, incest was subject to the court's most severe censure. In the total of fifty-three incest cases in the sample, the conviction rate was 80.8 percent, a much higher conviction rate than that sustained for any other charge. Moreover, the severity of sentencing was consistently severe in that the prison term minimums for incest averaged from 12.5 years in the 1870s, to 11.5 years from 1900 to 1910, 10.9 years from 1911 to 1920, 11.8 years in the 1920s, 18.4 years in the 1930s, and 11.9 years in the 1940s. 21 Remembering that the prison term minimums averaged 1.44 years for statutory rape in consensual relationships and 3.36 years for statutory rape with non-intimate acquaintances, it is possible to see that incest received a level of punishment considerably more harsh than either, but not as severe as the average minimum

sentence of 21.0 years given to convicted offenders of stranger statutory rape. [See Table 21. Average Minimum Prison Terms for Statutory Rape Convictions.] In the realm of forced sex crimes against children, this sentencing pattern may be an indication of greater deference allowed for fathers' intra-familial sexual infractions than for what apparently was seen as the greater wrong of stranger-perpetrated sexual assaults on children.

Such a conclusion would seem to violate what is generally regarded as a fundamental cross-cultural consensus against incest. As a universal societal taboo, incest is thus akin to cannibalism and bestiality, an act that is abhorrent by its very nature. Herman writes, "Breaches of the taboo are viewed not merely as crimes, but as desecrations of the primordial law, establishing the place of human beings in the natural and supernatural world." 22 Recent awareness of incidence rates, however, gives reason to be skeptical of the universal regard for incest as a sexual prohibition and to wonder about how it is really defined by individuals within a society. Gordon questions whether the incest taboo, seen anthropologically as rooted in the ancient need to establish exogamy and the exchange of women, should not more experientially be viewed as deriving from the need to nurture children. 23 Such a redefinition recasts any perception of incest as an abnormal sexual practice to a recognition of its effect as an injurious criminal act upon one's own children. Certainly in the last twenty years, that awareness has become more widespread. What has become ever clearer is the knowledge that victims of incest suffer

physical injury and psychological damage in degrees far beyond what was ever imagined, and in the context of that definition, the taboo that protects the sexual viability of children is grotesquely broken with the act of incestuous rape.

What has also become clearer, with increased understanding of this crime, is the predictive capacity of its attributes. Not surprisingly, the circumstances that have been shown to characterize situations of incest in present studies manifest themselves again and again in the Ingham County court cases. The testimonies that were given with such pain and reluctance in the course of this one hundred-year period show that the attributes that characterized this crime and those it involved did not change much over time. Further, the responses of the court to these complaints expose which aspects of this crime the court found most objectionable, and more fundamentally, what it was about the crime of incest that the court found worthy of consideration. These reactions form the basis for our understanding of how the court shaped its own definition of this societal taboo.

2. Common Case Patterns and Characteristics

The one characteristic that seems to have prompted the legal system's attention was its insistence: the fact that the assaults took place over an extended period of time. In 1906 Delbert Booker's thirteen-year old daughter testified he had been having intercourse with her for several years; in 1909, Charles Frederickson and his two sons, George and Michael, were convicted of having had intercourse with their fifteen-year old daughter and sister Lucy for four years; in 1916,

Daniel Peirow was tried for having engaged his eighteen year old daughter, Hazel, in intercourse for three years; in 1918, Frank Fuller and his wife were tried for having raped and committed other sexual abuses on their adopted fifteen-year old daughter since she was nine years old; in 1919, testimony against Sam Reese revealed he had been having sexual intercourse with his thirteen-year old step-daughter intermittently during the year since his wife had left him; in 1928, Sam Wise was convicted of having had sexual relations with his fourteen-year old daughter beginning three years prior to the complaint; in 1931, Vern Spinner was convicted of having sexual relations with his fourteen-year old daughter for an unspecified period of time in which his attentions had become more intense in the last few months; in a 1943 conviction, the judge's statement noted that Elmer Smith's sexual activities with his fourteen-year old daughter and fifteen-year old step-daughter had been going on for several years; finally, in 1944, John Densmore's step-daughter testified that he had relations with her on a number of occasions. 24

In keeping with the observations of Gordon and others, the Ingham County testimonies reveal the all-too-typical factor that allowed the abuse to persist for indefinite periods of time. As expected, the child's reluctance to tell anyone about her father's sexual involvement with her, secured by virtue of her father's threats to retaliate should she reveal "the secret," insured its uninterrupted perpetuation. 25 In predictable fashion, Delbert Booker (in 1906), threatened Irene that he would send her to the Adrian School for [delinquent] Girls; William

Atherton (in 1925) threatened Sarah that he would kill her if she told anybody; Peter Schur (in 1930) warned Suzanne he would put her in reform school if she told; Vern Spinner (in 1930), told his daughter Beulah this was for her own good but warned her nonetheless that doing that sort of thing with anyone else was "a state's prison offense" for that person, and that if she told anyone about doing it, she would be disgraced; Fred Hogue's (in 1941) step-daughter Audrey kept her silence because she feared he would harm her and her mother. 26 In her review of previous studies on the incidence, causal factors and intervention measures related to incest, Mary Hanemann Lystad's conclusion that daughters believed they had no choice but to submit is borne out historically in the testimonies of these court victims. 27

As such threats attest, the abusers in these cases were universally authoritarian, demonstrating an air of entitlement with regard to sexual access to their daughters, stepdaughters, nieces, and younger sisters. Gordon noted much this same feature in the fathers in the Boston incest child abuse records. They were "often especially tyrannical," "expressed no contrition," and maintained an "attitude of entitlement." 28 Similarly, in referring to more recent cases, Herman describes a behavior pattern common among incestuous fathers: isolating their families, keeping visitors away, and allowing the involved daughter no peer relationships. 29 In the Ingham County cases, Delbert Booker exemplified this demeanor. He insisted that Irene stay in the house with him and not be out in the evenings with her friends. In her testimony, Irene explained that she frequently went downtown to

be with her friends because she didn't like to be alone with her father while her stepmother was away. It was during those times that he would always force her to have intercourse with him. 30 Similarly, fifteen-year old Rose complained that her adoptive father, who had been having sexual intercourse with her since she was nine years old, followed her around and did not want her out with other boys. Mr. Fuller's possessiveness was coupled with an expectation that accommodated no objections: Rose reported that when Mr. Fuller wanted to have sex with her, he would send Mrs. Fuller away and would become angry if she refused to leave. 31 Vern Spinner exhibited a self-professed belief in the rightness of the sex acts he commited with his fourteen-year old daughter, Beulah. Having persistently sought to pinch her breasts and buttocks, or to see her breasts in the bathroom, he eventually got her alone in the bedroom where he had intercourse with her, telling her he was doing it to teach her what she should never do with anyone else. 32 Paternal oppression is further seen in the case of John Austin, whose "vicious temper" (the judge's words) drove his unstoppable intentions toward his daughter. In this situation, he was reported to have been in the act of raping his daughter, and when the mother appeared and told him to get off the daughter, he called her a son of a bitch and ordered her to get out of the room. 33 Finally, this complex of tyranny, entitlement, and possessiveness are evidenced in Fred Hogue's infatuation with his stepdaughter and his insistence that she marry him. Audrey consulted with her mother, and together they decided she could marry him on the condition that he stop drinking. It

is hard to imagine such paternal audacity and such maternal subjection. Yet the desire of this father to marry his stepdaughter provided this mother with a perceived form of leverage, by which she might get him to stop drinking, a behavior that had conceivably been the source of extreme domestic abuse. Perhaps too, she felt it was a way to deny him his desire, since he was unlikely to comply with her conditions. Hogue had up until then coerced Audrey into having sexual intercourse with him many times; when she tried to avoid him by sleeping in the same bed with her mother, he came in bed with her anyway and had sex with her while her mother (his wife) lay beside them. There was no remorse here. On the stand, Fred Hogue admitted to wanting to marry the prosecutrix, but denied his guilt of the offense charged. 34

It has been observed of incest cases, both in the past and the present, that the most consistent pattern in incest families is the extreme domination of the family by the father, in what amounts to an exaggerated and rigid conformity to traditional gender roles. 35 That pattern certainly seems to have been in evidence throughout this sample of incest cases. What Herman concludes about such a pattern is applicable here as well. What this attitude of entitlement says about incestuous fathers is that they were less motivated by a sexual urge than they were motivated by a wish for power and dominance. 36 The extent to which the court recognized this fact will be seen further on in this discussion.

Such a conceptualization qualifies the conclusion of many that somehow the incidence of incest is related to the absence of the

mother. 37 It is probably not accurate to assume that the wife's sexual inaccessibility was the cause of the father's need to have sex with the daughter. More likely, such an absence, when it occurred, may have served as the father's pretext for using the daughter to gratify his sexual urge. In fact, in the Ingham County sample there were as many cases in which mothers were present as there were cases in which they were not. This finding concurs with Gordon and O'Keefe, who observed from combined historical and current data that there was simply more opportunity for incest to occur when the mother was not present. 38

In the case of the Fredericksons, in which the father and two teen-age sons engaged in regular sexual intercourse with Lucy, the fifteen-year old daughter, the mother had been absent from the house for a number of years. 39 In the case of Sam Reese, his wife had left him a year earlier, during which time he had become sexually active with his daughter, Katie. 40 In the 1927 case against Joseph Owens, he and his three daughters had been staying for a few months with another couple, all of them sleeping together in the same room. It was in the context of this arrangement that Owens was first discovered to be raping his two older daughters; the person that was conspicuously absent in all of this was the mother, who had left him in the summer. 41 In one particularly sad case, Henry Bravender had been having sexual intercourse with his daughter "from the time that the child was seven years old until she was thirteen." The judge reported: "His wife died about eleven years ago," leaving him with two small children. The little boy ended up in a

tuberculosis sanitarium and the daughter ended up living with Henry at the grandparents' farm, where he regularly took sexual liberties with her. 42 Finally, the case against Jesse Ellis illustrates a situation in which the offender's wife, a victim of multiple sclerosis, was physically incapacitated. Ellis' daughter, who had been raped by her father a number of times, finally ran away from home. When later picked up and taken to a Detention Home, she confessed what her father had been doing to her; Ellis was convicted and sentenced to a life term in prison. 43

Thus, if the wife was sexually unavailable to the husband, the father could have used this circumstance as a pretext for obtaining sexual satisfaction from his daughter. It would be a mistake to infer from these relationships, however, that the presence and sexual willingness of wives pre-empted husbands from engaging in sexual activities with their daughters; many wives were present in these households, and still, their husbands raped their daughters. Moreover, it is necessary to recognize that the mothers who were present were not universally protective of their victimized daughters. As the following cases illustrate, mothers who were present in the households of incestuous fathers reacted with no small degree of conflict as to which came first: the welfare of their daughters or the protection of their husbands. Those who supported their daughters made what may have been huge personal and economic sacrifices on behalf of their daughters; some, on the other hand, were not supportive at all, and in fact acted to protect the incest perpetrators from prosecution or punishment. If

that happened, it was usually because they were caught in the middle, wanting to protect their daughters but feeling too powerless in the face of their husband's dominance to act on their daughers' behalf.

Two cases illustrate a stepmother's strong support for the victimized daughter. In the first instance, in 1870, sixteen-year old Suphronia had been doing the housework for her father, Cyrus Wheeler, ever since her mother had died. She had also been made to have sexual intercourse with him during that period. Then her father remarried, but apparently did not discontinue having sex with his daughter. When his new wife found out about it, she took the side of her new stepdaughter, threatening her husband that she would shoot him if he came to her bed. Wheeler was convicted and sentenced to prison for ten years; the record indicates he died while in prison four years later. 44 In likelihood the stepmother's role supporting her stepdaughter had everything to do with why Wheeler was prosecuted, and probably had much to do with why he was convicted.

Similarly, in 1906, Irene's stepmother took her side when she learned of the sexual assaults being made on the girl by her father, Delbert Booker. Emma Booker testified that after Irene had confessed to her what her father had been doing, she became quite sympathetic toward her stepdaughter. Indeed, Emma took it upon herself to contact the sheriff and press charges against her husband, Delbert, who was subsequently prosecuted, convicted, and sentenced to prison for life. Emma explained her actions in court:

> I had a different feeling for her after she told me; before I

> couldn't get used to the child...she shunned me...after that she seemed more loving and she seemed dearer to me than she ever did and I wanted to see her brought up a lady, I wanted to have her put in good hands. 45

In 1944, a child victim's biological mother took the side of her daughter. Here the wife of John Densmore was the one who made the complaint to police officers, that her daughter, Shirley, was the victim of incestuous rape by her husband, the girl's stepfather. That she took this action apparently infuriated her husband, the accused, about whom the pre-sentence investigator wrote:

> He claims...that the wife is extremely jealous and that the present charge was preferred in a fit of jealousy. The wife says that they got along well together except for the offender's attentions to her daughter. The offender was found guilty by a jury and still maintains his innocence. 46

In the foregoing cases, the mothers (and mother figures) defended their daughters against the sexual abuses of the fathers. These women acted in disregard of whatever anticipated adverse consequences they might encounter as a result. It may be, however, that they did not realize the potential impact of their reporting the offense. On the matter of anticipated outcomes, Gordon writes that most who reported simply wanted the offending behavior to stop without having the assailant prosecuted. 47 The naive belief that somehow the authorities could make things right without prosecuting and convicting the father is seen in testimony given by the police chief in the trial of Delbert Booker:

> Q. What reason did Irene give for wanting to make a complaint?
> A. Why, she stated that she loved her papa and all she wanted was to have her papa stop doing that kind of thing; she didn't know I was going to arrest him...neither did his wife...she simply came to me for advice and asked me if I

> wouldn't be kind enough to see Mr. Booker and have him stop doing that kind of thing. 48

The key here is that the court seemed to value the supportive testimony of the complainants' mothers. In cases where mothers corroborated the complaint, the court convicted the accused. Yet not all mothers took such initiative; in some cases, even when mothers were present in the household, they appear to have known nothing about the ongoing incest, or if they did know, they chose not to interfere. These mothers remained silent out of concern for their daughter's welfare or their own, or for the sake of keeping the family intact. As in the 1941 case against Fred Hogue, the judge reported to authorities:

> The mother of the girl claimed that while she knew what was going on, she was afraid to complain because she thought that respondent would injure her or the girl or both. 49

In what borders on the inexplicable, there was one woman who collaborated with her husband in the abuse. In 1918, both Frank Fuller and his wife (who was never named), were charged with having engaged in sustained sexual abuse of their adopted daughter, Rose. On redirect examination, Rose testified:

> Q. Did Mrs. Fuller ever abuse you in any way?
> A. Yes sir.
> Q. In what way.
> A. Mrs. Fuller whipped me with a razor strap...
> Q. Did she ever abuse you in any other way.
> A. Yes. When I was six years old she used to fool with me with clothespins and sticks.
> Q. Did she do that often?
> A. Until I was about eight or nine years old and I turned over in bed and would not let her.
> Q. Do you mean she would play with your breast?
> A. Yes sir.
> Q. Did she ever have you do anything like that with her?
> A. Yes sir.
> Q. With your hands?

A. Yes sir.
Q. Has she done that recently?
A. When I was six until I was pretty near nine. 50

Rose continued that Mr. Fuller had begun having intercourse with her when she was nine, "every time he got a chance." She added, "he would send Mrs. Fuller away--he would get mad if she didn't want to go." What Mrs. Fuller's motivations were for participating in the abuse of Rose and in not reporting the abuse by her husband remain forever unclear. Ultimately, this situation of abuse did not come to the attention of the authorities until the discovery was made when Rose was fifteen years old and that she was pregnant. In fact, she testified in court to the fact that she was sure Mr. Fuller made her pregnant. She stated, "Yes, I am in the family way now...I got pregnant on June 21... I had intercourse with him four times that night." By the trial's end, Fuller was convicted and sentenced to seven and a half to fifteen years in prison; the outcome for Mrs. Fuller was not recorded. 51 Rose of course was left unmarried to bear her father's child and be a likely object of disgrace in 1918.

In 1928, Mrs. Wise, the second wife of Samuel Wise and stepmother to his two children, opted to support her husband in the face of his conviction on incest charges. After the daughter had an "operation concerning which there is some little mystery" (the judge's words), Mrs. Wise suspected the husband but made no complaint. When the father persisted in his course, the judge reported, "complaint was made" later in the year. There is no mention of who made the complaint finally, but probably it was not the mother. As the judge's statement made clear,

this mother was not likely to have risked the consequences that making a complaint would invite. The judge wrote:

> Mrs. Wise was very anxious to have him placed on probation under her. She said she could keep him straight and that he would work hard and turn his wages over to her. To this he readily assented. 52

This was 1928, however, the middle of a period characterized by severe sentencing and few probations. Sam Wise was not given probation, but his sentence of three to ten years in prison was relatively light for incest nonetheless. One wonders if this leniency was due in part to Sam's having come from "an old family of Ingham County."

Thus, the loyalties of women as mothers and wives were often either divided or subverted in the context of a power relationship that left them believing they had no option but to acquiesce. As discussed earlier, the reasons that lay behind a mother's choosing not to report were part of a whole complex of factors that really did not change very much over time. Wives were economically dependent on their husbands and feared the financial hardship that their husband's conviction and possible incarceration would impose on them personally. Second, their desire to preserve the integrity of the family overrode their desire to disrupt a dysfunctional sexual dynamic. The consequences of making such an intensely intimate accusation in public threatened to disrupt the family unit internally, however tenuous it may have been, and to expose the family members individually to community attention and embarrassment.

To illustrate, thirteen-year old Irene's desire to avoid facing her classmates' curiosity and criticism represents what was probably a very

typical response to unsympathetic community reaction. When asked by the defense attorney about her school attendance record (in a commonly employed strategy to discredit her as a witness), Irene replied:

> A. I didn't go to school this last week because...since my father has been in jail and I didn't like to go back because they wrote it in the paper and I didn't like to hear them talk about it. 53

Further testimony in this case reveals that the truant officer had come to visit Irene, after which there was "no more trouble staying in school." It seems Irene was compelled to attend school and face daily the scrutiny of her classmates and teachers, a circumstance that could have been avoided had the crime not been reported. MacFarlane sums up well the position of mothers:

> To understand the role of the mother who is aware that some form of sexual abuse is occurring in her family, it is important to recognize that her behavior is rarely motivated by the conscious desire to hurt her daughter or intentionally subject her to the sexual advances of the father. More often than not, the mother herself is a victim of her circumstances, and her own poor self-image, so immobilized by a situation in which she feels powerless and ineffectual... Trapped within the boundaries of their own violent relationships and often aware of the precarious and temporary nature of the protection that society is able to offer them, they are afraid to intervene actively on behalf of their own children. 54

3. Fathers and Daughters

Who were the men that prosecutors saw fit to prosecute? One defendent in 1871 was described as a divorced, illiterate yeoman. 55 Another, in 1909, was a widower, of German nationality, and a laborer. He and his two unmarried sons were all involved sexually with the daughter/sister of the family. 56 A 1919 defendant was a farmer and

fireman, German-Irish, separated from his wife for a year, and suffering from venereal disease. 57 A father charged with incest in 1925 was Protestant, married, father of six children, had completed eight years of education, worked as a janitor, and owned 120 acres of property, a sign of wealth that was untypical of these defendants as a whole. 58 More representative, in 1927, was a father of three children; he apparently owned no property and was staying with another couple, whose means were evidently quite modest, as they all slept together in one room. 59 Similarly, there was a 1937 defendant who had his own home, but it was described as "extremely shoddy." 60 A 1942 offender owned no property and liked to tend stock on a farm for a living. 61

Beyond sharing a common economic status, these defendants generally were depicted as socially and mentally below accepted norms. Judges described them to be "of low mental type," as "half Jesse James and half moron," as a heavy drinker, having a "vicious temper," being "surly and ugly," and having a "low standard of morality." 62 In summary, virtually all the defendants accused of incest came from low socio-economic backgrounds, were poor providers for their families or failed providers, and exhibited mental, emotional, and social traits that were self-destructive or destructive of others. It may be concluded that such people fit the "type" of individuals who were "fit" to be prosecuted. As a group, they would seem to suggest that there were no incest perpetrators in in higher socio-economic levels or mental capacities. But, going back to the earlier portion of this discussion, Kinsey's findings long ago indicated there are educated, middle-class

individuals who engage in incestuous rape. Thus, the defendants here should be taken as representative only of those who the court felt might be guilty of committing incest, not of the entire population of incest perpetrators.

What characteristics may be said to typify the victims of incest in this sample? First, while their ages ranged from six to twenty, they were mostly twelve to fourteen years of age. They were usually daughters, though some were step-daughers, and a small number were nieces or sisters. Virtually all did not like the sexual attention of their fathers, but did not know how to avoid or stop it. If there were older sisters present in the household, they had already been sexually victimized by their fathers; if there were younger sisters, it seemed clear they were at risk of similar eventual sexual attention. Their behavior in court was often such that they were reluctant witnesses, crying on the stand, and easily intimidated by accusations as to their possible ulterior motives in bringing charges, usually having to do with wanting to "get even" with their fathers for whatever restrictions that may have been placed on them.

It was suggested by the defense attorney in 1906, for example, that Irene had been told to make an accusation against her father by her stepmother, and that she had done so to get back at her father for threatening to send her to the Adrian School for Girls. He had incidentally offered this threat as a possible punishment for her resistance to staying home with him, a familiar theme in these cases. The stepmother testified that at dinner one night, Delbert had warned,

"Irene's fixing for a trip to Adrian." It was shortly after this that Irene told her stepmother, "Father can send me to Adrian, I can send him to Jackson." 63 The implications of this threat constituted Irene's first attempt to break her long-held silence, and with prodding from the stepmother, she told everything.

In the 1918 case against Frank Fuller, it was suggested in court that the adopted daughter (victim), Rose, was ungrateful for everything her adoptive parents had done for her, and that she was using this accusation to get back at them for continually finding fault with her. Under questioning, Rose was unperturbed:

> Q. What do you mean Rosie by saying that your father and mother would be sorry if they did not stop finding fault with you?
> A. I threatened to tell the police about this a good many times but didn't do it.
> Q. You threatened Mr. Fuller?
> A. Yes sir.
> Q. Did you tell Mr. Fuller you would report him?
> A. No, I thought he would know enough to quit pretty soon. 64

Reiterating the same theme, questions directed to a daughter in a 1929 case emphasize the trouble her mother and father had been having in "making her mind," make an issue of the fact that she did not like the clothes her father had bought for her, and insinuate she was intent upon breaking her mother and father apart. The situation here was that she had apparently been involved with other boys her age, so was portrayed by the defense as someone who was trying to punish her father for not letting her do as she pleased:

> Q. Anyway, you went down there.
> A. Yes.
> Q. And your father had forbid your going down there.
> A. Yes, but when I went down--

Q. You have answered my question. And he came down there.
A. No, sir; he told me--
Q. To go on home and he would take care of you when he got home, didn't he?
A. Yes.
Q. And that made you angry?
A. I was scared of him?
Q. Pretty angry?
A. Yes, and I was mad at him.
Q. And you went on home then.
A. Yes, sir.
Q. And you told your step mother there that day that you would get even with your daddy, didn't you?
A. No, I told her I was leaving home.
Q. You told her you were going to get even with your daddy, didn't you?
A. No, sir.
Q. And that you were going to get your daddy into trouble, didn't you?
..... (3 pages of testimony deleted)
Q. And the thing that prompted you to make this charge against your father, Irene, was the fact that your father had told you to come home and stay there and he didn't want you to go down to this place where you were?
A. Yes, sir.
.....
Q. I will put it this way. If your father would have let you go on and do the things you considered right, and let you be the judge of what was right and wrong and what you ought to do and what you ought not to do, you would not have made this complaint against your father, would you?
A. Yes. What I mean, if he had let me have--said something--she misused me so and he misused me on her account more than once--and she twitted me of doing things and she twitted him of going with other women--
Q. Just a minute. I would ask that be stricken as not responsive.
THE COURT: I think she is trying to answer the question. 65

Thus the strategy for disentangling a truthful accusation from an untruthful one was apparently successful, or at least so it seems. If in fact, Irene had fabricated the story in retaliation for perceived mistreatment by her father, then this case might have easily served as an unfortunate standard by which to direct like suspicions at others. Interestingly, Irene's last statement, hinting at the marital infidelity

of her father, was squelched by the defense attorney as improper, but the judge allowed that it was information legitimately offered in answer to the questions asked. Clearly, it was not in the interest of the defense to have such aspersions cast on the character of the defendant, especially after he had worked so hard to portray an "innocent man" as the unfairly wronged party.

A last example of this pattern comes from the 1930 case against Peter Schur, whose fourteen-year old daughter, Suzanne, had had a history of not minding her father. Suzanne confided to the boarding-house owner that her father had threatened to send her to reform school for not minding him. The woman's inevitable questions as to why such a threat was made led to Suzanne's declaring, "If he does send me to reform school I can tell on him, too..." Suzanne testified it was at this point that she "told her all about it." 66 As with Irene Booker, the defense portrayed this victim as making a false accusation in order to get back at her father. The following examination excerpt illustrates the defense attorney's attempt to show how Suzanne, like Irene, had a motive for wanting to hurt her father.

> Q....your father did scold you pretty hard quite often, didn't he?
> A. Yes, sir.
> Q. And you didn't particularly like to be scolded, did you?
> A. No, sir.
> Q. And it made you unhappy?
> A. Yes.
> Q. Made you mad at him?
> A. No, it did not. I am not mad at my father. (Witness wipes her eyes.)
> Q. You are not mad at him?
> A. No. 67

Thus it was a regular feature of these trials that the victims were

expected to prove they were good girls who had been improperly violated. There was a dilemma in maintaining such a position, however. A daughter's resistance to her father was seen as evidence of her motive to retaliate; further, that resistance was taken as evidence of a girl's willfulness and disobedience at home, attributes that presumed her spiteful capabilities and portrayed her unsympathetically in the court. It was a precarious path to have to follow, but an essential one, and contributed no doubt to the guilt a daughter may have already been feeling about complaining against her father.

Indeed, the emotional strain of testifying in court seems to have been more painful for incest victims than for any of the others. An excerpt from Yvonne's 1948 testimony against her father, Harry Winters, begins to convey the internal conflict these young girls experienced when having to formally voice their complaint against their father in front of the judge and courtroom audience.

> Q. And did he come home about that time?
> A. Yes.
> Q. Now can you tell us just what happened?
> (Witness cries)
> Mr. Wilson [prosecuting attorney]: I know it is hard - - but this is something that has to be done, Yvonne.
> A. He won't leave me alone. He comes - - (cries)
> Mr. Wilson: Just tell us what happened, on the 16th of May.
> A. He came to my bed and got in with me, and would be almost asleep.
> Q. You said he would come to your bed and get in with you when you were almost asleep?
> A. Yes.
> Q. Then what did he do?
> A. (Witness cries) I can't answer. 68

Yvonne eventually revealed that her father had been having intercourse with her for over two years, in their home, a one-room

house, containing three beds to serve as sleeping quarters for the entire family. The level of physical defenselessness, material and social deprivation, and emotional vulnerability seen in her case characterize well the pitiable conditions in which these victims so routinely were trapped. Inadequate housing accommodations, family members sleeping together in the same room, little opportunity or space for the daughter to escape the access of the father, and overt threats made by the father to silence his daughter and further extend his authority over her--these were all part of the cycle of poverty that circumscribed the lives and consciousness of these victims. The great difficulty with which these daughters ultimately testified against their fathers, in the face of suspicions that they were expressing some kind of personal resentment, was a fundamental condition defining the terrain on which the incest cases in this sample went forward. The scenarios presented here served to situate the offending relative, his victim, and the court into a context of predictable variables that, in relation to case outcomes, spelled out the social assumptions by which the court understood and measured this most egregious of sex crimes.

4. Sample Cases: Telling on Daddy

Based on sentence severity, the punishments given to convicted offenders are consistently condemnatory over time, and demonstrate the degree of outrage the court appeared to have felt toward convicted incest offenders. It was not until the 1940s, in keeping with that decade's trend toward less severe sentencing, that the court began to act with some easing of censure. In terms of identifying case

characteristics relevant to outcomes, it will be useful to look at certain cases selected on the basis of sentence severity. Moving from examples with the most severe to the least severe outcomes, the social typifications that operated to determine these outcomes emerge in the individual case scenarios.

We have already looked at those aspects of the Delbert Booker case that had to do with defendant and victim characteristics and the support of the stepmother for the daughter. There is much more that this compelling case can tell us, however, and so it is described here in fuller detail. In 1906, Delbert Booker was charged with having committed incest with his daughter, Irene, who by the time of the complaint was thirteen years old. As was brought out earlier, a key aspect of this case was that the stepmother was responsible for bringing the crime out into the open. The offense had occurred on several occasions over a four-year period, having begun when the child was nine years old, shortly after the father and mother divorced and the mother moved to another state. In Irene's testimony, she related that she had delayed telling anyone for so long because she "didn't like to tell on him because [she] knew it would make trouble." As was pointed out earlier Delbert had often threatened to send Irene to Adrian School for girls for not staying home with him. She stated in court, "I couldn't help it, I didn't like to stay in the house where he was." Irene was asked, under cross examination, to talk at considerable length about how much pain she had experienced when she was raped. What is excerpted here on this issue is not exhaustive, but provides a sample of the

tenacious nature of the questioning on this issue. 69

Q. What made you cry?
A. It hurt me.
Q. It hurt you?
A. Yes, sir.
Q. Did it hurt you very much?
A. Yes, sir.
Q. How hard did it hurt you, did you scream?
A. No, I didn't scream.
Q. It didn't hurt very bad then, did it?
A. Yes, sir.
Q. Why didn't you scream?
A. Because he made me keep still. I couldn't scream.
Q. He just told you to keep still, he didn't tell you he would whip you or anything of that kind? if you didn't keep still?
A. No, he never whipped me very much anyhow.
.....
Q. Did it hurt you so bad you cried?
A. Yes, sir.
Q. Did he keep right on doing it after you cried?
A. Yes, sir.
Q. Did you tell him it hurt you?
A. Yes, I told him lots of times it hurt me, he never stopped.
Q. Did it ever get to where it stopped hurting you?
A. No, sir.
.....
Q. You didn't try very hard to get away, did you?
A. Why, I guess I did.
Q. You didn't scream?
A. No.
Q. You didn't cry hard at Kalamazoo (where one incident took place).
A. I didn't cry, it hurt just the same.
Q. You didn't cry at all did you?
A. I didn't cry right out; I had tears in my eyes.
Q. You didn't cry any place did you very hard.
A. Yes, sir.
Q. You could have cried hard enough so people could have heard you.
A. I might have, he told me to keep still. 70

Further questioning aimed at determining whether Irene had had intercourse with any other man or boy, to which she replied that she had not. The suspicion that she would implicate her father to protect someone else was not an unusual one. It will be remembered that Emma

Booker, the stepmother, corroborated the daughter's account, stating that Irene's retort about sending her father to Jackson was the tipoff that finally exposed the offense. A local physician testified as to the condition of Irene's genital organs: "I found the anatomical integrity of this girl destroyed...the female organs were unnatural for a child." The cross examiner struggled to find some basis, in light of that proof of injury, to undermine the validity of the girl's victimization. He questioned the doctor further:

> Q. Were this child's organs so distended that sexual intercourse with a man could take place without her suffering pain at the present time?
> A. I think she might indulge in sexual intercourse with a normal man without much suffering at the present time. 71

Finally, the chief of police was asked what reason Irene gave for making a complaint. His reply is revealing of the bitter loss this child must have experienced, in spite of the abuse, when her father was put away for life:

> A. Why, she stated that she loved her papa and all she wanted was to have her papa stop doing that kind of thing; she didn't know I was going to arrest him...neither did his wife...she simply came to me for advice and asked me if I wouldn't be kind enough to see Mr. Booker and have him stop doing that kind of thing. 72

In the end, Booker was indeed prevented from doing "that kind of thing" with his daughter ever again. Sentenced to Jackson Prison, he died seven years later in the prison hospital in 1914.

Beyond what was already said about his case, why is it so important? First, the whole issue of Irene's experience of pain seems like some anachronistic exercise made possible only by a deep ignorance

of a child's bodily structure. Or it was a cynically constructed conceptualization of the act, set up to create the fiction that there could have been no pain, a possibility that would lessen the daughter's victimization and the father's guilt. Second, the physician's testimony serves here to reveal just how fundamentally and permanently injurious incestuous rape was to the genital and reproductive organs of a young girl. Third, the police officer's recollection of Irene's simple desire to have her daddy stop doing "that kind of thing" when she spoke with him reveals how important abusive fathers may have continued to be in the lives of their daughters. The reasons for the court's strong punitive response seem most likely to have been related to the long-term nature of the offense and to Booker's lack of remorse. One other fact may have also influenced the judge to give Booker no leniency--from Irene's testimony, it is clear Booker had been involved in at least two exra-marital affairs. Whether that fact contributed to the court's perception of him is not possible to say for certain. In any case, he was deemed worthy in 1906 of the worst penalty the law would allow.

Vern Spinner's 1931 sentence to life imprisonment presents another view of an incest case that the court saw as particularly reprehensible. This was the case referred to earlier as the one in which the father claimed he raped his daughter to show her what she should not let other boys or men do to her. In fourteen-year old Beulah's testimony, she first described the offense that took place in their four-room house, in which lived the mother, father, six children,

and a grandmother: "my mother was sick in bed...pregnant...my father asked if I cared if he did something and I said yes...we slept in the dining room and my mother was in the bedroom...he said well, he would put it in those were his words." The questioning then continued:

> Q. Did it hurt you?
> A. Very much.
> Q. And after it was all over what did he say to you?
> A. He cried and I cried and I suppose the reason he cried was because he was afraid I would tell my mother...
> Q. What did he tell you?
> A. He told me I shouldn't ever tell anybody because he would probably be sent up for life and that it was for my own benefit that he did it.
> .....
> Q. Now, since that time, or, prior to that, has he done anything else that has been wrong?
> A. Well, he didn't do anything like that although he wanted to pinch my breasts almost every time he would come near me if my mother wasn't around, and, if I was in the bath room and he was near he would want to see my breasts. 74

The unusual aspect of proceedure in this case was that Spinner served as his own counsel, displaying at once the state of denial and self-deception in which he and the very few others who spoke on their own behalf were wont to do. What began as an attempt at cross-examination of his own daughter quickly turned into a personal address to the court, by which he tried to explain what happened, applying his own interpretation and justification for his actions. His statements are quoted here in their entirety as a revelation of the rationalizations that rapist fathers could employ to subvert the injunction of the incest taboo. If one can rightly root the taboo in a commitment to child nurturance, as was earlier discussed, then Spinner's own rendering of his actions reflected an awareness of the need to camouflage his abusive behavior in a cloak of parental protectionism.

The re

The result, as is so disturbingly clear, was pure distortion of reality:

BY RESPONDENT: [addressing his daughter on the witness stand]
Q. It was supposed to be about eight o'clock in the evening at the time I took you upstairs was about four o'clock in the afternoon. Florence was there and went away and she came back again, do you remember? And why did I ask you to go upstairs?
A. Well, I don't know.
Q. Well, I will tell you. She tried to do something with a boy and had poor success; the first experience they both of them had had; that's her confession. And I told her how wrong it was to do anything like that and if she did it would hurt; not only that, but it would disgrace her. But she didn't believe it because nobody ever told her anything like that would hurt, so, I told her I would insert my finger in her, that it would hurt her if she had never done anything. She didn't believe it. I says, "Now, I will prove it to you for our own benefit, if you will go upstairs," and she says, "All right, but" she says, "it's about my sick time." I says, "What I am going to do won't bother you at all for that." And she says-- she took her bloomers off. She says I pulled them down. The garment she had on couldn't be pulled down, for they had a button on each side, down her, on the leg. She unbuttoned that and laid on the bed. Now, I told her, "If this hurts, tell me because I want to know." And I inserted my finger just a little ways. I wet it. Put it just a little ways, and she said it didn't hurt. Then I told her if I put it in any farther it would hurt. I took that finger away, took another finger that I hadn't wet, and put it in a little farther than the other one, and I watched her face and I could tell by her face it hurt before she said anything. I thought she would start crying but she shed no tears but she kind of jumped, and I said, "That hurt, didn't it?" And she says, "Yes." And I took my finger out and set on the bed for probably fifteen minutes talking to her and telling her how much more it would hurt if anybody did anything to her because my finger was small; and I told her how to protect herself from anybody; I told her that if she went out with anybody that she knew and they knew her they wouldn't make any advances, if they knew she was going to say anything; if she would tell them she would tell on them, they would quit because that was a states prison offense...I spoke about promises they would make--anything to get next to her--and she wanted to know what they were. I says, "They will promise if anything goes wrong they will get a doctor and if--quite often it will be that they will use a safe, figuring that would be safe, but, I told her not to believe that because they are not; and, I says, some will tell you they will take it out in time to prevent trouble, but, I told her not to believe anybody, not to let them get far enough along, to give them no chance at all, to

> stop them before they get too far... and I told her to get up; and she got up and stood there and I lectured to her there for possibly ten minutes longer, and I told her if anybody did anything to you, a girl of your age, it would mean maybe 10 or 20 years in states prison..." 75

This father's careful recounting of the minute aspects of this clear sexual abuse of his daughter reveals a raw portrait of this girl's great physical and psychological vulnerability to exploitation by her father; it also reveals how much the father really knew about the law and what aspects of the law in practice were important for him to consider. For example, he made sure it was known she had taken her bloomers off herself, a technical point that was often seen as showing consent; it was also clear he understood the seriousness of the offense as was evidenced by his references to the possible penalty for committing such an act. Finally, his warning to her to protect herself from this sort of action by another man or boy was central to the pattern of all incest offenders: to possess their daughters for their exclusive sexual use and control.

In what may be seen as an understated response to this full disclosure, the prosecutor asked: "Didn't it occur to you that this was your wife's duty, rather than yours...that at her age, your actions would be extremely improper?" Further, in what may be seen as a very typical physician's report, the doctor who examined Beulah stated, "the hymen had been broken by some old rupture of the past...it is impossible to determine what kind of object would do this." 76 Despite the doctor's learned opinion, the jury must have determined the "old rupture" was, or could have been, caused by the father, given the

testimonies of both the girl and the father himself. Vern Spinner was sentenced to life in prison in March of 1931, and not paroled until April of 1947, almost exactly sixteen years later.

There were very few incest cases that ended in acquittal or were dropped by the prosecuting attorney before trial. Those that did not ultimately end in conviction were in some way linked to the establishment of an ulterior motive on the part of the daughter for filing a complaint. In 1915, a motion to nolle prosequi the case against Gustus Havens was granted because the step-daughter victim admitted that her charges had been made "in the hope of finding some way to get away from home and from under the control of her parents"; in 1929, Theodore Hodges was found not guilty of raping his daughter, Irene, quite possibly on the basis that the defense was able to successfully convince the court that her motives for complaining were due to an intense desire to get away from the house or to punish her father; and in 1930, the charges against Peter Schur appear to have been dropped because suspicions were raised here as well that Suzanne had filed false charges against her father in order to counter his threats of sending her to a reform school. 77

Much less severe sentences were given to the Fredericksons, a father and two sons, who were convicted of having sexual intercourse with their fifteen-year old daughter and sister, Lucy. In her testimony, Lucy stated that her sixty-two year old father, Charles, had been having intercourse with her once a month for about a year and a half, ending abruptly finally when it became clear she had stopped

having her "monthly sickness." Indeed, she reported, her father had obtained some dark colored medicine for her, which she claimed he gave her with some assistance from her twenty-nine year old sister Mary. It would seem this medication was procured as some sort of abortifacent, since Lucy was now "in the family way." The case was not simply a matter of finding the father guilty, however. Lucy's thirty-one year old brother, George, and her twenty-three year old brother, Michael, had also been having intercourse with her on an ongoing basis for some extended time as well. One key issue in the examination was to have Lucy recollect which one of these family members had had sex with her last before she realized she might be pregnant. Since all three had been fairly regular in their sexual involvement with her, the prospect of determining who was responsible for impregnating her was impossible. 78

The very sad thing about this full-family incest situation is its evidence of the complete and unselfconscious subjugation of Lucy by every member in the household, including the older sister, who was no doubt at some time a victim herself. The extent to which these ongoing concurrent sexual relations were part of the customary household routine is revealed most tellingly by Lucy herself. In appearing to impart an attitude of abject acceptance of the sexual expectations placed upon her in the home, Lucy stated impassively in court: "[Charles] asked if he could...I think I unbuttoned my underclothes... I don't remember how long [George] has been doing it...He wanted to know if he could--I told him yes... [Michael] wanted to know if he could...he did not threaten

or scare me nor promise me any presents or money--I said I do not care [if he did it]." 79 Thus, she appears not to have resisted.

There was a further difficulty for Lucy in what she was likely to face after the trial and incarceration of her father and two older brothers. Being left alone to bear and raise a child without the support of any man in a time when a man's support was essential, Lucy probably went to live with her older sister, who was married. This was the sister, it will be remembered who had collaborated in her abuse. Her father, Charles, and brother, George, were both sentenced to Jackson Prison for seven and a half to fifteen years; her brother, Michael received a lesser sentence of one to five years at Ionia Prison (where younger, less serious offenders were sent, in theory). In 1909, this situation would most likely have posed serious economic problems for a girl such as Lucy, problems compounded by the disparagement commonly directed at unwed pregnant girls, regardless of how their pregnancies occurred. There is no way to know what resources she might have called upon to cope with this situation; but no matter how one looks at it, this was a young woman for whom the experience of incest can not be described as anything less than calamitous.

It is very difficult to determine why the Frederickson sentences were not as severe as those for Delbert Booker and Vern Spinner. In all cases, the abuse had been perpetrated over a long period of time. In none of them is there any evidence that the defendants exhibited any sign of contrition or awareness of the seriousness of their offenses. Probably the most noticeable difference, on the other hand, was in the

demeanor of the victim; Lucy Frederickson's passive acceptance of the abuse arrangement and her candid acknowledgement that she experienced pain only "sometimes" may have created the perception that the crime was less heinous than some other incest offenses were. The Spinner and Booker daughters were both slightly younger than Lucy, had demonstrated considerably more resistance, and had evidenced greater physical injury. Without any further information on which to base a judgment, it would seem that this was the only significant factor accounting for the difference in sentence severity. If this observation can be trusted, then it follows that the assumptions of the court with regard to incest again paralled those of forcible rape. Signs of force and resistance created the distinction of greater moral turpitude, in spite of the fact that such criminal acts were not defined with a consent provision. Thus the outrage signified by these violations of a fundamental societal taboo seems to have been conceived of incrementally, just as it was for other sex crimes.

For cases with less serious outcomes, the following three exemplify the kinds of issues that could ameliorate the sentence or avert a conviction. The condemnation accorded incestuous sex was drastically lessened in a case in which the offender was the brother of the victim. In 1943, seventeen-year old William Wheeler was sentenced to a three-year term of probation subsequent to his conviction for having raped his eleven-year old sister. The probation officer's pre-sentence report details the background of the defendant and the circumstances of the crime, so that it is possible to see what may have influenced the

judge in deciding to award such a light sentence.

> Father deserted the family many years ago...Father was a drunkard. Respondent attended a number of schools... Was a Boy Scout for two years in Lansing. Used to attend Sunday School...Has worked for two years for his Uncle...and also worked for other farmers...Does not use profane language and does not drink. Likes swimming, hunting, fishing, radio. Reads quite a lot and says he reads good books as well as some stories..... William said that he was living with his uncle...and his sister also lived there... One afternoon just before milking time he said he was upstairs. He and his sister laid down on the bed together, got to talking and he attempted to have intercourse with his sister, Rose. They played around together awhile and he said he did penetrate her and all at once he thought of what he was doing and quit. He said she told him that he should be ashamed of himself... He said he never bothered any of his other sisters and he was very sorry for what he had done. He said he knew his mother had had a hard time trying to keep the children together before she died and of course, his father never was any good to the family...
>
> Respondent now wants to get a defense job, save his money and help maintain his brothers and sisters... It is my understanding the girl was not injured physically and that this was the only time respondent tried anything of the sort. I recommend probation with the distinct understanding that he go to work...and contribute a certain portion of his wages toward the support of his brothers and sisters. 80

The judge must have easily concurred with such a recommendation, making some additional stipulations. During Wheeler's period of probation he would be required to pay off $50.00 in court costs, "attend religious services each Sunday, and abstain from all use of intoxicating liquor." 81 This result indicates the court's measure of how the rape of a young sister by her older brother should be disciplined, given in particular its likely sympathy for his early childhood difficulties and his expressions of contrition and intention to provide for the family in a responsible way. The fact that this was a time of war, however, allowed the larger community to effect its own alteration to the

outcome.

released

Fi

of the

Theodor

questi

suspec

wanted

This

in th

inter

agai

to

bee

Ha

ra

fi

prej

just

outcome. After one year into his probationary period, Wheeler was released from probation to go into the army.

Finally, two cases illustrate situations in which the response of the judicial system was to exonerate the defendant. The case of Theodore Hodges will be remembered as one in which the daughter was questioned as to her motives for filing the complaint. She was suspected of making this accusation against her father because she wanted to get even with him for not letting her go out with other boys. This of course fit the normal pattern of offending incest fathers. But in this case, fourteen-year old Irene finally stated in court, after intensive questioning, that she would not have made this complaint against her father, had he "let her go on and do the things she wanted to do." This was taken to mean, perhaps inaccurately, that she had not been the victim of incest after all. 82

The same situation prevailed in the 1914 case against Gustus Havens, whose fifteen-year old daughter Nellie complained that he had raped her. Havens never went to trial, however, and the prosecutor filed a request for a nolle prosequi. He stated his reasons as follows:

> Nellie Woodard is a step-daughter of this respondent and had had trouble with her mother and this respondent because of their objections to her keeping company with certain young men. She is now married and living with her husband in another part of the State and has since stated that the charges which she made against her father were made in the hope of finding some way to get away from home and from under the control of her parents. 83

Such a confession in 1914 served, no doubt, to confirm the prejudices of the court that young adolescent daughters could be justifiably suspected of using the charge of rape to punish their

fathers. Accordingly, the notion that a daughter might retaliate against a father's authority in such a way became the primary argument offered by the defense in nearly every case of incestuous rape, especially when the situation involved adolescent girls. It became an easy prescription to follow; as adolescent girls became more involved through school with their peers in the outside world, they moved out of their father's control, which often served to intensify his efforts to restrict them. The alternative to rebellion, if indeed incest was occuring, was unfortunately what happened in most cases: daughters tolerated the abuse in silence. Gordon noted in the Boston cases that incest victims often came from poor immigrant families; like their parents, they remained isolated and fearful of the outside world. 84 Such a response, of course, made it that much more possible for the abuse to continue indefinitely. However much the Ingham County authorities would have wanted to interfere in such situations, they were in fact often persuaded that a girl who was desperate to get out of the family because of supposed parental mistreatment would wrongfully use an incest charge to accomplish that end. It may have been the great misfortune of some that the court failed to recognize its own non sequitur. Such a charge may have been made in anger, coming out of circumstances that were overly restrictive; this should not have precluded the consideration, however, that it may have been legitimately tied to an experience of incestuous rape.

5. The Childhood Taboo: Challenging Paternal Authority

Exhibiting the highest conviction rate and the most severe minimum sentencing average except for stranger statutory rape, incest can be said to have received the most unqualified court censure of all the sexual assault cases in the Ingham County Circuit Court over this period of one hundred years. An intrafamilial sexual crime by definition, its censure was most evident in cases of extended periods of abuse.

Profiles of the father-perpetrators reveal that they were characteristically of low economic and occupational status, under-educated, destructive of themselves and abusive to others, authoritarian and possessive, self-interested and irresponsible. Profiles of the daughters reveal that they were emotionally, economically, and physically vulnerable to their father's threats, and that, while the court sought to prove a basis for their possible ulterior motives in filing a complaint, their testimony was clearly presented with no small amount of reluctance. Mothers were frequently absent, or in some way powerless to act on their daughters' behalf.

Thus, the factors by which the court defined the "worst" incest offenses included an offender who engaged in long-term abuse of his daughter, lived on the fringe of moral acceptability, engaged in excessive drinking, provided insufficient income for the operation of the household, and demonstrated little or no comprehension of the seriousness of his crime. Further, the victims needing the most protection were those who had endured a lengthy period of abuse or were

perceived to be extremely vulnerable. The significant factor by which the court suspected an absence of incest in the face of a complaint to the contrary was its perception that the victim's charge was motivated by an ulterior desire to punish the father or remove him from the household.

It seems to have been a prevailing notion that a daughter would make up a charge of incest in order to get back at her father for what the defense portrayed as her exaggerated view of his restrictions on her behavior. The assumptions behind such a rationale were many: foremost among them was that fathers commanded a position of authority in the family, and that such authority was to be respected on the basis that fathers knew what was best for their children. The pre-eminence of this patriarchal ideal dated back across centuries of time, but was no more firmly held in place than it was in the early twentieth-century American midwest, infused as it was with the presence of a Judeo-Christian ethic of obedience to the father. 85 Such public acknowledgement of private power and protection gave a broad imprimatur to the moral force of a father's word. This then was the crucial difficulty with incest. The perpetrator was someone whom the child was societally bound to trust, love, and most importantly, obey.

Against this cultural backdrop, the court's injunction to investigate the father's ultimate societal violation of his child's sexual integrity was dependent upon its obligation to safeguard the daughter's right to violate the ultimate childhood virtues of submission and allegiance. Influenced no doubt, as many Americans were by the

1920s, by Freud's theory of young daughters' seduction fantasies, defense attorneys may have operated on a belief that daughters were prone to seduce their fathers, or possibly concoct fantasies. 86 Evidence of this interpretation is never explicitly articulated in the Ingham County courtroom discourse, but certainly the suspicion that daughters might falsely accuse their fathers had to have been based in a belief that they were able to fabricate accounts of sexual activities they had never experienced first hand. This belief can be seen as credible only to the unlikely extent that naive young girls were able to construct elaborate sexual fantasies that had no basis in fact.

Establishing the "fact" of incest rested on the belief that fathers had no legal or moral right to sexual access to their daughters. The believability of the claims of these victims, however, rested on assumptions that imposed on the definition of incest law a host of relatively consistent but plainly extraneous features. Legitimately punishable incest perpetrators were poor, irresponsible, often irrational, undereducated, and without remorse. Fundamentally, they did not fulfill society's expectations of a "good father" in multiple other ways, and their deplorable sexual behavior was underscored by virtue of the class assumptions that enjoined the essentially middle-class legal structure to prosecute only socio-economically lower-class defendents. This is not to criticize the court's actions; indeed, it seems the court was quite correct in bringing these offenders to trial. What seems amiss, however, is that there must have been other offenders from the middle and upper classes as well, whose possible similar actions

warranted equal scrutiny and punishment. The evidence of a one percent retrospective reported incidence among Kinsey's college-educated subjects is a sign that incest occurs with some frequency among population sectors beside the lower class. 87 Yet middle- and upper-class defendants are rarely in evidence in this sample. Russell's findings may show the reason why: victims from higher level socio-economic backgrounds do not report the offense. Thus the nearly exclusive prosecution of lower-class defendants in Ingham County may at least have been due to the fact that middle- and upper-class families assiduously hid the offense from public attention.

It may be wondered if the marked degree of under-reporting among more affluent families might be seen as a measure of the degree to which those female children were under greater pressure, by virtue of being raised within a strong, middle-class, Judeo-Christian world view, not to break the taboo against challenging the authority of the father. Such a life construction offered them a picture of the family and their place in it that fully discouraged any possibility of their altering the father's position of absolute power. As feminist theologian Sheila Redmond has presciently observed: "Christianity (and most other world religions, I would say) constantly underscores the value of obedience to authority figures, especially parental figures...[and] has a vested interest in the maintenance of the patriarchal family ideal..." Within this model, female children are taught the virtue of submission to this authority. The result, she concludes, is an atmosphere that "does not make it easy for children who have been sexually abused to deal with the

abuse." 88 This is not to denigrate religion generally, but to point out how this aspect of patriarchally-defined religions may exacerbate the reluctance of abused children to report, especially if they have been raised in homes more rigidly modeled after a patriarchal religious ethic. This is a consideration that merits fuller investigation and may account in part for the dearth in court of incest cases from the mainstream families of the county.

The effect of such a class-specific emphasis meant that incestuous rape was on trial along with inept, callous, and improvident fatherhood. Yet to say this is to say not quite enough. More to the point, incestuous rape came to trial only in a context of class-identified extra-legal concerns, serving to perpetuate a larger societal definition of this intra-familial sex crime. Essentially, it was a definition that excluded anyone but the most marginal individuals and contributed to the false, but nonetheless accepted, general perception that, among those who fit societal norms, violations of the incest taboo were indeed rare.

II: Indecent Liberties: "Sexual Assault... Without Intending to Rape"

1. Incidence and the Law

The legislature of the State of Michigan enacted a law against taking indecent liberties with a female child under the age of fourteen (the age of consent) in 1887. 89 That law made such action a felony offense, punishable by imprisonment for a period of up to ten years or

by a fine of no more than $5000.00. In 1948, at the point when this study ends, the law read exactly the same as it had 61 years before, with the exception that the age of consent was set at sixteen, a change that had been enacted in 1925. The penalty was unchanged throughout the entire period. 90 Cases that came into court under this law comprise almost 20 percent of the sample, a substantial portion, and are a reminder of the preponderance of attention given to offenders of victims under the age of consent. It may be surmised that the impetus for enacting this law was similar to that for raising the age of consent in the statutory rape law. At a time when the social purity forces prevailed upon the public mind to prevent young girls from being led into prostitution, it is possible this law was conceived at least in part toward the same end.

As with statutory rape, the court was slow to process cases under this law. After it was enacted, only one such case was tried in the next year, 1889, and then not another one until ten years later, in 1899. As distributed in the decades that followed, the cases do not occur in substantial numbers until the 1920s. From 1901 to 1910, there were six cases; from 1911 to 1920, there were nine cases; from 1921 to 1930, there were twenty cases; from 1931 to 1940, there were thiry cases; and from 1941 to 1950, there were thirty-seven cases. Curiously, as with statutory rape, there was more support for this law after the discovery of the deleterious effects of venereal disease. A further similarity to statutory rape cases may be noted: there was a big increase in attention to cases like these in the 1920s, a time when

concern for preventing premature sexual activity was at its height.

To elaborate on this point, the victims of indecent liberties ranged in age from fifteen years to a low of seventeen months, with the highest concentration of victims at the ages of seven and eight. But the age limit in this law was raised from fourteen to sixteen in 1925, indicating a desire at that time to prevent men from inappropriately fondly adolescents as well as little girls. What may be significant in this regard, is that in the 1920s, there was a higher percentage of victims at twelve to fifteen years of age than in any other decade (33 percent in 1901-1910; 33 percent in 1911-1920; 50 percent in 1921-1930; 7.1 percent in 1931-1940; 12.1 percent in 1941-1950). Thus, the use of this law suggests that if it was conceived to protect young female children from indecent fondling, it came to be used as well as a law to protect young adolescent girls from premature sexual initiation.

One does not have to read very far to understand what behavior constituted "assault of a female child under the age of consent and taking indecent liberties with the person of said child without intending to commit the crime of rape." 91 The key element in this crime is that the assault was perceived to be limited to the touching of "private parts," emphasizing always what was perceived to be the absence of any intent to rape. Since actual rape was defined exclusively as penile penetration of the female's vagina, and intent to rape could be established only by evidence that the perpetrator was intending to penetrate the female's vagina with his penis, the territory of sexual assault legally covered by the indecent liberties charge was very

broad. Thus, while the term indecent liberties generally designated a less invasive sexual assault than rape, an action such as penile penetration of a child's mouth could be, and was necessarily, prosecuted under the indecent liberties charge. Further, as is obvious in the wording of the law, little boys were not protected from indecent liberties assaults. So, in cases that involved both boys and girls, only the girls were named as the complaining witnesses. Finally, as with cases of forcible rape, assault with intent to rape, and statutory rape, indecent liberties cases reveal that the court was predisposed to respond to this crime on society's terms.

The defendants in these cases were, on the whole, not so different from the defendants in all the other cases in terms of their socio-economic status, level of education, and property ownership. Their roles were not relationship-defined, as with incest offenders, but in fact, many indecent liberties offenders were the fathers of their victims. They were also, however, neighbors, family friends, and storekeepers. There was even one proverbial "stranger in the park" who picked up a little girl, took her to a sandwich shop, and promised her ice cream, all the while putting his hand inside her pants while she ate her sandwich. They were all white, with one exception--a mixed-race, Baptist laborer, who in 1937 was sentenced to a mental hospital for having habitually practiced oral sex on young boys and girls with whom he was unacquainted. The percentage of defendants who were convicted of indecent liberties was 65.4 percent with the average minimum prison term sentence being 1.93 years. Probation sentences did not occur in great

numbers until the 1940s, when fourteen of the thirty-one sentences (or nearly half) in that decade were for probation. Remarkably, even though this average minimum sentence indicates a far less severe court censure of the indecent liberties offense than that applied to the incest offense (average minimum sentence was 13.87 years), the judges' statements accompanying the offenders who went to jail were replete with many of the same descriptors applied to those who were convicted of committing incest.

Similar to the commentary judges ascribed to incest and statutory rape offenders, an indecent liberties offender could also be "worthless to society," "hopelessly insane," "a smart alec type," or classed as a "criminal sexual psychopath," the latest term not entering the criminal justice lexicon until after 1940. As with the other offenders, several indecent liberties offenders had come up from the South, a few had once been Boy Scouts, some had gone to Sunday school, and some had previous criminal records for drunkenness or breaking and entering. One distinct consideration with regard to these offenders should be noted: they were, on the average, much older, relative to the ages of their victims, than were those accused of any other non-intra-familial sexual assault. Bearing in mind that the bulk of the victims fell into the seven- and eight-year range, it is particularly notable and disturbing that the bulk of the offenders whose ages could be identified fell into the forty- to fifty-year age range.

The offenses took place in both predictable and unexpected locations. Intrafamilial offenses took place most often inside the

victim's own home; offenses perpetrated by neighborhood offenders happened in places of work, in a garage, in a warehouse, on a front porch, or in a car; one child was kidnapped from the sidewalk to a nearby boarding house room, another was enticed out onto the balcony of a window in the dome of the Capitol building. Except for the cases that took place at home, the very spontaneous, public nature of indecent liberties offenses often contributed to their being discovered, as was the situation with cases of assault with intent to rape. Most often, however, offenses came to public attention only after the victims told somebody about the offense.

The discussion that follows will show what two elements were particularly common to these cases; it will show how the earliest cases, in 1887 and 1897, reflected the court's interpretation of the then new law; further, three later cases will expose the disturbing realities an indecent liberties charge typically brought to the court's attention and how the court responded to those realities; finally, the court's treatment of cases involving fourteen- and fifteen-year old victims after 1925 will attempt to reveal why the age limit in the law was raised. The entire discussion will conclude with a review of case outcomes, showing how outcomes were linked to key case factors and to the social assumptions those factors signified.

2. Offender Strategies and Victim Vulnerability

Aside from the actual sexual liberties complained of, which may be assumed, there are two elements that are quite common to these cases: one has to do with strategies reportly employed by the offenders in

order to attain compliance from their victims, and the other has to do with the court's defense-related exploitation of the very traits in the victims that made the offense possible in the first place: their age, naivete, and vulnerability.

Probably one of the most common strategies employed by these offenders was to offer a small amount of money to the child to get her attention and gain her trust. Eli Sheldon, charged three separate times, often gave small amounts of change to the little girls who visited him at the Wheelbarrow Works where he was employed; then he took them individually into the back room and often took them for rides in his wagon. 92 Albert Welton's newly adopted fifteen-year old daughter reported that he had promised her a wristwatch if she would allow him to touch her. 93 These cases were before 1930; after that, the strategies of the offenders became more inventive and elaborate. Wayne Ryal, in 1933, engaged his little daughter and niece in a game in bed called "tell what you touch"; of the little girls, seven and eight years old respectively, the first could barely speak of the particulars in court, and it was only due to the candid disclosures of the second child that his game came to light at all. 94 The ultimate inducement came from Lewis Scott, who, while babysitting the three children of a family friend in 1946, promised a pearl to the child who sucked on his "privates" the longest. Testimony revealed that Robert got the pearl. The defense attorney's reaction to this unexpected disclosure was to seek a week's continuance. It was the "most astounding story" he had ever heard and he did not feel he was in a position to cross-examine. 95

What these inducements reveal is the common offender behavior of using an indirect approach, wanting apparently to avoid alarming the child and at the same time wanting to gain the child's trust, compliance, and silence. The conscious employment of some kind of inducement or manipulative tactic by the perpetrators of indecent liberties was a nearly universal case characteristic and seems to have had an effect in the court such that prosecutors could establish an attribution of deliberateness in the offender. Such an attribution did not necessarily result in conviction, however. Defense strategies, as adapted to individual cases, were employed to counteract the impression that a victim had been unwittingly vulnerable to the improper deception of an unscrupulous sex offender.

Generally, the defense strategy was not to question the fact of the sexual advance directly, nor was the strategy to question the victim's resistance. Since this offense excluded penile penetration, there was no need to prove penetration; since these victims were under the age of consent, there was no way to account for resistance. Thus, the usual targets of concern, proof of penetration and proof of resistance, were generally not matters for courtroom consideration. Rather, the critical defense variable was the possible ulterior motivation of the victim in making a complaint. One pattern is similar to that found in the incest cases: when the perpetrator was the father, the child was portrayed as using the charge to be rid of her father or to punish him. When the perpetrator was not the father or other relative, there was a similar result: the complainant was cast into the role of devious witness and

her believability was impugned.

For example, in a 1907 case, Mrs. Cora Hills brought an indecent liberties charge against Eli Sheldon, whom she suspected of taking indecent liberties with her ten-year old daughter, Teneriffe. Sheldon, a neighbor, had been baby-sitting for the Hills children while Cora was away briefly. When Cora returned, she caught a glimpse of Sheldon quickly throwing ten-year old Teneriffe's skirt down just as she (the girl's mother) was returning to the house. The Hills family had recently emigrated from eastern Europe and was experiencing some financial strain with the store they were managing. As an incidental matter, they were still having trouble with speaking and understanding the English language. The defense insinuated Cora had brought the charges against Sheldon in order to get money from him. In fact, Sheldon had offered to settle out of court with a sum of one hundred dollars, but Cora had refused the offer because she did not want to be responsible for his being free to repeat the offense with someone else. Her expressed motivation was apparently discounted. Further, she was asked if she had accused other men of taking indecent liberties with her daughter, a charge that implied she made a habit of making false accusations for material gain. Finally, as to the daughter's testimony, it was suggested by the defense attorney that she had, "by reason of parental influence...been induced to relate things..." The defense was bent on persuading the jury this was "a put-up job" engineered by Teneriffe's mother. Ultimately, the jury must agreed: Eli Sheldon was found not guilty. 96

True to Cora Hills' fears, Sheldon did take indecent liberties with another child and was charged in court two months later. In this subsequent case, the third brought against Sheldon in two years, there had been no witness to the act, but both the father and mother of the child testified to their suspicions about Sheldon's motives for inviting their daughter over to his house every Sunday afternoon. There is no evidence that this family was financially stressed, and no evidence that they were in any other way socially marginalized, so the arguments that they might be using the charge for their own material interest were not employed here. It was in this case that Eli Sheldon was finally convicted of committing indecent liberties. It should be noted, to the credit of this prosecuting attorney, that he did not seek a nolle prosequi in either of these cases, but rather took them to court. 97

The assumptions that seem to be in evidence in these cases against Eli Sheldon are identifiably rooted in a ready suspicion that women are devious and men are not. It seems to have been more believable to the jury that Cora Hills would be deceptive than that Eli Sheldon would not be. The case also reveals the prevalence of the notion that a child would easily lie about such an event, despite evidence of her obvious reluctance and embarrassment in talking about it in any specific way. Then too, one cannot miss what emerges as an underlying distrust accorded a woman who demonstrated a profound deficiency in understanding and speaking the English language. Here was someone who clearly was at a disadvantage educationally, economically, and socially in the context of an all-male, educated, middle-class courtroom. That the subsequent

case ended in conviction may have been due to the fact that the father supported the mother's complaint and that the family was not so plainly outside the boundaries of community norms.

The case against Albert Welton in 1923 reiterates the incest theme in which a daughter's accusation against her father was born out of a need for revenge against some perceived mistreatment. Welton's adopted thirteen-year old daughter testified that her adoptive father of four weeks had come into bed with her, had put his hand on her, had gotten on top of her and had told her if she did not do it, she would not get the wristwatch she had been asking for. There were frequent subsequent occasions in which he continued to attempt to touch her. This scenario was portrayed by the defense as a situation in which the newly adopted daughter had been taking advantage of the father's good will, that she had deliberately placed herself in his lap and had teased him for things such as the wristwatch. The implication here was that she was making this charge against him because he had not given her the watch. It is evident the jury accepted this line of thinking in this 1923 case. Moreover, if any jury members had been at all disposed to sympathize with her, it may be that her expressed wish that her father would go away for a long time convinced them she was indeed an ungrateful, spiteful young girl. The jury found Albert Welton not guilty of taking indecent liberties with his recently adopted adolescent daughter Elinor. 98

Similarly, in 1933, Wayne Ryal's daughter, upon whom the game of "tell what you touch" had been perpetrated by her father, shook her head

no in answer to the cross examination question: "Would you like to have your Papa come back to live with you?" 99 As with incest cases, the fact that a little girl would express such a sentiment toward her father seems to have been linked with a perception that she was making the accusation deliberately to fulfill a wish to be rid of him. The fact that Ryal was acquitted suggests it was a ploy that worked; it played upon those deep social expectations that little girls are to love and obey their fathers. Moreover, if jury members and other courtroom agents believed there was any truth to the Freudian idea that little girls would seduce their fathers or fantasize about being seduced, then certainly a young girl's accusation that her father committed indecent liberties with her had to be carefully scrutinized. 100

Another approach to testing the authenticity of the key witness' complaint was to question whether she understood the seriousness of the charge. This was to suggest she was making up the charge as a game. When ten-year old Lavay reported that sixty-three year old store-keeper Charles Force had taken her behind the counter and felt her "private parts," she was asked if she understood that she would be sending a man to the penitentiary if people believed her story. She replied that yes, she knew it, because she had been told it by Mr. Force. The assumption behind such a question could only have been that little girls make up stories that aren't true, and in terms of making sexual accusations, certainly young girls needed to be held accountable for the truth of what they said. It must have been thought that they either did not know that such an action might result in sending a man to prison or, more

fundamentally, that such knowledge would induce them to change their story, if in fact they were not telling the truth.

Finally, in the 1946 case against Lewis Scott, eleven-year old Ann's account of how a man who was babysitting three children got them to take off their clothes and engage sex acts with him had the effect of shocking everyone in the courtroom. Even the defense attorney recognized her account as believable and did not question the fact of the offense. Instead, he took the position that, since she was old enough to know better, certainly she was as much to blame as was the accused. After all, Scott had used no force, and by her own account she had taken her underwear off herself. Such reasoning was embedded in that whole framework of thinking that assumes young girls who genuinely do not want to participate in sexual activities with a man must be physically forced to comply with his advances. Any sign of compliance indicated they were complicit in the act. The jury was not persuaded by such reasoning in this case, however, and found Scott guilty of indecent liberties. The judge declared "this was one of the worst offenses of this nature that this Court has seen in a long time". 101 At least in this case, the social assumptions played to by the defense were overcome by an overriding conviction that the bodily integrity and innocence of Ann and the other children had been outrageously violated.

3. The Early Cases: First Use of the Law

The first case of indecent liberties to appear on the Ingham County Circuit Court docket was in June of 1889, just two years after the law was placed on the books by the state legislature. William Haviland was

charged with having committed indecent liberties with ten-year old Linnie Bell Sly. Haviland had been a boarder in the Sly home for six weeks, and had been seen habitually following the child around. Linnie Bell first told her mother that Haviland had been putting his hand on her breasts, to which the mother's response was that she should stop talking to him. When she told her father, he went to Haviland and told him not to be tagging around Linnie. It seems the formal complaint was made after Haviland threw Linnie onto the grass near her aunt's house with the apparent intention of forcing her to have intercourse. She "hollered and screamed", and when her aunt came to the door at the sound of the screams, Haviland started to run. Linnie testified: "He said he was going to make me do something bad...I told him I was not going to be a bad girl like that woman over at Mrs. Bell, and my ma told me not to be a bad girl." 102

Four witnesses testified to having seen Haviland with Linnie during the previous several weeks, each one offering what they had perceived with regard to the defendant's attentions toward Linnie. A twenty-three year old male witness said he had admonished Haviland, "You ought to be ashamed of yourself, following that little girl around." Another adult male witness said he had seen them together many times and once, "[Haviland] was doing something with her dress...it was unbuttoned." An eight-year old girl reported she had seen them together many times, but that she "never saw him take any indecent liberties with [Linnie]". From the disclosures of these three witnesses, no one had yet reported actually seeing an act of indecent liberties take place. The testimony

of the fourth witness no doubt contributed significantly to the final disposition of the case. A fourteen-year old boy stated, "I saw things that excited my curiosity...I saw him hug her up to him...I saw a man one time in their house hugging the girl...and had his hands under her clothes. There were two men there--this one and another--I could not tell as this one was the one." Ultimately, the impression created seems to have been that no one actually saw the defendant in the act of committing indecent liberties with Linnie Bell, regardless of the number of times they were together. Moreover, there was some sense that these behaviors were taking place with some degree of mutuality. In a letter to the court, the prosecuting attorney pre-empted the processing of the case by filing a request for nolle prosequi, stating, "from an investigation of the evidence, I am satisfied a conviction upon the offense charged would not be warranted." 103

From a present-day perspective, it seems that in reality there was ample support for an indecent liberties conviction. The fact that the prosecutor dropped this case suggests that courtroom agents simply were not prepared to implement this legislature-made law on the basis of inference. Nor were they about to send a man to prison on the word of a ten-year old girl who said a man had touched her private parts. Though Linnie Bell's screams were sufficient evidence to convince law enforcement authorities to formally register her father's complaint and apprehend the accused, it was not sufficiently convincing in the prosecutor's mind. With only these available facts, the prosecutor apparently concluded there was not enough to prove to a jury beyond a

reasonable doubt that William Haviland had violated this new law. While clearly the alleged activities fit the parameters of the law as described, the measure of proof lay only in someone actually seeing the offense take place.

It was a full ten years before another indecent liberties charge was filed with this court, such may have been the impact of the first case in discouraging the willingness of the sheriff to formally accept similar complaints. In 1899 the charge of indecent liberties was filed as a second count, accompanying a first count against George J. Walker for statutory rape. The complaint read that George "did make an assault and did carnally know and abuse one Anna Elliott, a female child under the age of sixteen, to wit, of the age of seven," and "that the same also did take indecent and improper liberties with the person of the said child without intent to commit the crime of rape." 104 What cannot be missed is the obvious contradiction in the wording of the two charges: to "carnally know" and also to "commit indecent liberties...without intent to rape." As explained earlier, it was a contradiction that was overlooked in the effort to provide a lesser charge in case a conviction could not be had on the first charge. In this 1899 case, the defendant waived examination, so without the transcript that such an examination would have provided, there is very little information in the file as to the particulars of the situation. Yet we know that the attorney for the prosecution filed an information with the Circuit Court on September 25, 1899, and cited both charges.

The outcome of this case was that George Walker was found guilty

and sentenced to three years in the State Prison at Jackson. There is no explicit indication as to which charge pertained, but since sentences for statutory rape at that time were typically around ten or fifteen years and a 1902 conviction for indecent liberties on its own merits resulted in a three-year sentence, it seems the verdict here pertained to the indecent liberties charge. 105 With apparent disregard for any contradiction in the two charges, this case illustrates the use of the indecent liberties offense as a secondary charge that allowed for possible conviction on a lesser offense.

This strategy reappears in a 1903 case against Henry Tanto. The complaint against Henry charged that he "did make an assault upon one Augusta Bassick, a female child..., and her did beat, wound, and ill treat with intent to carnally know. Further, that Henry Tanto...did take indecent liberties without committing or intending to commit the crime of rape." Again the explicit contradiction in the two charges was both taken for granted and disregarded. A brief description of the events that took place here will again illuminate the use of this charge as a secondary offense on which to "bargain" for a conviction. 106

According to the testimony of thirteen-year old Augusta Bassick, she had gone with her sister to pick huckleberries around 7:00 a.m. about one-half mile from Mount Hope Cemetery, south of the city of Lansing by about two miles. When Henry Tanto saw her, he came over and talked to her, then tried to grab her and pull her down. As she screamed, he lifted up her dress and pulled down her pants; he was kneeling over her, with his knees on either side of her, his own pants

unbuttoned, when a third party, Mr. Miller, appeared. Alarmed upon hearing the girls' screams, this witness came to the scene and demanded, "What were you trying to do to them girls?" At this point, the defendant retorted with, "What business have they in my berries?", and pulled out a knife. 107

This would seem to be an obvious case of assault with intent to rape, perpetrated in this instance on a quite young victim. As articulated on the complaint, that charge alone was sufficient and appropriate to the described action of the accused. Yet the prosecutor took the precaution of including the lesser charge of indecent liberties as well, in case the jury was unconvinced of the offender's intent to rape. There can be no other explanation for his including what seems to be the otherwise inappropriate charge of indecent liberties. A county agent made "an investigation into the circumstances of the offense charged." Tanto's conviction, determined after only three minutes of jury deliberation, led to a sentence of five to ten years in prison, suggesting he was convicted of the greater offense of asault with intent to rape. 108 Such a severe sentence was not customary for the crime of indecent liberties.

These first cases of indecent liberties show that this court was slow to implement the new law in its own right. Even with enough evidence to support "probable cause to believe" the crime had been committed by the accused, the prosecuting attorney in the case against William Haviland predetermined the evidence was insufficient to secure a conviction. Accustomed to relying on proofs of nonconsent and

corroborating evidence such as injury, penetration, pregnancy, or gonorrhea, this 1889 prosecutor seems to have felt ill equipped, with no eyewitnesses, to prosecute a man for the crime of indecent liberties.

As it turned out, prosecutors quickly came to use this charge to cover all sexual assault actions that did not qualify as forcible rape, statutory rape, or assault with intent to rape. Moreover, they quickly came to see the potential for using this offense as a secondary charge, against which it was possible to obtain a conviction in the event that the prospects for a conviction on the primary charge were in doubt. Indeed, there were a total of sixteen cases in which indecent liberties charges were combined with a primary charge that pertained to underage females. It is probably safe to assume the indecent liberties charge was added to a statutory rape charge if the fact of penetration was in question; it was added to an assault with intent to rape charge if the perception of the perpetrator's intent was in doubt. It is worth noting that combining the indecent liberties charge with these other charges only lasted until 1928, after which there was only one more instance of such a combination--in 1945. This would suggest that the crime of indecent liberties became more prosecutable after this time in its own right. Indeed, in that the protections under this law had been expanded by the mid-1920s to include girls of fourteen and fifteen years, it seems there was a greater willingness after that to publicly repudiate sexual assault actions as they were defined under this law.

4. The Measure of a "Detestable Offense": Sample Cases, 1904 to 1946

In 1904, Henry Kohler was brought to trial on a charge of having taken indecent liberties with eight-year old Goldia Berry. Goldia had been waiting on the sidewalk for her father, who had gone into a local saloon. When the father came out to find Goldia missing, he was informed she had been seen with Henry Kohler. William Berry was then able to round up two policemen and go with them to Kohler's boarding house. By the time they opened the door to Kohler's room, they found him on the bed with Goldia. Her clothes were unbuttoned and she cried when she saw them come in. 109

In the ensuing trial, Kohler was found guilty of committing indecent liberties with Goldia Berry. There were three features of this case that virtually assured Kohler's conviction: (1) by arriving at the room when they did, the police had been witnesses to the offense; (2) the physician who examined Goldia at midnight that same night testified there was "every evidence of an injury" in her vaginal area; and (3) the woman who had been caring for Goldia reported there had been no noticeable vaginal injury before the night she had been found with Kohler. With all of this evidence, the prosecuting attorney had little trouble convincing the jury that Kohler had indeed committed indecent liberties. As with two prior cases in this court, however, the indecent liberties charge was the secondary charge; the original charge of assault with intent to rape had been dropped because there was no way to prove he had intended to rape her. Even though, as the physician

testified, the "lips of the vagina were swollen, black and blue, and bleeding," there was no perceived verifiable evidence of penile penetration, so indecent liberties remained the only provable charge. Kohler was sent to Jackson Prison for five to ten years. 110

A 1915 case against Edd Piper is important for the way it highlights the age limitations of this law. Piper was acused of committing indecent liberties with his fourteen-year old daughter Mary. Piper was discharged, according to the record, because there was "no law to protect girls fourteen and over" from such actions. A 1924 case against Raymond Pierce similarly illustrates the problem with regard to age. Pierce had originally been charged with having committed statutory rape with Gladys, a female under sixteen. When that charge was dropped because testimony revealed that intercourse had not been completed, the suggestion of the prosecutor to charge him with indecent liberties was refuted on the basis of Gladys' age--she was fifteen. 111

It was shortly after this time that the age limit in the indecent liberties law was raised to sixteen. Some reflection on this matter suggests that any previous reluctance to extending the protections of this law to fourteen- and fifteen-year old girls was due to an assumption that girls of that age ought to be able to refuse such unwanted attention. It seems, instead, the fear that they might choose to participate willingly in such activities with boys who were their peers prompted a desire to raise the age limit as a legal control over promiscuity. Seen in that light, it was an action that fit with the prevailing mood, so evident in the heightened use of the statutory rape

law in that period to prosecute for consensual sexual intercourse.

On June 19 in the year 1928, ten-year old Margery and her friend Gladys were enticed to walk up the steps into the Capitol dome with Allen Crawford. Gladys went only part way up, but Margery continued with Crawford all the way to the top, and after Crawford opened a window, he took Margery out onto an outside balcony. It was there on that balcony that Crawford put his hand inside Margery's pants and then told her not to tell anyone about it. She reported she told her dad and Gladys before supper that same night. 112

It was not until August 11, however, that a complaint was made to the justice of the peace and on August 21, an examination was held before him. What issues were raised in this examination? First, the obvious unstated issue was that there was no third witness to the offense. Second, suspicion was directed at the parents' motive for filing the complaint. As was seen in the 1907 case against Eli Sheldon, the question was asked, had Margery's father hoped to make some money off of Mr. Crawford by making this charge? One suspects that the defense attorney here may have used the Sheldon case as a precedent on this point. 113

The issue that made the most impact on the jury in this case, however, was likely related to the signed statement made by the defendant under questioning by the police. The statement, entered as Exhibit A, was indeed self-incriminating. In it, Crawford admitted to having been played with sexually as a child and having approached and fondled other little girls at the Capitol Dome while in the employ of

the State Auditor General; further, he acknowledged that the written statements of Margery and Gladys were true, but that he had been unaware of the seriousness of his acts at the time that he performed them. His statement concluded, "I told [the detectives] that I have been mentally aware that I was what can be termed a sex degenerate." The defense, bent upon undermining Crawford's self-incriminating statement, suggested it was false because it was gotten from the defendant under duress. But under cross-examination, the detective refuted the suggestions that there had been an inducement offered, a threat made, or any promises given about seeking a pardon from the Governor in exchange for signing the statement. 114

This case went to trial twice and resulted both times in a jury disagreement. Allen Crawford was not convicted, in spite of his signed confession to the offense and disclosure of a history of sexually deviant behavior. The defense argument apparently succeeded in convincing some jurors that Crawford's statement was unreliable. By throwing suspicion onto the detectives who obtained the confession, the defense was able to shroud the substance of the defendant's very pertinent personal revelation and subsequent confession in doubt. Perhaps too, some jury members may have come to suspect Margery's father had brought these charges in order to extort a sum of money from the defendant. In any case, apparently those who believed Margery's father was duplicitous or regarded the defendant's confession as false must have also believed Margery was lying. There is no other way to explain this divided jury.

Eleven years later, in the case against Lee Morton, there were again no third party witnesses. The processing and outcome of this case indicate, in contrast to that described in the Crawford case, a very different court response to the events reported by the victim, eight-year old Bonnie Jean. First, the defendant pleaded guilty to the charge and waived the pretrial examination before the justice of the peace. No one questioned the truth of his confession. No one accused Bonnie Jean's father of using the charge to extort money from the defendant. And no one doubted Bonnie Jean's description of what happened, not her parents, not the neighbors, and not the judge. 115

An officer's report in the file recounts the sensitivity with which the court handled this case. Bonnie Jean gave her statement privately in the presence of the judge and the probation officer. The substance of her statement, according to the officer, was that Morton had taken her into her family's garage one afternoon, whereupon he shut the door and...

> proceeded to put his hand under her clothes and put his fingers in her privates and then took his tongue and licked her face and neck and then took and put his private in her mouth. She stated that he pried her mouth open in order to commit this crime. He then told her this was a secret and she must not tell anyone. 116

The report notes that Bonnie Jean had run into the house crying and looking very pale. After telling her mother what happened, she was examined by a doctor who confirmed "her privates were bruised but that there had been no attempt made to rape her." 117

Lee Morton was convicted of committing indecent liberties because there was no other way to legally define penetrating a child's mouth

with a penis. The pre-sentence investigation shows Morton had moved up to Michigan from Alabama in the early 1920s, had worked steadily at Olds Motor Works, and had built up $600.00 equity in a home. That was on the positive side. On the negative side, Morton was reported to have been drinking heavily since 1928. These extraneous factors may or may not have been material to the disposition of this case. For reasons that are not entirely clear, the jury was inclined to believe Bonnie Jean, and Lee Morton was sentenced to three and a half to ten years at Jackson Prison.

In the judge's statement, he expressed a measure of sympathy for the defendant's family, revealing what was the all-too-typical outcome for the wives of offenders who went to prison.

> The fact that he has a wife and two nice children and that they were buying a little place on contract and that the wife and children are now subjects of public relief is, as often, one of the factors in this case. 118

It is little wonder that the defendant's wife had at one point tried to excuse his behavior, saying that such sex demands were normal, that he had never looked at another woman, and that drink was his only sin. Later she tried to deny it had happened at all, as did he. But the court was unmoved; the judge's statement to prison authorities read, "I am thoroughly convinced as to his guilt..."

Probably as much as anything, the child's terrified state when she walked into the house after the assault must have played a significant role. The injuries she had sustained and the state of her hair, face, mouth, and genital area were taken as sound evidence of her

victimization. Moreover, it may have been that her descriptions were so graphic as to make it unlikely the court would perceive she had made up a story like that on her own. In any case, there seems to have been no doubt of the veracity of this complaint, and as a result, neither the victim nor her parents were subjected to the suspicions so frequently aimed at the complainants in indecent liberties cases.

The 1946 case against Lewis Scott, it will be remembered, was particularly shocking to the court's sensibilities. If one could describe the essential difference between this case and most of the others, it was the patent evidence of the perpetrator's level of prurient fantasy. Though indecent liberties cases had presented the court with a repertoire of reprehensible behaviors, the degree of operationalized fantasy and inventive manipulation that was evident in this case truly offended the court more than any other case.

Scott had been asked to babysit three children who were apparently his nieces and nephews. The only child named in the complaint was eleven-year old Ann. On May 29, 1947, Ann took the stand in the courtroom of the justice of the peace and told about the offense. Her testimony revealed that "Scottie" had shown the children pictures of nude women, had unbuttoned his pants and taken his penis out, had induced them to suck on it, had licked their genitals, and had tried to insert a glass tube into the vaginas of the two female children. He had warned them to keep it a secret or he would not like them anymore. The children took his warning to heart for nearly a year; the complaint against Scottie was not filed until one full year after the offense took

place. 119

The defense attorney reacted to Ann's testimony by seeking a continuance so he could better prepare a defense for what was "the most astounding story [he] had ever heard given". The prosecutor wisely objected, stating, "It is a great strain for this girl to come in here and testify as she has...I would very much dislike to ask this girl to come back again in a week from now and go through another session." The judge must have agreed and refused to grant a continuance. Further, after listening to the defense attorney question the victim at great length as to why she had allowed herself to participate in such a series of activities, he in the end revealed where his sympathies lay by disallowing further cross-examination. 120

Subsequent to the pre-trial examination, Lewis Scott waived his right to a jury trial, anticipating probably a heavier degree of censure from a jury of his peers than from a learned, presumably more objective judge. The judge's objectivity led him to find Scott guilty of indecent liberties, and as he handed down a prison sentence of three to ten years to the offender, he admonished him:

> Here are three small children. They are going to get into enough trouble without having somebody teach them...this is the kind of matter the court can't overlook and tell you to forget about it. 121

Moreover, he wrote in his statement to prison authorities:

> The testimony showed that this was one of the worst offenses of this nature that this Court had seen in a long time. The Court is convinced that this man is a sex pervert and very much in need of discipline. 122

Why were courtroom agents so particularly offended by this case?

Surely many of the other cases were just as detestable. In looking at the scenario this case presents, it seems the unique features of it lay in the amount of time the offender spent with the children and the fact that there were multiple victims involved simultaneously. Also, as I mentioned earlier, the degree to which the offender was acting out sexual fantasies and manipulating the children to satisfy his sexual urges are features that were manifested more overtly here than in any of the other case stories. It would appear on the basis of these observations that these courtroom agents envisioned a "typical" indecent liberties situation as being a good deal more benign than this--they expected the "typical" indecent liberties offender to be more passive and non-invasive, the "typical" offense more transitory and furtive.

The judge's remarks to the offender further illuminate the reasons as to why this particular instance was so offensive. Here was expressed the belief that children were liable to get into trouble on their own, the implication being that often "trouble" meant sexual misbehavior. The judge's remarks hint at a belief that the chief harm in an indecent liberties charge was to threaten the morality of the child. From this perspective the Scott case was perceived to be more offensive than the others. But perhaps there is more. Indeed, looking closely, one may begin see the judge's remarks as mere rhetoric, camouflaging a much greater and deeper contempt. Specifically, this case seems to be a crucial index of the degree to which indecent liberties cases demonstrated a more prurient kind of sexual activity than was seen in other types of sexual assault. To put the matter more concretely, the

official punishment was generally greater for raping a child than for licking her genitals; on the other hand, the social disapproval, reflected in the court's rhetoric of distaste, was often greater for the less invasive but seemingly more salacious, or lecherous, form of sexual offense.

5. Summary of Outcomes

What was perceived as unnatural sexual behavior prompted the general court reaction of distaste and disgust to cases of indecent liberties. Expressions to this effect are evident in many of the judge's statements that accompanied offenders sentenced to prison. For example, a 1928 statement about forty-three year old Carl Carey's guilt in committing indecent liberties against three-year old Waneta is characteristic: "the defendant made a frank confession regarding his horrible crime...he is a degenerate...a down and outer and entirely worthless to society." 123 Later, in the 1939 case against John Smalley, the judge wrote, "The offense charged in the information involved enticing a child eight years of age into a vacant warehouse and committing the act charged... I think the conclusion is justified that respondent belongs to the degenerate or pervert class." 124 Then, in 1944, a long-time judge in the county wrote these words about thirty-five year old Delbert Jessie, who was being sentenced for having sexually assaulted a four-year old girl. His statement is worth quoting at length:

> While this man has no previous record he is quite obviously not a normal individual... While it is regrettable to put away an able-bodied [man] in these times when there is so much work

> to be done, together with the fact that he has dependents, nevertheless, in view of his quite obvious mental deficiency ...together with the known fact that he played with this little female child, I...have given him a reasonable sentence, with the hope that some psychiatric as well as medical attention while confined may do something for him. Another factor which entered into my decision to commit him is that the almost universal history of these matters is that men of this type, having these tendencies, begin to break down and evidence them to a more marked degree when they have attained middle life..." 125

The remarkable thing about the rhetoric describing this man's moral failing is that it accompanied a sentence of only one-and-a-half to ten years in the State Prison at Jackson. As a matter of fact, the irony exemplified in this case is characteristic of indecent liberties cases as a whole. In keeping with the point made in the foregoing discussion, the court generally viewed these cases as "horrible", and the conviction rate was consistent with that for the other sex crimes, but the prison term sentences were comparatively light and did not appropriately reflect the articulated level of moral outrage.

The usual prison term minimum was for two or three years, a sentence length that did not change much for this crime from 1900 to 1950, and the longest prison term minimum for indecent liberties, awarded twice, was for five years. The major exception to this pattern was the frequent awarding of terms of probation, begun in the late 1930s, but practiced most heavily in the 1940s. Specific cases reveal that one comparatively severe sentence of five to ten years in prison may have been handed out because the victim was only four years old, and the offender had infected her with gonorrhea; on the other extreme, a term of probation may have been awarded in another case because the offender was young, had been involved with a young girl nearly his peer,

and had expressed an inclination to study to be a minister. Of such were made the value judgments that affected sentence severity.

In the earliest cases, conviction depended entirely on the presence of a third-party witness. Later, there were some convictions obtained without a third party witness, but not many. And, in most cases, harshness of punishment was related to factors extraneous to the crime itself. There was no witness to Lee Morton's crime, but the fact that he had a criminal drinking record may have enhanced the court's perception of his guilt. William Kimball had been previously arrested for similar offenses, but no prosecution was brought because "the child or children involved were too young to testify"; still, his conviction in 1940 led to a prison term minimum of only eighteen months. And Neal Bradley's 1943 sentence of three to ten years, unusually long for a case in which the offender was only seventeen and his victim was fourteen, may be attributed in part to the judge's perception that he was "of the smart-alec type, being impressed somewhat with his own importance as a hard guy" and to the history of this young man at the Starr Commonwealth, a rehabilitative school for boys. 126

Outcomes may have been a reflection as well of the period of time in which they occurred. The conviction rate remained steady from 1900 to 1930: it was 66.6 percent in the decades from 1901-1910 and from 1911-1920, and 65.0 percent in the period from 1921 to 1930. Then, curiously, it dropped sharply to 46.6 percent in the 1930s and then even more sharply rose to 83.8 percent in the 1940s. The drop in the conviction rate in the 1930s was tied to two phenomena: an increase

in the number of unknown outcomes, and an increase in the number of not guilty verdicts. The former change was apparently due to an unusual amount of incomplete bookkeeping in that period; the latter change suggests that the prosecutors were becoming more willing to prosecute these cases, even at the risk of not getting a conviction. The extraordinarily high percentage of convictions in the 1940s is predictably linked to the high number of probationary sentences handed out in that decade. As with statutory rape, the use of probationary sentences may have served to ease the minds of many jury members as they pronounced accused sex offenders guilty of committing indecent liberties.

In looking at factors key to the cases not ending in conviction, it is relevant to distinguish between those that were nolle prossed by the prosecutor and those that ended in not guilty verdicts. Often the prosecutor had no choice but to request a nolle prosequi. In a 1905 case, the father decided to withdraw the charges against the man who had offended his daughter because he did not want the publicity; in two cases, one in 1915 and one in 1924, the ages of the victims were over the age limit the law allowed; in a 1937 case in which the defendent was found insane and sent to a state mental hospital, the decision to nolle pros the case was made when said defendant was released from the hospital in 1951; in a 1926 case, the prosecutor asked to nolle pros a case at the close of an examination in which the victim was perceived to be embellishing her complaint and changing the facts of the offense as her testimony proceeded; a nolle prosequi was filed for an indecent

liberties charge in 1938 when the defendant plea-bargained to the lower offense of indecent exposure; and a 1937 nolle prosequi resulted when a long delay in processing a case led the prosecutrix to "lose interest." 127 Thus, often the reasons prompting a nolle prosequi were tied to extenuating circumstances that compelled the prosecutor, sometimes reluctantly, to give up a case.

The cases ending in a jury acquittal are the most revealing of the social assumptions and prejudices defense attorneys consciously used to foster reasonable doubt in the minds of the jury members. An immigrant mother, confused by the language and economically impoverished, was portrayed as using the charge to get money from the defendant for the family business. Such a woman could not be trusted to tell the truth. A daughter who did not want her father to come back was portrayed as using the charge to accomplish that end, not as a sign of her legitimate need for relief. In this way society's reverence for a daughter's obedience to her father was held as the standard by which to measure her behavior, not her father's. A respect for proper police tactics was played on to convince the jury that an offender's confession had been coerced.

Thus, jury acquittals resulted when defense attorneys were successful in fashioning an interpretation of events that played on the possible pre-existing dispositions of jury members. The ease with which defense attorneys built arguments favoring the defendant on the basis of a victim's supposed ulterior motives lends credence to the conclusion that girls (and their mothers) were perceived capable and ready to use

such charges as a means to exercise a kind of power over men they did not otherwise have. So, the crime that was often termed "horrible" was punished with some consistency when witnesses were available or evidence was sure, but also with much restraint. It seems to have been deemed horrible because it went against all accepted societal standards of what was sexually "decent", more so than because it was sexually harmful.

The comparatively "light" sentencing pattern was due, I believe, to the fact that this sex crime was defined by an absence of rape. If there was no penile penetration of the vagina and no verifiable intent to penetrate, the physical harm inflicted by any other kind of penetration was simply not protected by law. What one comes to recognize is that the physical and psychological harm perpetrators of indecent liberties could inflict on a child was not sufficiently appraised on its own terms. Since the parameters of this crime included every sexual act but penile penetration of the vagina, it defined fondling in the same breath with penetration of a very small vagina by very large fingers and penetration of a child's very small mouth by a presumed engorged penis. As a criminal charge, indecent liberties was defined by its relationship to an "idea of rape." While anything less was seen as morally distasteful, it was not taken legally to be worthy of serious punishment.

Conclusion

This chapter opened with a recognition at the outset of the limitation inherent in this sample--that these cases of sex crimes

against children could only be representative of a fraction of the offenses that really occurred. In spite of such a limitation, they are of value for what they say about the experience of child sex abuse and for what they reveal about the treatment accorded these crimes by the courts. In relation to the forced sex experiences of children, these courtroom testimonies corroborate all previously drawn conclusions about what such an experience could mean--enduring immeasurable pain, humiliation, entrapment, fear, guilt, and alienation. In relation to the response of the court, these cases show that the legal system constructed a definition of forced sex crimes against children that differentiated between penile penetration of a child's vagina and penetration of her mouth, between fathers who raped their own daughters and acquaintances who raped other fathers' daughters, between incestuous rape that was painful and that which had gone beyond pain, between daughters who hated the abuse and daughters who hated their fathers, and between sex crimes of injury and sex crimes of lechery.

The multi-layered definition constructed by the court raises disturbing questions about how this community, as representative of any in society, protected its children from sexual abuse and exploitation. It seems the effort to do so was complicated by two factors. First, the reluctance of adults to believe children when they reported such as experience was commonly rooted in assumptions about female children's sexuality and their ability to fabricate such accounts. Freud's retraction of his seduction theory in 1905 is suspected to have been of enormous influence in subsequent years in persuading professionals that

little girls fantasize of seducing or having sex with their fathers. Christine Froula explains: when Freud first offered his conclusion that some little girls' symptoms of hysteria were the result of sexual encounters with adult men who were often relatives, he "met with an icy reception." After a time of further research to prove his theory, Freud came by 1897 to confide that he no longer believed in his "neurotica," and replaced his seduction theory with the theory of the oedipal complex. Froula surmises that Freud's abandonment of his original thesis had little to do with its lack of explanatory power and everything to do with "his inability to come to terms with what he was the first to discover: the crucial role played in neurosis by the abuse of paternal power." 128 Significantly, it appears his revised thesis was more popularly received than the original, and we may wonder whether he would have achieved so much acclaim had he remained convinced of his seduction theory. While we may think his work was of great influence, he may simply have formulated in the oedipal complex the only acceptable explanation then possible for little girls' sexual "stories." The effect of his decision, ultimately, was not only to confirm, but to raise the skepticism accorded girls' reports of incest to new heights; it consequently may have also limited the willingness of legal agents to believe these complaints. The predisposition of society to protect fathers from false sexual accusation was not challenged by Freud, but rather was upheld; such a predisposition was affirmed as well by a religious ethic that together supported the pre-eminence of a father's authority and guarded his sexual viability.

Certainly there should be no doubt that the court held to a belief that forced sex crimes against female children were dreadfully wrong. And when it became convinced that such an act had indeed taken place, the reaction to punish the offender was swift, if not always sure. But the male-dominated, adversarially-structured court was not always fully prepared to accept the word of a female child, whose small voice could profoundly devastate the life of an adult male. Clearly the complaint of such a little girl or adolescent was considered legitimate only in the face of overwhelming evidence that the taboo restraining adult males from having sex with female children had truly been disregarded and the taboo preventing female children from challenging paternal authority was justifiably disobeyed.

DATE DUE	DATE DUE	DATE DUE
SEP 2 6 1996	MAR 2 [illegible]	
JUN 1 9 1996		
OCT 2 9 1996		
JUN 1 7 [illegible]		
MAR 3 1 1997		
MAY 4 [illegible] 1998		

LAW, CULTURE, AND SEXUAL CENSURE: SEX CRIME PROSECUTIONS IN A MIDWEST COUNTY CIRCUIT COURT, 1850-1950

Volume II

By

Kathleen Ruth Parker

A DISSERTATION

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

Department of English (American Studies)

1993

V: THE LEGAL APPARATUS OF THE STATE: ARBITERS OF EVIDENCE, REFEREES OF PROOF

> Let us then suppose the mind to be, as we say, white paper, void of all characters, without any ideas. --How comes it to be furnished? ...From where has it all the materials of reason and knowledge? To this I answer, in one word, experience.
> John Locke (1690) 1

Introduction: Perception and the Jury

Susan Glaspell's provocative story, "A Jury of her Peers", is compelling for what it reveals about perception. At the start of this 1917 tale, farm wife Minnie Foster is under arrest for the strangulation murder of her husband. She is eventually exonerated of the charge because the sheriff and neighboring men can find no evidence of Minnie's motive on the Foster property. The wives, however, walking about the kitchen and parlor while awaiting their husbands' investigations, take note of abandoned kitchen chores, fine hand-sewing suddenly "gone awry", the run-down condition of the home, an old and broken stove, Minnie's spare and fraying wardrobe, and a canary lying dead with its neck broken. The women comprehend as with one mind the circumstantial evidence of the murder and discern as well Minnie's motivation. Conspiring to keep their insights to themselves, they hide the canary from their husbands, who collectively believe that the women "would not know a clue if they did come upon it." 2

Why are these women able to perceive things of which the men are

oblivious? In their conversations with each other, it becomes clear that what these wives discover in this "lonesome-looking place" is analogous to their own situations, as they ultimately recognize, "We all go through the same things--it's all just a different kind of the same thing! If it weren't-- why do you and I understand? Why do we know--what we know this minute?" Annette Kolodny writes that such a perception is made possible by "the profoundly sex-linked world of meaning which they inhabit." 3 It is out of their own subjection to isolation, loneliness, and brutality as wives that they know what the "clues" to the murder motive are. Moreover, it is at this level of sex-defined experience that they recognize the prior crime--what Minnie's husband had been doing to her for years.

* * *

The Ingham County pre-trial examination transcripts show how the justice of the peace deferred authority to a higher level of the legal structure, a trial court that promised a hearing by a jury of impartial citizens. As it may be recalled, Justice Coash's 1944 explanation of the process indicated that a Circuit Court jury trial was necessary to decide "this question of fact," a function that he, as a justice of the peace, was not empowered to perform. 4 The importance of this function in the process cannot be overstated. The crucial role of the jury lay in its ultimate responsibility to hear the evidence and decide the fact of the alleged offense. In this way, the jury was structurally the ultimate arbiter of the law in practice, for as we have seen, even when cases did not make it to the circuit court level, it was usually because

of the prosecutor's expectation as to how a jury was likely to perceive the evidence in a case.

Of the 544 sex-crime complaints heard by the justices of the peace in this sample, there were at least 400 known cases, or 73.5 percent, tried before a jury. All other cases were nolle prossed by the prosecutor or were cases in which the outcome was unknown. Such a high proportion of jury trials relative to all preliminary examinations suggests the consistent reliance of the Ingham County court system on trial by jury. This emphasis ostensibly assured that the guilt or innocence of an accused person would be decided by a body of the defendant's peers, not by legal agents acting autonomously. It is further worth noting that the Ingham County juries rendered guilty verdicts in 357, or 91.3 percent, of the 391 sex crime cases that came up for trial. This is a statistic that, as was noted earlier, says more about the system of control that pre-empted doubtful cases from making it into court than it does about the juries themselves. One may conclude that when juries were convened in the Ingham County Circuit Court, they were mostly expected to return from their deliberations with a guilty verdict in hand. Indeed such was the result in 226 of the 242 known statutory rape trials (93.4 percent), forty-eight of the fifty-one assault with intent to rape trials (94.1 percent), sixty-eight of the seventy-eight indecent liberties trials (87.2 percent), and fifteen of the twenty forcible rape trials (75 percent). 5 If these percentages seem inflated, given what we have seen in the examination proceedings, it is important to remember that they were computed after all nolle

prossed and unknown-outcome cases were factored out. [See again Tables 4, 5, 6, and 7 for outcome distributions of the cases for each charge.]

While the role of the jury appears to have been the pivot on which the entire judicial process turned, these statistics raise several important questions about the jury's perceptions of the evidence. Specifically, to what degree were the jury's perceptions of the evidence conditioned by the perceptions of the defense attorney, the prosecutor, and the judge? Conversely, how much were the perceptions of these courtroom agents conditioned by their expectations of the jury's response? How significant to the jury's role was the patchwork of legislated statutes and judicial interpretations, or common law rulings, by which agents of the court were bound to regard the evidence? Finally, what may be said about the perceptions of the courtroom agents in relation to the perceptions of the victim and the defendant?

These questions become an important entree into an examination of the actors, rules, and actions that functioned on behalf of the state, or more precisely as the state, to adjudicate sex crimes. This examination will not study the elements of the crimes as such, or the outcomes of the trials, or what factors might have influenced those outcomes; that approach was pursued extensively in the previous portions of this work and needs no duplication. Instead, this chapter will look at the discourse that marked the proceedings of the Ingham County pre-trial examinations, to better understand how the actors and actions observable in those court hearings embodied the power of the state to interpret the law and define the evidence.

At one level, the perspectives of these courtroom agents--the prosecution, the defense, the judge, and the jury--differed. The prosecution, on behalf of the People of the State of Michigan, sought legal redress against men who were reported to have sexually attacked women and girls. The defense sought to give legal representation to men who were so accused. They each had the task of persuading the jury, under rules enforced by the judge, to see the worth of their respective positions. As for the jury, their position of having to decide the merits of the evidence either way was ostensibly representative of the consensus of the larger society.

To begin to think about the defining capabilities that each of these agents brought to the legal process, one must accept the premise that things are what they are only by virtue of their relationship to something else. The view that regards definition as a product of perspective is the essential key to understanding the power of the court to define sex crimes in keeping with its taken-for-granted assumptions about the law and sexuality. This analysis of the discourse in the Ingham County Circuit Court proceedings understands fundamentally that sex-crime adjudicature was constrained by cultural antecedents of the law and rooted in men's experientially-referenced perceptions of sex behavior.

There is much scholarship that informs this effort. Recent studies of both the Western legal tradition and the norms for sexual behavior reinforce the idea that our understanding of things is born of deep cultural conditioning, and that perception is a function of one's place

in an entire matrix of intersecting social and historical factors.

I. A Theory of Perception

1. Knowledge and Experience

The notion that our understanding of the world around us is relative to our experience is reminiscent of Gary LaFree's use of labeling theory, which showed how we interpret behaviors on the basis of expectations gained from previous experience. 6 LaFree's application of this theory to courtroom definitions of sexual assault was discussed earlier and used as the basis in this study for uncovering the social assumptions underlying the Ingham County courtroom treatments of sex crimes. This approach led to the discovery that the court responded to sex crimes on the basis of a wide range of societally-derived definitions of sexual assault. The significance of this effort was to understand how fundamentally contingent the court's definitions of sex crimes were, and at the same time, to see how the court's responses to the "stories" of sexual assault were constrained by its own presumptive inferences regarding the events reported by the witnesses. Thus, LaFree's use of labeling theory is compatible, if not synonymous, with contemporary notions about how perception is embedded in experience, which is rooted in culture. The analysis to follow will push that idea a little further.

Barbara Shapiro's work on the history of the doctrine of "beyond reasonable doubt" addresses the historical links between what was viewed

as credible evidence in any criminal proceeding and what were larger cultural notions of truth. According to Shapiro, the first use of juries in English trials came about in the early modern period. Religious and philosophical notions affected legal concepts of evidence then in the same way that religious and philosophical notions affected ideas of truth. Jury decisions at that time were first based on personal knowledge, and witnesses in criminal trials did not become common until the end of the fourteenth century. By the sixteenth century, jury deliberations concerning guilt came to be based on evidence, and the earlier criteria of personal knowledge became less the standard on which to decide cases. In 1563, legislation made the attendance of witnesses compulsory and perjury was made a crime; thereafter distinctions began to be made as to the credibility of witnesses. 7

Of great importance were the flowering of the humanist and scientific movements in the seventeenth century and the growth of Protestantism in England, all of which rejected the Roman Catholic Church's hierarchically-based claims to infallibility. Thus, the method for verifying true conclusions came to rely on experiment, observation, and testimony; the rational senses were now seen to be the basis for deriving truth. John Locke's <u>An Essay Concerning Human Understanding</u> (1690) had become, in Shapiro's words, "so influential...the first treatise writers on legal evidence attempted to build on Lockean foundations." In this pivotal work, Locke had articulated the idea that truth derives from what the senses perceive, rather than from

pronouncements based on superstition or religious authority. Shapiro shows how the practical worth of Locke's thinking was especially relevant to uses of the law in his development of degrees of probability based on "the general consent of all men...in like cases... attested to by fair witnesses," the second level of certainty being, "when I find by my own experience, and the agreement of all others that mention it, a thing to be for the most part so..." 8 Shapiro notes that by the time this essay appeared, the idea of witness credibility was familiar to lawyers, naturalists, theologians, and historians. In that Locke established systematic criteria for evaluating testimony, his work was of great importance to the law. Of further significance, Shapiro concludes, Locke "neither denied the possibility of gathering reliable and persuasive evidence nor made claims to absolute certitude," and thus his theory served "the needs of the English legal system." 9

Thus it became established that juries would hear the evidence and arrive at the truth, based on evaluation of that evidence. It was not until the period from 1750 to 1800 that there seems to have developed a concern with legitimate doubts in jurors' minds. Here, the participation of defense counsel, initiated in 1770, first raised the issue of doubt. In a rare fully-documented case conducted in 1777, counsel told the jury, "if you see any room upon the evidence to doubt of his being guilty...you must find the accused not guilty." The reasonable doubt standard then appeared in trials in the United States around 1798. 10

The "reasonable doubt" standard was in keeping with ideas of

"belief," "satisfied conscience," and "moral certainty" used in the legal setting and in other realms of educated life. Just as Locke's theory of the empirical nature of truth emerged at a time when humanism and science had rejected the irrational dogmas of the Roman Catholic Church, the recognition that verdicts would necessarily be devoid of absolute certainty came at a time when "reasonable doubt" and "satisfied conscience," as two concepts common to the discourse of the educated classes, became inextricably linked. 11 Shapiro's point, finally, is that rules of evidence were always grounded in current theories of knowledge. 12

Thus, what was taken to be the standard for truth in the court, or the requirement for credible evidence, came out of a larger cultural understanding of what was the measure at the time by which to verify perception. It is on this insight that Shapiro's rich exposition of notions concerning the usefulness and worth of evidence under the law can be seen as consistent with current notions of the relativity of knowledge. What has historically been taken as the standard for truth by courtroom agents has always been tied to larger cultural notions of knowledge. As for Locke, there is a lot to be said for the idea that truth lay in one's rational power to discern and reflect on what one experiences. This however creates a dilemma with regard to jury trials from Locke's time to the present day: from whose experience has the jury derived its perceptions of the evidence? Since rape has almost always been experienced as a crime committed by men against women, wherein has lain the experiential grounding for the measure of evidence--with the

accused or with the victim?

A sense of the relatedness of culture to knowledge, broader in scope than Shapiro's, is found in Martha Minow's work on how society decides the criteria for "difference." Who or what is seen as "different" is a characterization of that which is different from the "norm" established by the dominant group in a society. Minow posits first that assumptions about knowledge, categories, and boundaries usually remain implicit and unexamined. 13 In that difference is a comparative term, always implying a reference, it is the reference that assumes unexamined precedence. For example, difference, according to Minow, is a clue to the social arrangements of a culture--that is, that some people are less accepted than others. Societal understandings about such arrangements, Minow states, are assumed often without question. Moreover, in the legal universe, the features that distinguish what is different usually have a "moral crux" in that difference is not an objective fact, but is "humanly invented". Thus, though legal language seeks universal applicability it often erroneously takes the part for the whole; and judges, charges Minow, fail to acknowledge their own perspective and its influence on their own unstated norms. 14 This usually means failing to acknowledge another person's vantage point, and taking one's own perception as the "norm" by which to make judgments in cases of law. 15 As an alternative, Minow advocates utilizing a social relations approach, which looks for the interrelatedness of the parts to the whole, in analyzing workings of the legal system. 16 On the basis of that social relations approach, Minow

emphasizes the degree to which the liberal individualism upon which our system of laws was founded was conceived to protect only one part of the whole--men. "Special status was assigned to infants, married women, and imbeciles." 17

Finally, among feminist scholars, there are those whose work is distinguished by its attention to aspects of experience that are unique to women. Specifically, there are feminist scholars who believe that women live more in connection with others, in contrast to men, who more readily live in individuation. For example, Carol Gilligan, whose identification of a (primarily women's) morality of care as distinct from a (primarily men's) morality of rights provides fundamentally a "greater sense of the complexity of context." Nancy Chodorow (to take another scholar) argues that girls experience a "sense of themselves as similar to their mothers" and develop an identity through attachment, differing from boys, who see themselves as opposite their mothers and move away from them, thus developing identity through a "more emphatic individuation." 18

Such feminist scholarship is not representative of all feminist thinking and has had its share of critics, those who argue that it risks obliterating women's individuality or that it forgets differences may be culturally conditioned. Nevertheless the findings of such research are important for what they say about the fallacy implied in taking the male perspective as the universal measure of meaning. Beyond that, it is important for its implication that judgments should be made with a view to how each part is linked to the whole and that correct knowledge

cannot come from any one part in isolation from the rest of the group.

Against the backdrop of a feminist consciousness that recognizes the complex relational aspects of experience, feminist legal scholars thus criticize the historical pretense that has made male norms the universal neutral standard by which to make judgments. This critique presupposes that the male standard in law is in fact not neutral and that it almost always ignores competing perspectives. Feminist legal theorists call instead for a concern with context and with connections between "the parts and the whole of a situation." 19 From this viewpoint, we must ask again whose perspective defined sexual assault law. Who is the reference that "assumes unexamined precedence" in formulating the standards by which sexual assault complaints are judged? Minow's defense of a social relations approach to knowledge confirms my sense of the need to address that question.

2. Perspectival Law and Sexual Assault

Critics of the legal system claim that a male perspective has conditioned, or more precisely dominated, the legal system's response to sexual violence against women. 20 In keeping with social-relations theories of knowledge, the courts' one-sided view of sex crimes may thus be seen as coming out of a larger social and political landscape that made such a perspective possible and inevitable. Assuming the relational nature of knowledge, the effect of a male-dominant view exposes the fact that the female perspective toward sex crimes has historically been given very little attention. Indeed, without the insight that a social relations perspective offers, it would be easy to

ignore the idea that a separate female perspective exists or to assume that the female position was the same as the male position.

Robin West, feminist legal scholar and professor of law at the University of Maryland, discusses the legal ramifications of the feminist theory that women are more connected than men, an experiential difference that she claims male jurisprudence ignores. West accepts what she terms "the central insight of feminist theory in the last ten years," that women are "potentially connected" to other human life in ways that men are not. 21 West goes to great lengths to point out that this is no simple dichotomy of roles. Generally, she concludes, the dominant culture condemns men who need others and condemns women who want to be apart. 22 In regard to sexual violence, the irony is that while women experience intimacy as natural in a way that is theoretically not usual for men, they fear invasion in the sense of being "occupied," an anxiety that for some radical feminists is articulated in the form of sexual intercourse, but for most women and some men is understood in its most tangible form as rape. West asks, "Would there be fear of intimacy if there was no fear of rape?" 23 Because men do not have a sense of intimate invasion in intercourse, West surmises that for men, "rape is only criminal when it is accompanied by forms of violence that other men understand." 24 Rape is, in West's analysis, the ultimate ironic criminal act against women; those who would value intimacy experience in rape an invasion they dread. It is the complexity of this position that the legal system has failed to understand. The further irony is that women who seek the kind

of individuation that the law assumes in men, are seen as suspect and therefore not legitimate victims of an invasive criminal act. Because it stands in ignorance of this women's perspective, says West, current jurisprudence needs to be exposed as patriarchal. 25 It is an insight like this that gives further meaning to Minow's citicism that the "universal" reference point in American law rests on "the picture of an independent man, not on interconnected women." 26

Deborah Rhode, a professor of law whose scholarship spans a number of topics related to women and the law, builds a critique of law on an insight similar to that of Minow: that the legal system uses male norms as natural and neutral. 27 In keeping with social relations thinking, Rhode premises her study of discrimination in the law on the idea that law both illuminates and influences the cultural construction of gender. 28 Here she recognizes law as an artifact of culture and a window to the assumptions and beliefs within the culture that affect the law; this concept is reminiscent again of LaFree's employment of the labeling theory model to view sexual assault trials as clues to deeper social biases in culture.

Looking back on the American legal system in the past, Rhode openly derides the "common-law tradition in which women were more separate than equal." She decries the "utter lack of self-consciousness with which an exclusively male judiciary interpreted texts written by exclusively male assemblies to determine issues of male power and exclusivity." She reports that in the United States there were only five women lawyers in 1870, few more than 1000 by 1900, and by the late

1960s only 2 to 3 percent of the bar was comprised of women. The percentage serving as judges was even smaller. 29 It comes as no surprise then that the Ingham County Circuit Court evidenced no women lawyers or jurists throughout the entire 100 years studied. Furthermore, according to Rhode, women were often not allowed to serve on juries, partly out of a rationale that they were needed by their children at home, but more to protect them from references to "loathsome language," "indecent conduct," or "intimate sex relationships" they might encounter in a trial courtroom. Such thinking caused some states to exempt women from jury duty for any cases involving crimes against chastity or morality, even as late as the 1980s. 30 While it is not possible to determine from the records at hand when women served as jury members in this sample, it appears women began serving on juries in the state of Michigan beginning in March of 1919. 31 Even so, Rhode's observations are confirmed in the Ingham County cases to the extent that court authorities often asked to have the courtroom cleared before hearing testimony in sex crime cases. Ultimately, Rhode echoes Minow in lamenting the fact that the overwhelming dominance of court proceedings by men permitted them to set the norms by which women appeared different and deficient. 32

To show how influential male-biased attitudes toward rape have been in recent times, Rhode reports that in surveys conducted in the late 1970s and early 1980s, "two-thirds of respondents believed that women provoked rape by their appearance and actions," a point of view that has historically justified in most people's minds the use of a woman's past

sexual behavior to undermine her complaint. 33 Additionally, Rhode reports on disturbing studies of American rapists' attitudes in which they have "revealed a striking absence of guilt and a consistent perception of their conduct as normal sexual behavior," a position, it will be recalled, that was all too often characteristic of the Ingham County defendants. 34 The frequency with which such thinking about rape appeared seems indicative of a deeper cultural insensitivity to a woman's experience of rape, an experience that would hardly allow one to think of rape as normal sexual behavior.

As a judge who has written extensively on the law and on sexuality, Richard Posner is not to be classified as a feminist legal critic, but he is important here for his assertion that most of his colleagues are not very knowledgable about sexuality. Even as they make judgments in sex crime cases, they know little about sex matters beyond their own point of reference, their own middle-class, heterosexual, Western male experience. 35 He therefore sets about educating them, taking the approach, as we have seen before, that beliefs about sex, and prohibitions applicable to sex, are (and always have been) tied to culture. Accordingly, he writes that the "significance attached to differences (in sexual preferences, etc.) is social, cultural, and alterable rather than, as we tend unreflectively to believe, natural, inherent, immutable." 36 He emphasizes the fact that attitudes toward all kinds of sex behaviors, including rape, have varied across time and place. 37

Posner's exposition of sexual beliefs and traditions is far-reaching

and illuminating, and much of it remains beyond the scope of this study. But one point he makes is of some pertinence here: the severity of punishment given for sexual behaviors that lie outside the bounds of acceptable norms may be seen as an index of the societal fear and loathing felt toward any given sexual practice. The fact that numerous laws and restrictions against sex behaviors have typically not been well enforced through history, observes Posner, may be attributed to the fact that, though sex offenses have been disapproved of, they have not been seen as deeply threatening. 38 He refers in particular, here, to laws against fornication, or sexual intercourse between consenting persons not married to each other. As for more injurious or nonconsenting sex crimes, the implication is that the casual societal attitude he describes was reflective of a male-identified world-view. Thus, to the extent that sex offenses in general were not seen as deeply threatening to the culture, it may be they were simply not deeply threatening to males in the culture.

Posner's effort to effect more informed decisions on the part of judges is seen to be all the more consequential when viewed in the light of his belief that the practice of law is more personal and idiosyncratic than most people think. While lawyers want to be syllogistic, ie. objective and rational, the autonomy and objectivity of the law are threatened when the outcome depends, as it always does, he contends, on "facts about the world." 39 Further, in "the absence of a legislative definition, judges have to decide what a word shall mean for legal purposes, not what it does mean." Indeed, Posner adds, differences

in judicial outlook and behavior reflect different judgments and life experiences--but these judgments may also be "rooted in a judge's psyche and are thus resistant to experience". 40 In other words, judges may be so inured by their own experience, as to be unaffected by the experiences of others. In that judges do not come to a case with a tabula rasa, it is to be understood, for good or ill, that the preconceptions judges bring to a case are "not extraneous or impertinent foreign matter," but a necessary component of the trial process. 41

To summarize, the relevance of Posner to this study lies in his premise that judges rely primarily on their own experience, personal opinion, or feelings, and that they do not know very much about sex behaviors in the larger cultural sense. Reinforcing the contention that law is perspectival, Posner's contribution is to confirm the very limited nature of the perspectives held by enforcement agents.

LaFree, Minow, West, Rhode, and Posner each demonstrate two aspects of social relations thinking that are so critical to the process of locating meaning in culture. First, culturally-derived male attitudes toward women, sexuality, and sexual violence have infused the legal system. Laws that have been written and enforced exclusively by men have historically supported male dominance throughout the culture. Second, social relations theories begin to reveal the other relational aspect of meaning--that the male-defined system of law necessarily constrains the female experience of the law as well. It is women, the victims of sexual assault, who have had to accept the male definition of that experience.

The purpose of this discussion has been to develop a working understanding of perspectival theories of knowledge and relate them to our culture's traditional definitions of law and sexual violence. This effort serves to situate an examination of the Ingham County courtroom discourse in a conceptual framework that is grounded in the deterministic function of perspective and sees the structure of discourse as an artifact of social relations in the culture. In selected cases from the Ingham County sample, the interaction of the prosecutor, defense attorney, judge, and the victim will be the critical measure of the perspectives that defined in practice, with and for the jury, the evidence. Taking as "evidence" the testimony elicited from children, consenting adolescents, adults, and physicians, and concluding with the role of judges in ruling on the presentation of that testimony, the following analysis will concentrate on the definitional roles played by the courtroom figures. As agents of the state, how did they, individually and collectively establish within the culture the legal meaning of sexual assault crimes? From whose experience was the definition of a sex crime derived? We may thus begin to see how the "whole" of the legal system's treatment of sex crimes was "conceived through the parts that actualized it" and the "parts" may be understood as they were "conceived through the whole that motivated them." 42 Then, as Minow suggests, we may be able to "connect the parts and the whole of a situation; see how the frame of analysis influences what is assumed to be given." 43

II. Perception in the Courtroom

1. Credibility: Witnesses of Tender Years

We know from our earlier discussion of the cases involving child victims that the testimony of young children was seen as especially problematic to the court. In the 1901 case against Sam Beach, it will be remembered, a circuit court verdict was vacated by the Michigan Supreme Court because the only witnesses were young children. In that case, the higher court decided that "in said Circuit Court there is manifest error...

> that the judgment and sentence of said Circuit Court for the County of Ingham be and the same is hereby set aside and vacated and the cause is remanded to the court below for a new trial. 44

Subsequently, when prosecutor Tuttle filed for a nolle prosequi, he indicated that the Supreme Court had held that the two children were not competent witnesses, and without their testimony, "the People would have no testimony upon which to ask for a prosecution." 45

Forty years later, a Michigan Supreme Court ruling on instructions that could be given to juries in regard to the testimony of children voiced a similar regard for the veracity of children's testimony. The 1942 statutory rape case of People v. English provided that jurors could be directed "to weigh the testimony of any child in the case in the light of their experience with the minds of children." 46 Thus, from at least 1901, the State Supreme Court gave its official imprimatur: the testimony of children was to be regarded with great skepticism. What

becomes very clear in the Ingham County sample is that this skepticism was increasingly evidenced by the 1920s in the elaborate means used to assure the truth of what a child might say.

Four strategies were commonly employed in the questioning of child witnesses. The child was asked: (1) if she knew what the consequences of lying were; (2) if someone had told her what to say; (3) if she knew the seriousness of the offense; and (4) if she could tell what happened without the benefit of direct or leading questions. While these attempts to test the testimony of child witnesses were not made, for example, in the 1905 and 1907 cases against Eli Sheldon or in the 1906 case against Delbert Booker, they seem to have become a matter of accepted courtroom routine beginning in the late 1910's. Initiated by the prosecutor to show how truthful the witness was, and exploited by the defense attorney to show that she could not be trusted, these methods served to "test" a child witness for her truthfulness.

The questioning of ten year-old Norma Johnson in the 1936 case against Fred Stevens for indecent liberties began with the usual inquiry, and her answer was typical of how young girls often responded:

> Q. Do you know what happens to people who don't tell the truth?
> A. Yes
> Q. What?
> A. Go to jail. 47

The prosecutor in this case, aiming to convince the court of her reliability, pushed the point further by posing the possibility: if someone were "an awful liar...did you ever think they go to a different place than the people who are good?"

Similarly, before six year-old Yvonne Facer gave testimony in her 1935 indecent liberties complaint against Joshua Lovell, she was asked by prosecutor Watson, "What happens to people who tell lies?," she replied readily, "[they] go to hell." 48 Such a response was a prerequisite to the court's accepting a child's testimony as competent. Defense attorney Conley's reaction in 1934 when eight year-old Ireta Luce apparently did not know the difference between truth and untruth underscores the significance of this preliminary ritual:

> MR. CONLEY: May I question her first? [an irregular motion]
>
> BY MR. CONLEY:
> Q. Do you know what the truth is? Do you know there is a difference between what is true and what is not true?
> A. Yes, sir.
> Q. You don't know what happens to little children--what is supposed to happen to them when they do not tell the truth, do you? Nobody ever explained to you how important it is to tell the truth?
> A. No.
> Q. You do not go to Sunday School. You say you are in Grade 2A; is that where you were last year?
> A. Yes, been in that grade.
> Q. Did you pass all right?
> A. No.
> Q. You are going to be still in 2A next year?
> A. Yes.
> Q. You are sure of that?
> A. Yes.
> MR. CONLEY: I will object to her testimony.
> THE COURT: Make a record of that so it will show it is made in time. 49

It appears that Ireta's testimony was objected to because, by her own admission, she did not know the consequences of not telling the truth. Further, she did not go to Sunday School, an apparent signal that she was insufficiently exposed to the proper teaching of what was right and wrong. Finally, with her lack of progress in school, the

implication was made that she was mentally deficient, a final element attesting to her inability to distinquish truth from falsehood. Interestingly, the justice of the peace, identified always as "The Court" in the transcripts, instructed the transcriber to put the defense attorney's objection to Ireta's testimony in the record right away to show it was "made on time." Presumably, the defense could not have discounted the truth of the complainant's testimony on any one point had he not wholly discounted it from the outset. As is turned out, when the case had been heard, Conley asked, "Does the Court want to rest on the testimony of the child alone?" To this, Mr. Watson, the prosecutor allowed that he was "satisfied," and The Court replied, "That may be the only direct evidence available." In the end the case concluded in a jury disagreement, and the prosecutor ordered no new trial because there was "insufficient evidence." 50

The seriousness of telling the truth was presented more explicitly to seven year-old Evelyn Brooks, who had brought a complaint of indecent liberties against thirty-five year-old Wayne Ryal in 1933. As the examination opened, the justice of the peace was consoling Evelyn not to cry; next he admonished her to tell the truth so she would not go to jail:

> THE COURT: You don't need to cry; you just tell us what you know about this case. Nobody is going to bother you.
> MOTHER: Come on, Honey, you're all right.
> THE COURT: You are just asked these questions to see if you understand what you are to do. Push your hair back- that's the girl. (Witness' mother removes her coat.)
> MR. WATSON: Does the Court want to swear this witness?
> THE COURT: I don't know whether she's old enough to take the oath or not.
> .....

THE COURT:
Do you know, Eveline, if you tell the truth, why, then, nobody can do anything to you for telling the truth, of course, legally--but if you should tell a lie when they ask you in the case, about this, why, a person who takes the stand and swears to tell the truth, and they do not tell the truth, why, something bad might happen to them--you might be sent to jail?
Do you understand that?
A. Yes.
Q. If you are asked any questions, tell just what you know, not what somebody told you, but just what you know, something you saw or experienced and what you know did happen--will you?
A. (Nods)
THE COURT:
All right.
MR. WATSON:
Q. So, now, put your handkerchief in your lap and sit back in your chair. I want to talk to you a little while.
A. (Witness cries) 51

Evelyn was never able to stop crying. The facts of the case were more readily explained by eight-year old Virginia Ryal, whose father had gotten into bed with both girls and played "tell what you touch" with them. The defense moved to separate the offenses against the two girls and only consider the one against Virginia, since there was "not any testimony in the case of Evelyn" to indicate any indecent liberties. It is not probable that Justice Hughes' injunction to her to tell the truth or go to jail was the only factor that frightened her into silence, but it may have played a role in adding to whatever fear she was already feeling. In the end, by virtue of "the evidence," the jury found Wayne Ryal not guilty.

Another concern that directed the questioning of young complainants was the fear that someone might have told them what to say. A Michigan Supreme Court ruling in 1932 allowed:

Where rape victim is of tender years, details of complaint are

> admissable in corroboration of her testimony, if complaint is shown to have been spontaneous and without indication of manufacture. 52

When fourteen year-old Telitha Clark testified in 1922 against Myron Potter, she had come to court from the Social Center, where she had been staying since filing the complaint. This example demonstrates the concern that a young witness might have been coached; the questions of the defense attorney aimed to reveal whether people at the Center had induced her to concoct a story.

> Q. When Miss Howard brought you up here did she tell you anything about what they were going to do to you if you did not tell them you had had intercourse with Myron?
> A. No.
> Q. Did she tell you they would send you to the reform school?
> A. On going home she said if I said - that's where I would go.
> Q. If you didn't say so?
> A. Yes.
> Q. And did she tell you that you would have a better time than you have ever had in your life if you came up here and told--
> A. If I would tell the truth.
> Q. And she said if you did not tell you had had intercourse with him they would send you to reform school, didn't she?
> A. No.
> Q. Did she tell you that?
> A. No. 53

In a manner that was common, the defense overstated the possibility of prompting by outsiders, necessitating a denial of his assertion by the complainant. What in fact had happened in this case was that the defendant's mother had tried to convince Telitha to drop the charge; Mr. Crawford, who as a court officer, had signed the complaint, went to the defendant's mother and told her "there would be trouble if she didn't wake up, stating that things were not right." Eventually, Myron Potter was found guilty by a jury and sentenced to five to fifteen years in Ionia Prison.

With regard to child witnesses there was also a concern on the part of the defense with preventing the prosecutor from asking leading or suggestive questions. The 1925 charge against sixty-three year-old Charles Force, described briefly in the earlier discussion of indecent liberties, was brought against him by ten year-old Lavay Corwin. The alleged offense had taken place in the store where Force was working; he was reported to have pulled little girls behind the counter where he would then commit the crime of which he was accused. As a child, Lavay was not untypically reluctant at first to report the details of what had happened, and when the prosecutor tried to help her with more direct questions, defense attorney Brower interrupted:

> MR. BROWER: ...it is pretty easy to influence her testimony by asking leading questions, and just as far as possible, she should be allowed to tell her own story, because she is of the age that a question--I am not criticizing him at all--but it is easy for him to influence the answer.
> THE COURT: It is true. It is also understood, I presume, that in cases of this kind it is very hard to get the testimony unless the questions are more or less leading.
> MR. BROWER: Let's settle the thing once for all. Before every effort has been made to secure the testimony of the child without leading questions, leading questions should not be asked.
> THE COURT: That is true.
> MR. BROWER: Sometimes there is necessity of taking a half day to get a child's testimony.
> MR. HITTLE: I don't think it is necesary to take half a day.
> THE COURT: Let's proceed; perhaps she can tell the story. 54

Mr. Hittle, the prosecutor tried to get Lavay to tell the story on her own, but she continued to "bow her head" in silence. Finally, Justice Steinkohl took the role of counsel:

> Q. Now, can you tell us now what happened? (Witness starts to answer and then hesitates) You almost got it out that time, didn't you? Could you tell us just some of it? After he put his hand under your panties what did he do? Can't you tell us

now what he did?
(No answer)
Q. Can't you tell this lady what you told me a little while ago? Can't you tell her that?
A. Yes.
Q. Just tell her that.
MR. HITTLE: Your Honor, I think we should be allowed to ask leading
questions. I think the record discloses we have done all that is necessary in the way of trying to solicit the story from the little girl without leading questions.
THE COURT: Well, proceed.
Q. After he had put his hand under your panties did he put his hand on your private parts?
A. Yes.
Q. What did you say?
A. Yes.
Q. Did he put his finger up in you?
A. Yes, sir.
MR. HITTLE: That is all. 55

Thus, Lavay was able to reveal what Charles Force had done to her by responding "yes" or "no" to the options presented to her by the prosecutor. Such a mechanism had the advantage of getting at the facts, but the limitation for the witness was that she could only reveal the facts "pertinent" to the offense as they were preselected for her response by counsel. For the defense attorney, there was the danger that the witness could all too easily assent to something that was not true. Even though this method of eliciting testimony from a child inherently constrained the result by limiting it to the options presented in the questions, it was utilized with support from the prosecution because little girls were either reluctant or unable to articulate on their own the intimate details of the offense.

The 1948 case against Harry Winters for committing incest with his fourteen year-old daughter, Yvonne, is another example of how this happened. Here, Yvonne was being questioned by Mr. Wilson, the

prosecuting attorney:

> MR. WILSON: Just tell us what happened, on the 16th of May.
> A. He came to my bed and got in bed with me...
> Q. Tell us now just what he did do? Did he put his arms around you?
> A. Yes.
> Q. Did he get on top of you?
> A. Yes.
> Q. Did he insert his penis?
> A. Yes.
> Mr. Jones: I think that is suggestive and furnishes direct answers. I think she can tell her story.
> Mr. Wilson: I think in view of the nature of this crime, and in view of the tender years of this witness, that direct questions are permissible.
> The Court: It is a matter in the discretion of the Court. I will permit them.
> Q. Did he get on top of you?
> A. Yes.
> Q. And did he insert his penis into your private parts?
> A. Yes. 56

As can be seen, the justice was the figure who intervened and claimed the authority to permit the direct questions. In this case, the answers that followed were allowed to stand as competent testimony, but in its limited fashion, the questioning structured responses to reveal only facts that were legally relevant as evidence.

A 1942 case demonstrates the concern that seven-year old complainant, Ada Postler, might not know the seriousness of the indecent liberties charge she made against Steve Kunis. Here, it appears the justice of the peace introduced the question:

> THE COURT: (To witness) Do you know what a prison is, or a jail?
> A. Yes.
> Q. Who do they put in a jail? Do you know?
> A. What?
> Q. Who do policemen put in jail?
> A. Mans that's naughty, awful naughty, they put them in jail.
> Q. Because they are naughty?
> A. (Nods her head)

Q. Do you know how they put them in jail? Because someone tells--
A. Because they call up the cops.
Q. How do they find out how naughty they were?
A. When the man does something naughty you tell the mother and they will call the cops.
Q. And what do the cops do?
A. They talk to them and say they're bad, fussing around with the girls.
Q. And then if they find they have fussed around with the girls, what do they do with them?
A. They put them in jail.
Q. And would you want this man to go to jail if he fussed around with you and was naughty with you?
A. Yes.
Q. But you wouldn't want him to go to jail, though, if he didn't fuss around with you, would you?
A. No. (Shakes her head) 57

Seemingly assured of her sincerity on this matter, the defense sought to further check the worth of her testimony, using one of the other accepted barometers for measuring the credibility of little girl victims: her religious training.

Q. What Sunday School did you go to here?
A. Nazareens [sic], but I'm Catholic. I went to Catholic and to Nazareen.
Q. How many times did you go to the Nazareene [sic] Sunday School?
A. I don't know; about two or three times.
Q. Have you been to the Catholic Sunday School?
A. No; I just have been in the Catholic Church, just once, but I ain't baptized yet though.
Q. You're not! You will be some of these days, won't you? 58

William Wise did not wait for an answer to the last question, so it seems he may have asked it rhetorically, mostly to infer that her not being baptized was problematic. Ada could be aware of what it meant to tell the truth only to the extent that any child who did not have the benefit of regular religious training would be. That religious training was a factor in assessing the truth of testimony was, to be sure, one

indication of the wider cultural importance accorded a person's religious orientation. It was also, as we see here, a factor of profound legal significance.

Given the perceived wholesale unreliability of a child victim's testimony, it is not surprising that children's complainants did not, as a matter of course, meet with much sympathy from the defense attorneys. Indeed, portions of testimony reveal the almost palpable contempt with which defense attorneys were wont to approach young complainants, a contempt not even expressed as openly by the prosecutors toward the defendants.

This study has already referred to the 1923 case against Albert Welton, so portions of it may be familiar. Welton was charged with committing indecent liberties against his recently adopted daughter, Elinor. You may recall that the contention of the defense, common to incest cases, was that Elinor had filed the complaint in retribution against her father--in this instance, for his restrictions of her social life and for his withholding of a promised wrist watch. A closer look at how the defense attorney questioned Elinor reveals how he was able to reinterpret Elinor's story from his own perspective.

Elinor had been adopted by the Weltons only four weeks prior to the time of the examination. Before that she had lived nine years with Mrs. Birch in Ohio, and before that with a neighbor in Chicago. Elinor's biological father was a "drunkard" and her mother had died when she was three months old. By now, Elinor was thirteen and among strangers again. At the moment of the following entry into the transcript, Elinor

had already explained in direct examination that her adoptive father had fondled her and tried to have intercourse with her:

Q. How far did he put his hand on your leg?
A. Clear up on my body under my drawers.
Q. He put his hand up under the leg of your drawers?
A. Yes sir.
.....
Q. Did you tell Mrs. Welton about that at the time?
A. No sir.
Q. What did you say to Mr. Welton when he did that to you?
A. I didn't say a thing to him.
Q. What! You didn't say a thing? Just stood there and let him do that and you not say a thing?
A. No sir.
Q. Did you tell your sister about it?
A. No sir. I didn't tell anybody about it.
Q. You say your sister stood right by the side of you and she never said anything about it?
A. No sir, she never said anything to me about it, anyway.
Q. And you stood right there and let him put his hand on your private parts.
A. Yes sir.
.....
Q. You didn't think it was very nice of Mr. Welton to put his hand on you like that, did you?
A. No sir, I didn't.
Q. Didn't you tell him to stop it?
A. No sir, just stood still; had my legs crossed.
Q. Had your legs crossed? And you were standing up?
A. Yes sir.
.....
Q. Were you alone very much with him?
A. No sir, I didn't happen to be alone very much with him.
Q. How many times did you sit on his lap?
A. I sat down on his lap quite a few times. I kept teasing to go some place. I would sit down on his lap and tease and tease.
Q. Where did you want to go?
A. Down to Lyons. He said I could not go over there all the time.
Q. He wanted you there to help his wife, and you were expected to do a little work and he wanted you to help, didn't he? No, you would go over and sit on his lap and tease him. What did he do, where would he be sitting?
A. In the big chair.
Q. In a big chair, and you would just go over and sit on his lap and tease and tease?
A. When I first went there I did.
Q. After that first time you were careful weren't you?

A. Yes sir. 59

One has the image here of a young girl who somehow felt it was acceptable for her to sit in her new adoptive father's lap and tease, as little girls sometimes do for the things they want. For Elinor, the reality of having a father for the first time in her life may have prompted her to seek and expect more affection than was appropriate, especially at this early stage of acquaintance. But, it seems that if there was not yet a feeling of mutual affection, there was ostensibly an attempt to establish one. What begins to emerge from Elinor's account, however, is a situation that moved from one of fatherly acceptance to one of sexual exploitation, with Elinor as the object of that action.

In defending Albert Welton, D.S. Avery "adjusted" this scenario--Elinor was not the exploited one, Albert was. Avery perceived that Elinor had both provoked Albert's sexual attention and accepted it. She had not protested Albert's advances to her and therefore, by "letting" him do it, she must have thought it was okay. Moreover, her frequent approaches to her new father, the acts of sitting in his lap, were cited to portray her as a selfish, ungrateful child, unwilling to help Mrs. Welton with chores in the house. By making this connection, Mr. Avery implied she had been unfair to Mrs. Welton in two ways: (1) she had withheld her household assistance, which was, after all, the least she could be expected to do for this family who had taken her in; and (2) she had apparently enticed Mr. Welton into engaging in sexual behaviors, in flagrant violation of Mrs. Welton's trust.

Finally, when Elinor reported how she had resisted Albert's

advances, Avery distorted her protest as much as he had earlier misconstrued her submission, a conscious manipulation that made her look bad either way:

> Q. What did he do next?
> A. The next thing he did he put me on the bed and lay on top of me.
> Q. What did he do then?
> A. He tried to raise my skirt.
> Q. What did you do?
> A. I cried.
> Q. Are you in the habit of screaming when things don't go to suit you?
> A. No sir. Only when I get hurt.
> Q. You don't scream unless you are punished?
> A. No sir.
> .....
> Q. On this night of the 21st you didn't scream any, did you?
> A. I told him to get off and leave me alone.
> Q. You say he got on top of you and was there ten or fifteen minutes. You didn't scream at all, did you?
> A. No sir.
> Q. Why didn't you scream?
> A. Because I was afraid of him. I told him I would yell and he said: "Well if you yell", and then I commenced to cry.
> Q. You knew your sister was in the next room. Did you talk loud enough so she could hear you?
> A. I don't know whether she heard me or not, she didn't say anything.
> Q. Were you whispering to Mr. Welton?
> A. I said, "Get off me and leave me alone and if he didn't, that I would yell".
> Q. Did he get off then?
> A. No, he stayed there ten or fifteen minutes. 60

To say that the logic of this interrogation was contradictory is pure understatement. Mr. Avery had it both ways--when Elinor screamed, she was petulant and willful; when she did not scream, she was submissive and thus even complicit. Elinor came off looking, in the end, like an opportunistic, street-wise adolescent who sought to punish a well-meaning man when he did not accommodate her attempts to take advantage of him. Rumors about her past--the fact that she had come

from a disadvantaged background and had no roots in the community, had had intercourse one time before with a boyfriend by her own admission, and was known to have taken some things from her former guardian (some powder for her face, and a little money to give to a small girl for food, so she said)--were used by the defense to prejudice the court against her. Mr. Avery's efforts paid off, and Welton was discharged. There is no way to know how Elinor fared after that. What is sure is that her experience with Mr. Welton was redefined in court to mean something it probably never meant to her, and the tragedy is that she herself may have become convinced of its plausibility.

Again, what cannot be missed about the testimony of any child witness is the great amount of skepticism with which it was viewed; but the lengths to which defense attorneys went in qualifying the accounts children gave should be understood as the lengths to which they were permitted to go. These practices reflected a State Supreme Court-sanctioned belief among courtroom figures that very young complainants should not be too readily believed. Compelling as their stories might be, female children were thought capable of imagining sexual fantasies and, believing them true, using them to accuse an adult male in their lives of a sex crime.

Significantly, the testimony of child witnesses was treated with great circumspection because children were not considered mature enough to understand the meaning of an oath. If one considers that an "oath" is "a solemn appeal to God...to witness one's determination to speak the truth...", it is possible to extrapolate from this courtroom practice

the deeper religious significance attached to telling the truth in court. 61 Indeed, such a view begins to explain the preoccupation of the court with a witness' baptism or attendance at Sunday school. If, as Shapiro has pointed out, ideas of truth had their foundations in both science and religion, then it is not surprising that the validity of courtroom testimony still rested on some outward sign of religious belief as late as 1950. 62 Indeed, the legal connection between religious conviction and knowledge of truth was not finally challenged until 1961, when the Supreme Court's decision in Torcaso v. Watkins prevented the state of Maryland from requiring state office holders to believe in God. This decision held that freedom of religion also meant freedom from religion and paved the way for atheists to testify in court. Throughout the period of this study, it was this condition of conscience that young children could not legally sustain in the eyes of the court. 63

It was a concern that seems to have intensified over time, at least as evidenced in the increased use of strategies to test the truth of child witnesses in the 1920s, 1930s, and 1940s. Such strategies were clearly not evident in the years before the 1895 change in the age of consent nor immediately thereafter, but became more prevalent as the influence of Freud's ideas on female child sexuality pervaded popular thinking. Defense attorneys were ostensibly the most responsible for pursuing these strategies, and sometimes, as we have seen, they stretched credulity farther than would seem possible. But they should not be viewed as the sole perpetrators of such methods, for their

excesses were potentially subject to the censure of judges who generally exercised much restraint in intervening in the proceedings.

Insofar as female child witnesses were not able to take an oath, and could not be trusted to overcome their perceived "natural" tendency to engage in sexual fantasy, defense attorneys took an attitude that ranged somewhere across three positions: the first was a kind of patronizing acknowledgment that a child could unconsciously misstate the facts or confuse fantasy with reality; the second was an open contempt rooted in a belief that female children would knowingly exaggerate or deceive with an ulterior purpose in mind; the third was a simple determination, regardless of possible perceptions of the legitimacy of the victim's story, to discredit her in order to exonerate the defendant. From any one of these three perspectives, the effect of the defense strategies was to undermine the child's version of what had been done to her. Thus, to the degree that the defense was successful, the evidence to support the complaint of "the People"--ie. the testimony of a child--was not competent to support a jury's accepting her story as truth.

2. Resistance and Character: Evidence of Force

The 1937 closing argument of defense attorney Brown in the case against Harold Hanks is indicative of the criteria held before the jury for evidence of sufficient resistance under the law:

> ...I think the proof indicates that whatever resistance there was was only very little... Nobody was hurt; there was no intimidation, nothing of that nature at all. There was evidently a little scuffle, and it must have been willing

> submission or the scuffle would have resulted in some injuries; nobody was out of breath or injured in the scuffle, nothing to indicate that it was such resistance as the law requires...I submit that there's not enough evidence in this case to show she resisted to the utmost. 64

The definition of "resistance to the utmost" indicated here that the victim would have to be intimidated, out of breath, or injured as the result of a scuffle if her resistance was to meet the requirement of the law for forcible rape. As we saw in our earlier discussion of these cases, evidence of victim resistance was the factor upon which hung almost the entire worth of such a charge.

An 1872 precedent, as we saw before, required that there must be "utmost resistance and reluctance, or that her will [be] overcome by fear of the defendant," enough to preclude her resistance (1872). 65 As we saw earlier, the waiver based on fear was reiterated in 1943 with the decision that "failure to resist is excused if the will of the prosecutrix was overcome by fear." 66 From such judicial rulings was fashioned the interpretation that excused a woman's lack of resistance if she was "paralyzed with fear," which, as Debra Rhode points out, has usually been the case in most rape situations. It would seem from the Ingham County cases of forcible rape, however, that the judges found this higher court ruling at best difficult to follow. With regard to victim resistance, there simply was little allowance made for fear.

Related to evidence of resistance was evidence of bad character, presumed to be a sign, on the basis of social assumptions about given behavior norms, of a victim's likely consent. As for precedents on character, there were higher court rulings that applied to both rape and

statutory rape victims. A 1907 Michigan Supreme Court forcible rape decision provided:

> The bad reputation of the prosecuting witness above the age of consent prior to the date of the alleged rape is admissable to show that there may have been consent to the intercourse. 67

A 1929 precedent related character to credibility of the witness, allowing that "evidence showing prosecutrix's sexual perversion and lascivious conduct was admissable" to the extent that it had a bearing on her credibility." 68 As for the character of statutory rape victims, it was decided in a 1912 case that evidence of the prosecuting witness' unchastity could be offered to impeach her only "to the effect that she had previously made the same complaint against other men, and then admitted the falsity thereof." 69 Thus, unless the victim had previously given reason to suspect that she was making a false accusation, her prior chastity was not at issue by virtue of both statute and common law ruling. A later precedent reaffirmed the court's interpretation of the protection to be accorded underage rape victims under the statute:

> Refusal, in prosecution for statutory rape, to permit cross-examination of prosecutrix regarding relation with another man, was not error. (1930) 70

Thus, the common law rulings regarding the victim's resistance and character were consistent with the statute: resistance and character were appropriately to be addressed in rape trials, but not in statutory rape trials. In the analysis of the cases that follow, we shall examine how the questioning of the victims, or complaining witnesses (as the legal term benignly referred to them), was conducted in keeping with

these provisions, and how the structure of the testimony on resistance and character affected the evidence put before the jury. The two cases described below are representative of the discourse seen in forcible rape cases from the 1920s on because in both situations an automobile was involved.

In the 1923 case against Roy Murphy, twenty-three year old Ruth Walker claimed Murphy had given her a ride home from a Pine Lake dance, and on the way home, he had attempted to rape her. Knowing about Ruth's struggle against Murphy is important because it is possible then to understand that defense attorney D.G.F. Warner's response is in contradiction to the testimony. The following entry into the transcript begins where Ruth was being asked to describe the drive home:

> Q. Where was the defendant at that time?
> A. He was in the car with me.
> Q. What took place there, if anything?
> A. Why, have I got to use that language?
> Q. Yes.
> A. Well, he asked me to have sexual intercourse and I told him no. And he said "Well, then, you uncross your feet." I had my feet crossed, like this (illustrating). He says, "Uncross your feet," and I said, "No." And he tried to force me and he got hold of my head and pulled it back and he choked me this way. (illustrating). 71

At the outset, the defense challenged the very substance of her complaint by asking her to tell what happened, "if anything". In Ruth's response, she attempted to show the court what had happened. After clarifying who was sitting on which side of the car (details that were consistently solicited as necessary to the evidence in every examination), Ruth revealed the rest of what Roy Murphy had done to her:

> Q. Then what else did he do?
> A. Why, he tried--- I hollered and he slapped my face, first--

> just kind of brushed it, like that (illustrating)--and pulled me back and he tried to open my feet and I wouldn't open them and he struck me with his fist in the eye.
>
> .....
>
> Q. How many times did he strike you?
>
> A. He struck me twice in the car and then I fought him and then got away, and he said, "When I want anything bad enough to go after it I generally get it," or words to that effect and-- ...and no litle red headed kid would hold on him.
>
> Q. When you got out what happened?
>
> A. As I got out he struck me on the back and I ran and got in front of the car, as far as from here to you, and I had on high heeled shoes and I tripped and fell and he came running after me and I says, "Don't touch me," and he hit me in the chest here, and I fell down and he struck me twice again on the face.
>
> Q. What else occurred there?
>
> A. Nothing, because this other couple had heard me scream and they came up.
>
> Q. Did they come up as this happened in the road?
>
> A. Yes.
>
> Q. Did this respondent tell you anything about his reason for striking you, afterwards?
>
> A. Why, he said that if I hadn't-- if I had had intercourse with him it wouldn't have happened. 72

It appears this young woman had been extensively threatened and physically assaulted, and would likely have been raped, had third-party witnesses not intervened. That is why Warner's closing contention, dismissing the offenses described to him in the testimony, was so surprising, at the same time that it was so usual. As he undertook to make clear, asking a woman to spread her legs and then striking her because she would not comply did not fit the law's definition of attempted rape:

> MR. WARNER: Now, if Your Honor please, there was no undertaking to rape this woman. To rape her he would raise her clothes--he simply asked her to spread her legs--whatever might have occurred--but there is not the first thing he undertook to commit the offense or anything more than to strike her. I think the evidence is absolutely void on that proposition. 73

But the prosecutor argued that something was done for which this

defendant needed to account. As representative of "The People", he claimed the right to know why Murphy had hit this woman.

> MR. PIERCE: I want to know why this assault was committed and why he proceeded down the road. This man certainly was not acting in self defense. 74

Ultimately, the justice of the peace settled the matter, as it was alone his established role to do:

> THE COURT: I think, under the circumstances, Mr. Warner, that it should be submitted to a jury with proper instructions. 75

"The instructions," of course, were the cautionary statements designed to "prepare" the jury to consider the elements of the case within the "proper" interpretation of the law. This justice evidently incorporated the jury instruction stipulation (not usually stated in the order for a trial) to appease Warner, who adamantly maintained this defendant was in no way guilty of the offense under the law. Why this justice was concerned with appeasing this defense attorney may say something about their respective personalities, but may also say something about their shared doubts regarding the worth of this victim's complaint in light of the law. It may be recalled that in attempted rape cases, the evidence of the offense generally necessitated the defendant's having opened his pants and exposing his penis, and then attempting to penetrate the victim. These were the elements, required by court interpretation of the law, that were missing from Ruth Walker's report. It was by virtue of these missing details that Warner insisted the evidence, as presented, could not be defined as attempted rape. Finally, more will be said about the role of the judge with regard to

jury instructions in a later section of this chapter.

In 1937, defense attorney Joseph Planck's cross-examination of twenty-seven year old Bernice Carper in a rape charge against Earl Chapin directed, not surprisingly, the attention of the court to her character and resistance. Under direct questioning by the prosecuting attorney, Bernice told how Earl Chapin had given her a ride home from the restaurant where she worked as a late-night waitress, but stopped at a deserted wheat field, where he attempted to rape her. She stated that when he turned into the wheat field, she "knew [she] was in for it." Mr. Planck asked:

> Q. Do you always go straight home from the restaurant by arrangement with these other men? [The men who worked in the gas station across the street usually drove her home.]
> A. Yes.
> Q. Never take a ride with them?
> A. No; always went straight home when I left there.
> Q. In the sixteen months?
> A. I haven't worked nights sixteen months. I have worked nights only three months.
> Q. And every previous night in those months you have gone straight home?
> A. Yes, sir.
> Q. Whether you took a taxi yourself or some man took you?
> A. Yes, sir.
> Q. You do go out to parties and dances occasionally?
> A. Not very often. I have never run out. You can't find one thing against my character, any place I have ever been. 76

As her questioner focused on the number of nights she had been taking rides home from men, Bernice perceived the direction of his thinking. Accurately anticipating his strategy, she declared that he would find nothing wrong with her character. But the ever important issue was raised nonetheless:

> Q. Ever had sexual intercourse with any man before?
> A. Yes.

Q. More than once?
A. Yes.
Q. How many times?
A. Half a dozen times.
.....
Q. Been going with him about a year?
A. Yes.
Q. Expect to marry him?
A. I don't know about that.
Q. You plan to tell him about [the attack]?
A. No, I'm not going to tell him if I don't have to; I don't care about having anybody know.
Q. Well, are you engaged to marry him?
A. No, not necessarily.
Q. These half dozen times that you had intercourse with your boyfriend, did you consent to it on each of those occasions, or were you raped?
A. No. I consented to it.
Q. Experience any pleasure doing it?
A. Not necessarily.
Q. Please say yes or no.
A. Well, no.
Q. Why did you repeat the experience?
A. (No answer)
Q. With this boy friend?
A. Just to show that I cared about him.
Q. To please him?
A. Yes.
Q. Not to please yourself?
A. No.
Q. You did not experience any sexual desires through it, whatever?
A. (No answer)
Q. Not at any time?
A. I won't say not at all; I would say not much. 77

The defense strategy had established her pattern of riding home with men late at night. This was easily done to show a possibility of promiscuity. As to her prior experience of sexual intercourse, Planck conceived her response to be critical on two counts: (1) she had had intercourse with someone she was not even sure she would marry, and (2) she may have even enjoyed it. With each question phrased to elicit a yes or no answer, there was no room for explanation or qualification.

Somehow, she managed to convey, sensing it was crucial to courtroom perceptions of her character, that she had not enjoyed sexual intercourse very much, even when she engaged in it by choice. Her motive for having intercourse with her boyfriend had been only to satisfy him.

Since Planck had four times asked her to clarify this fact, it was clearly a matter of importance to his conceptualization of the evidence. Using phrases like "you did not experience any sexual desire...whatever" and "not at any time," he increasingly pushed her to take an absolute stand, which she could not truthfully do. Thus, she was forced to move from a position of saying she had had intercourse to please her boyfriend to one of having to acknowledge she had experienced some pleasure in it herself. In this way, Planck conveyed what he wanted the jury to suspect: she had engaged in sexual intercourse before because she wanted to, and thus, perhaps she was looking to have sex again in that late-night ride with Earl Chapin.

Next Planck moved to question her resistance.

Q. Did you strike him at any time?
A. No. I pulled his hair once.
Q. When did you do that?
A. When he started the first time.
Q. You pulled his hair once?
A. Yes, sir.
Q. Did you scratch him?
A. I don't know whether I put all my finger nails in.
.....
Q. You didn't scratch him and you don't think you struck him.
A. No.
.....
Q. How loud did you scream?
A. As loud as I could.
Q. Show us how loud you screamed.
.....

Q. When you got up from the car and ran out of the gate were you screaming?
A. Yes.
Q. When he caught you in the road were you screaming?
A. Yes.
Q. As loud as you could?
A. Yes.
Q. Did you try to fight him in the road?
A. Yes.
Q. What did you do?
A. I just dropped down on my knees, that's what I done.
Q. Is that fighting? And, as he carried you back towards the car did you scream?
A. I was screaming and crying, too, I guess.
Q. You intimated that if it was going to happen again you would rather get back in the car?
A. Yes.
Q. And you walked into the car by yourself?
A. No, I didn't. After he let me get up I started off again and he took me by the arm and dragged me over to the car.
Q. Did you pick your feet up and climb into the car?
A. Sure. I had to when he picked me up and ut me in there and dragged my feet in. I don't know as I made any special effort.
Q. Put you in the back seat?
A. Yes.
Q. Who pulled your dress up, do you remember, at that time?
A. He did.
Q. Did you try to keep your knees together?
A. Yes.
Q. And didn't you agree to it when you said, "If you want to do it again let's get in the car?"
A. After I got in the car I fought him again.
Q. And you were attacked again, in the back seat.
A. Yes. 78

Planck took the resistance issue into a series of ever-probing inquiries, not only asking about actions taken, but more specifically, about degrees of action. Had she pulled his hair only once? If she did not "think" she had scratched him, could she not just as well say she had not scratched him at all? Since she said she had yelled, could she show the court how loudly she had yelled? Should the court accept that getting down on her knees and refusing to move was a measure of

resistance adequate to the requirements of the law? Conversely, since she had ultimately picked up her feet to get back into the car, was this not a sign of her consent? For every move Bernice reportedly made to resist this protracted sexual attack, the defense contrived to make it appear as a sign of her compliance.

What did Planck take her reported resistance to "mean"? From his perspective as the state's defender of the accused, sufficient resistance under the law was to include striking, scratching, pulling hair, screaming, running away, and keeping one's knees together. While these elements were present in this account, what specifically seems to have made her resistance suspect? To answer that question, we need to look again at the transcript.

Planck was able to take what she said and recast it. First, he showed that she in fact had not scratched her assailant nor struck him. Second, by compelling her to demonstrate in the courtroom how loudly she had screamed during the attack, he showed that she had not yelled very loudly at all. This was surely an effort to embarrass her as much as it was to discredit this piece of evidence. Finally, by inducing her to repeat four times the fact that somehow she had gotten into the back seat car on her own volition, he contrived to emphasize this element of her participation.

So, there were at least three areas of redefinition--the degree to which she had scratched him, the loudness of her screams as measured by those who could hear in the courtroom, and most importantly, the amount of willingness she exhibited about getting into the back seat of car.

This last element was the most important evidence of her compliance to Planck because, as he perceived it, she had made a choice regarding the conditions under which she would be raped. If she was going to be raped again, she preferred that it be in the back seat of the car rather than outside on the ground. Significantly, she had exercised the "individuation" that Robin West says the law finds so suspect in women, yet is in fact the basis for the law in men. 79 The irony here was that even as Bernice, by law, needed to fight the attack like a man, she could not endeavor to control it. Making any such choice might have been considered understandable for a man in similar situations of threatened peril, but not for a woman experiencing a sexual attack.

Planck moved away from the resistance issue finally and questioned Bernice's motive for bringing the charge. In the same way that Avery's strategies made Elinor Welton appear complicit no matter what she said, Planck's approach toward Bernice was formulated to produce the result he wanted--that Bernice would be not be seen as a legitimate victim.

Q. Have you told your mother about these other intimacies you had had, that you had committed with your boyfriend?
A. No.
Q. Nobody knew about those?
A. No.
Q. Why did you tell this time, about this, instead of these half dozen other times?
A. Because I was forced into this one.
Q. What?
A. I was forced into it this time.
Q. What?
A. I was forced into it this time.
Q. I know, but any other reason why you told?
A. (No answer)
Q. The effect of it is just the same, you know-- your person had been violated.
A. I cared about my boyfriend. I didn't care about this fellow.
.....

Q. Then, did you tell in order to see that he got punished for what he had done?
A. Yes.
.....
Q. And that's why you are here today.
A. Yes.
Q. Resentment toward him.
A. (No answer)
Q. Is that right?
A. (No answer)
Q. You are willing to--- I will withdraw that. And so your indignation and resentment and the desire to see this man punished is what led you to wake up your mother a while after you had gotten in bed that night---
A. Yes. 80

Can there be any doubt that Planck took these events and cast a meaning onto them that was substantially removed from the meaning they had had for the victim? Can there be any question that his role was to select the facts he would address and to order the questions in such a way as to contrive a response? Can there be any mistaking of the ways in which he defined the issues in his words, to conceptualize and categorize events to fit his purpose? It was his idea to relate this rape to her former experience of consensual sexual intercourse and to place them both into the category of "violating her person;" it was also his characterization that her anger at being attacked was a "resentment" feeding an impulse for revenge, as if to say her motive for waking her mother and filing a complaint were unreasonably vindictive and self-serving. It seems that by his definition, rape and sexual intercourse both constituted violating a woman's person if she was not married; further, by his estimation, the motive for filing a rape charge should be "reasonable."

As was seen in the earlier discussion on forcible rape, evidence

of victim resistance did not alone prove the offense beyond a reasonable doubt. Insufficient by itself, evidence of her resistance was always qualified by evidence of her character, which needed to conform to preconceived notions of acceptable female victimization. In this excerpt we have been able to see how repeated, ever narrowing clarifications forced the complaining witness to either fully accept or completely deny the unequivocal options presented to her by the defense attorney. The effect was often to certify her inadequate resistance or substantiate her questionable character.

When prosecutor Bailey moved to bind the respondent over for trial, Planck offered, "I make the customary motion", meaning, as we know, he moved to dismiss the charge. Effectively denying the validity of the evidence brought forth in the testimony, his motion to argue that there was no basis for the charge was the standard procedure by which he finalized his perception of the evidence. This was a prerogative he exercised by virtue of the authority granted him by the state to defend the accused. It was by this same authority that the prosecutor and judge engaged with the defense on terms that were understood by all as the accepted interpretation of the law. Thus, to the extent that courtroom agents interactively defined the evidence presented by child witnessess, they also tactically defined together the evidence of victim resistance and character as it was presented in the testimony of adult victims of sexual assault.

3. Culpability: Evidence in the Face of Consent

This study has observed that, after the 1887 and 1895 changes in the age of consent, the court came to view statutory rape cases in three ways: these were cases that could involve (1) consenting partners, (2) acquaintances, or (3) strangers. By far the bulk of the cases fell into the first two groups and constituted those that were defended more readily on the basis of questionable victim character. The defense idea in cases of this nature was not to disprove penetration, but to minimize the culpability of the defendant. What emerges from the following analysis is a more detailed examination of how the defense strategies were able to effect such a perception and how they contrived to define the evidence in consensual intercourse cases.

Generally, The People's case against the accused required that the victim be properly shamefaced and fearful. Consenting victims were usually neither. An example is seen in Marcille Florian's demeanor in the 1936 case against Dale Young. As an uncooperative witness, Marcille had not wanted to file a charge; her father did it to keep her boyfriend away from her. The defense attorney and the justice of the peace seem to have been irritated that she did not have the "right attitude."

> Q. If you had had intercourse, do you think you would have remembered?
> A. I do not know.
> Q. Well, what did Mr. Young do to you while you were there?
> A. Nothing.
> Q. Please, you dispose of your gum young lady; there's a spitoon. Just spit it out.
> A. (Takes her gum.)
> Q. You sit up in your chair. (Witness moves) Sit up straight please. (Sits more straight) And don't smile so much.

There's nothing funny.
A. Well, I didn't say there was.
Q. I know you didn't.
THE COURT:
Here is a man charged with a serious offense and you are callled here as a witness for The People, and you are not supposed to take it as a joke or entertainment or theatrical performance. When you are given questions, you answer them, and don't be smart about it, either. 81

Clearly, the perspective of the court expected the complaining witness to be serious and repentant--that was part of the definition by which the court felt compelled to punish young men who engaged young girls in unlawful sexual intercourse.

Under resumed questioning, Marcille eventually confessed that, during her stay in the hospital for an undisclosed ailment, her father induced her to tell him with whom she had had intercourse, promising "he would not prosecute the guy." Marcille explained then, "he lied to me...he went down to the prosecuting attorney's office and swore out a warrant for Dale...I'll always hate my Dad for that." The defense attorney responded with a superficial sympathy that quickly turned judgmental:

Q. Now, wipe your eyes, Marcille, and remember that we are all friendly here.
A. I don't know. (Wiping her eyes) I wonder if you feel sorry, do you?
Q. No, nobody feels sorry for you, young lady. Didn't you know this conduct between yourself and Mr. Young was wrong?
A. Yes, I knew it. I don't see why I did it. He was nagging me and hounding every minute and watching (crying) and I didn't have no friends and Dad wouldn't let me have-- All I had was one girl friend. Dad wouldn't let me have chums or anything.
MR. WATSON: That is all. 82

In keeping with our ealier discovery about statutory rape, Marcille's position illustrates well the dilemma that statutory rape law

imposed upon young girls, promising to protect them from unwanted attack but at the same time prohibiting them from having intercourse by choice. When Mr. Watson succeeded in breaking down Marcille's defensiveness, her show of remorse was met with little compassion and much reproach for her responsibility in this illegal sexual behavior. The irony of this courtroom episode was that, even as Marcille accepted the blame--"Yes, I knew it. I don't see why I did it"--she revealed as well the defendant's level of culpability--his "nagging and hounding every minute" until she relented. She also revealed her father's role in isolating her from other sources of personal involvement. These factors seem to have had little bearing on the outcome, however. By making no objection to the cross examination questions, the prosecutor assented to the defense attorney's approach to the witness. Faced with Marcille's admission, the prosecutor accepted that the basis for pursuing the charge was indefensible and dropped the case.

Another frequent technique for eliciting testimony was to phrase questions as though they were established fact, obliging the witness to refute the truth of what was stated. That such suggestions might be true was made believable with the use of repetition, fixing a possibility in the jurors' minds that what amounted to pure innuendo was actually plausible, regardless of the victim's responses to the contrary. Defense Attorney Lawler's cross-examination of fifteen-year old Geraldine Merrill in the 1926 case against George Middlebrook illustrates this strategy:

> Q. ...Geraldine, you have been running around with a lot of men, have you not?

A. Yes, sir.
Q. You have wanted a steady fellow, have you not?
A. Yes.
Q. You wanted George to be a steady fellow, didn't you?
A. No, sir.
.....
Q. Did you dance with George at Park Lake?
A. Yes, sir.
Q. Well, George talked with you while you were dancing...
A. Yes.
Q. You liked George, didn't you?
A. Yes, sir.
Q. You really wanted to sit next to him and ride out beside of him out to the lake, didn't you, Geraldine?
A. No, sir.
Q. And wasn't it you who suggested that you go for a ride and go out to Park Lake this evening?
A. No, sir.
Q. And do you remember dancing with George and saying to him- ...that you liked him?
A. No, sir.
Q. Do you remember saying that?
A. No, sir.
Q. Do you remember telling George he danced well and you liked to dance with him?
A. (No answer)
Q. You did tell him that, didn't you?
A. No, sir.
Q. Don't you remember telling him that?
A. No, sir.
Q. And don't you remember saying or telling George you wished he would come up and see you often?
A. No, sir.
Q. Or words to that effect?
A. No, sir.
Q. You don't remember that?
A. No, sir.
Q. And do you remember George saying to you he wasn't out to have any steady company?
A. No, sir.
Q. Don't you remember that?
A. No, sir.
Q. And as the result of his refusal to say to you he would come up to see you or be your steady, didn't you get sore at him this night?
A. No, sir.
Q. And aren't you in court to tell this story about George Middlebrook just because you are sore at him for not having been your steady?
A. No, sir.

Q. That isn't true?
A. No, sir.
Q. You are testifying that these things I have suggested here about your wanting him to be your steady company-- that is not true.
A. No, sir. 83

One has to admire Geraldine's patience through this not untypical cross examination ordeal, having to refute a continuous series of fabricated accusations having little basis in fact. It was a strategy that stretched reality at times to the absurd, but in practical terms, was often successful in making what was absurd seem true. In this instance, the case against George Middlebrook was nolle prossed.

Very commonly, in cases involving consenting underage adolescent girls, the defense would take the position of warning the complainant that, with her testimony, she might incriminate herself. By reporting that the defendant had had sexual intercourse with her, she was leaving herself open to the charge of female adolescent delinquency, putting herself at risk of ending up in a detention home. It should be noted that this was no idle threat, for often these girls did go to detention homes, or were already living in one at the time of the complaint. There can be no mistaking, however, that these threats were made by the defense out of little concern for the complainant. The intent, of course, was to persuade her to drop her complaint against the defendant.

Such a strategy is illustrated in the 1920 case against Everett Hastings, who had sexual intercourse with fifteen-year old Beatrice Howe. In her testimony, Beatrice revealed that she had had sexual intercourse twice before the current occasion with Everett. During the

initial questioning done by the prosecution, in which the complainant stated the facts of the offense, defense attorney D.G.F. Warner interrupted. The posturing that ensued is lengthy, but worth including here in substantial portions, though parts of it have been omitted because of excessive repetition:

> MR. WARNER:
> At this time I think I shall object to the evidence first--not to the legal status of the evidence, but here is a girl that is giving evidence here and I am judging now from the complaint and warrant which I have read... if she gives evidence in this case, it naturally incriminates her...and forever places a record against this child, and I think she should be fully informed of her constitutional rights, that she need not give this evidence if she does not wish...
> MR. SEELYE:
> How could it incriminate her?
> MR. WARNER:
> In two or three different ways that I can think of. And I don't know but if I should think a little more I might get another one. It would incriminate her in this way, it might make an offender of her as a street walker; that is one thing. It also may make a criminal of her, and not only a criminal, but put infamy upon her which she has a right to be protected against under her constitutional right. And there are other minor offenses, offenses which the court well knows lead up to and which cross examination may develop...that she need not answer these questions if she does not want to...
> THE COURT: What have you to say about that, Mr. Prosecutor?
> MR. SEELYE: If the court please, so far as incriminating her in any sense of the word is concerned, I see nothing so far that would bring that about...
> THE COURT: I understand, Mr. Seelye that if I am placed on the witness stand as a witness, and asked to testify to matters which, if true, would bring me to disgrace and shame, and infamy, I have a right to claim that constitutional privilege. That is the general proposition of the law.
> MR. SEELYE: I never supposed it went so far as that.
> .....
> MR. WARNER: ...if your honor wants me to go into this fully... I do know that this is one step towards prostitution, and this would be self-incriminating along that line. Now, if this little girl wants to go on here under those circumstances, but I think in fairness and justness to this girl, she should be informed of her rights, that is all.

.....
THE COURT: All right. Beatrice, under the circumstances in this case you are called upon to testify to a matter now, which if true might incriminate you, and also might bring shame and disgrace and infamy upon your reputation...you may refuse to answer the question, if you so desire... Do you want to claim that privilege or testify?....
MR. WARNER: Will the court pardon me to say one word. Now that is a proposition, little girl, you need not try to protect this man or do anything of that kind; we don't ask you for that, but I might add that for yourself, when you give your testimony in this court, this man here is going to take it down, and it is going to be printed and it is going to be filed, and remain in court forever. ...if you want to answer [these questions], and take the chances of incriminating yourself, and having this disgrace and shame, why go ahead and answer them.
THE COURT: What do you want to do---do you want to go ahead and testify?
THE WITNESS: Testify. 84

Mr. Warner's efforts to "protect" the witness notwithstanding, Beatrice chose to testify against the accused. Remarkably, or perhaps predictably, the offense as charged had never taken place. While in the bedroom preparing to have intercourse, Beatrice reported, she and Everett were interrupted by a rattling of the door knob from the outside. Mr. Warner took her statement to be true--it was after all, what he had hoped she would say--but mockingly restated what she had just reported to the court:

Q. You people didn't have what you would call intercourse from your former experience did you?
A. No.
Q. Just started as you say and somebody rattled the door and his hair and everything else went up, and the other thing went down, that was about the size of it, now, isn't that true?
A. I guess so.
Q. That is all. 85

To this exchange, Mr. Seelye objected:

Q. I ask that that last remark be stricken from the record.
MR. WARNER: I don't want that to be stricken out; that is commonly known.

MR. SEELYE: I don't think that is a proper remark to put in the record. 86

The remark obviously stayed in the record or we would not be reading it today. In this example, Mr. Warner employed the strategy of threatening the complainant with self-incrimination to a greater extreme than anyone else. His listing of all the possible consequences for her--that if she reported the incident of intercourse had with the accused--she would necessarily expose her own sexual activity and invite damage to her own reputation, possibly portraying herself as a prostitute. His repeated references to these grave possibilities were a manipulative challenge: "if you want to...take the chance of incriminating yourself and having this disgrace and shame, why go ahead and answer them." It seems, from the outcome of things, that all these warnings were unnecessary; then again, perhaps they had their intended effect after all. In silent consideration of her options, Beatrice may have taken the path of least risk to herself and, on that account, disclaimed the act of unlawful sexual intercourse that had supposedly taken place between herself and the accused. Oddly, there was no followup charge for attempted rape or indecent liberties, both of which, by law, would have been prosecutable in this case, but neither of which, by custom, would have been viable.

As for the justice of the peace, he took the position of upholding the girl's constitutional right to be "protected" from bringing "shame and infamy" to herself. And by virtue of assent, the prosecutor chose to accommodate the defense attorney's inflated use of this court-sanctioned method for insuring the "truth" of the evidence brought

against the defendant. So, again, these courtroom agents interactively defined the evidence, and in the end, the prosecutor's only challenge to the defense was to call for a retraction of that last derisive re-statement of the events described. His objection had, as we now see, no effect on the record.

Because, as we know, these cases of consensual sexual intercourse were prosecuted on the basis of protecting young girls from being led into lives of prostitution and the defense of the accused could not be built on the questioned resistance of the complainant, the defense used tactics to show that the victim was over the age of consent, to uncover flaws in her testimony, or to expose her promiscuous reputation. Successfully employed, any of these tactics served to ameliorate jury perceptions of the defendant's guilt. In the 1926 statutory rape case against Jack Hutton, fifteen-year old Dorothy Mitchell testified that Hutton had had intercourse with her on Sunday, July 4, behind the chicken coop. Defense attorney Berry employed strategies in this case that were of course representative of those used to disqualify the evidence of the crime in the eyes of the jury.

The victim's age was often the first item open to question. Since Dorothy's parents were dead and the family Bible was missing, there was no official record of her birth. Thus Berry questioned whether she was really under the age of consent. First he objected when prosecutor Bird asked Dorothy to state her age at the time of the offense. Her response constituted "incompetent" evidence because it could only be considered "hearsay" evidence. In other words, she only knew her age because

someone had told her of it. In cross-examination, Berry asked her to recount how old she was when she began school and to list all the years she had attended school; by thus adding the total years in school to her age at the start of school attendance, he attempted to "prove" her age empirically. Such a strategy, though cumbersome, lengthy, and presumably not always accurate, was quite routine with this defense attorney.

The primary focus of Berry's defense was to isolate and magnify discrepancies in any part of Dorothy's testimony, the intention being to discredit the reliability of her entire testimony. Two discrepancies presented themselves for Berry's scrutiny. Dorothy had first described the offense as having taken place behind the chicken coop, but later said it had taken place behind the garage. When Berry questioned her on this change of location, she admitted the change, saying,

> I didn't realize it would matter so much, whether it was behind the garage or the chicken coop...they were both joined together and I didn't think it made any difference, if it was in his back yard. 87

Berry, however, made it clear to the court that this inaccurate reporting of the evidence was a serious matter. An even more serious matter, however, was Dorothy's altered testimony about the underwear she had been wearing at the time of the offense:

> Q. You had bloomers on?
> A. Yes, sir, I did, or--
> Q. What?
> A. Teddy bear, step ins.
> Q. Which was it, bloomers or step ins?
> A. It was step ins.
> Q. Didn't you testify here he took down your bloomers?
> A. Yes, sir, I did.

Q. Then you didn't tell the truth when you said he took down your bloomers?
A. Well, I know when I changed them afterwards and that is what I had on.
Q. You told me and Mr. Bird here when you got up there and was standing up Mr. Hutton took down your bloomers. That's wrong isn't it?
A. Yes.
Q. That isn't true.
A. No.
Q. And you sat there upon the stand realizing you were under oath--
A. Yes, sir.
Q. And you said that here before all of us?
A. Yes, I did.
Q. It is not true.
A. No, sir.
Q. You knew when you said it it was not true.
A. Well, I didn't until now, still, of course, I did; I remembered just now you mention my bloomers and I remember I had on my step ins and he pulled the rubbers down he pulled the step ins down and they had rubber in the same as my bloomers.
Q. You knew what you had on when you answered Mr. Bird's question and mine, didn't you?
A. Yes.
Q. You knew when you were testifying about Jack Hutton pulling down your bloomers that that was not true.
A. No.
Q. Isn't your recollection about other events just as clear, so you would like to change your statement of what happened?
A. I had on my step ins, now.
Q. Now, which did you have on?
A. I said I had on my step ins.
Q. Why were you using the word bloomers? They are not the same?
A. Yes, there is a difference in them.
.....
Q. You didn't mean to say bloomers? You meant step ins throughout this examination, didn't you?
A. I did mean step inse but I just said bloomers.
Q. You said that because you did not think?
A. It was the first thing that came into my mind because I usually wore bloomers, until--
.....
Q. You hadn't had them on before?
A. Yes, I had had them on before.
Q. But you just happened to have them on that day; is that right?
A. Yes, I did. 88

The lengthiness of this line of questioning attests to the emphasis

Berry placed on this change in her account of the incident of sexual intercourse. Clearly he took what had been most likely an oversight on her part and magnified it into an indication of the unreliability of her testimony generally. His continued repetition of the issue and his characterization of her mistatement as a deliberate attempt to deceive everyone in the court served to exaggerate the mistake she had made in her recollection of what had happened, and not incidentally, to embarrass her by stressing the underwear she was wearing at the time of the offense. The strategy seems to have been aimed at producing two possible conclusions: (1) she had a faulty memory; or (2) she had deliberately lied about this, so she might be lying about other aspects of the event as well.

The other strategy worth noting here was Berry's attempt to prove she may not have been penetrated by Hutton's penis. A common strategy, it was an attempt to disqualify the most important evidence in the case, vaginal penetration by a man's penis.

> Q. You did not see his privates at any time, did you?
> A. No, I didn't.
> Q. It was dark?
> A. Well, of course, it was dark.
> Q. And all you know was something was inserted in you.
> A. Yes, it was.
> Q. And you didn't know the feeling of a man's private parts before that day.
> A. No, I had not-- but if I---
> Q. Just a minute. Answer my question.
> A. Yes.
> Q. And you did not see what was inserted into you, did you?
> A. No, I didn't see, but then it couldn't have been his hand.
> Q. I am not asking for conclusions. All you can testify to here is--from your own knowledge--something was inserted into you, is that true?
> A. Yes, it is.

Q. And you cannot testify it was his private parts that was inserted into you.
A. I saw him open up his pants... 89

Dorothy later stated, in the course of demonstrating for the defense how she had stood during the intercourse, that she could not have been penetrated by the defendant's hand because he had held both of his hands behind her back at the time of penetration. The irony of this defense strategy was that it was made possible by the fact that she had not had intercourse with anyone else before, so would not have known from prior experience what intercourse would feel like. As the reader may surmise from this study's earlier discussion of penetration, if Dorothy had had intercourse before, the defense would likely have used that fact to show how promiscuous she was. Either way, the defense had the option of constructing an interpretation of this piece of "evidence" that was to the benefit of the defendant.

What should also be noted in this excerpt is again the ways in which the defense attorney was at liberty to contrive the testimony of the witness, limiting her responses to an assent or denial of facts he selected, always presenting them in a context he controlled. The witness was not allowed to explain her answers--"Just a minute. Answer my question." She was not able to elaborate with details--"All you can testify to is...from your knowledge..something was inserted into you, is that true?" And she could in no way draw conclusions--"I am not asking for conclusions." Allowing the victim to express in her own words what happened would have been the same as giving voice, in effect, to "her perception" of what she had experienced. For her to conclude that she

was penetrated by his penis because she saw him open his pants and because he had held both of his hands behind her during penetration was outside the allowed structure of the testimony.

The prerogative of the defense attorney, not objected to by the prosecution and only rarely interfered with by the judge, was to construct, through conscious design of the courtroom discourse, the boundaries of what constituted evidence. Such a formulation of the evidence was made possible because the controlling perspective of the discourse was, in fact, the defense attorney's and not the victim's. Thus, what was taken by all as the complainant's perception of the event was in reality, for any one present in the court, a perception fashioned by the defense attorney. Playing to anticipated juror perceptions in a manner sanctioned by the prosecutor and the judge, this interactive arrangement endorsed a male-invested view of the sex act and perceived the victim's testimony from such a perspective. In this case, three months after the pretrial examination, the prosecutor asked that the charge against Jack Hutton be nolle prossed. And so it was.

4. Medical Opinion: The Reports of the Doctors

Physicians were relied upon for "expert testimony." They were most often hired by the prosecution to prove penetration or genital injury to the victim or occasionally to prove sexual psychopathy in the defendant. In these capacities, they played a vital role that should not be overlooked in this analysis of what was taken to be evidence in forced sex offense cases. As to proving penetration or injury, their testimony was generally relevant only in cases of child sexual assault

or when victims claimed never to have had intercourse before; they were rarely consulted in cases involving adult victims or underage victims who by their own admission had consented to the intercourse. The only exception to this rule was in cases calling for a diagnosis of venereal disease. As to finding the defendant psychologically deviant, psychiatrists began to be consulted in the late 1930s when there had developed among professionals a belief that some sex crimes were due to criminal sexual psychopathy. Under Michigan's criminal sexual psychopath law, enacted as Act 165 in 1939 (an earlier Act had been passed in 1935 and later held unconstitutional), the Department of Mental Health could place committed individuals into an institution "under the jurisdiction of the Department of Mental Health or the Department of Corrections." 90 A diagnosis of criminal sexual psychopathy led to an indeterminate order of confinement of the accused in a state mental hospital. The discussion that follows attempts to show how expert medical testimony was utilized for two purposes: to prove penetration or to prove criminal sexual psychopathy.

Very significantly, a physician's testimony about the physical condition of the victim was strictly confined, by the rules of courtroom discourse, to the official parameters of medical expertise--doctors could only testify to their medical knowledge of the victim's condition. A Michigan Supreme Court ruling in 1884 (People v. Brown) provides some indication of the limitations that prevailed for acceptable medical evidence. This decision read:

> Though a hypothetical question put to a physician whether, in

> his opinion, the facts assumed would constitute rape, is improper, being a demand for his legal, instead of his medical knowledge, yet, if he gives a correct answer, the error is harmless. 91

Such a ruling helps explain the nature of the testimony given by physicians in the Ingham County cases. Curiously, the appearance of physicians in these pretrial examination transcripts is found as early as 1886 and as late as 1932; after that, their testimony was apparently reserved for the circuit court trials themselves.

The testimony of Dr. O. Marshall seems to have been critical to the conviction of Henry Elliott in 1886 for attempted rape with "great damage" of the eight-year old victim, Kate Wirth. He reported:

> I am a physician...I have examined Kate Wirth since September first...It was the second day after the arrest of the defendant, about six weeks after the offense...
> ...the examination showed that the parts seemed to have been unnaturally strained some time. The child seemed to be unnaturally developed from some cause. I mean her female parts.
> ...I had no means of knowing what caused her abnormal condition except what the child told me. 92

In accordance with the limits of his medical expertise, Dr. Marshall could draw no conclusions about the cause of this girl's "unnatural parts." Dr. Shumway, however, was less reticent to express what he supposed was the cause of the genital abnormality or injury he observed in Fanny Culp. In the 1899 case of statutory rape against Jason Gowen, his examination in the first week following the offense was "to determine if there had been any interference of the parts." He reported:

> A. ...there was a rupture on the sides of the vaginal canal near the entrance showing there had been stretching, an entrance into those parts lacerating the soft tissues.
> Q. How recent was the penetration?

A. ...the canal was tender and sensitive at this time and I attributed that condition to the fact that her period had come that very day.
Q. What was the condition of [the girl's skirt]?
A. It was soiled quite badly in spots.
Q. With blood?
A. As near as I could say with blood, bloody spots. 93

The above information was given under direct questioning by the prosecutor. Then, under cross examination:

Q. Could you tell what caused [the bloody soiling of the garment], whether from a menstrual period or from some other source?
A. I could not tell sir. 94

Very quickly the attention had been turned away from the "laceration" he had observed to the appearance of blood on her person and on her clothing. That Shumway had supposed the blood was due to her period seems to have been within the realm of an acceptable "medical" conclusion; the signs of physical injury, not compatible with the menstrual period theory, seem to have been ignored. It may be recalled from our earlier reference to this case, that a jury found Jason Gowen not guilty.

Dr. Shumway's testimony in the 1901 case against Sam Beach was graphic and indicative of serious genital injury to the victim, six-year old Grace Metz. Excerpts of his statement to the prosecutor show he was quite willing in this instance to offer a "nonmedical" conclusion regarding the evidence:

...my examination showed the labia in an extremely sensitive condition...I found at the lower part of the opening an abrasion showing that an injury had been done to those parts...
...wetting the bed might cause sensitivenees, but not of this character. Neither would it produce abrasions...I am positive this condition came from nothing else except violence. 95

Under cross examination, however, his conclusion was challenged in ways that required him to qualify his earlier certainty:

> ...these conditions might of course be produced by disease, except the laceration...
> ...the laceration was just where the external labia comes together at the bottom...a laceration is a tear of the tissue, an abrasion is a removal of the mucous membrane, the outside layer of the mucous membrane. 96

Defense attorney Davis apparently wanted to establish the possibility that some other cause may have brought about the victim's condition; he also took the route of questioning the exact meaning of this doctor's word usage and the authenticity of his expertise. As the reader may recall, the jury in Ingham County convicted Beach, but the Michigan Supreme Court ordered a new trial, maintaining the verdict could not stand alone on the children's testimony. Assuming the Supreme Court justices had access to the doctor's testimony, it appears they did not regard his "medical" report of observed injuries sufficient to hold a conviction either. Possibly their uncertainty may have been due to the question put to the doctor as to whether Grace's eight-year old brother might have done this to her, rather than the accused. The doctor's reply--that "boys at eight years of age may be developed enough to have an erection"--may have been the compelling "medical" evidence that ultimately threw Sam Beach's guilt in doubt.

This case is an example of how the court's reliance on the "expert" testimony of a physician was carefully construed to permit the possibility of reasonable doubt. It was the sort of practice that occurred in numerous situations involving physician testimony. One may recall that it happened in the 1932 case against Fred King, described in

detail in chapter three, in which the doctor's detailed description of the victim's injuries were subsumed into his diagnosis of gonorrhea, seen as possibly the result of sitting on an infected toilet seat. 97 Even in the incest case against Vern Spinner, who was sent to prison for life for having sex with his daughter "for her own good," the doctor reported that the girl's hymen had been broken by some old injury of the past. It "would be impossible", he stated, "to determine what kind of object would do this." 98 The only physician who did, in fact, offer her "opinion" relative to the victim's sexual experience was a woman. In the 1903 rape case against David Harris, it may be remembered, Dr. L. Anna Ballard determined, "based on my opinion upon the girl as I saw her, and counted her as an innocent girl from what I saw," that the victim had been penetrated, but that "intercourse was not customary with her." Admonishing her to hold her report of the evidence to what was permitted by law, Attorney Nichols not unexpectedly requested that the doctor "confine her testimony solely to what the appearances were, without connection with the presumption of innocence." 99

Curiously, the only case in which a physician was asked for his opinion as to whether the injuries he had observed were due to a rape was in a case of sodomy done to an eleven year-old boy. This was the 1931 case, discussed earlier, against Pat Moran, whose crime was witnessed by a telephone wire service worker from up on a telephone pole. There had been a witness and there was no one acting as defense counsel, two factors that seem to have granted the prosecutor more latitude with the doctor's testimony. One may wonder, however, to what

extent the direct response permitted the doctor in this case was linked to the fact that the victim in this case was a boy, not a girl. Below is the excerpt of his testimony, which reads very much differently from what we have seen in other cases:

> Q. What did you determine from your examination?
> A. Well, the rectum was quite inflamed, and on the sides of the rectum, possibly exending an inch from that, there was an exudation, like scratches and so forth.
> Q. In your opinion, as a doctor, state whether that could or could not have been caused by the act of sodomy, or intercourse.
> A. Yes.
> Q. In your opinion, you would say that was the reason for it?
> A. I would say that was the reason.
> MR. McCULLOUGH:
> I think that is all. 100

Since there was a witness, Pat Moran may have been convicted, regardless of the doctor's testimony. One remarkable thing about this testimony is what is not there--there was no attempt made to qualify or discredit the doctor's observations because there was no defense counsel to cross examine his statement. Further, there was a direct request put to the doctor to say whether, "in [his] opinion", the injury he saw was caused by a sexual act. This is a question that was simply never asked of any doctor in any case of sexual assault upon a female victim.

With one exception, the physical examinations of genitally injured women and girls were conducted by men. How sensitive these doctors were to the pain and additional trauma such examinations could cause is not known; certainly some testified to it--"it was with great difficulty that the little finger was inserted"--but from the courtroom discourse, it appears their ability to empathize was unfortunately somewhat

limited. 101 By the late 1940s, genital examinations of little girls in Detroit were conducted by women physicians, except in emergency cases when a woman physician was unavailable, but this does not seem to have been the practice in Ingham County. 102 And, problematically, the evidence provided by a physician's testimony seems to have been of very little consequence; indeed, the expert evidence a physician could provide was confined to what almost any nonexpert would have been able to observe. In case after case, doctors could only report the appearance of the vaginal tissues, and even as the prosecution counted on these experts' reports to prove signs of injury, the defense used these same experts to diffuse attributions of cause. It was a practice that gave new meaning to the warning that the deadliness of one's weapon could be used by one's opponent in retaliation. The prosecutor expected the expert physician to corroborate the injury, but the defense utilized the physician's expert authority to authenticate his contention that female genital injuries could be caused by something other than the offense complained of. In this way, the defense attorney rendered almost meaningless the evidential worth of reported signs of injury and legitimated any doubts as to the worth the complaint.

As to the use of psychiatrists to examine defendants for criminal sexual psychopathy, we have to turn to the law referred to earlier, passed by the Michigan legislature in 1939. Coming out of an increasing sense that some sexual deviancy was attributable to psychological causes, the Goodrich Act provided that rehabilitative treatment of psychopathic offenders required hospitalization and psychiatric

treatment. An extensive two-year study of the problem of sexual deviancy in the state was commissioned by Governor G. Mennen Williams in 1949. Completed two years later, this study distinguished sexual offenders from sexual psychopaths, stating that "all sex offenders are not sex deviates" and that "only a small percentage of those who are sex deviates ever become sex offenders." 103 Two cases in the Ingham County sample illustrate the call of a prosecutor for a psychiatric examination of the defendant and show what the "evidence" provided by two independent physicians was taken to mean.

In the 1940 case against Virgil Sampson for taking indecent liberties with eight year-old Barbara Johnson, the prosecutor petitioned that the defendant be psychologically evaluated. In keeping with the law, Sampson was examined by two area doctors, whose reports showed he had had a "long police record of misconduct ranging from breaking and entering charges to sexual irregularities with children...

> ...He states that he is very highly oversexed, that he requires frequent satisfaction of his sexual desires even to so much as three or more emissions a day...If the stimulation of observing small children is not sufficient to cause sexual satisfaction then masturbation is practiced...He is feared by neighbors because of his reputation and conduct with children...There is a history of asocial activity and...he is to be classed as a criminal sexual psychopath. 104

The history of repeated sexual misconduct seems to have been the key here, evidenced in his admitted compulsive sex drive, acted upon with children or with himself. The result of the concurring diagnosis and recommendation of the doctors was that Sampson be confined to a state mental hospital for an indeterminate period of time, as was prescribed in the law; a second hearing conducted in response to his

petition two years later, ended with his being recommited to the hospital. He petitioned for habeas corpus ten years after that, from which time there is no further record of him available.

The second example of an expert diagnosis of criminal sexual psychopathy was comprised of two cases--two men who had been involved with each other in a homosexual relationship. In 1945, Elroy Pride and Carl Crosby waived examination on a charge of unnatural carnal copulation and were referred for psychiatric appraisal. Only the two reports on Crosby remain in the file, both of them attesting to his continued sex relations with Pride, who was noted as "his only friend." One report added that members of the family had described Crosby as "an habitual liar...[and]... generally unstable." The other report noted with deliberate imprecision:

> His sexual acts with John Elroy Pride have been of an aggressive nature and classed as the lowest forms of perversion. These acts being practiced regularly on a weekly average over a period of several years. 105

It seems the "aggressive" acts so vaguely referred to were acts of anal intercourse, understood by all "as the lowest form of perversion." That there were no documents referring to Pride having committed these acts on Crosby suggests the latter was deemed the sole offender. As was necessary in all situations calling for such a psychiatric examination, the Crosby and Sampson evaluations concluded with the language required by the law for commitment to a mental hospital. Following the definition of the law provided in 1939, each of these offenders was termed...

> a criminal sexual psychopathic individual who is suffering from a mental disorder and is not insane or feeble-minded, which mental disorder has existed for a period of not less than one year and is coupled with criminal propensities to the commission of sex offenses. 106

Thus, it can be seen from the Ingham County examples what kind of "evidence" meant a defendant was sexually psychopathic (but not insane or feeble-minded), as determined by medical experts hired by the court. Notably, the effort to distinguish psychopathy from insanity and feeble-mindedness was important for what it said about defendant culpability--if he was feeble-minded or insane, presumably he was not rehabilitatively treatable. Sampson's extreme compulsive sexual behavior was a signal of behavior that needed psychological treatment as opposed to discipline or simple removal from society. The determinations regarding the homosexual behavior of Pride and Crosby dramatically illustrate what Posner referred to as the culture-bound nature of opinion about sexual matters--that prohibitions applicable to sex are "social and alterable rather than...inherent and immutable." 107

What happened to Crosby then would not happen today. This is not to say that homosexuality is not now met with condemnation from the dominant culture, but such social judgment as occurs today is clearly of a different description. Confined to a mental hospital from July, 1945 until February, 1951, Crosby was not recommended for parole until the end of that six-year period. Later still, in 1955, a medical report recommended his discharge from parole, stating:

> ...he does know that his acts were wrong and has proven by his conduct that he does have and can exert good control over his

> emotional and sexual urges. He denies any sexual outlet except for occasional nocturnal emissions... He is proud of his good record. 108

Crosby's dubious outcome was better than some others, who reportedly committed suicide when faced with a charge of homosexuality. 109 Considering sociologist James Henslin's discussion of the role peer influence plays in the "promulgation of non-normative sexual structuring," a homosexual's resort to suicide reflects in part the strong social sanctions held against evidence of homosexuality. 110

One interesting note may be added here as an insight into what may be either the nature of sexual psychopathy or the preconceptions that led court agents to recommend psychological assessments. In the 1951 Report of the Governor's Commission, a comparison of the Ionia State Hospital patients and the Jackson Prison inmates, both having committed sex crimes, showed that the "older, less violent offender tend[ed] to be 'Goodriched,' the younger, more violent types to be sent to prison." Further, while both groups were of lower socio-economic status, there was a distinction: while 46 percent of the sex offenders in the prison had been born in the South, only 8.5 percent of the sex offenders in the hospital had "ever made such a move" to the North. In an observation that was consciously critical of the legal system, the commission noted that this data should be interpreted with caution--that socio-economic status, for instance, may be a reflection of the "tenderness of public authorities toward offenders of higher status." 111 Conversely, we may add, such data may also have been a reflection of the disparaging attitudes of court authorities toward southern migrants, in evidence in

other ways in the Ingham County sample, as has already been seen.

All in all, it seems this court was not inclined to link criminal sexual psychopathy with extremely violent offenders, with incest offenders, or with offenders involved in consenting relationships. This meant that every convicted offender, except the very few who conformed to a societal image of what was a psychologically-rooted behavior problem, ie. habitual molestation of children or homosexual intercourse, presumably received no psychological evaluation or rehabilitative counseling. What is further worth noting is the noticeable difference in the degree to which a psychological evaluation of a defendant's state of mind was less questioned by court authorities than was a medical evaluation of a victim's physical injuries. It seems that when medical evidence had the effect of ameliorating the outcome for a defendant, it was more acceptable to the court; when, on the other hand, medical evidence served to threaten the fate of the defendant, it was challenged. Given this, one is apt to conclude that courtroom perceptions of medical testimony were altogether bound by a perspective that was generally sympathetic to the defendant.

5. Setting the Rules: Judges and Precedent

We have seen that the evidence presented in testimony through direct examination under the prosecutor was subjected in cross-examination to a carnival of rhetorical artifice. The defense attorney, aiming to undermine the worth of the charge brought against the defendant, was permitted great latitude, by the rules of courtroom discourse, to manipulate the meaning of any aspect of the testimony. As

we have seen, his strategies skillfully mined the cultural assumptions that could be made to fit a circumstance, often reconfiguring the implications of a witness's story. In attempting to refute the stated worth of a complainant's accusation, the defense set before the prosecutor, judge, and jury the possible alternative meanings of the evidence at hand. It was up to the jury to assess the meanings and then declare the correctness of the charge or deny its value. Often, as we know, the prosecutor chose to forego taking a complaint before a jury, in the expectation that a jury would weigh on the side of denying the value of the charge, given the probable meanings that the defense was likely to attach to any given case. Thus, the "evidence" seems to have been fully available to the conscious manueverings of the defense attorney.

There were limits, however, established by judicial interpretations of the law, beyond which an errant defense attorney was subject to challenge. The function of the judge, (or, in the case of pretrial examinations, the justice of the peace), was in part to arbitrate those limits and to resolve disputes between the prosecution and defense over stretching those limits. In this capacity, the judge served, in specific cases and in a general sense, to draw the outermost boundaries by which the evidence could be defined in the courtroom discourse. Below are presented examples from the Ingham County pre-trial proceedings to illustrate the judge's role in the courtroom discourse.

When the prosecutor objected to the presentation of evidence constructed by the defense, the judge would be called upon to rule on

the objection. This could happen often in pre-trial examinations, of course, and did. An example is the 1909 Claude VanOrsdale case for statutory rape against fourteen-year old Tressa McKeeby. The excerpt opens with prosecutor Foster addressing the justice:

> MR. FOSTER: (prosecuting attorney)
> In your absence your honor the question was asked as to whether she had had intercourse with other men since her intercourse with Claud Van Orsdale. I want to ask to have the answer struck out for the reason that a want of chastity is not proper as impeachment and the girl being below age and this not being a bastardy charge it could have no bearing....
> THE COURT:
> What would you have to say Judge about that? [The defense attorney in this case is also a judge.]
> MR. ROE:
> I think your honor will stike it out.
> THE COURT:
> It will be striken out. 112

Here, there was a gesture of cooperation between the justice and the defense attorney as the justice sought the assent of the defense in striking the chastity questions from the record. It is important to remember this was ten years after the change in the law that made this fourteen-year old witness under the age of consent, and both the justice and the defense knew the prosecutor was within the law in objecting to the raising of the chastity issue. Further, at this point in time, defense strategies did not routinely include the intensely antagonistic questioning, crudely obvious distortions of the facts, or attempts to embarrass the witness that came to be more common practice by the 1920s. In this case, in 1909, the defense attorney assented to the justice's decision that the chastity of the victim was not a proper defense issue.

Sometimes the justice in these examinations interfered with the defense attorney to stop his line of questioning. He was most likely to say it was improper, confusing, or excessively repetitive. For example, in the 1926 case against Lester Cornish for indecent liberties, defense attorney Hubbard was interrupted by the justice of the peace when he framed a question to a ten-year old witness as a double negative:

> Q. Didn't you just say that none of these actions on the part of Mr. Cornish took place inside of the building?
> A. No.
> Q. That that is untrue.
> A. No.
> Q. It is not untrue?
> A. Yes.
> THE COURT: It's awfully hard for a girl. It would be awful hard for you or me to answer that question, to say it was not untrue. 113

The defense rephrased the question in response to the admonition of the justice. In effect, the justice was not only clarifying the question for the witness, but insisting that the evidence be clear for the record, whether the case went to a jury or not.

Out of a similar concern, the justice of the peace intervened in a 1928 case and even took the role of cross-examining the witness when a particularly antagonistic defense attorney had confused the issues for everyone in the court in an attempt to confuse the witness. Having engaged at length in asking repetitive and convoluted questions regarding the ordering of the events in the rape of twelve-year old Catherine Davis by her stepfather, Andrew Gogar, defense attorney Berry objected to the justice's usurping of his function:

> Q. Don't you remember telling Mr. Berry you went out to play and that you read the newspaper--
> MR. BERRY: I object to all this and take exception.

THE COURT: No. I am going to try to find out--
MR. BERRY: I am going to object.
THE COURT: I understand you object to anything I am asking.
MR. BERRY: No; I object to anything that's improper and I think it is improper for the court to function as--
BY THE COURT: [addressing the witness]
Q. You remember reading the paper.
A. Yes.
Q. This didn't occur before you read the paper, did it?
A. No.
MR. BERRY: I object to leading questions.
THE COURT: I understand you object to everything. Let the record show.
MR. BERRY: I don't mean that I don't want the record to show. I want the record to show just what I object to.
THE COURT: I want to ask this girl a few questions and you keep still and you can make your objections-- 114

Apparently at this point, Berry sat down, as the justice continued questioning the witness. This justice's unusually strong reprimand of the defense attorney was taken, it seems, to protect the clarity of the evidence for the record. The defense strategy of confusing the witness was used commonly to throw doubt on her memory of the offense; but in this case, Berry had so confused the witness that even the court was confused as to what had happened. In cases where the defense went too far, the justice had the prerogative of stepping in to insure that the clarity of the evidence was preserved.

One of the most frequent tasks taken by the justice was to settle disputes between defending and prosecuting attorneys. The 1945 case against William Rodgers for the statutory rape of fourteen-year old May Flower Dean was, it appears, a situation of consensual sexual intercourse, May having brought a charge against another defendant concurrently. In the testimony, Charles Haight, the defense attorney, had been asking May about the fact that she had been in the hospital to

give birth since the time of the offense. This baby, he had learned, was not the child of the accused. At the point when he was asking whether she had had any other children and she responded that she had, the prosecutor objected:

> MR. WILSON: I think I will introduce an objection to all the questions along this line, as having nothing to do with the offense charged.
> MR. HAIGHT: We have the right to know.
> MR. WILSON: She could have a thousand children, but this boy had sexual intercourse with her and is still guilty of statutory rape.
> THE COURT: What is your purpose?
> MR. HAIGHT: The purpose is, --it goes to the credibility of the witness and it is for impeachment purposes, purely. We will admit that the statement that Mr. Wilson has just made is right--that if she had been with fourteen hundred ninety-two, every one of the fourteen hundred ninety-two would be guilty, but it goes to the credibility of the witness. It is for impeachment purposes.
> MR. WILSON: The fact that she has had babies--I don't know that that goes to the credibility of the witness.
> THE COURT: Objection overruled. 115

Is there any doubt, after reading this examination transcript, that these agents of the court understood the statutory rape law to mean that consent was not a viable factor for the defense? Here, Mr. Haight had introduced a matter of witness consent that was legally of no consequence to the offense. Nonetheless, he knew that by introducing it as a matter of credibility, he would expose the witness as consenting in the act, making the accused seem less culpable. Instructively, the justice allowed the testimony to stand, not for the purpose of showing her consent, but for disproving her credibility, ie. "for impeachment purposes only." Such was the role of the justice in ruling on the disputed worth, or in this case, the weight, of the evidence.

Sometimes resolving a dispute was made easier by consulting a prior court decision. Justice Paul Younger referred to such a precedent in court in the 1947 statutory rape charge against Robert Emerson, Sr., for the purpose of settling the matter of whether witnesses should be excused from the courtroom during the testimony of the victim. The prosecutor had objected to the request of the defense, believing it was "proper that the parents [of the girl] should be in the courtroom, no matter whether or not they are witnesses." In making the decision that was his alone to make, the justice read:

> THE COURT:
> There is a case, People v. Hall, which indicates that it is the desire of the Supreme Court to have the respondent's rights protected. In view of that case, this Court takes the position that the respondent is justified in making his request as to people who are going to be witnesses and those who are not officers of the Court can be excused.
> MR. McDONALD:
> Including the girl's parents?
> THE COURT:
> Yes. I am sorry to make that ruling but that is the law in this state as I view it. 116

After some discussion as to whether the deputy sheriff should be excused with the parents, and after the prosecutor asked to see the statute, the witnesses were indeed excused. It was a decision that may have been aimed at keeping the victim's statements from being prejudiced by the presence of her parents; or, it may have been for the purpose of protecting the parents' later testimony from being influenced by what they would have heard their daughter say. In any case, by relying on a prior decision, likely to have been made in a higher court, this justice exercised the long-revered tradition in the law of letting an earlier

court ruling be the guide by which the law could be interpreted. In this way, the justice protected himself from breaking with precedent and perpetuated what Posner refers to as the "stability" that judges seek to preserve. 117 With such behavior, the practice of judge-made law was carried out.

The judge alone was the person responsible for instructing the jury as to the proper interpretation of the law by which the accused was charged. Significantly, the sex crime rulings given on appeal in the Michigan Court of Appeals and in the Michigan Supreme Court are replete with decisions on the appropriateness of jury instructions, suggesting a disproportionate number of cases were appealed on the basis of perceived improper instructions. There were 287 higher court sex crime rulings in the State of Michigan from the time of statehood, 1837, to 1968; of those, eighty, or 27.9 percent, were devoted to questions regarding jury instructions. 118 It was a matter of highly sensitive importance in sex crime cases that juries be properly cautioned about what was credible evidence and what testimony could be taken as competent. Thus, when the defense requested that certain instructions be read to the jury, the judge could accept or refuse the request and play the final authority on what the jury was told in regard to interpreting the evidence.

An example is seen in the 1899 case against George Walker, who had been charged with raping a seven-year old girl, Anna Elliott. As was customary, the defense had requested a brief of specially-prepared instructions be read to the jury; among them, the judge refused to read

this charge:

> If you find from the evidence that the assault charged was the offspring or product of mental disease in the defendant, rendering him unable to resist the impulse to do the act, your verdict should be not guilty. 119

Such a decision was made frequently by the judges in the Ingham County sample, as it turns out, almost as often as defense atttorneys requested that special instructions be given. In the example above, the judge may have refused to read this charge because he estimated that the defendant was not at all mentally diseased and to suggest such a possibility to the jury would have contributed to a faulty conclusion. In this way, he was in a position to judge the evidence himself and rule on the legal interpretations by which the jury should be admonished to view the evidence.

If the jury returned a verdict of guilty, it was, as stated earlier, the judge who awarded the sentence. Based on their appraisal of the evidence, judges made their determination of appropriate punishment. Very curiously, from about 1945 on, the cases that ended in probation retained a copy in the file of the judge's conversations with the offenders, in which they explained the conditions to be met during the terms of probation. These conversations are important for the way they illuminate the attitudes that perpetuated the 1940s' propensity for probation sentencing. Specifically, they reveal the very paternalistic role taken by the judges, offering advice as well as chastisement, always taking the position that the offender's crime was a serious one, for which he deserved to be punished very severely but was now getting a break. So it was, in 1948, that the judge addressed Clyde Dale Nichols.

> THE COURT: And incidentally, this offense that you are charged with has a maximum of life. Did you know that? Did you know that it had a maximum penalty of life?
> THE RESPONDENT: Yes, sir.
> THE COURT: Did you know that if you violate your probation, the terms of your probation, that the court could have no alternative then except to sentence you on this offense, not for violation of your probation but for this offense?
> THE RESPONDENT: Yes, sir. 120

It seems almost as if the judge was reminding the court in general, as much as he was reminding the defendant, of the maximum penalty allowable for this offense. By reiterating the seriousness of the offense, he was justifying his lenient response in this particular case, conducting an exercise also in preserving the pretense that this offense was not to be engaged in without risk of severe societal condemnation.

The conditions that respondents were required to meet during the time of their probation were consistently similar. In 1945, William Allen Coffee was sentenced to three years probation with the admonition that he should "attend church services in some church each and every Sunday and...be in his home not later than 11:00 p.m. each and every night during his probation period." 121 In the same vein, in 1947, a judge told George Lawrence:

> Now, Mr. Lawrence, as I say, I can do either one of two things: Send you to Jackson, or give you a break, and we are giving you a chance, hoping that you won't get in any more trouble because if you do, why, the next time there isn't any hope for you. During the term of probation, of course, you are not allowed to leave the State of Michigan. You have got to behave yourself. You cannot go any place where any liquor is sold or do any drinking, either buying it and taking it home or any place. By drinking I mean any alcoholic liquors of any kind, including beer. You are not to asociate with anyone who has any criminal record or anybody of ill repute. Just find somebody else and

behave yourself during this time. 122

Again, here was the reminder to the defendant and to the larger society that this was still a very serious offense, even though a light penalty was being imposed this time. Additionally, there was the warning that any behavior of this kind in the future would be treated much more severely. As to the further conditions of the probation, there was sometimes the requirement to attend church services, sometimes to abide by a curfew or stay in a certain locale (or to leave it), and sometimes to stop drinking any alcoholic beverages. Always there was the warning to avoid associating with girls who could get the probationers into trouble again.

It was with this last condition in mind that, in 1947, the judge told Martin Leseney: "You are not to associate with any young girls; by that I mean any girls under the age of eighteen. You shouldn't with your age, you are forty-three." 123 Similarly, in 1948, the judge told Linton Elwood Stewart:

> As far as girls are concerned, you are not to associate with any girls unless your father knows about it, and their age, and all about them. Furthermore, you are not to have intercourse with any girl. You are to behave yourself. That is part of your probation order. And any girl that you may go out with--I am not saying you can't go with them, but your parents are to know about it before you go. 124

Again reiterating this theme, the judge's words to Gordon Lee Studt were adapted to first the individual case circumstances of this situation:

> THE COURT: ...I am going to give you a break...You got in this trouble, and of course you shouldn't have been in it in the first place. Under the terms of this probation, you have got to behave yourself. You cannot go around doing anything like

> this; you cannot associate with any girls that will get you in this kind of trouble. I understand you still like this girl you were with.
> THE RESPONDENT: Yes, sir.
> THE COURT: If you continue to see her, you are to do it with the supervision of either her parents or yours. In other words, you can't just go out and around yourselves. It might be better, if you haven't any idea of marrying her later on, that you didn't see her. However, if your parents or her's are present, under their supervision, you can see her, but I don't want you to go out anywheres around with her; you are liable to get right back in this kind of trouble. 125

So, again, here was the offer of "a break" and the admonition that this behavior had better not be practiced again. Of further note, the defendant was advised that any future visits with the complainant would be subject to the supervision of his parents or hers, lest she, or any other girl, get him into trouble again. It seems, as usual, there was an attempt to spell out a regimen by which the punishment would fit perceptions of the crime, which in these cases, as we now well know, were historically based in the movement to prevent female adolescent delinquency and eventual prostitution. When the victims were perceived to share culpability with the defendant, the judges reproved offenders with great doses of verbal moral corrective rather than with severe punitive consequences. Of such was the judge's final evaluation of the evidence.

Finally, in a 1948 case, the judge's reprimand suggests that a lenient sentence was being given to Paul Stanfield in spite of his crime, because he had been arrested (and released) only once before, he had been given an Honorable Discharge from the Army, and "the girl in the complaint was also at fault":

> THE COURT: I have gone into the facts of this case and even though it is a statutory rape case, there is no excuse for what you did, but there might be some justification for doing what I am going to do. This girl, although she was under age, I understand her mother was more or less a party to this, she had the fake birth certificate. She has a very bad record for getting people into trouble, and is quite a delinquent child. ...Do you think you can behave yourself if I give you a break?
> THE RESPONDENT: Yes, sir.
> THE COURT: And not get into any more trouble?
> THE RESPONDENT: If I can't, I am going back to the Army. 126

In all of these judges' words, we are reminded of the ritual by which the court accommodated the statutory rape law. The evidence of the crime, as seen by this last judge, was measured in terms that held consensual sexual intercourse as the unlawful given and took the relative delinquency of the complainant as the important dependent variable by which the guilt of the accused could be gauged. As much as these admonitions provide a window to the judge's role in announcing the final measure of the crime, they also demonstrate the important purpose of this judicial rhetoric. Taking pains to assure the court and society that this crime was indeed still reprehensible, this judge at the same time, in awarding a light penalty, suggested he perceived it otherwise.

Finally, it is important to understand how rulings made at the circuit court level were subject to the authority of a state appeals court or the State Supreme Court. As we have seen, higher court rulings held the power to reverse circuit court decisions. Such an action, for example, made Sam Beach a free man in 1901 when the Michigan Supreme Court vacated that Ingham County Circuit Court verdict and called for a new trial. Likewise, in the 1941 verdict finding Henry Patrick guilty of rape upon thirteen-year old Beulah Cousino, the decision of the jury

finding Cousino guilty and Judge Hayden's statement to prison authorities that "the facts even since the trial, convinces me that the verdict of the jury was correct," came to naught when the evidence was reconsidered by the Michigan Supreme Court. The defense attorney's appeal, his ultimate redress against the authority of the lower court judge and jury, was based on numerous objections to--what should not be surprising--errors in the trial court's instructions to the jury. Among the thirteen "grounds for appeal," the defense included:

> Because the trial court erred in his instructions to the jury.
> Because the trial court failed to properly define the elements of the charge against the defendant.
> Because the trial court erred in his instructions to the jury relative to the respective theories of the people and the defense.
> Because the trial court erred in his instructions to the jury relative to the presumption of innocence.
> Because the trial court erred in his definition of reasonable doubt.
> Because the trial court erred in defining the weight of the testimony. 127

Surely, as was noted earlier, there can be no doubt as to the significance of the judge's role in instructing the jury. And if the instructions were perceived by the defense to be prejudicial against the accused, as was so clearly the case here, the judge, who was arbiter of the evidence at one level, was subject to the censure of other arbiters at another level--the justices of the Supreme Court. Such higher court rulings, formed the aggregate, judge-determined interpretation of the law, and as such, constituted the common law grounding for the legal position of the state. It was at this level, finally, that the "proper" interpretation of the evidence, as it was given to the jury, was ultimately protected. Here, the role of the judge as interpreter of the

law in practice acquired its authority to perpetuate its definition of the evidence. To the degree that lower court rulings were consistently influenced by the precedents set by other judges, the perspective of the local judge did not readily stray beyond the structure of the state's highest legal mechanism of contol.

Conclusion

Starting from the premise that all knowledge is a function of culture, and that the perceptions held by any one individual or group are relative to that person or group's perspective, this chapter related a social relations theory of knowledge to critiques of the legal system's traditionally male-dominated perspective of the law and rules of evidence. This work was informed principally by Barbara Shapiro, Martha Minow, Robin West, Deborah Rhode, and Richard Posner, all of whom maintain in one way or another the central thesis--that judgments are relative to perspective, and that the practice of law has been fundamentally flawed by the limited perspective of its own agents. From this conceptual position, it was possible to read excerpts of the Ingham County pre-trial examination transcripts with the purpose of discerning the perspective that defined sex crimes in the courtroom discourse. To thereby study the "parts that actualized the whole" of the legal system, this analysis looked at the roles of the prosecutor, defense attorney, and judge as they defined sex crimes for the jury in interaction with each other and with the victim, known to the court as the complaining witness. The question central to these court agents' definitions of sex

crimes was their evaluation of the evidence. Ultimately, courtroom perceptions of sex crimes revealed the larger cultural "whole that motivated the parts" of the legal infrastructure. 128

We began with the order of the presentation of evidence: the prosecutor would introduce the evidence with direct examination of the witness, to be followed by the defense attorney's cross-examination of whatever testimony she offered. In terms of the amount of transcript material devoted to each, it is important to emphasize that the cross-examinations usually comprised five to ten times the number of transcript pages as those devoted to the direct examination testimony. It was not at all unusual to find five pages of direct testimony followed by fifty pages of cross-examination testimony in any one case. That so much more time was taken by the defense attorney to break down the testimony of the complaining witness provides a structural indication of the dominance held by the defense perspective in controlling the evidence. This did not happen in non-sexual criminal proceedings. In a random sampling of cases for murder and assault to cause bodily harm, the number of pages given to direct examination were only slightly less than the number given to cross examination. 129 In similar findings, Gary LaFree found in the Indianapolis trials that the inordinate amount of time given to questioning the victim, in relation to the time spent questioning the defendant (who was not required to testify anyway), demonstrated the courtroom bias that put the victim on trial instead of the defendant. 130

We saw in this analysis that both the prosecution and the defense

took precautions with the testimony of young children. They utilized tactics to assure the truth of what these young victims reported, the prosecutor aiming to demonstrate the child's trustworthiness and the defense aiming to discredit her competence. With strategies such as asking her if she knew "what happened to people who told lies" and warning her about the "seriousness of the offense," the defense attorney exaggerated the accepted legal understanding that a child's testimony was circumspect. Children, after all, were seen incapable of taking an oath, which rested on the religious concept of making a solemn promise to God to tell the truth. Moreover, given the possible response alternatives to a question on, for instance, victim compliance to the assault, the defense could use manipulative techniques to make her look bad no matter how she answered.

As to the testimony solicited from adult victims, strategies used to magnify the aspects of a victim's resistance and character were again most often practiced by the defense attorney. His reliance on earlier rulings provided him with needed higher court interpretations as to what constituted sufficient resistance or credible character. Operating within the latitude granted him by these precedents, the defense had much freedom to pursue lines of questioning that emphasized the victim's lack of legitimacy on these issues. Here, it was his prerogative--indeed it was his responsibility to the defendant--to discount the victim's descriptions of her resistance and to heighten, as each situation made possible, aspersions on her character. Consistently, cross-examination questions attempted to reduce matters to those

which could be answered with only a yes or no response, or to structure questions that limited responses to only what the defense contrived to be revealed. In this way, as Joan Scott so aptly pointed out, courtroom discourse was reductive, preventing the more complex interpretations that better reflected reality from surfacing. 131 Further, it seems to have been within the acceptable range of defense counsel's control to magnify matters that would deliberately humiliate the victim, all done, of course, under the guise of asking for legitimate clarification of the evidence. For example, such a practice made it possible to ask her to show in court how loudly she had screamed at the time of the offense or to demonstrate for the court how she had stood during the intercourse. And finally, in spite of a victim's extensive account of her resistance, it was nevertheless the expected and accepted defense action to conclude with "the customary motion," that is, to move that the case be dismissed on the grounds that there was "no evidence" of a crime committed.

In regard to the testimony presented by complainants who had been involved in consensual sexual intercourse, one important strategy was to shift the responsibility for the offense from the accused to his accuser. She was, after all, expected to be compliant with the defense and contrite about her sexual misdeeds with the defendant; indeed, she was to be repentant. The methods employed to diffuse the blame directed at the accused included insistently demanding that the victim refute repetitious fabrications, warning her that she might incriminate herself if she testified to the sexual intercourse had with the defendant (brought up under the ruse of her constitutional right for protection

under the Fifth Amendment), and magnifying any inconsistencies in her story (however slight they might be). The result sought by the defense was to engender "reasonable doubts" about her story, such that the jury would be obliged to find the defendant not guilty or the judge would be led to issue a lenient sentence.

The key piece of evidence beyond the usually suspect "testimony of the girl" was the expert testimony of a physician. As we saw, this expert was the only person in a position to tell the court about the physical condition of the victim's genital organs. Yet, he (or she, in one case) could in no way offer any opinion he might have about what sexual trauma may have caused the injuries he witnessed. At the same time, he was always asked to speculate on what other causes might have contributed to her condition, and talk as if all possible causes were equally viable.

The use of physicians (probably psychiatrists) to test certain defendants for criminal sexual psychopathy began in the 1940s under the sanction of laws enacted by the state legislature, first in 1935, and then after the first law had been ruled unconstitutional by the Supreme Court in 1939. Significantly, this law specified that an offender could not be ruled sexually psychopathic if he was insane or feeble-minded for that would mean he was not liable. The function of the medical diagnosis, in this instance, was to send the offender to a state mental hospital for "an indeterminate" period of time for psychiatric rehabilitative treatment. Upon the medical certification of his mental recovery, usually many years later, he was released to the court for

final disposition of his case. At that time, and never before it, the prosecutor would file for a nolle prosequi and the defendant would be discharged.

Foucault's theory that cultural experts hold the power to define the meaning of things within a society may offer an appropriate way to understand the power of legal experts to define the meaning of the law. 132 It would seem that the conjunction of the power of the medical establishment and the power of the legal authorities constituted a coming together of two kinds of experts, who in a confluence of unchallenged authority, claimed to define the medical and legal terms by which the acts of a sex offender were deemed mentally remediable and the genital injuries of a victim were seen as plausibly unrelated to the stated offense.

In presiding over the court preceedings, judges were in a position to be the authorities on order and precedent. They could rule on disputes between the prosecution and the defense, and very importantly, they were the givers of instructions to the jury. Then, when the defendants were convicted, it was within the judge's position to determine what was a fitting sentence, and to personally administer that sentence to the offender, as well as explain it to the prison authorities. These functions characterized the role of the judge, who was mostly silent during the proceedings, and in a position of review over other agents in the court. Ultimately, his level of authority was subject to the authority of the justices of the State Supreme Court, who held the overriding power of the state to interpret the parameters of

the law and evidence.

At the first level then, we have seen courtroom agents, as societal experts, ostensibly working against each other, but in fact, working interactively with each other and with other experts, to define for the culture the official meaning of sex crimes. We recognize at this level the judge's authority to rule on the circuit court proceedings. But at a higher court level, the judge could, with other judges, undo the decision of a circuit court jury, that body of so-called peers who represent society at large. Based on these observations, the authority of the Supreme Court jurist was the most visible measure of the authority of the state, that place where interpretation of the statute was constituted in the accumulated rulings that have commonly been referred to as judge-made law.

In reference to the practice of maintaining a common law system of legal authority, Posner writes that this has been the vehicle by which judges have become legislators. An original law, codified by elected law-makers, is in itself only a "prediction of how state power will be deployed in particular circumstances." As judges rule on how such a law should be interpreted, they may be said, according to this analogy, to re-codify the law. Posner compares the line of precedent established by a series of rulings to a "chain novel": similar to the function of a previous chapter in a book, each high court decision does not predict the next case outcome, but constrains it. In this way, common law decisions serve to "modify" the view presented by previous interpretations. 133

It is this reliance on precedent that has become in large part the target of legal critics. Minow charges that judges like to maintain continuity with the past to promote social stability, at the expense of needed re-examination of legal interpretations. 134 Posner himself writes that judges like stability, so are reluctant to re-examine the rules. 135 Rhode's criticism is aimed at the legal structure that has historically been unselfconsciously male-dominated, a status maintained by all-male assemblies, who wrote the laws, and an all-male judiciary, who long continued an unfailing adherence to the interpretations of past male judges. 136

While Posner's characterization of the common law function is accurate, it seems to me that it is more benign than either Minow or Rhode would be willing to allow. The real difficulty with the system, as it is has been sustained for so long, has had to do with the unreflective nature of its perspective. Minow observes that those who are in positions of power are less able to see that their own perspectives coincide with those of the dominant structure. 137 They are not able to see the perspectives of others, or even to acknowledge that other perspectives exist.

Rhode extends this criticism to cases of sexual assault, charging that the perspectives taken by legal agents bear little resemblance to those of the victims. 138 In company with feminist critics who (Minow says) argue that the definition of rape is taken from a male perspective, Rhode asserts that rape is defined by male views of sexuality. For example, she reasons that the male-defined prohibitions

on force in rape law function to protect men, not women. Male fears about female fabrications have resulted in a kind of "schozophrenia": while rape is seen as the "archetypal anti-social crime," it goes unpunished, or punished very lightly. Further, the myth that women mean "yes" when they say "no" is grounded, says Rhode, in male sex fantasies, not women's realities. 139

In a thoughtfully presented study of the accounts of adult survivors of incest, Carol Poston and Karen Lison document what others have told them of their child sexual abuse and the coping mechanisms they learned to employ as children and as adults who could never forget. Here are found the accounts that received no hearing in court--the stories that describe what incest was like from the child-victim's perspective. The following story provides an idea of what was not heard in the Ingham County courtroom:

> My father came and put his hand under the covers and did things to me. He whispered to me that it was our secret, wasn't it, that I liked it, didn't I. He wanted, he said, to "play" with me. It didn't feel like play...It hurt. His hands were big, gnarled with years of work, but also just plain big, for he was a big man. And he put fingers in and around and forced his way between my legs no matter how much I closed my eyes and held my legs together or prayed to Mary and to God and to Saint Jude, saint of the impossible, to make him go away. I clenched my teeth tightly and closed my eyes...I thought I might throw up on him, which would make him angry... He came across the room every night for years, and sometimes before he turned out the light he stood across the room rubbing his terrifying huge thing that looked red and ugly and fat. Nightmares began. 140

The authors of this text note that to survive, children in incestuous homes "had to be resourceful" and develop numerous strategies to avoid being accessible to their fathers. Many times, however, these strategies were futile. These authors add, "An abusive adult is

merciless; he has everything on his side: power, authority, physical strength, even credibility (for who believes a child?). ...the child has to have wit and courage to invent ways to survive against tremendous odds." 141 Into adulthood, survivors of incest find they have developed a lot of psychological and physical strategies for coping with the fear, distrust, and shame they have carried with them from childhood. They commonly experience forms of dissociation, selective amnesia, post-traumatic stress disorder, multiple-personality disorder, or recurring depression. They try the physical escapes of entering a convent, committing suicide, becoming alcohol or drug addicted, or avoiding intimacy. 142 These aspects of the incest experience are the long-range effects that also do not enter into the courtroom consideration of female child sexual abuse.

By virtue of what was told and what was left out, the male-constrained courtroom revelations of female child sexual abuse were far removed from the female-experienced personal perceptions of that abuse. That children would often black out from the pain during intercourse may explain why occasionally young girls in court could not remember feeling the pain of the offense. Poston and Lison write of a victim named Cheryl:

> Her uncle babysat her during the day, and began raping her from about age five onward. Cheryl survived by inducing a catatonic state watching the television set that was always on as her uncle abused her. Even now, she remembers the cartoons better than she does the pain or details of the abuse, physical abuse so severe that gynecologists who have treated her doubt that she can ever have children, so traumatized were her reproductive organs. 143

That there was usually virtually no escape explains why the abuse could continue so long unreported, a circumstance that was officially excused when a 1930 Michigan Supreme Court case left three precedents:

> Rape victim's delay in making complaint is excusable so far as caused by fear or other equally effective circumstance.
> Details of complaint made by seven year old indecent assault victim three hours thereafter was admissable.
> Father's admonition to tender-aged child not to tell of indecent assault upon her was held to excuse three-hour delay in making complaint. 144

Barbara's case is one of the most physically severe reported by Poston and Lison. She had not consciously reflected on her experience until she went into therapy as an adult multiple personality.

> When I was a small child he would come in and play with me as if I was a doll, and he would stick his middle finger into my rectum and his index finger into my vagina and hold me up over his head as if I were a puppet or a doll or something...I have a memory of his changing my diapers, fondling my clitoris and sticking his finger into my vagina and it hurt....
> He would be this sexually active pervert and then he would come back and he was a prude. [After the diaper-changing incident] he came back and it had hurt so I had placed my hand down there to comfort myself and he said that I was a filthy slut and God would punish me for touching myself down there.... 145

The authors report that, as Barbara grew up, she felt she was rotten inside and the only way "to get herself clean was to cut herself open and scrape her insides out." She was able to reflect in therapy, "I felt like a garbage dump inside." 146

These stories are told not to add more horror to what we have already seen; they are told to illustrate the side of female child sexual abuse that was not voiced in court. The courtroom revelations of physical pain were seen only as some kind of measurable evidence; the humiliation of the experience was exacerbated by further humiliation on

the stand; the enduring anatomical trauma that was the principle visible effect of such victimization was objectively characterized as evidence that intercourse would now not be painful; and the long-term psychological disturbances were never openly considered at all. A greater awareness of these realities allows one to see in the skepticism of the court no real cognizance of what this experience was like for the victims. When one thinks about defense attorneys being so obsessed with whether young girls knew "the seriousness" of the offense, it seems that these girls might more rightly have asked that question of their interrogators, for they were the ones who seemed not to know.

Diana Russell's interviews of rape victims have become over the years an often-quoted source of what the experience of rape meant to those who endured it. 147 Over and over again, the comments of these survivors reflected that the experience had changed their perceptions of rape. Before, they had accepted the cultural notion that a woman who did not want to be raped would be able to prevent it from happening. As women, they had not consciously questioned the prevailing male-defined cultural view. Afterwards, they each in their own way reiterated the feelings of having been degraded, humiliated, and frightened beyond description during the attack. Further, they expressed anger with not only their rapist, but with the members of the law enforcement system who subjected them to hyper-critical scrutiny as they sought to obtain legal redress. From the examples of incest, told above, to the example of a young college student, told below, we move from victims whose sexual assault experiences were the most likely to be defined as

legitimate to one whose experience was least likely to be perceived that way.

Russell tells the story of Joanne Kelly, who was picked up by a young man while hitch-hiking to her college from a nearby small town. Taking her on an unfamiliar route, he suddenly pointed a gun at her and whispered, "Do what I want and you'll be all right." She spent a lot of time telling him she was afraid of him, to which he could only reply that he did not understand why. Finally stopping on a old logging road, he started kissing her and touching her. She found herself saying any nice thing she could think of to keep him from doing what she feared--blowing her apart with the gun. Dutifully, she took down her pants and pulled out her tampon, throwing it out the window. When it was over and she noticed he was feeling bad because he had not ejaculated, she talked to him in a gentle tone to soothe him but also to tell him he ought not do that again to anyone else. He took her back to the college then, and immediately after leaving him, she cried in relief. Then she phoned the police.

The policeman who came out to see her made a mistake in telling her she would not have to be examined. He took all the information and then left. When she called the station back two days later, she was then informed she should have been examined. The sheriff had to come out to get her and bring her back to the station for further questioning and a lie detector test. She recounted later that two things had been the most upsetting during the whole experience: (1) when the rapist pulled the gun on her and (2) when the sheriff sarcastically said to her:

> I know how serious this is, little lady. This is as serious as if I forced you with a gun into my car, and I took you out in the woods, and I forced you to have sexual intercourse with me. That's how serious this is. 148

She recalled he had asked her to describe the rape in great detail, acting as though he would "take pleasure in exposing me." She stated

> But I wasn't shy, and it wasn't exposing me, so I don't think he got off on it as much as he could have. I said, "The man put his hand on my breast," and he said, "Now, was this over the sweater and the bra, or between the sweater and the bra, or under the bra next to the skin?" And I said, "Oh, well, I don't wear a bra." And he said, "Oh!" and this just blew his mind for a minute, and then he forgot that he wanted to have me describe it in detail, and he didn't ask me to again. So evidently it wasn't of importance. 149

Joanne's interviewer asked her, "Do you regret in any way the way you handled the situation?" She responded,

> Yes, I do. I regret it because I had to kiss so much ass. But I would be willing to kiss that much ass again in the same situation. I resent being a simpering little flower waiting to be plucked, allowing a man to do whatever he wants to me. Yet I would handle it in the same way again, because I would be terrified again... 150

Then, in answer to the question, "Can you think of any solutions to the rape problem?", Joanne replied, "Having all women learn how to defend themselves physically. And then, of course, having people brought up in a different way, so that rape is not a normal thing in society...

> A guy...said to me one time, "...you're so beautiful I might have to rape you." He was only kidding, but the idea that somebody would even think like that is incredible. It's like saying, "Your flesh looks so taut and fresh that I might have to stick a knife into it." That's what it sounds like to me, now that I've been raped... 151

Finally, her interviewer asked, "What is your reaction to people who think that rape is usually provoked?" Joanne's response is symbolic

of what this study reveals about perception:

> I think that people who make that statement not only are prejudiced against women, but have no conception of how horrible rape is. That's like saying, "You were trying to attract that murderer. 152

The Ingham County pre-trial examination transcripts reveal that sex crimes were perceived from the perspectives of the agents who interpreted and implemented the law in court. There was little evidence in the case files collected from the years 1850 to 1950 to indicate any courtroom cognizance of the terror, shame, humiliation, and anger that were all part of being a victim of sexual assault. Further, there seems to have been no understanding of how traumatic the trial process itself was to those few who managed to get a sheriff to believe their story and press charges. Rather, the court's disregard for a complainant's account of fear and resistance was sometimes akin to outright contempt for her descriptions of what that experience had been like. In court, victims were subjected to further humiliation and shame as part of a state-sanctioned attempt to prove they had resisted "to the utmost," the stipulation in the law that put a victim at grave risk to her personal well-being before it allowed her to dishonor herself by giving in. This was again what Rhode calls "a kind of death-before-dishonor philosophy." 153

Thus, if everything said in court, if the structure of that discourse, can be seen to reflect a perspective from which perceptions of the evidence were manifest, then we begin to recognize the importance of Minow's recommendation that "the process of judgment should be the

process of taking the perspective of another." 154 We would do well to think again on Glaspell's story of Minnie Foster and of how the men's perceptions of what happened were so far removed from what the women understood right away. Kolodny's assessment of the men's complete misreading of the circumstances, as they looked in all the wrong places and sought out all the inappropriate signs, seems applicable to the sex-linked misperceptions we have seen displayed in the courtroom here: "the men could not comprehend the meanings of the women closest to them." 155

In this same way, we might want to think about Richard Posner, whose insightful work on sexuality and the problems of jurisprudence sheds needed light on a very dark corner indeed--but whose thoughts about the female perspective are nonetheless male-infused. Posner refers to Catharine MacKinnon as the leader in feminist law on sex and quotes her as saying that "to be about to be raped is to be gender female in the process of going about life as usual." 156 He reflects, somewhat magnanimously for a man, that "in the mountains of hyperbole" generated by radical feminists, there are "nuggets of truth." 157 With experience being at the root of perception, it is understood that probably most men (and many women) would not readily recognize or acknowledge the "nugget of truth" in MacKinnon's statement. It is to Posner's credit that he does. Nevertheless, it may be that male-driven cultural conceptions of sexuality and autonomy account for why anyone--male or female--would characterize MacKinnon's insight as hyperbolic.

It is only because of the assumed male perspective, so clearly holding sway over the courtroom discourse in these sexual assault proceedings, that the female experience of sexual assault was fully lost. Sadly, it was even lost to the victims themselves, whose consciousness of these events seems to have been subsumed into the prevailing consensus by which male norms defined the female role in sexual assault. This is the point, then, that returns this discussion to the place where it began. The jurors' perceptions of the evidence, played to by the competing perceptions of the prosecution and defense, emerge ultimately as both product and process of a ritual that interactively reproduced the larger underlying cultural definition of women and sexuality. These were perceptions that, finally, had little or nothing to do with the female sexual assault victim's experience.

VI. CONCLUSION: HISTORICAL PERSPECTIVES ON SEX CRIME PROSECUTIONS TODAY

> When the results of adjudication turn on "whose meaning wins" and we experience representation as a fiction through which a source of culture becomes exogenous and inauthentic, I believe we need to get clear of superordinate representation for there to be meaning and multidimensional reality that will leave our heads intact. Sarah Slavin 1

Introduction: Review of the Findings

The conclusions to be drawn from the three approaches of inquiry in this study are distinct but related. The quantitative findings regarding the patterns in charging, convicting, and sentencing; the historiographical factors informing the prevailing social assumptions that conditioned interpretations of sex crime behaviors; and the theoretical analysis yielding insights into the court's definitions of evidence--all contribute to a contextualized retrospective view of this court's evolving response to sex crimes. One might conclude that this view is limited to the particular court under study, but one might more plausibly see it as representative of the legal response to sex crimes more generally, at least in midwestern American communities of this size and composition.

First, if there is one thing to remember about the activities of the Ingham County Circuit Court over this one-hundred year period, it is that on only forty occasions was the complaint of an adult woman

accepted and a warrant issued for the arrest of the accused. Of those forty complaints, only twenty are known to have been prosecuted, and of those, only fifteen reached conviction. To know that only fifteen men were convicted of raping an adult woman over a one-hundred year period in a county whose population was nearly 40,000 in 1900 and over 130,000 by 1940 is to understand how strong was the disinclination of the court to charge and prosecute men who were accused by adult women of rape. 2 From the perspective of adult women, then, the experience of being raped was not likely to be taken seriously if reported. By contrast, we know that on 326 occasions, the justices of the peace collectively issued warrants for the rape of girls under the age of consent, and that in over one-third of those cases the victim had consented to what was in fact voluntary sexual intercourse. Of the total 326 cases of statutory rape, we know that 242 were prosecuted, and of those, 226 led to conviction. Thus we see how strong was the inclination of the court to process cases involving child and adolescent victims.

Furthermore, the distribution of cases over time shows an inordinate increase in the number of statutory rape charges, especially those involving consenting adolescent girls, heard by the court in the 1920s. This great increase is also reflected in a doubling of the percentage of cases of this type relative to the population, suggesting that the court was acting out a dramatically heightened concern for controlling the sexual activities of underage girls at this time. The emphasis in this post-war decade may be said to have been more on enforcing sexual abstinence rather than on protecting women and girls from violent sexual

attack.

In cases of attempted rape, we saw additional evidence of the court's greater sympathy for victims under the age of consent. In this category that included victims of all ages, there were far more cases involving child and adolescent victims than adult victims, suggesting there was a greater willingness to prosecute; moreover, there was a higher conviction rate for cases involving victims under the age of consent than with cases involving victims over it. Further, the court's greater sympathy for children was also evidenced in its willingness to process over 100 complaints for indecent liberties, with prosecutors taking seventy-eight of those cases to trial and getting sixty-eight convictions. In summary, these numbers alone are preliminary evidence of the court's great preoccupation with cases involving child and adolescent victims and its very limited attention to the complaints of adult victims.

We also saw that the proportion of forced sex crimes increased relative to the population at a rate greater than did the proportion of other crimes of bodily injury relative to the population. Yet, apart from the disparity in these numbers, the conviction rates for forced sex-crime cases and non-sex-crime cases of bodily injury were comparable in a range of roughly 65.0 to 70.0 percent from 1900 to 1940, with conviction rates for both groups jumping to 80.0 percent or more in the 1940s.

Finally, we found that sentencing was dependent on a number of variables relative to each of the charges, the circumstances of the

charge, and the individuals involved in each case. Generally speaking however, the severity of sentencing increased as perceptions of the victim's conformity with societal norms increased and the defendant's conformity with such norms decreased. Further, sentence severity decreased as perceptions of the victim's resistance decreased. This pattern is especially apparent in the uneven response of the court to cases of statutory rape. Additionally, the relationship between sentence severity and conviction rates is shown to be of an inverse nature: as sentence severity decreased dramatically in the 1940s (evidenced particularly in the very high number of probationary sentences), conviction rates jumped to 80.0 percent for all cases except forcible rape. This is a pattern that confirms what others have observed, so this outcome is not particularly surprising. 3 It is a pattern that is true for other crimes too, but its significance in regard to cases of forcible rape should not be underestimated. We have seen that when sentences for rape were very harsh, in keeping with an ideology that rape was indeed an egregious crime against an imagined virtuous, indeed virginal, woman, prosecutions and convictions were few and far between. Indeed the average for forcible rape convictions from 1850 to 1940 was less than one every ten years! Then, in the 1940s, when sentences ranged from probation to five years imprisonment, there were an unprecedented eight convictions in one ten-year period.

All this would seem to say something about the relationship of rape ideology to the reality of sexual assault. There were, for all practical purposes, no women who fit the ideology of the pure and chaste

ideal and few men whose behavior matched the ideologically-drawn vision of the heinous man violating an innocent woman. The constraints this ideology imposed is fundamental to understanding why the typical defense of an accused offender showed how the supposedly violated woman did not conform with the standard of a pure woman set up by the prevailing rape ideology. Perhaps, as the reality of women's lives changed, the ideology adjusted, and punishments for rape eased away from the severity of earlier decades.

Moving beyond the implications of the numbers, this study borrowed from LaFree's use of labeling theory to demonstrate how the meanings of sexual assault are socially constructed. With this theoretical formulation in mind, this study then showed how the Ingham County Court responded to the given circumstances of each case on the basis of social "typifications." In other words, sex crimes were adjudicated on the basis of assumptions about behavior patterns that were at best only indirectly related to the legal definition of the crime.

We saw that before 1897 (the year the age of consent was raised to sixteen years), the forcible rape cases tried in this court involved intra-familial parties almost exclusively. Thus, with regard to adjudicating sex crimes committed against women and girls over the age of consent, the legal system directed its censure primarily at those offenders who crossed intra-familial boundaries; the few exceptions were cases that had resulted in pregnancy.

The impetus to both raise the age of consent for rape and institute a law against indecent liberties in 1887 was related to the "social

purity" movement's campaign to eradicate prostitution. This campaign sought to condemn men who engaged young girls in early adolescent sexual activity. While such activity was believed to be a prelude to leading unwitting young girls to prostitution, an eventuality that was socially ruinous in itself, the mid-1890s' discovery of the lethal effects of venereal disease made this behavior seem all the more egregious and was the force that gave the court societal support for prosecuting young men who had sex with girls under the age of consent. Even so, it was clear that the court approached the law's injunction to censure such behavior with little enthusiasm. Convictions for statutory rape involving consenting and acquaintance victims usually resulted in the lowest average minimum sentences of any sex-crime charge; further, the indecent liberties law was used only as a lesser charge upon which to secure a conviction if one could not be had on a more serious offense.

After 1897, the court began to consider forcible rape charges brought against accused non-familial offenders. Thus, it was broadening its definition of legitimate violators of the socially-inscribed boundaries of sexual behavior. In spite of this gradual change, however, the court continued to give, as we have seen, only limited attention to sex crimes involving adult women victims. This pattern was made all the more apparent in the 1920s, when there were several indicators at that time of the court's heightened preoccupation with cases involving victims under the age of consent. First, this decade witnessed a virtual explosion in the number of statutory rape cases, three times what it had been in the previous decade and twice the

proportion of sex-crime cases in relation to the population as compared to the percentage in the previous decade. Further, as to cases of attempted rape heard in this decade, those with victims under sixteen years had a 64.3 percent conviction rate, and those with victims over sixteen years had only a 20.0 percent conviction rate. Finally, the 1925 action of the legislature to raise the age of protection under the indecent liberties law from fourteen to sixteen years was yet another sign of increased concern at this time with using this law to control sexual behavior among adolescent girls and among the young men with whom they might become involved.

The 1930s' precipitous drop in consenting statutory rape cases suggests that there was noticeably less concern with using this law to control promiscuity at this time. In fact, the more severe sentencing that seems to have prevailed at this time--especially in acquaintance cases in which consent was more equivocal than not--indicates the legal system's fundamental change in attitude from its position of the previous decade. There was now an apparent greater willingness to punish acquaintance offenders of adolescent victims with more severe sentences and less willingness to spend time and energy on cases involving consenting young girls, where the emphasis was simply on controlling promiscuity.

Finally, with the 1940s' dramatically increased use of probation as a punitive and rehabilitative response to sex crimes, and its accompanying increase in conviction rate (from approximately 65.0 percent to 80.0 percent), the court developed a new form of sympathy for

the defendants during this time. That the energy of the country was directed at fighting the war, and the community was concerned with the welfare of its young men, may explain such sympathy in part. But again, the roles of women had dramatically changed over the period of World War I, the 1920s, and the Depression. The gradual realization of this reality brought the court to a changed perspective by the 1940s--manifested in more convictions but less severe punishments for sex-crime offenders.

Moving to the findings that were generally unrelated to features of time, we saw that victims of forcible rape were more readily believed if the defendant had some deviant personality trait; stranger offenders were convicted at a higher rate than acquaintance offenders and suffered more severe sentences because there was usually a third-party witness who made the apprehension of the attacker possible.

The implementation of statutory rape law remained subject to a rationale rooted in forcible rape law, as much more severe punishments were awarded in cases where there was clearly an absence of the woman's consent. Further, the reformers' idea that the law should be used to prevent young males from having intercourse with underage adolescent females in order to protect them from being led into prostitution was only nominally supported. Though there were many cases that were based on such a premise, the intent to protect these girls became instead a pretext for punishing them as delinquents.

As for child witnesses, the testimony of young children was not likely to be trusted throughout the sample regardless of the charge,

unless there was unquestioned support from the mother or stepmother in cases of incest. Often, the child or adolescent victim of incest was perceived to be using the charge against her father in retaliation for the parental restrictions he may have placed on her in the past. Significantly, only fathers who came from a low socio-economic group were brought before the court; they were usually alcoholic, improvident, and authoritarian. It should be understood that such fathers only represented those against whom complaints were filed or those against whom the court chose to press charges. The court's difficulty in believing reports of incest abuse was seen in this study to be related to traditional reverence for paternal authority, upheld in part by long-time patriarchal religious sanctions. When convinced that incest had indeed occurred, however, the court's response was to impose more severe sentencing than for any other sexual offense except the rape of a child by a stranger (when observed by a witness). Indecent liberties, the sex crime that was perceived to be less severe than any of the others and was thereby punished with greater leniency, was never accorded the legal seriousness it deserved in its own right. While it was met with slight actual punishment, however, it ironically met with the some of the strongest expressions of social opprobrium. In this way, it seems the court saw indecent liberties as morally corrupting, but more benign than rape, though in fact there were cases of indecent liberties that resulted in severe physical harm to the victim.

Finally, on the premise that definitions under the law are tied to perception, this study shows that what was taken by the court as

absolute in the definition and implementation of rape law was in reality tied to limited perceptions of the experience of rape. By identifying the ways in which the discourse in the court was structured to define the evidence for the jury, this analysis revealed that a male-derived perspective served as the basis for the court's definition of rape and its perception of rape complaints. To elaborate, the evidence in sex crime cases primarily consisted of the testimony of the victims--a child, an adolescent, or a woman--and the testimony of others such as third-party witnesses and medical experts. We saw how defense attorneys constructed the facts as presented in testimony to the jury in a way that favored the defendant. We saw, too, that juries were persuaded to accept these representations as the plausible explanation of the circumstances in a case. Evidence became, specifically, what it had to be to benefit the perspective of the defendant--which, in effect, meant it reflected the perspective of a man's experience. Thus, the norms used to legally examine complaints of rape were male middle-class norms rooted in male experience, not female norms rooted in female experience.

I. The Contours of Sexual Censure: Race, Class, and Gender

To notice absence is to take the measure of something by that which is missing. Permeating the gender dimensions so obvious in this data, there are, to be sure, noticeable race and class dimensions that raise questions as to other levels of social control. Except for a very few cases, the Ingham County sample clearly demonstrates the absence of

white, educated, well-to-do men as defendants. They are simply not represented. Further, there are very few black women complainants. It is not accurate to say that they are missing, but their few numbers are indeed noticeable. Furthermore, while there are a few instances of white complainants bringing charges against black defendants, there are no cases of black complainants bringing charges against white defendants. Given these observations, the questions may be posed: why were there no cases of black women complaining of being raped by white men, and why were there so few defendants of high social status and more substantial financial means? Finally, how is it that black defendants were so disproportionately represented in the 1940s when there was for the first time a black population of any real substance in this area? And how may we regard the conviction rate and sentencing of the black defendants who came before this court?

First, it is useful to look at what others have observed about the treatment of black defendants by the criminal justice system. Martha Minow, for instance, cites the evidence presented to the Supreme Court proving racial discrimination in the state courts of Georgia. A statistical study of over 2000 murder cases in Georgia during the 1970s showed that:

> a defendant's likelihood of receiving the death sentence correlated with the victim's race: black defendants convicted of killing white victims had the greatest likelihood of receiving the death penalty, and defendants of either race who killed black victims had considerably less chance of being sentenced to death. 4

From this data, Justice William Brennan concluded that

> enhanced willingness to impose the death sentence on black

> defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons. 5

In assessing more contemporary aspects of rape and race, Deborah Rhode comments:

> Rapes of black women by white men were often discreetly overlooked, while black men accused of raping white women ran the risk of show trials, disproportionate sanctions, and lynch mobs....Between 1945 and 1965, a death sentence was eighteen times more likely for convicted black rapists with white victims than for any other racial combination. 6

Perhaps of greater significance to this aspect of the Ingham County study, Gary LaFree also reveals the important disparity in the treatment of black defendants by the criminal justice system. Moving beyond labeling theory to conflict theory in his examination of the social construction of sexual assault, LaFree explains, "The most fundamental characteristic of conflict theory is perhaps its insistence that individuals or groups with greater social power are better able to create and enforce the criminal law for their own benefit." 7 To approach criminology from a conflict perspective is to assume that:

> people generally pursue their own self-interests, defined in large part by their subgroup memberships (especially, economic class, race, ethnicity, sex, age). Because resources are scarce and their distribution unequal, the self-interests of various groups will necessarily conflict. Dominant groups use power and violence in these conflicts to maintain their superior positions. Law is simply one of the mechanisms used by the powerful to promote their own interests...Conflict theorists argue that powerless groups are overrepresented in the legal system because laws are written and enforced to protect the interests of the powerful. 8

In support of conflict theory's premise, LaFree's assessment of the effect of race composition on the rape trials in his Indianapolis study showed that:

> black men accused of assaulting black women accounted for 45 percent of all reported rapes, but for only 26 percent of all men sentenced to the state penitentiary and for only 17 percent of all men who received sentences of six or more years. By contrast, black men accused of assaulting white women accounted for 23 percent of all reported rapes, but for 45 percent of all men sent to the state penitentiary and for 50 percent of all men who received sentences of six or more years. 9

Furthermore, LaFree found that eight of nine outcomes indicated that black/white interracial assaults are likely to end with "more serious sanctions for offenders." And, "seven of nine outcomes indicated that black intra-racial assaults were likely to result in less serious sanctions." Thus, in LaFree's study, black men who raped white women received the most severe penalties; black men who raped black women received the least severe penalties. 10

The racist attitudes that openly held black men guilty of lusting after white women while tacitly holding white men blameless for their open sexual exploitation of black women go back a long time, as Jacqueline Dowd Hall and others have pointed out. 11 Can we then assume that there are no complaints of black women being raped by white men in Ingham County because of the long social tradition that simply preempted such complaints from being made or held them invalid if they were made? It would be easy to take such a view with the data we have surveyed, but certainly a closer look is in order.

As was seen earlier in this study [See Tables 17 and 18], the number of known black defendants was very small in the sample, but the rate of black defendants to the black population quickly exceeded the rate of all defendants to the general population in the 1940s, when

for the first time, there was a black population of any measureable proportion. Further, the conviction rate for black defendants was 87.5 percent, which was noticeably higher than the conviction rate of 80.0 percent for defendants generally in the 1940s. Finally, sentencing patterns for black defendants show that the average minimum sentence for convicted black defendants in the 1940s, all of whom were charged with either assault with intent to rape or statutory rape, was 4.78 years, an average minimum sentence that was considerably higher than the average minimum sentence of 2.99 years for all offenders convicted of those two charges in that same decade. It will be remembered that this was the period in which probations served as the most frequent punitive response.

An idea of the attitude motivating a judge to award a very severe sentence to a black defendant convicted of statutory rape on a white twelve-year old girl is provided in the 1941 case against Willie Everett. Here, Judge Hayden wrote to prison authorities:

> The subject is apparently not of great mentality, although in some respects he appears above normal, but is very emotional and criticized himself severely when I interviewed him for his conduct toward this girl. He attempted to place the enticement at her door, but admitted frankly to me that he, partly at least, consummated the act and commented at length, religiously and otherwise, upon how low a man must be to do this sort of thing. The girl is of low mentality and doesn't appear to know any too much about what went on, or at least to tell about it. I am satisfied that Everett committed the offense, in so far as the statute contemplates, and while perhaps some might feel that a more severe sentence, in view of the racial situation, should be given, nevertheless I believe that, taking all the circumstances into consideration, this is about right. 12

It is this judge's comment--"in view of the racial situation"--that suggests that this was an interracial rape. The punishment that he

seemed to feel was "about right" was in fact quite harsh compared to the sentences that were customary for statutory rape at this time: Everett was sentenced to a prison term of ten to fifteen years. The weight of this outcome is difficult to assess because the defendant waived the pre-trial examination and so there was no transcript by which we may know the details of the situation. On the face of it, however, if we are to accept the perceptions of the judge, "others"--presumably other judges and members of the community at large--would have thought a more severe sentence was in order for a "racial situation" such as this, when the defendant was black and the victim was white. Such a conclusion is corroborated by the 1943 case against Henry Hudson, a black man who received a 10-year minimum sentence for breaking into the home of a white woman and raping her. The judge wrote that this was "a very reasonable sentence" since police noticed this man fit the description of the suspect in another recent rape of a seven-year old girl. 13 Viewing the attitude evidenced in these two cases, one might expect that all situations involving black defendants and white victims ended in convictions and harsh penalties. But this was not always true. The patterns that emerge reveal a kind of discrimination that was more subtle than that.

Of the twelve black defendants, four of those convicted received severe prison sentences. Two of these situations are known to have involved white victims, one a Syrian victim and one with no record of the victim's race. Of the four black defendants who received light prison sentences, one victim was black, one was white, and two were not

race-identified. With the defendant who was put on probation, the victim was Syrian; in this case, the defendant and the victim married, which served to get him released from probation and get her released from a detention home for delinquent girls. One defendant was sent to a mental hospital where he remained for over fourteen years; the race of his victim was not recorded. The defendant who was found not guilty had been accused by a white victim who withdrew her charge on the witness stand. And the case that was nolle prossed, as one may recall, involved the 1903 conviction of David Harris which was set aside because the defense attorney secured a call for a retrial; the prosecutor was then forced to request a nolle prosequi because the white victim, Carmen Rifner, refused to endure the trial proceeding again. The following examples detail the circumstances that may have affected the outcomes for these defendants. They also reveal, when one examines the outcome patterns in relationship to the race of the victims, the court's attitude toward black complainants. [See Table 18. Sentencing of Convicted Non-White Defendants]

In the 1944 case against black defendant John Henry Doan, he reportedly slapped his white victim, fourteen-year old Nora Rose Evans, and told her he wanted her to perform fellatio on him; he claimed she wanted to go with him to get married, but the prosecutor argued that since she was under sixteen, her consent was not an issue in the case. Doan was sentenced to a term of only two to five years at Jackson Prison, a light sentence that was due apparently to perceptions of the victim's consent. 14 In this case, the probability of the victim's

consent overrode the interracial implications. Thus it conformed to the pattern of statutory rape punishments generally, in which evidence of victim consent led to less severe outcomes for convicted defendants.

To further illustrate, in the 1941 case of Andrew White, a black defendant, his conviction for raping a white fifteen-year old, Essie Dean Williams, led to a sentence of eighteen months to ten years; in the 1942 cases of black defendants Robert Regland and James Davis, the charges of raping thirteen-year old Mary Louise Maffett, a black victim, won them prison terms of only two to five years each. Significantly, the cases against White, Reglund, and Davis involved a dating circumstance and the appearance of consent. 15

By contrast, in the 1930 case against Jack Burns accused of raping Juanita Stimer, his more severe sentence of seven and a half to fifteen years may have been due to a perceived lack of the victim's consent, the customary result in cases of great age disparity (he was forty-three, she was thirteen). If it was true that white victims occasioned more severe sentences than black victims, as was indicated in the cases of Everett and Hudson, it would seem that Burns' sentence may have had more to do with age disparity than with the race of Juanita, who was Syrian, ie. not black. Similarly, in the 1948 case against black defendant James Wright, his sentence of seven and a half to fifteen years may also have been due to his victim's young age (his age was not given, but she was only eleven); the racial implications of this case are not possible to assess, however, because the race of the victim, Lareuse Williams, was not recorded. 16

Thus, on the basis of the Ingham County cases, LaFree's argument that rape law implementation served as a mechanism for white men to control black men is upheld but with some qualifications. In this sample, the agents of the law were apparently all white during the period covered by these cases, and it was white men who administered the law against black defendants. In this sense, certainly, these black defendants were subject to the control of a white male upper-middle-class power structure. But for the conclusions of LaFree and others that sex-crime prosecutions result in worse outcomes for black defendants, and that the rape of white women receives more severe punishment than does the rape of black women, the race-specific findings of the Ingham County sample show only mixed support. To be specific, the number of black defendants in the 1940s was higher than that of whites in proportion to the the respective populations; the conviction rate for black defendants during this time was higher; and the average of their sentences was higher. Still, there is evidence that other factors influenced racially-identified cases. Even with black defendant/white victim cases, the appearance of consent mitigated the outcome; and a great disparity in age between the defendant and the victim also made the outcome for the defendant worse. Finally, while sentences for black men convicted of raping white women were not uniformly harsh, it seems profoundly significant that there was no instance of any harsh sentence given to a man (black or white) for raping a black woman. This suggests that the court indeed had less sympathy for black victims than for white victims, supporting LaFree's thesis in that regard.

For the presence of class bias in the court, the findings in this study are stronger than they are regarding racial bias. As we have seen in the foregoing chapters, virtually all but a very few defendants came to this court from low socio-economic backgrounds. Does this mean that sex crimes were not committed by men from more privileged groups? Possibly, but more likely it suggests that the court was more inclined to accept as believable the complaints made against men of working- and indigent-class backgrounds by women who were similarly situated. As was pointed out in the preceding discussion, these defendants were typically men who owned little or no property, who worked and boarded on the farms of others, who were vagrants recently arrived from other locales, who had records of previous arrests for other charges, or who were given to be alcoholic. Even the younger defendants, who were often too young to be in a position to own property, had proven themselves to be of an irresponsible character at an early age.

The very few cases that did not fit the customary pattern of lower-class defendant and similarly situated victim are exemplified in cases that the reader may remember, if only because these defendants were so unlike the others. Ira Winslow, for instance, was a man of financial means who was accused of attempting to rape Jane Britten in August of 1889. When Jane's husband found her in their hotel room alone with Winslow, Winslow's response was to try to buy the husband off. This was never an option with defendants who had no financial resources. Interestingly, there is no record in the local newspapers of

Winslow's case, save that his name is included along with those in other cases settled by the court the following October. 17

In very nearly the same year, William Cline, also a man of means since he was a manager of an office, was accused of rape by his former secretary, fifteen-year old Flora German, who became pregnant as a result of the act. Cline tried to buy her off with an offer of $5000.00 to go have the baby in Canada, where he would later come and surreptitiously "adopt" the child. Though Flora's attorney found that she had "good associates," Cline's wife and the women of his community pleaded with his attorney on his behalf, and Cline was apparently able to convince the court that Flora was "a wild one" with whom he had had nothing to do. "I determined," he said, "they were after money." While Flora's attorney expressed the sentiment that any other Lansing justice beside the one presiding in this case would have held Cline over for trial, the case was dismissed. Here a man of higher social position was able to discredit the charge made by a woman of lower social standing. 18

In just such a way was James Terrill, owner of a greenhouse, able to discredit the 1929 charge of attempted rape made by his married employee, Flossie Sampson. His attorney took the approach that Flossie and her husband, who were not poor but were by no means financially well off, had conjured up the accusation as part of a scheme to get money from Terrill. Again, this was a defense only made possible when the defendant was of high, or at least sound, economic status. Not surprisingly, the case against Terrill was dropped. 19

Finally, in the 1938 case against William Bockbrader, we see an example of a higher status victim charging a lower status man. This was the case in which sixteen-year old Hattie Marie Burger was attacked while walking home across an open baseball field following an evening school event. Her financial status was not revealed, but that is not the issue here. She had status by virtue of being respectable; he had no financial status to speak of. In this situation, both the witness who interrupted the attack and the victim's status as a respectable young woman worked to assure Bockbrader's conviction. There was no attempt here to buy off anyone or insinuate that the accusation was made for the purpose of ulterior financial gain. The relative status of the two parties in this case made such a propect inappropriate. 20

These few examples involving middle- or upper-class defendants or middle-class victims are the exception to the rule, which was largely constrained by the parameters of a strictly class-differentiated courtroom composition. The experiential reference points of the courtroom agents themselves--differing greatly from those of the defendants and victims--cannot be underestimated. Essentially, the lopsided composition of the courtroom players, seen as an important manifestation of class-positioning, makes tangible the fact that the disparity between those who implemented the law and those who were judged by it assumed the breadth of a socio-economic chasm. Under this condition, the adjudication of these sex-crime cases well typifies the principles of conflict theory, as elucidated by LaFree, by which the agents of the dominant class define and implement the law on terms that

serve to maintain a position of dominance over those with less power. The view suggested here is one of middle- and upper-class men using the law to control lower-class men, including men of color. 21

Perhaps the distinction that best relates to class is the degree of privacy that money assures--which creates space away from public view. It would seem that this is one feature that makes sexual indiscretion among lower-class persons vulnerable to middle- and upper-class oversight in a way that is not possible in reverse. So, is it fair to say that middle- and upper-class elites were imposing their morality on everyone else? Did they set a standard for themselves and enforce it for everyone else as well? To a large extent, the answer is yes. Was this wrong? In and of itself, no. After all, while the kind of cross-class control we are talking about may seem obvious, it must be wondered who was using the law. Admittedly, in the case of adolescent girls, some lower-class fathers used these middle-class agents of the law to enforce the rules with their adolescent daughters. Indigent mothers relied on their social betters to protect their daughters from sexual exploitation from fathers. It seems promiscuity and intra-familial sexual violation were not just middle-class concerns.

But as was seen earlier, when perceptions of behavior were filtered through lenses that catalogued degrees of culpability according to extralegal measures of class orientation, then the questions regarding class bias in law take on profound importance. For example, others have shown that this kind of class prejudice "shielded upper- and middle-class families from the enforcement of [child] neglect and abuse laws"

in the 1870s while it justified "the more constant state instrusion in the lives of poorer families" at that time. 22 Moreover, in the Ingham County cases, class prejudice was evident in that respectable girls (by middle-class standards) were seen as more legitimate victims, especially if the accused did not conform to a mainstream lifestyle. It was a pattern that Posner observes in his discussion of societal views toward coercive sex--that "enforcement officials are sympathetic to respectable women raped by men of the criminal class." 23 By the same token, victims who were not respectable by middle-class standards, received less sympathy, regardless of the class of the accused.

Thus, the dimension of class control, though by no means entirely uniform, cannot be ignored, and furthermore, must be seen necessarily to intersect dramatically with the dimension of gender control. We saw in Chapter Five that agents supported a male-defined interpretation of the law--using definitions by which courtroom assumptions were grounded in an unspoken male standard. It is from this view that the disparity between male legal agents and male defendants is superseded by the disparity between male legal agents and female complainants. One may see in a Lansing State Journal photograph one justice's wife "modeling the same size afternoon dresses at Green's as the slender mannequin beside her"--a "navy blue chiffon with white polka dots, a white linen collar, and a cummerbund"--to recognize the huge gap between the lives of the women with whom these agents of the court lived and the lives of the women to whom they applied their interpretations of the law. 24 One may rightly begin to wonder about the degree to which these judges

and attorneys, as representatives of middle- and upper-class society, held their wives and mothers as the standard by which to view the behaviors of the girls and women who came into the court--or, conversely, held their same-class wives, friends, and mothers to the court's standard by enforcing it with lower-class women. It is in these ways that both class and gender disparity characterized the relative positions of the courtroom agents and complainants.

In considering the intersections of race, class, and gender in the practice of sex-crime law, this court followed rules whereby well-educated, white men of social position held the power to call it the way they saw it, which usually meant: (1) that women and men who had little or no social position were the figures most likely to be subject to the law; (2) that men of color were never in positions of authority to judge white men; (3) that women of color who were alleged victims of rape appear to have received less legal support than did white victims of rape; and (4) women who had social standing (by virtue of their relationship to men of social standing) embraced (by design or by default) the unspoken standard to which lower-class women were held by agents of the court. In this matrix, dimensions of class, race, and gender are interconnected in multiple ways; but there is one additional point not yet considered.

What seems remarkable, after all, is the seeming absence of concern on the part of higher class women for the women who came into court. One has the sense of middle- and upper-class women being unaffected by the plight of the lower- and indigent-class girls and women who were not

only the victims of sexual assault but also of highly antagonistic courtroom scrutiny. Did they simply not know about these events? Did they remain unconcerned because of a perception that the females coming to the court were simply not "nice people?" Or, did they share in the societal notion, so apparent in the courtroom rhetoric, that only women who "asked for it" were raped and therefore deserved no sympathy from women who had not had such an experience?

Knowing what we know about how badly sex-crime complainants were treated in the court, the answer as to why other women did not raise objections in their defense is related, I think, to why they have done so more recently. To address this change, I turn again to Gary LaFree, who uses conflict theory to show how men implement rape law to control women. His central thesis--that in holding the women in court to a certain standard of middle-class female conformity, men reinforce all women's "gender-role conformity"--may offer a clue to why women are now more generally concerned than they once were with women's subjection to society's male-biased definitions of sex-crime law. 25 As we know, in his analysis of the Indianapolis rape trials, LaFree found that the practice of rape law held the victim's non-traditional behavior to be more important than any evidence in predicting case outcomes. 26 This pattern was evident in the Ingham County courtroom too, especially, as we saw, in the cases involving adult victims. So, it may be that the current heightened concern among women over the traditional expectations holding sway in rape law enforcement is a product of women's pervasive movement out of traditional roles. Such movement resists the

institutionalized punishment for female non-conformity that traditional rape law enforcement sanctioned.

Similarly, Posner's theory--relating women's reduced economic dependence on men to their greater sexual freedom--complements LaFree's notion that women's greater social autonomy translates into demands for greater freedom to define themselves sexually. As Posner reasons: "a woman's economic dependence on a man was the glue that held traditional morality in place and provided the basis for masculine appeals to female chastity." 27 If these theories hold true, supporting each other as they do, it means that women's more recent challenges to the traditional male-weighted imbalance in rape law enforcement are now both possible and necessary because women in larger numbers have come to positions of greater social, economic, and personal viability. 28 That both women who came into the court during the period covered in this study and those who remained outside it accepted the operant definitions of sex crimes for so long had much to do, if one accepts the reasoning of Posner and LaFree, with the fact that in neither group had significant numbers of women achieved an autonomous position. But, according to Posner, women's increasing economic and social status in the 1970s and 1980s changed all the rules. Or so it would seem.

II. Criminal Sexual Conduct in the Age of Amended Laws

One has to be very careful about how one moves from the findings of the Ingham County sample to the realities of rape prosecution today. To begin, it is perhaps helpful to recognize that the process of

adjudicature is not much different now than it was as described in Chapter One of this study. The main difference is that the role assumed by the justice of the peace has been taken by the judge of the district court. Whereas the Ingham County preliminary examinations were heard before a justice of the peace during the century analyzed in this study, complaints today are heard first in the district court. [See Appendix Two. The Criminal Justice System.] This is perhaps merely a technical procedural difference, but there are deeper structural and attitudinal continuities and changes in the legal process that we will now address.

First of all, insofar as the law for forcible rape was the measure by which all other sex offenses were defined, the issue of force was of crucial importance in the adjudication of all sex crimes whether they legally required proof of force or not. This was even true, for example, with statutory rape, the seriousness of which varied according to perceptions of force, even though the impetus for this law came more from concerns about prostitution and venereal disease than about notions of protecting underage girls from sexual attack. In cases of attempted rape, perceptions of force became the measure of blame in each instance, regardless of the age of the victim; and in cases of indecent liberties, the absence of forced penile penetration, the prerequisite for an act of rape, became the measure by which harmful sexual acts were deemed not very harmful at all. As to attitudinal limitations, the law's standard of force provided the basis for interpreting victim behaviors according to visible or provable signs of resistance to the act. As we found, belief in the necessity of such resistance was predicated both upon

cultural assumptions about female sexuality and upon inaccurate notions about female physical strength. These limitations in rape law met finally with opposition in the women's movement, which emerged in the late 1960s and was largely (but not solely) responsible for redefining forced-sex offenses and prompting a rewriting of the law.

In the early 1970s, a group of anti-rape activists from Ann Arbor met with the staff of State Senator Gary Byker to discuss the problems in the current law and to formulate language for a revised statute. Byker's interest in this issue had been prompted by a letter from constituents whose retarded daughter had been raped and who were dismayed over the futility of pressing charges under the prevailing law. 29 According to Carole Living, who was at that time working on his staff, Byker was a conservative whose first reaction to the plight of these parents was to say that, given the provisions of the law, there was nothing he could do. After receiving their angry response to his letter, Byker agreed to meet with the Ann Arbor activists. What followed were several meetings that resulted in the drafting of legislation, eventually sponsored by Byker (a white Republican) in the State Senate and Earl Nelson (a black Democrat) in the State House. Much to everyone's surprise, the proposed law met with a groundswell of support from all but the legal establishment, from which there had been much resistance. Even so, as hold-outs in the senate were convinced by their constituents of the need to support this measure, the law passed in both houses, and was signed into law by Governor William Milliken on August 12, 1974. Recasting the terms of coercive sex crime as "conduct"

instead of "assault" (to direct emphasis away from the victim's behavior and redirect it toward the behavior of the accused), this law became known as the Model Criminal Sexual Conduct Code, because other states subsequently enacted similar measures. 30

The changes brought about by this law addressed four conceptual areas of reform: (1) a "rape shield" provision was instituted to prohibit testimony about the rape victim's sexual history; (2) rape was redefined in gender-neutral terms to protect male victims of homosexual rape and all victims of penetration (either oral, anal, or vaginal) by an object; (3) corroboration requirements were dropped, along with the demand that a victim prove she had resisted "to the utmost"; and (4) a system of "degrees" of seriousness was instituted to insure that an attacker who stopped short of penetration could still be convicted on a lesser sex offense rather than a non-sex offense. This last provision was important because it aimed at making sure repeat offenders would be recognized and punished more severely. 31 [See Table Appendix One. Degrees of Criminal Sexual Conduct.]

Several studies have been conducted to test the effectiveness of this reform statute. By looking at statistics for reporting and conviction rates, and by obtaining the self-reported experiences of judges, attorneys, and victims from 1973 to 1978 in various places across the state, Jeanne Marsh, Alison Geist, and Nathan Caplan found that reports of rape continued to follow an upward trend that had begun even before the statute was enacted, and the number of convictions as charged increased dramatically. The other, less tangible factors

affected by the change in the law were recounted in the subjective assessments of legal agents and the victims themselves. First, judges, prosecutors, defense attorneys, police, and rape crisis center personnel all agreed that the law improved the prosecutor's chances of winning cases. The reasons most often cited for these improved chances were the restrictions on the use of past sexual history as evidence, the provisions in the degree structure of the law, and the changes in resistance standards. While plea-bargaining was found to continue at the old rate, those interviewed felt that there was now more control by the prosecution since under the degree structure, even lesser charges were plea-bargained as sex offenses. Courtroom tactics had changed to the degree that prosecutors reported worrying less about proving the "worthiness" of the victim and more about showing that the act had occurred. On the other hand, while defense attorneys agreed that there was now less emphasis on the victim's sexual history, less than half said they had changed their tactics. Judges reported a change in jury behavior--that juries seemed more likely to convict in sexual assault cases--but stated they attributed this change in behavior to "changes in attitudes about sexual behavior," "public awareness of rape," and "the impact of the women's movement," more than to the impact of the law. Finally, as to the victims, the feature that was reported to have improved the victim's experience with the criminal justice process the most was the new prohibition against using sexual history as evidence. The conclusion these researchers reached is that the change in the law made it possible to win more cases, but that defense

attorneys still focused on victim character and credibility. 32

In a later study, Ronald Berger, Patricia Searles, and W. Lawrence Neuman summarized the findings of others with regard to the effects of the reform statute, commenting in particular on how it served to redefine sex offenses and abolish the special corroboratory rules of evidence and rules of resistance. Referring to statutory age offenses, they note that:

> traditionally, statutory age offenses were not aimed at prohibiting sexual exploitation of young girls but at protecting female virginity and regulating consensual sexual conduct. 33

They go on to say that the new law moved away from the old moralistic focus that carried relatively low penalities to a focus that would permit consensual teen-age sexual intercourse while also protecting children from sexual exploitation. Berger's point is particularly pertinent to the findings of the Ingham County study, as these cases so clearly show the great extent to which the court used the statutory law to punish consensual underage sexual intercouse.

While commending the revised penalty structure that provides for mandatory minimum sentences in sex offense charges, Berger and the others suggest, however, that there are limits to the reforms as currently utilized. There have been challenges, for example, to the constitutionality of the "rape shield" provisions in the law, and questions have been raised about the uneven applicability of these protections. For instance, often the victim's past sexual conduct is not admissible for purposes of showing consent, but may be admissible to challenge her credibility. Further, and very importantly, they note

that the prosecutor must still prove that the woman did not consent...it is "a practical matter that cannot be avoided." Additionally, they reason, since the institution of this law was supported by a spectrum of conservative (law and order) and liberal (women's rights) groups, it must be recognized that what are seen as extremely liberal concerns such as removing the spousal exemption do not get the full support of the broader coalition. 34

They find in the rape reform statutes of states across the country, that provisions supported by conservatives co-exist alongside provisions supported by feminists in different reform statutes. They point out, significantly I think, that "the coexistence of traditional and feminist elements in contemporary rape statutes is symbolic of the current status of women." It is still difficult, for example, for states to eliminate the exemption for spousal rape because such a move would challenge "certain basic assumptions about men's and women's roles and social relationships." While feminists would support such a move, women and men who hold more traditional views would regard it as very threatening. Legally, it is a dilemma because states are reluctant to impose control in the private realm of people's lives, yet not to do so "gives license to men's exploitation of women within the family." 35 A further problem related to this issue is acknowledged by an Ingham County assistant prosecutor, Linda Maloney. She notes that in intra-familial sex-crime cases, the victimized females are still prone to abort the prosecution process by withdrawing charges. 36 As we know, this action is consistent with what we saw in the Ingham County

cases as long ago as 1873. 37

Finally, in studying attrition and conviction rates under the new law in Michigan, Susan Caringella-MacDonald found that comparisons of statistics for Kalamazoo (1975-1977) and Detroit (1973) showed substantial increases in conviction rates from the earlier date to the later date. For authorized cases (those accepted for prosecution), the conviction rate went up from 55 to 73 percent; for all cases reported, the conviction rate went from 5 to 34 percent, the non-conviction rate went from 95 to 64 percent. 38 It is impossible to compare these statistics with those of this study without having more information on the number of cases in our sample that were reported to police. These numbers are mentioned here to show the measured effect by current standards of the changes brought about by the new law.

Further, the new law "facilitated the use of plea-bargaining, a process which enhanced convictions in both locations." 39 What Caringella-Macdonald found particularly problematic, however, was that complaints accepted by the police were dismissed by the prosecutor because there was not enough evidence. This happened in both places, showing what she regards as a "persisting de facto need for more evidence," a phenomenon she attributes to a fundamental lack of change in attitudes about rape. Ultimately, she argues, "if myths are not dispelled, and attitudes about sexual assault and its victims are not changed, they will likely permeate the implementation of even model legislation." 40

In summary, these studies of the new law's effects on prosecution

show that it addresses some of the problems seen occurring in the Ingham County cases: the lack of any official means for dealing with graduated sex offenses, the need to eliminate force as a criterion for showing nonconsent (especially since force was always defined by a male idea of strength), and the irrelevance of allowing a victim's sexual history to be used for the purpose of proving her consent. Essentially, the changes in the law have had mixed results, and I am particularly drawn to what Caringella-MacDonald sees as the prosecutor's need for more evidence. Given what we saw happening in the Ingham County cases, we know that historically, the court routinely claimed to lack sufficient or appropriate evidence. Yet Berger's reminder of the "practical matter" of proving nonconsent speaks to the question many will still ask: On what basis is the law to accept a woman's accusation of rape?

According to findings summarized here, the staircasing built into the law now allows for convictions on lesser sex crimes, which works to the victim's favor, especially when repeat offenders come before the court. Also, the elimination of force sufficient to prove nonconsent has apparently had a positive impact by current measures on conviction rates, making it much easier to obtain a conviction. But the prohibition on using a complainant's sexual history for the purpose of showing consent has not been a fully successful reform. By law, as currently practiced in Michigan, a defense attorney may seek to introduce a complainant's sexual history if it pertains to her prior sexual encounters with the defendant or to show the course or origin of semen, pregnancy, or disease. 41 Such information may also be

introduced to argue against the victim's character. If a defense attorney wishes to present such information to the court, he or she must seek a judge's approval in a pre-trial hearing. 42 The dilemma here has a familiar ring: information that is admissable for showing victim character becomes fair (if inadvertant) game for jury considerations of victim consent.

There is no charge as such for statutory rape and incest in the new law. Rather, sexual offenses that involve daughters (and sons) and other children are covered in the staircasing of the Criminal Sexual Conduct Code. And when cases involving consenting adolescents do come to trial, guidelines for sentencing are left less to the discretion of judges than they once were. Now sentences are determined by factors contingent to the offense as they are found on a pre-established grid; such factors include but are not limited to: injury to the victim, use of a weapon, age difference between the victim and the accused, the victim's need for subsequent psychological counseling, and a defendant's prior record of sex crime convictions (now made more possible through plea-bargaining within the degree structure in the law). As for incest cases, the primary prosecution difficulty remains that the victim or family members back out midway in the prosecution process or pressure the court to issue a light sentence. 43

Berger's conclusions--that the results of the rape shield provision in the law are mixed--are substantiated elsewhere. According to one report:

> Michigan defense attorneys admit that previously they had shamelessly put the victim on trial, and some still find a way to turn the tables...Even strict shield laws, for example, permit sexual histories to be introduced if the defendant knew the victim or there is reason to believe the victim had sexual relations with another man on the day of the attack. 44

Assistant prosecutor Maloney's observations corroborate this conclusion. She states that in spite of the rape shield law, "attitudes are still the same." The complainant must still endure long hours of questioning about the details of the offense as if she were the party on trial; she is still considered at fault if she was drinking before the attack; and she is still seen to be complicit if she is found in a parking lot late at night. Reflecting on her experiences with the court, Maloney remarks, "the chauvinistic notion of 'woman as the seducer' is still alive and well in the American mentality." 45

Where does this leave us now? What is to be said finally about the findings gained from this study in relation to the current situation for sex crime prosecutions? The following final reflections attempt to arrive at some coherent synthesis of the situation with regard to sex crime prosecutions--the way it once was, and the implications of that for the way it is today.

Conclusion

This study is important because it has done what no other study of rape has done before. It has carefully examined the complete court records of forced-sex cases in a Midwest county circuit court covering a period of 100 years. It has uniquely developed an examination along

three lines of inquiry: (1) a quantitative assessment of cases, conviction rates, and sentencing patterns; (2) a categorization of the cases according to identifiable charges, permitting a close reading of the assumptions that underlay the court's treatment of the cases within each category; and (3) a theoretically grounded analysis of the courtroom discourse that sought to understand the basis for the court's definitions of evidence in these crimes. The conclusions of this study yield new insight into the historical development of the rationale for sex-crime laws and the prosecutions conducted against those who were charged with breaking them. To see how the court defined these laws in practice is to understand as well how society defined issues of gender, sexuality, and power.

First, the essential discovery revealed in the numbers--that so very few cases involving adult women victims were tried in this court--dramatically substantiates our suspicion that rape of adult women was not taken seriously. Certainly that is the first and foremost finding of this work. The second discovery revealed in the numbers is one that is obviously connected to the first--that the court gave disproportionately more attention to cases involving adolescents and children. This is necessarily instructive for what it says about the long-term legal understanding of how to use the law in keeping with who society deemed legitimately worthy of protection. Further, the higher conviction rates averaged for cases involving young victims (65-70 percent with young victims, 37.5 percent with adult victims) is added evidence of the sympathy that was present for the former and

hardly present at all for the latter.

Taken together, the respective complaints of the three groups of victims--adult women, adolescent girls, and children--were met with distinctly different responses from the court. Adult women were simply not believed, and the net effect was the court's unwillingness to accept a woman's rejection of a man's sexual advances. Women, in the eyes of the court, had no sexual autonomy that a man was bound to respect. In fact, if they did have sexual autonomy, the court was bound not to respect them as women. Consenting adolescents were primarily regarded as sexually irresponsible, and because there were so many of these cases, policing female delinquency became as much the justification in the court's eyes for adjudicating rape cases as was protecting girls from sexual exploitation. As for children, the court's view of incest and indecent liberties complaints was to argue that children invent accusations to live out their sexual fantasies or to get back at somebody for something, not realizing the seriousness of the charge they are making. Ultimately, the court's resistance to hearing the complaints of women and taking them seriously seems indicative of the court's simple incapacity for accepting a woman's rejection of a man's sexuality. It was, perhaps, easier for the court to focus on the cases involving girls who did not know any better, and who, clearly, had not rejected a man's sexuality.

This distinct and pervasive differentiation between cases of nonconsent and cases of consent reflects the court's immutable attachment to a rape ideology that denied women's sexual autonomy. It

was an ideology that defined rape as the heinous sexual violation of a pure, chaste, and virginal woman. Few women could measure up to such an ideal, but it worked better in the late-nineteenth century, when sentences for rape were customarily 10-15 years in prison, than it did by 1940, when sentences dropped to under five years, except in certain isolated cases. It may be that what we see in the court's changing response to rape and rape-related crimes from 1850 to the present is its misdirected attempts to adjust its ideology of rape to the changing realities in women's social and sexual status.

In the 1920s, when women moved into public view in ways they never had before, wearing less clothing, working in more jobs outside the home, riding in cars, and using birth control, the court's response to this new level of independence was reactionary. It inflated its attention to female delinquency. By the 1940s, when women had emerged as tough survivors of the Depression and their resiliency as strong supporters of the family during the war was so visible, the rape ideology of the late-nineteenth century had by then been greatly weakened. With perceptions of women's autonomy greatly expanded, the old ideal of women as innocent sexless icons was even less realistic than before. With cases of adult rape greatly increased and conviction rates up, there was, nevertheless, a new kind of trivialization of rape in effect by this time, as sentence minimums dropped precipitously. This may be the point at which the court's reaction to growing women's autonomy in this century took new shape. In being more accepting of women's sexual viability, it also took the role of legal protector of

sexual innocence less seriously.

There are deeper historic realities revealed in this study that may speak to present-day events. That adult victims were viewed sympathetically by the court only when their alleged attackers were socially disreputable is perhaps antecedent to the thinking of jurors sympathetic to William Kennedy Smith but not to Mike Tyson. The former was, after all, white, wealthy, and from a family whose long association with government service had taken on mythical proportions; the latter too was wealthy, but he was black and a man whose earlier divorce had been a cause celebre because of accusations of wife-beating. 46 It would be an over-simplification to wholly attribute the respective outcomes of these modern cases to the legitimate offender theory that is evident in the Ingham County sample. Nonetheless, the connection seems at least to some degree unavoidable.

As for the statutory rape cases in the sample, the predominant function of the law, in effect, was to condemn adolescent girls who engaged willingly in sexual intercourse. This social censure posed as protection, based on the premise that these girls did not know any better. In these cases, the presence of consent was no defense, except to mitigate the blame attributed to the offender. Today, we read of a New Jersey case involving a mentally retarded twenty-one year old girl who functions at the level of a six-year old, who has freely admitted to having consented to sexual acts with several young boys in the basement of her home. On the prosecution side, the issues are very similar to those for statutory rape: the victim cannot be held responsible for her

consent because she did not know any better and was therefore vulnerable to the sexual exploitation of those who did. The defense strategy is also similar to that for statutory rape: she consented--which at least serves to mitigate (if not exonerate) the guilt of the accused. 47

Young children who complained of sexual abuse by fathers or other grown men were seen as too young to testify, too young to know the seriousness of the accusation, too young to distinguish between truth and fantasy, and too young to be religious enough to take an oath. It is with these patterns in mind that the reluctance of the prosecutor to take the charges against Michael Gleason to court in Dover, Delaware, in 1992 is better understood. According to a newspaper account, this case was resolved with Gleason signing a confession that he had raped his three-year old daughter; he was put on a five-year probation sentence but was not required to undergo the usual intensive supervision and rehabilitation program for sex offenders that is customary in cases such as this. The child's mother "denounced" this arrangement; nonetheless, prosecutors had decided not to prosecute because of experts' determinations that her daughter, like many children her age, "could not distinguish between truth and falsehood." 48

An Ingham County Court Watch participant, Kerstie Borysowicz, believes that things are better now than they used to be in regard to dealing with sex crimes against children. In the period from 1975 to 1985, she notes, attitudes changed, especially among social workers and doctors, who are now more supportive of children's complaints. Before, attention was only given to complaints of physical abuse, but now it is

given to sexual abuse as well. Furthermore, most of these cases are handled out of court, which it appears is what happened in the Gleason situation. 49 There is, reportedly, a growing body of "research on the best ways to prepare very young children to help them be more effective witnesses," but researchers are concerned that prosecutors and judges are not aware of it. Indeed, their concerns are well-founded. In a survey of 1000 child sex abuse prosecutions, "the majority of prosecutors surveyed reported that they frequently decide against prosecuting a sex abuse case on the ground that the victim is too young to testify." 50

In the Ingham County cases, the issue of sexual autonomy--the defendant's put at risk by the complainant's--is vital. To illustrate, there was again and again evidence of an assumption played out in the courtroom discourse--that a woman could make no choice as to the conditions of being raped or she would be perceived as complicit in the offense. We may recall that Bernice Carper was thought to have consented because, faced with the sure prospect of being raped a second time, she climbed into the back seat of the car rather than submit to being raped in an open wheat field. That was in 1937. 51 More recently, in 1992, a young woman in Austin, Texas, was held complicit in her rape because she insisted that her rapist put on a condom before raping her. 52 In both cases, the action taken by the victim was defined by the defense attorney as a form of compliance and accepted as such by the jury. From the victim's point of view, however, such action was taken with the knowledge that nothing could be done to prevent the

rape from happening; it was an action aimed essentially at preventing the rape experience from being more harmful than sexual violation would be in and of itself.

Thus, sexual violation becomes only part of the harm to which a woman perceives herself vulnerable when faced with impending rape. But her acting to limit that harm to sexual violation only becomes in the courtroom discourse, not merely an action taken to accept limited sexual violation, but rather an action taken to invite fullblown sexual intimacy. Such a courtroom definition seems to make no distinction between rape, and rape that causes undue exposure, and rape that causes AIDS. For a woman to exercise control over that definition, or any part of it--for her to limit her vulnerability to rape only and prevent an unspecified range of additional threatened injuries--is for her to presume too much sexual autonomy.

This issue of bringing the law to bear upon a woman's autonomy is the significant crux of the dilemma with regard to rape prosecutions. It is also an issue of great concern among feminist legal scholars, primarily because law is seen as the institutional vehicle by which societal notions are enforced, either by design (by written law) or by default (by interpretation of the law). It may be women's autonomy that troubles the court the most. Sarah Slavin's discussion of Rhonda Caplan's critique of constitutionally "guaranteed" rights in regard to women's ability to choose to have an abortion seems pertinent to this discussion of women's ability to choose to be protected by law from unwanted sexual assault. Slavin writes:

> In the struggle that has ensued over abortion rights, feminist reasoning about self-determination has come into the foreground. The idea that women are entitled to represent themselves personally, and to have a state and market supportive of prerequisites for autonomy, is antithetical to legitimization of a state programmatically inclined to facilitate a woman's dependence and disinclined to intervene on her behalf and on behalf of her resources. 53

Slavin argues that "exposing the historical, legal fictions that blame the victim for what state policy and the market have wrought will provide insights to help us imagine what autonomy might be." That, it seems to me, is the chief contribution of this study. The meaning of evidence in these cases was rooted in male perceptions of sexuality, which presumed to define for men and women the experience of rape. Implementation of the law was in the end biased to protect men and hold women's sexual autonomy as a threat to men's sexual viability. To counter such a state of affairs, Slavin calls for women being able to voice their stories and "bear witness to their own first-order truths." 54

There is a danger in arguing that women's autonomy under the law has been subject to wholesale subversion by men's outright control of the process of definition. Minow warns against taking the position that women's interests under the law are monolithic in opposition to men's. As she points out, to take such a position "threatens to obscure the multiplicity of women's experience representing a particular view as the view of all." 55 We have heard the rationale for that warning elsewhere. 56 It is an important point to remember. Borrowing from Adrienne Rich, Minow reminds us that women are "no more free than others from the stereotypes in cultural thought." Thus, she points out,

it is imperative that women of privilege not become the definers of experience (anymore than men have been) by "claiming special authority to speak for women unlike themselves." 57

As to reforming the law with multiple interests in mind, I return to Berger, who concludes that since rape law reforms recognize women as "autonomous beings who possess the right to personal, sexual, and bodily self-determination," rape reform law can only happen when supported by coalitions that include sponsors from both traditional and progressive groups. 58 It would not be fair, nor accurate, to say that this study makes claims only for women of a dominant group; though hopefully, women of privilege are not excluded. More precisely, it claims to raise from very distant silence the voices of those whose experiences we never knew: the inarticulate immigrant woman whose daughter was molested by the neighbor, the secretary who became pregnant by her boss, the little girl accompanied home from school by a strange man, the adolescent whose father took liberties when her stepmother was away, the adopted daughter who gladly gave up the promised watch in exchange for her sexual privacy, and the many "delinquent" adolescents whose "protection" under the law often simply led to censure of their behavior. This study claims to see in the historical record of the court the male bias that defined for women and men the contours of all sexual boundaries. The observations made here show specifically how the meanings by which forced-sex crimes were prosecuted over a 100-year period were constructed from a white, middle-class male point of view.

I expect there will be those who, having read this work, will

caution further against my positing a thesis of conscious male intent to disempower and delegitimize women's sexual viability. Such a warning, it seems to me, is misplaced. This study posits no such thesis. Rather, it shows simply who had control over the legal meaning of sexuality, indeed the legal meaning of sexual autonomy for both women and men. These agents of the court were sometimes, as we know, consciously awful to the women who charged men with rape; much of the time, they were unconsciously awful, acting out cultural beliefs about women. Either way, there is no way to say that men did not codify the legal dimensions of those cultural beliefs, thereby carving out the terrain on which crimes of a sexual nature were judged. The facts are indisputable, as Deborah Rhode points out as well--men were, up until very recent times, the only persons in positions of authority to make the law and enforce it. 59

Drawing on a long tradition of precedent, the players in the Ingham County Court acted out the societal assumptions that held women and girls to sexual standards that did not accurately reflect female sexual experience. We have surmised that the routine acceptance of these standards by women and men alike demonstrates the power of underlying social assumptions to sustain male-derived sexual meanings in legal discourse. Yet, what this historical examination shows may be more the reverse. In the face of dramatic societal changes in women's autonomy, the court continued its adherence to a rape ideology that had little basis in fact in 1850 or 1900, and even less so by 1950. To see how the court resisted and then devalued the changing representations of

those it was charged to protect is to recognize how insistent has been the court's role in defining on its own terms the meaning of sexual assault. This meaning has been the "fiction through which a source of culture becomes...inauthentic," brought about by "superordinate representation," and accounting finally for why the autonomy of women under the law has been so long coming.

TABLES AND FIGURES

TABLE 1

COMPARISON OF SEXUAL AND NON-SEXUAL ASSAULT

Decade	Census	Sexual Assault			Non-Sexual Assault		
		Cases	Convicts	*C.R.	Cases	Convicts	*C.R.
1870s	25,268	8	2	25.0%	36	14	38.9%
1880s	33,676	8	1	12.5%	32	14	43.8%
1890s	37,666	17	6	35.3%	34	8	23.5%
1900s	39,818	25	14	56.0%	41	25	61.0%
1910s	53,310	55	37	67.3%	39	24	61.5%
1920s	81,554	161	102	63.4%	63	38	60.3%
1930s	116,587	97	61	62.9%	89	59	66.3%
1940s	130,616	167	134	79.8%	91	77	84.6%

*C.R.= Conviction Rate

TABLE 2

DISTRIBUTION OF ALL CHARGES FOR EACH DECADE

Charges	1850s	1860s	1870s	1880s	1890s	1900s	1910s	1920s	1930s	1940s
Forcible Rape	3	3	4	4	1	4	3	3	6	9
Statutory Rape	--	--	--	1	13	13	38	117	49	95
Assault with Intent to Rape	--	--	4	2	2	2	5	21	12	26
Indecent Liberties	--	--	--	1	1	6	9	20	30	37
Totals	3	3	8	8	17	25	55	161	97	167

FIGURE 3

NUMBER OF CASES FOR EACH CHARGE

Name of Charge	0	100	200	300	400	500
Forcible Rape 40 cases (7.4%)	XXXX					
Statutory Rape 326 cases (59.9%)	XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX					
Assault with Intent to Rape 74 cases (13.6%)	XXXXXXX					
Indecent Liberties 104 cases (19.1%)	XXXXXXXXXX					

FIGURE 4

OUTCOME DISTRIBUTION: STATUTORY RAPE
(Total Cases=326)

Outcome	0	100	200	300	400	500
Not Guilty (16 cases-4.9%)	XX					
Nolle Proseq. (56 cases-17.1%)	XXXXXX					
Unknown (28 cases-8.6%)	XXX					
Guilty (226 cases-69.4%)	XXXXXXXXXXXXXXXXXXXXX					

FIGURE 5

OUTCOME DISTRIBUTION: FORCIBLE RAPE
(Total Cases=40)

Outcome	0	100	200	300	400	500
Not Guilty (5 cases-12.5%)	X					
Nolle Proseq. (13 cases-32.5%)	XX					
Unknown (7 cases-17.5%)	X					
Guilty (15 cases-37.5%)	XX					

FIGURE 6

OUTCOME DISTRIBUTION: ASSAULT WITH INTENT TO RAPE
(Total Cases=74)

Outcome	0	100	200	300	400	500
Not Guilty (3 cases-4.1%)	x					
Nolle Proseq. (13 cases-17.6%)	X					
Unknown (10 cases-13.5%)	X					
Guilty (48 cases-64.8%)	XXXX					

FIGURE 7

OUTCOME DISTRIBUTION: INDECENT LIBERTIES
(Total Cases=104)

Outcome	0	100	200	300	400	500
Not Guilty (10 cases-9.6%)	X					
Nolle Proseq. (19 cases-18.3%)	XX					
Unknown (7 cases-6.7%)	X					
Guilty (68 cases-65.4%)	XXXXXXX					

TABLE 8

CASES/CONVICTIONS FOR EACH CHARGE PER DECADE

Decade	Ind.Lib.	Statut.Rape	Forcib.Rape	Attempt.Rape
1850	---	---	3/1	---
1860	---	---	3/1	---
1870	---	---	4/1	4/1
1880	1/NP	1/0	4/0	2/1
1890	1/1	13/4	1/0	2/1
1900	6/4	13/7	4/1	2/2
1910	9/6	38/28	3/0	5/3
1920	20/13	117/75	3/2	21/12
1930	30/14	49/35	6/2	12/10
1940	37/31	95/77	9/7	26/19

TABLE 9

KNOWN SENTENCE RANGES FOR SEX-CRIME CONVICTIONS

Charges & Sent. Ranges	1850s	1860s	1870s	1880s	1890s	1900s	1910s	1920s	1930s	1940s
Indecent Liberties										
Prob							1		2	14
1-4yrs				1		3	3	13	8	15
5-9yrs						1	2		2	2
10-14yrs										
15-19yrs										
20-25yrs										
LIFE										
Statutory Rape										
Prob.					1	1	7	23	3	36
1-4yrs					1	2	11	30	16	25
5-9yrs						3	6	10	4	9
10-14yrs							2	4	4	4
15-19yrs					1			1	2	1
20-25yrs					1					
LIFE						1	1	4	5	2
Mental Hosp.							1			
Assault with Intent to Rape										
Prob.								1	1	4
1-4yrs				1			2	2	4	12
5-9yrs			1		1	2	1	6	4	1
10-14yrs										
15-19yrs										
20-25yrs								1		
LIFE										
State Mental Hosp.								2	1	
Forcible Rape										
Prob.										1
1-4yrs									1	5
5-9yrs	1								1	
10-14yrs		1				1				1
15-19yrs			1							
20-25yrs										
LIFE								2		

TABLE 10

SEXUAL ASSAULT CHARGES & PERCENT OF POPULATION BY DECADES

Decade	Total Charges	Forc. Rape	Stat. Rape	Assault w.Intent	Indecent Liberties	Convict. Rate	Population of County	% of Pop.
1850s	3	3	--	--	--	33.3%	8631	.034%
1860s	3	3	--	--	--	33.3%	17,435	.017%
1870s	8	4	--	4	--	25.0%	25,268	.032%
1880s	8	4	1	2	1	12.5%	33,676	.024%
1890s	17	1	13	2	1	35.3%	37,666	.045%
1900s	25	4	13	2	6	56.0%	39,818	.063%
1910s	55	3	38	5	9	67.3%	53,310	.103%
1920s	161	3	117	21	20	63.4%	81,554	.197%
1930s	97	6	49	12	30	62.9%	116,587	.083%
1940s	167	9	95	26	37	79.8%	130,616	.127%

TABLE 11

SEXUAL ASSAULT AND NON-SEXUAL ASSAULT: RATES OF INCIDENCE TO POPULATION

Decade	County Census	SEXUAL ASSAULT Number of Cases	SEXUAL ASSAULT Percent of Population	NON-SEXUAL ASSAULT Number of Cases	NON-SEXUAL ASSAULT Percent of Population
1870s	25,268	8	.032%	36	.142%
1880s	33,676	8	.024%	32	.095%
1890s	37,666	17	.045%	34	.090%
1900s	39,818	25	.063%	41	.103%
1910s	53,310	55	.103%	39	.073%
1920s	81,554	161	.197%	63	.077%
1930s	116,587	97	.083%	89	.076%
1940s	130,616	167	.127%	91	.070%

TABLE 12

RANGE OF SENTENCES FOR NON-SEXUAL ASSAULT CONVICTIONS

Charges & Sent. Ranges		1870s	1880s	1890s	1900s	1910s	1920s	1930s	1940s
Assit.& Battery	Prb-1yr	??**	2	1	8	3	7	6	12
	1-5yrs	??	????	1	2	3	1	2	1
	5-15yrs	??					?		
	15+ yrs								
	LIFE								
Assit. to do great bod. harm	Prb-1yr	?	2	?	5	2	7	15	20
	1-5yrs	?	1		3	8	9	15 ?	23
	5-15yrs	?				1		4 ?	4
	15+ yrs					1***		?	2
	LIFE								
Assit. to Murder	Prb-1yr	?	??				1	2	3
	1-5yrs	?		1	1	3	?	2	1
	5-15yrs	?	1			?	4	5	4
	15+ yrs	?	1***		1****		1***		
	LIFE				2				
Murder	Prb-1yr								
	1-5yrs		1	1		1	1		5
	5-15yrs	?				1		1	1
	15+ yrs			1					1***
	LIFE		1		4	3	4	2	4

*Includes: Assault with intent to rob and assault with a deadly weapon
** ? represents a conviction with an unrecorded sentence
*** Offender confined to State Mental Assylum

TABLE 13

COMPARISON OF STRANGER AND ACQUAINTANCE ASSAULTS

	1850s	1860s	1870s	1880s	1890s	1900s	1910s	1920s	1930s	1940s	Average Sent.
Stranger Assault											
Convict.	--	--	--	--	--	2	1	5	8	11	6.7yrs
Acquittal	--	--	2	1	--	1	--	9	4	6	
Acquaintance Assault											
Convict.	--	--	--	1	--	7	6	39	32	40	2.2yrs
Acquittal	--	1	2	2	9	6	6	24	12	7	

TABLE 14

DEFENDANT DESCRIPTORS: SOCIO-ECONOMIC STATUS

Year	Characteristics of Defendants	Outcome of Case
1871	- father of vict.; illiterate	g/15yrs
1881	- wealthy, prominent	not guilty
1903	- unsteady, lazy, vicious	g/5-10yrs
1911	- "honest, decent man"	g/probat.
1914	- vict. reputation is worse than deft	g/probat.
1914	- spent 3 years in reform school	g/5-10yrs
1917	- was laborer	g/10-20yrs
1919	- daughter and he are transients	Unknown
1922	- is moral pervert; admits to masturbation	Ment. Hosp.
1922	- is a school teacher	g/5-10yrs
1923	- is feeble-minded epileptic	Ment. Hosp.
1924	- is laborer; has 4th grade educ	g/life
1925	- has 5th grade education	g/3-10yrs
1925	- is storeKeeper	Unknown
1925	- owns 120 acres, is fa. of 6 children	g/6-10yrs
1927	- he and daughters board in one room with another fam	g/10-20yrs
1927	- wore dress pants and tie; not married	ng/
1928	- is 43; vict. is 3; he is "degenerate, worthless"	g/3-10yrs
1928	- is "good worker"; she has sex with others	g/1-10yrs
1928	- wanted vict. to run away with him	g/prob.
1928	- is lazy, drunken, brutal, unemployed	g/3-10yrs
1928	- leads transient life	g/prob.
1928	- environment poor; subnormal mentally	g/6-15yrs
1929	- is from old family in county, hardworking, illiterate	g/3-10yrs
1929	- has 4th grade education	g/2-10yrs
1929	- is a busin. owner/manager	nol.pros
1930	- has little sense of moral decency	g/12-20yrs
1930	- has two children in sanatarium	g/?
1932	- has past convict. for illegal poss. of liquor	g/5-10yrs
1932	- is subnormal mentally	g/3-10yrs
1932	- is itinerant sign painter; associations not good	g/1-10yrs
1932	- is of "low order mentally & morally"; 2nd grade educ	g/1-10yrs
1934	- is insane; epileptic	g/3-10yrs
1934	- has prior record of minor offenses	g/LIFE
1935	- has I.Q. of 60; no sense of shame or regret	g/9-10yrs
1935	- deft. is of low mental type	g/10-20yrs
1935	- two defts are college students	g/prob
1935	- works in a produce store	ng/

(continued next page)

TABLE 14 (continued)

1936 - admits to long period of self-abuse; is psychopath.....g/5-15yrs
1936 - is subnormal mentally due to heredity and environ.....g/1-15yrs
1936 - comes from good family.....g/1-10yrs
1937 - was sexually perverted since age 6.....Ment.Hosp.
1938 - is college student.....ng/
1938 - has former drinking offenses.....pl.g/5-10
1938 - was previously petty offende.....g/LIFE
1939 - is "constitutional psychopathic inferior".....g/2-5yrs
1939 - mult. defts; vict. from "usual poor and large family".....g/1-3yrs
1939 - has property and is from good family.....g/3-10yrs
1939 - has 6 years of college, is journalist.....g/5-10yrs
1940 - is drinker; has "sodden mentality".....g/15-30yrs
1940 - is "as dumb as his victim".....g/3-10yrs
1940 - vict. "needs a proper home".....g/5-10yrs
1940 - vict. employed at carnival.....g/5-10yrs
1940 - is from broken home; 8th grade educ.....g/2-10yrs
1940 - is Baptist, married, wife is pregnant.....g/6-15yrs
1941 - has record of previous sex crimes with children.....Ment.Hosp.
1942 - was intoxicated, 11th grade educ., factory worker.....g/12-24yrs
1941 - parents of deft. are refined; good breeding.....g/2-10yrs
1941 - has no real estate; migrant from KY; hit victim.....g/7-10yrs
1942 - has no property; migrant from KY.....g/4-8yrs
1942 - has I.Q. of 80; is black with black victim.....g/1-10yrs
1942 - is "worst type of moron".....g/12-15yrs
1942 - letter from Navy say he has bad character; victim is
from family of prominent people.....g/3-10yrs
1942 - is subnormal.....g/1yr
1942 - is of low order of intelligence.....g/2-10yrs
1942 - community sympathy is on side of deft; vict. is aggressor.....g/prob
1942 - is Methodist; Sunday School all his life.....g/2-5yrs
1942 - has fine parents, but his crime is inexcusable.....g/prob
1942 - is laborer; has prior conviction; 8th grade.....g/prob
1942 - is Mexican; illiterate.....g/2-5yrs
1943 - is "bombastic", victim is honor student.....g/2-5yrs
1943 - has no auto & no property; 7th grade.....g/prob
1943 - is buying home.....g/prob
1943 - has previous conviction for lewd and lascivious...
behavior; no sense of morality and decency.....g/5-15yrs
1944 - it is "obvious" that deft. has "run wild".....g/2-5yrs

(continued next page)

TABLE 14 (continued)

1945 - eccentric deft; has low standard of morality.....g/3-12yrs
1945 - has previous criminal record.....g/6-10yrs
1945 - is criminal sexual psychopath.....nol.pros.
1945 - is of "low mentality"; 5th grade educ.....g/3-10yrs
1946 - had committed previous sex violations.....g/2-10yrs
1946 - is elderly; pays fees with old-age pension.....g/prob
1946 - is financial support of his mother and daughter.....g/prob
1947 - is boarder; has no property.....nol.pros
1946 - has no moral responsibility.....g/5-15yrs
1947 - drinks to excess.....g/2-10yrs
1947 - is H.S. grad; training at Walgreens; Navy.....g/1-5yrs
1946 - has past history of sexual assault.....g/3-10yrs
1947 - is sexual pervert; needs discipline.....g/3-10yrs
1947 - was drinking heavily.....g/2-5yrs
1948 - is farm tenant; has no property.....g/4-5yrs
1948 - wants to be a minister.....g/prob
1948 - father met with judge to plea for a break.....g/prob
1948 - has epilepsy.....to Caro Hosp
1948 - house has one room; 3 beds in one room.....g/3-10yrs
1948 - court thinks deft. won't repeat offense.....g/prob
1949 - is migrant from KY.....g/7 1/2-15yrs
1949 - is migrant from KY.....g/10--20yrs

TABLE 15

DEFENDANTS WHO HAD MIGRATED FROM THE SOUTH

Year of Case	Migration Status	Outcome of Case
1923	victim is from Arkansas	nolle pros.
1927	defendant is from Kentucky	g/9-10 years
1928	defendant is from Kentucky	g/15m-10yrs
1939	defendant is from Alabama	g/3.5-10yrs
1942	defendant was born in Kentucky	g/7.5-15yrs
1942	defendant is from Kentucky	g/4-8years.
1942	defendant is Mexican, from Texas	nolle pros.
1942	defendant is from Tennessee	g/prob.3
1947	defendant is from Kentucky, has bad record	g/3-10yrs.
1948	defendant is from Arkansas; got vict. pregnant	g/prob.3
1949	defendant and victim went tog. to Kentucky	g/prob.3
1941	defendant is from Arkansas	g/7.5-15yrs
1941	defendant is from Arkansas	g/10-20yrs

TABLE 16

CASES WITH NON-WHITE DEFENDANTS

	CHARGES:			OUTCOMES:		
Decade	Forc. Rape	Stat. Rape	Assault w.Intent	Acquittal	Nolle Prosequi	Conviction
1900s	1	1		1	1	
1910s						
1920s						
1930s			1			1
1940s	1	5	2		1	7

TABLE 17

PROPORTION OF BLACK DEFENDANTS TO POPULATION

Decade Begin.	Cases with Black Defts	Black Popul. in County	% Black Defts to Black Popul.	% All Defts to Total Popul.
1870	---	158	---	---
1880	---	404	---	---
1890	---	452	---	---
1900	2	410	.480%	.065%
1910	---	404	---	---
1920	---	753	---	---
1930	1	1474	.068%	.197%
1940	8	1722	.464%	.126%

TABLE 18

SENTENCING OF CONVICTED NON-WHITE DEFENDANTS

Date	Charge	Race or Ethnicity Victim/Defendant	Sentence
1931	Attempted Rape	Black/Syrian	7.5-15 yr
1941	Statutory Rape	Black/White	10-15 yrs
1942	Attempted Rape	Black/Black	2-5 yrs
1942	Attempted Rape	Black/?????	2.5 yrs
1943	Forcible Rape	Black/White	10-15 yrs
1944	Statutory Rape	Black/White	2-5 yrs
1948	Statutory Rape	Black/Black	7.5-15 yrs
1948	Statutory Rape	Black/Syrian	Probation-3yr

TABLE 19

ASSAULT WITH INTENT: AGE OF VICTIM AND OUTCOME OF CASE

Age of Victim	Number Cases	Conviction Rate
Below Age of Consent	57	75.0%
At or Above Age of Consent	19	42.1%

TABLE 20

STATUTORY RAPE CASES--DISTRIBUTION BY RELATIONSHIP OF PARTIES

Relationship of Parties	1900s	1890s	1900s	1910s	1920s	1930s	1940s
Consenting	---	4	10	8	41	16	27
Acquaintance	---	---	5	4	6	8	24
Stranger	1	---	---	---	2	2	3
Incest	---	---	4	7	12	13	12

TABLE 21

AVERAGE MINIMUM PRISON TERMS FOR STATUTORY RAPE CONVICTIONS (IN YEARS)

Relationship of Parties	1900s	1910s	1920s	1930s	1940s	Composite
Consenting	0.95	0.42	0.92	4.40	0.81	1.44
Acquaintance	prob-1	1.50	2.80	6.64	2.43	3.36
Stranger	---	---	21.00	30.00	12.00	21.00
Incest	11.5	10.90	11.80	18.4	11.9	13.87

APPENDICES

APPENDIX ONE

DEGREES OF CRIMINAL SEXUAL CONDUCT FROM THE 1974 MICHIGAN CRIMINAL SEXUAL CONDUCT CODE

A. FIRST DEGREE CSC: SEXUAL PENETRATION WITH ANY OF THE FOLLOWING CIRCUMSTANCES:

1. Victim under 13 years of age.
2. Victim 13-15 years of age and the defendant is a member of the same household as the victim, related to the victim by blood, or in a position of authority over the victim and used this authority to coerce the victim to submit.
3. Penetration occurs under circumstances involving the commission of another felony.
4. Defendant is aided by one or more other persons and: defendant uses force or coercion; defendant knows the victim is mentally incapacitated or physically helpless.
5. Defendant is armed with a weapon or uses article in manner to make victim believe it is a weapon.
6. Defendant causes personal injury to the victim, and force or coercion is used.
7. Defendant causes personal injury to the victim and knows that the victim is mentally incapacitated/incapable/disabled or physically helpless.
8. The victim is mentally incapable/disabled/incapacitated or physically helpless and: the defendant is related to the victim or in a position of authority over the victim and uses this authority to coerce the victim to submit.

B. SECOND DEGREE CSC: SEXUAL CONTACT WITH ANY OF THE CIRCUMSTANCES SET FORTH UNDER FIRST DEGREE CSC.

C. THIRD DEGREE CSC: SEXUAL PENETRATION WITH ANY OF THE FOLLOWING CIRCUMSTANCES:

1. Victim 13-15 years of age.
2. Force or coercion is used to accomplish sexual penetration.
3. Defendant knows that the victim is mentally incapable/incapacitated or physically helpless.

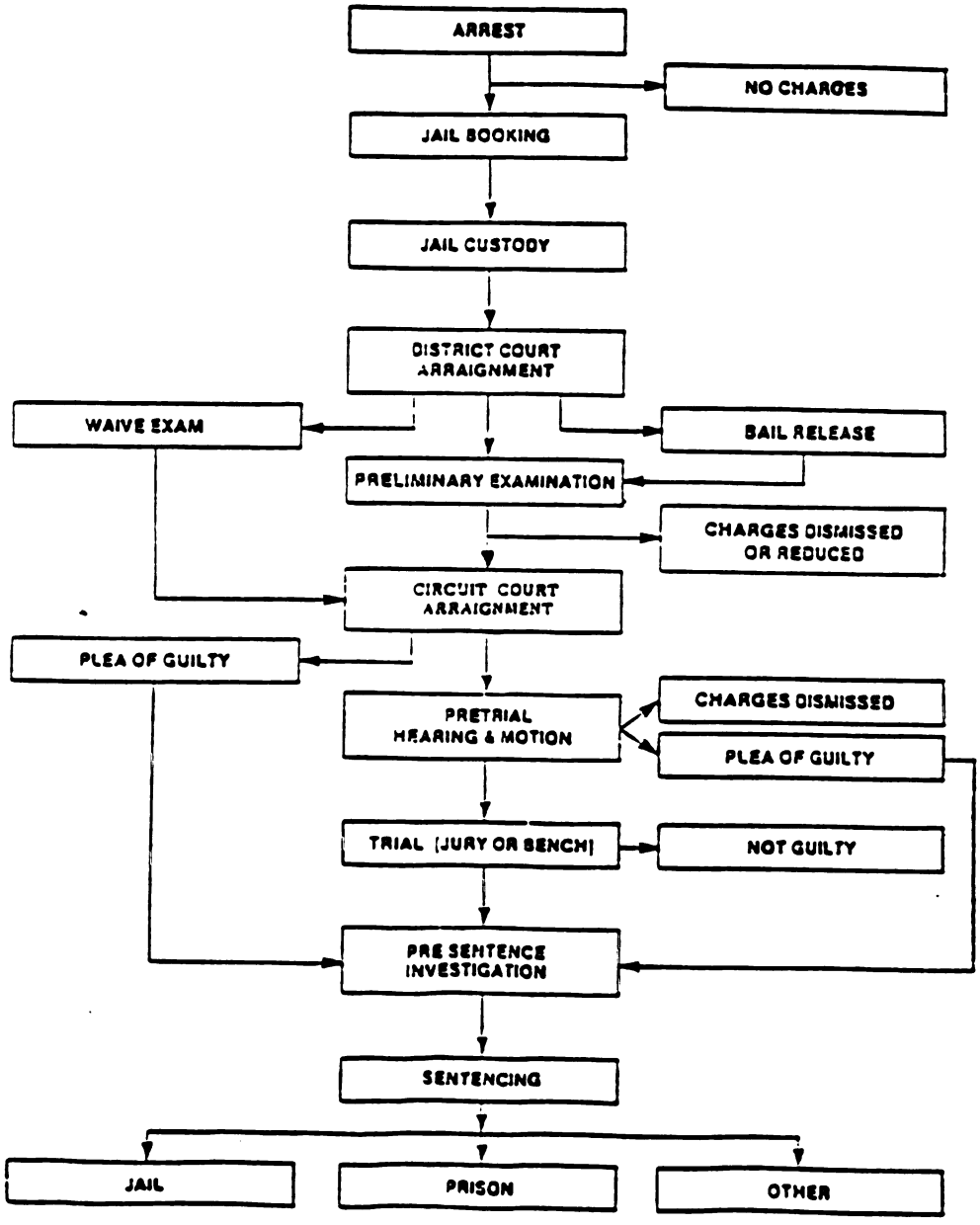
D. FOURTH DEGREE CSC: SEXUAL CONTACT WITH ANY OF THE FOLLOWING CIRCUMSTANCES:

1. Force or coercion is used to accomplish the sexual contact.
2. Defendant knows that the victim is mentally incapable/incapacitated or physically helpless.
3. The victim is under the jurisdiction of the department of corrections and the defendant is an employee or volunteer with the department of corrections.

[This statement made available courtesy of Ingham County Court Watch.]

APPENDIX TWO

THE CRIMINAL JUSTICE SYSTEM: CURRENT STRUCTURE



[This chart made available courtesy of Ingham County Court Watch.]

END NOTES

END NOTES

Notes for the Introduction

1. Catherine S. Manegold, "Abuse Trial Jury Overrun in Minutiae," New York Times, 19 January 1993.

2. Anna Quindlen, "21 Going on 6," New York Times, 13 December 1992.

3. Allan Griswold Johnson, "On the Prevalence of Rape in the United States," Signs: Journal of Women in Culture and Society 6 (Winter 1980): 136-146.

4. Theodore N. Ferdinand, "The Criminal Patterns of Boston since 1849," American Journal of Sociology 73 (July 1967): 84-99.

5. Barbara S. Lindemann, "'To Ravish and Carnally Know': Rape in Eighteenth-Century Massachusetts," Signs: Journal of Women in Culture and Society 10 (Winter 1984): 63-82.

6. Terry L. Chapman, "Sex Crimes in the West, 1890-1920," Alberta History 35 (Fall 1987): 6-18.

7. Jan Sundin, "Keeping Sex Within Marriage: Legal Prosecution of Extra-Marital Sex in Sweden c. 1600-1850," Paper presented at the annual meeting of the Social Science History Association, Washington D.C., November, 1989. Session 3: Criminal Law and the Moral Community.

8. Susan Brownmiller, Against Our Will: Men, Women and Rape (New York: Simon and Schuster, 1975), 15. Brownmiller subsequently clarified what she meant: "that all men benefit from the action of rapists because rape makes all women fearful and less likely to challenge men." Cited in Stephen Pistono (see note 10).

9. Edward Shorter, "On Writing the History of Rape," Signs: Journal of Women in Culture and Society 3 (Spring 1977): 471-482; and Heidi Hartmann and Ellen Ross, "Comment on 'On Writing the History of Rape'," Signs: Journal of Women in Culture and Society 3 (Fall 1978): 931-935. Shorter argued that rape in medieval France was not occasioned by political factors, as Brownmiller contended, but was more a result of the lack of available sex outlets for young men. Hartmann and Ross respond that Shorter's handling of Brownmiller's "central insight", that men rape women to affirm their power over them" is "cavalier" and dismisses too easily an idea that should be seen as a viable hypothesis for historical study. They point out the consensus among feminists and criminologists that "rape is a crime of aggression and hostility, not a form of sexual release."

10. Stephen Pistono, "Susan Brownmiller and the History of Rape," Women's Studies 14.3 (February 1988): 265-276. Pistono cogently reviews the work of other historians on rape, noting for example Sarah Pomeroy's comparison of the Zeus rape mythology with the wretched real-life position of women under Athenian law and John M. Carter's recounting of the six grueling and embarrassing steps a woman had to pursue to prosecute her rapist in medieval English society.

11. Pistono 1988, 273.

12. Darlene Clark Hine, "Rape and the Inner Lives of Black Women in the Middle West: Preliminary Thoughts on the Culture of Dissemblance," Signs: Journal of Women in Culture and Society 14 (Fall 1989): 912-921. See also Jacqueline Jones, Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present, (New York: Basic Books, Inc., 1985), 157. Jones explains that the degraded status of black women in the South, including sexual harrassment by white men, was one of the undocumented forces fueling the migration of black families to the North during World War I.

Notes for Chapter One

1. People v. Albert Raddick, RG89-284, B666, F7982. Ingham County Circuit Court. Criminal Division. State of Michigan Archives, Lansing. In this case and all others, I will refer to the defendant and victim by name as listed in the court records. These documents being a matter of public record, there is no attempt to disguise the real names of the individuals involved.

2. People v. John Critchett, RG80-109, B179A, F29.

3. Michigan Manual (Lansing, Michigan: Legislative Service Bureau, 1989) 552. Andrew Parsons became the Acting Governor on March 8, 1853, when Governor McClelland resigned to serve as Secretary of the Interior beginning March 7.

4. People v. Jason Gowen, RG 80-109, B192, F4.

5. Court Calendar. RG80-109, Vol. 94. Ingham County Circuit Court Records. Criminal Division. State Archives. Lansing, Michigan.

6. People v. Martin Leseney, RG89-284, B685, F8748.

7. Michigan Manual (Lansing: State of Michigan, 1965) 150, reports justices of the peace were appointed by the governor during territorial times. The first State Constitution, however, provided for their election for a term of four years. The Constitution of 1850 contained the same provision, as did the Constitution of 1908. See also Compiled

Laws of the State of Michigan 1871 Vol. 2 (Lansing: W.S. George and Company, 1872) Chapter 12, Section 11, p. 273, to see a reading of the statute that stipulated the terms of the appointment of justices of the peace.

8. Revised Statutes 1846, Chapter 163. Published under the Direction of Sanford M. Green. Sections 1 through 18 stipulate the provisions by which justices of the peace shall examine complainant on oath, issue a warrant to the sheriff to command him to bring in the person accused, take in a recognizance and examine the prisoner, who may be assisted by counsel in such examination. This system remained in place until the 1963 Michigan Constitution abolished the office of the justice of the peace, effective five years following the effective date of the new constitution. This constitution provided that these courts be succeeded by Courts of Limited Jurisdiction in which the judges should be attorneys. The plan is outlined in a Michigan Chamber of Commerce "State Legislative Report" filed under "Courts" in the vertical files, Library of Michigan, Lansing.

9. Revised Statutes 1846, Chapter 163, Section 20. Specifies the provisions with regard to issuing an information. See also Compiled Laws of the State of Michigan 4 (Ann Arbor: Ann Arbor Press, 1948) SS7661, Chapter VI, Sec. 40, specifying that "all informations shall be filed during the term in the court having jurisdiction of the offense specified therein". Originally enacted as Section 2 of Act 138 of 1859.

10. Compiled Laws 1948, 4 (Ann Arbor: SS767.41, p. 14369. Specifies the precedures that the prosecutor must follow upon determining that an information ought not be filed: ie. that he or she shall file with the clerk of the courts "a statement in writing, containing his reasons in fact and in law for not filing an information in such case."

11. There are nine court calendars available for this sample of cases. Record Group 80-109, Vol. 94 & 95 applies to the period 1874 to 1920; Record Group 89-284, Vols. 104-110 applies to the period 1922 to 1951. There was no calendar for cases prior to 1874. To the extent that the calendars served as an index to the case files, there was no index as such to the cases prior to 1874. Thus, early rape cases were found by individually examining each file.

12. (Revised Statutes 1846) Chapter 153, Sec. 20. See also Compiled Laws of the State of Michigan 4 (Ann Arbor: Ann Arbor Press, 1948) Chapter LXXVI, SS750.520.

13. (Revised Statutes 1846) Chapter 153, Sec. 20. Amended 1887, Act 112 effective Sept. 28.; Amended 1897, Compiled Laws of 1897, 11489. Also see: (Compiled Laws 1948) SS750.520.

14. Hubert S. Feild and Leigh B. Bienen, Jurors and Rape: A Study

in Psychology and Law (Lexington, Massachusetts: Lexington Books, 1980), 307.

15. (Revised Statutes 1846) Chapter 153, Sec. 21. See also (Compiled Laws 1948) Vol. IV, SS 750.85, Sec. 85.

16. (Compiled Laws 1948) SS 750.336, Sec. 336, which supersedes Sec. 1 of Act 153 of 1887.

17. Susan Estrich, "Rape," Yale Law Journal 95.6 (May 1986): 1170. Estrich comments on the attrition rate of all felony crimes, including rape, at 40 to 60 percent. See also (Lindemann 1984, 70) In this study of rape in the eighteenth century, Lindemann states that estimates of the current figure for unreported rape vary widely from 55 percent to 95 percent. And see Jeanne C. Marsh, Alison Geist, and Nathan Caplan, Rape and the Limits of Law Reform (Boston Massachusetts: Auburn House Publishing Company, 1982), 25-39. This report seeks to assess the success of the 1974 Michigan Criminal Sexual Conduct Code, focusing on the changes wrought by the law in factors that improved arrest and conviction rates, which are taken to have been seriously low before the law reform. The authors note that "because it is not in [the prosecutors'] best interests to pursue unwinnable cases, prosecutors' preoccupation with conviction rates prevents marginal Criminal Sexual Conduct cases from entering the justice system." It can be assumed that this attitude prevailed in a like fashion during the period of time of this study. See also Rosemarie Tong, Women, Sex, and the Law (Towowa, New Jersey: Rowman and Allenhead, 1984), 101. Here Tong states that 15 to 20 percent of reported rapes are unfounded by police.

18. Census Reports Volume I, Twelfth Census of the United States, Taken in the Year 1900. (Washington: United States Census Office, 1901), 24. Sixteenth Census of the United States: 1940, Population, Volume I, Number of Inhabitants. (Washington: United States Government Printing Office, 1942), 785.

19. (Ferdinand 1967, 91) Ferdinand found in his study of Boston crime files an upward trend of forcible rape.

20. (Marsh, Geist, and Caplan 1982, 101) This study of rape reform explains: "for prosecutors the ability to win cases is the primary measure of their competence. Their superiors evaluate their performance based on win/loss records, and...so does the community at large." Also see Wallace D. Loh, "The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study." Washington Law Review 55.3 (June 1980): 582. Here, in a footnote, Loh quotes from a Battelle-LEAA Report: "Given a choice, most prosecutors (68% of those surveyed) shun specialization in rape cases. The reasons include: rape cases are 'too emotional,' 'a pain in the ass,' and 'not good for one's career.'"

21. See note 16 above.

22. (Ferdinand 1967, 91) He shows that rapes in Boston from 1849-1951 "witnessed sharp rises in the prosperous years of 1866-72, 1906-15, 1922-27, and 1940-51; ...the depressions of 1873-78, 1919-21, and 1930-39 all saw appreciable declines, with only the depression of 1893-98 showing an increase."

23. Roger Lane, "Crime and Criminal Statistics in Nineteenth-century Massachusetts," Journal of Social History 2 (Winter 1968): 163. Lane reasons that by 1900, "the move to cities had produced, for better and worse, a more tractable, more 'civilized', more socialized generation than its predecessors. What had been tolerable in a casual, independent society was no longer acceptable in one whose members were living close together...All the cities had acquired police forces." See also Roger Lane, "Urban Homicide in the Nineteenth Century: Some Lessons for the Twentieth," History and Crime: Implications for Criminal Justice Policy, eds. James A. Inciardi and Charles E. Faupel, (London: Sage Publications, 1980), 100. Here Lane speculates, "school, factory, and bureaucracy, then, with mass supervision and discipline, are the kinds of influences which in theory might account for falling rates of interpersonal violence..."

24. Linda Gordon, Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960 (New York: Penguin, 1988), 27-58. Gordon provides an excellent description of the levels at which protections for children were sought during the period 1880-1910.

25. (Ferdinand 1967, 87) He demonstrates how the data of violent crime in Boston in 1849-1951 show a steady decline from 1875-78 to 1951, the terminal point of his study.

26. (Loh 1980, 604-605)

27. (Feild, and Bienen 1980, 116-119) The authors present a highly detailed examination of the defendant, victim, case, and juror characteristics that interact with each other to affect jury decision-making. They point out that jurors "maintain a certain degree of discretion and autonomy...[and]...may disregard the facts in a rape case and rule on the basis of extraneous information."

28. RG80-109, B215, F49. (1919)

29. RG89-284, B603, F5411 (1932)

30. RG80-109, B216, F23 (1920)

31. (Lane 1980, 163) Lane states that the ineffectiveness of the detective system was due to its largely undeveloped state at the turn of the century.

32. (Feild and Bienen 1980, 101-105, 119)

33. (Brownmiller 1975, 214-216) From numerous statistics, Brownmiller reports that black rapists of white women are subjected to more convictions and far greater penalties than are white rapists of women of either race.

34. Thelma Jennings, "'Us Colored Women Had to Go Through a Plenty': Sexual Exploitation of African-American Slave Women," Journal of Women's History 1 (Winter 1990): 45-74. Jacqueline Dowd Hall, "The Mind that Burns in Each Body" in Powers of Desire: The Politics of Sexuality, eds. Ann Snitow, Christine Stansell, and Sharon Thompson (New York: Monthly Review Press, 1983), 328-349. (Hine 1989, 912-921) These monographs expose the pervasiveness with which white men have historically had free sexual access to black women with impunity. To think that a black woman would bring charges against a white man for raping her is almost ludicrous in light of the discussions that Jennings and Hine bring to light. See again: (Jones 1985, 20; 157).

35. Even the prison records are sketchy with regard to the race of the prisoners. The state prisoner index cards provide information on race unevenly at best, and the prison registers for Marquette, Jackson, and Ionia prisons do not give race except for one inmate register, which provides photographs of all prisoners. None of the Ingham County rape prisoners in that register were non-white.

Notes for Chapter Two.

1. (Feild and Bienen 1980, 119)

2. (Brownmiller 1974, 373.

3. (Tong 1984, 96)

4. (Loh 1980, 605)

5. (Feild and Bienen 1980, 95; 103; 106; 138)

6. Gary LaFree, Rape and Criminal Justice: The Social Construction of Sexual Assault (Belmont, California: Wadsworth Publishing Company, 1989), 7.

7. (LaFree 1989, 13; 28)

8. (LaFree 1989, 53-147) On Alfred Schutz, see p.28.

9. (LaFree 1989, 197-198)

10. Joan Wallach Scott, Gender and the Politics of History (New York: Columbia University Press, 1988), 39. Scott argues that ideas of masculine and feminine are not fixed, since they vary according to contextual usage. It seems this notion relates well to the approach I am taking here, in that I believe many of the concepts I use, especially as they relate to notions of male and female sexuality, are variable in meaning according to context.

11. (Scott 1988, 170-171) In her discussion of the Sears Case, Scott insightfully observes how in this case and others, courtroom discourse is reductive of broad, complex issues, and manipulative of concepts and definitions.

12. Kim Lane Scheppele, "The Re-Vision of Rape Law," University of Chicago Law Review 54.3 (1987): 1095-1116. In her review of Susan Estrich's Real Rape (1987), Scheppele discusses the freedom of juries to create their own "construction" of the facts, which is pertinent to this discussion of courtroom relativism.

13. (Loh 1980, 618)

14. See page 9 of this study. Also note 13 of Chapter One. See also Susan Estrich, "Rape," Yale Law Journal 95 (May 1986):1109. Estrich decries the inappropriate effect of the pre-reform law, which required that definitions of force rest on the reactions of the victim. She notes that the new laws attempt to define force by the actions of the offender.

15. Refer to note 31 for Chapter One.

16. People v. Albert Comer, RG80-109, B179, F67.

17. People v. Charles Webb, RG80-109, B179, F63.

18. People v. Charles Webb, RG80-109, B179, F62 & F64.

19. People v. Charles Sitts, RG80-109, B182, F60.

20. Michigan Compiled Laws Annotated, Vol. 39 (St. Paul: West Publishing, 1968), 381. See Section 750.520.31.

21. People v. William Cline, RG80-109, B184, F40.

22. (Lindemann 1984, 79)

23. People v. John Critchett, RG80-109, B179A, F29.

24. People v. Carl Crosby, RG89-284, B671, F8163; People v. Elroy Pride, RG89-284, B671, F8164. These two individuals had engaged in

homosexual intercourse with each other. Crosby was declared a "criminal sexual psychopathic person" and sent to a mental hospital, not being discharged until twelve years later, in 1957. The outcome for Pride was not recorded. "Psychopathic" is reported as a term that came into use by the 1920s to "stigmatize homosexual expression", according to John D'Emilio and Estelle Freedman in their monumental book, Intimate Matters: A History of Sexuality in America (New York: Harper and Row, 1988), 193. I have chosen not to focus separately on homosexual rape or consensual homosexual activities, as these cases seem to represent. It would be a provocative area for inquiry, but would require greater digression from the primary focus of this work than I am willing to allow.

25. Don Moran v. People (Michigan Compiled Laws Vol. 39, 1968, 374). See Section 750.520.8.

26. People v. Geddes (Michigan Compiled Laws 1968, 374). See Section 750.520.8.

27. People v. Myers (Michigan Compiled Laws 1968, 374) See Section 750.520.8

28. People v. Roy Kaufman, RG89-284, B563, F3538. In this case, a nineteen-year old woman had gone to an interview in the back of a store. Her would-be employer attacked her at the end of the interview, after the store was closed, held her on the floor, and raped her.

29. People v. David Harris, RG80-109, B193, F52.

30. People v. Ora Wiley, RG80-109, B215, F33.

31. Ora Wiley.

32. People v. William Fulton, RG89-284, B624, F6313.

33. David Harris.

34. People v. Ora Collins, RG 89-284, B560, F3406.

35. David Harris.

36. State Republican, 28 September 1903. On microfilm, Library of Michigan, Lansing.

37. David Harris.

38. State Republican, 30 September 1903. On microfilm, Library of Michigan, Lansing.

39. People v. William Cummings, RG80-109, B197, F24.

40. Allan F. Brandt, No Magic Bullet: A Social History of Venereal Disease in the United States Since 1880 (New York: Oxford, 1985), 14-18. Also see D'Emilio and Freedman, who cite Prince Morrow, the New York physician, who shocked his reading audience with the statement that "there is more venereal infection among virtuous wives than among professional prostitutes." (1988, 204)

41. William Cummings.

42. People v. Edmund Jolls, RG89-284, B634, F6801. D'Emilio and Freedman point out that in nineteenth-century marriages, "a woman was the sexual property of her husband; that is, she had a duty to have intercourse with him. Although marital rape was gradually recognized as a form of cruelty, it was not a crime." (1988, 79). I have a sense that in 1939, the vestiges of those assumptions about marriage still operated powerfully, and were influential in the disposition of this case.

43. Tong 1984, 103.

44. Edmund Jolls.

45. Edmund Jolls.

46. Edmund Jolls.

47. Edmund Jolls.

48. Edmund Jolls.

49. Edmund Jolls.

50. Emund Jolls.

51. Ora Wiley; People v. Roy Kaufman, RG89-284, B563, F3538; People v. William Fulton, RG89-284, B624; Edmund Jolls.

52. William Cummings; People v. Lansing Wanamaker, RG89-284, B680, F8552.

53. People v. William Slomka, RG80-109, B199, F24; People v. Ora Collins, RG89-284, B560, F3406.

54. People v. Charles Bankey, RG89-284, B588, F4713.

55. People v. Claire Kirtland, RG89-284, B659, F7729; People v. Charles Beatty, RG89-284, B668, F8047.

56. People v. Clifford Letts, RG89-284, B681, F8576.

57. (Estrich 1986, 1172-74)

58. Ira Winslow.

59. Lansing Republican Tri-Weekly. "Ingham County Circuit Court," 6 December 1881. On microfilm, Library of Michigan.

60. People v. James Terrill, RG89-284, B582, F4470.

61. James Terrill.

62. People v. Charles Weller, RG89-284, B603, F5395.

63. Public Acts of the Legislature of the State of Michigan, Regular Session of 1931, 87 of Chapter 11, Act 328, Chapter XI, Section 87. Found in the chapter on assaults, this law was listed two sections below the law for assault with intent to rape. Both that law and this one carried the same penalty: imprisonment in the state prison for not more than ten years, or a fine of not more that five thousand dollars.

64. Ira Winslow; James Terrill; Ora Wiley.

65. Charles Weller.

66. People v. William Bockbrader, RG89-284, B631, F6680.

67. William Bockbrader.

68. People v. William Alford, RG89-284, B590, F4814.

69. William Alford.

70. William Alford.

71. (D'Emilio and Freedman 1988, 200-201)

72. People v. Henry Elliott, RG80-109, B183, F53.

73. State Republican, 12 November 1886. On microfilm, Library of Michigan.

74. Henry Elliott.

75. State Republican, 12 November 1886. On microfilm, Library of Michigan.

76. People v. Merle Zerba, RG89-284, B634, F6296.

77. People v. Charles Davis, RG80-109, B203, F22.

78. People v. Jack Burns, RG89-284, B590, F4814.

79. Jack Burns.

80. Jack Burns.

81. Jack Burns.

82. (D'Emilio and Freedman 1988, 31)

83. (Feild and Bienen 1980, 103; 125. In this research on the effects of several variables in regard to jury actions, one influential variable was the race of the defendant, such that black defendants receive harsher sentences, especially in cases in which the victim is white. They found that jury members generally are harsher on opposite race defendants. Also, see LaFree where he notes that with black defendant/black victim combinations, 17 percent of sentences in the Indianapolis trials were for over six years; with black defendant/white victim combinations, 50 percent of the sentences were for over six years (1989, 133).

84. Ira Winslow; People v. LeRay Ellerbrook, RG89-284, B648, F7312.

85. Charles Weller.

86. William Alford; Ira Winslow; James Terrill.

87. People v. Martin Root.

88. People v. Alexander Varsoke, Spencer Rogers, and James Jackson, RG89-284, B618, F6040.

89. William Bockbrader.

90. Henry Elliott.

91. People v. Earl Ostrander, RG89-284, B571, F3935.

92. People v. John Sullivan, RG89-284, B635, F6856.

93. People v. Mitchell Narducci, RG89-284, B685, F8731.

94. People v. George Murphy, RG89-284, B574, F4096.

95. People v. Clarence Hills, RG80-109, B206, F33.

96. George Murphy.

97. People v. Elmer Bravender, RG89-284, B617, F6000.

98. People v. Henry Johnson, RG80-109, B189, F21.

99. People v. Charles Davis, RG80-109, B203, F22.

100. Charles Davis.

101. (Gordon 1988, 214) The records of the client victims of incest in the Boston study reveal how family members, as well as perpetrators, worked to keep the secret from being revealed. See the discussion in Chapter Four of this study for an analysis of the incest cases in this sample.

Notes for Chapter Three

1. People v. John Wilson. RG89-284, B556, F3247.

2. People v. Vonda Lee Bellah, RG89-284, B662, F7839.

3. Barbara Epstein, "Family, Sexual Morality, and Popular Movements." Powers of Desire: The Politics of Sexuality, eds. Ann Snitow, Christine Stansell, and Sharon Thompson (New York: Monthly Review Press, 1983), 118.

4. Refer to Chapter One for a brief description of each of the laws, especially pages 9-10 for the description of the statutory rape law.

5. David Pivar, Purity Crusade: Sexual Morality and Social Control, 1868-1900 (Westport, Connecticut: Greenwood Press, Inc., 1973), 142-143. Pivar's chart showing each state's changed age of consent from 1886 to 1895 shows that Michigan's action to raise the age of consent to sixteen in 1895 was in keeping with similar actions in thirty-two other states.

6. (Gordon 1988, 32-45)

7. (D'Emilio and Freedman 1988, 153)

8. John C. Burnham, "The Progressive Era Revolution in American Attitudes toward Sex," Journal of American History, 59 (March, 1973): 890-891.

9. (Burnham 1973, 891)

10. (Brandt 1985, 14-15)

11. (Burnham 1973, 887)

12. (Burnham 1973, 892-898) Burnham discusses the remarkable amalgamation of two forces that ultimately worked toward the same goal, but came from two quite disparate positions. The Social Purity forces had come with a moral agenda, wanting to eradicate prostitution and vice; the Social Hygiene forces came from a medical agenda, wanting to regulate and license prostitution. Initially the campaigns of both groups differed greatly, one distributing highly euphemistic and spiritual literature, the other issuing much more explicit and practical literature. They did not really join forces until early in the twentieth century, when the medical establishment gave up on licensing prostitution and the purity reformers agreed to support sex education in the schools.

13. Elaine Tyler May, Great Expectations: Marriage and Divorce in Post-Victorian America (Chicago: University of Chicago Press, 1980), 33. May's study of divorce records in Los Angeles in the 1880s revealed that one common reason wives sued for divorce was on account of the excessive sexual expectations of their husbands.

14. Barbara Welter, "The Cult of True Womanhood: 1820-1860," American Quarterly 18 (Summer, 1966): 155.

15. (Welter 1966, 155) Welter's reference on this point is to an 1807 publication by Thomas Branagan, entitled: The Excellency of the Female Character Vindicated: Being an Investigation Relative to the Cause and Effects on the Encroachments of Men Upon the Rights of Women, and the Too Frequent Degradation and Consequent Misfortunes of the Fair Sex (New York) p. 277,278.

16. (Welter 1966, 155) The reference is to Branagan again.

17. (Burnham 1973, 885)

18. D'Emilio and Freedman make a similar statement, stating that the new legislation raising the age of consent served to deny men their youngest victims. (1988, 153)

19. Joan Brumberg, "Ruined Girls: Changing Community Responses to Illegitimacy in Upstate New York, 1890-1920," Journal of Social History 18 (Winter, 1984): 249. Brumberg is citing George H. Naphys, The Physical Life of Woman, (Toronto, 1875), 46-48; 67.

20. Public Acts of the Legislature of the State of Michigan, Number 63, Section 1. (Lansing: Wynkoop Hollenbeck Crawford Co., 1911), 77. To commit the offense of pandering is to "procure a female inmate for a house of prostitution; or... [to] induce, persuade, encourage, inveigle, or entice a female person to become a prostitute...

21. People v. Edwin Marietta, RG80-109, B184, F36.

22. Ingham County Court Calendar, RG80-109, Vol. 94. State of Michigan Archives.

23. Lansing Journal Daily, March 8, 1889.

24. People v. Ernest Carr, RG80-109, B190, F51. People v. Ernest Whitney, RG80-109, B190, F52.

25. Ernest Carr. Ernest Whitney.

26. People v. Jason Gowen, RG80-109, B192, F4.

27. Jason Gowen.

28. People v. Samuel Beach, RG80-109, B193, F24.

29. Samuel Beach.

30. Samuel Beach. The Michigan Supreme Court case cited was #19070, considered in Session on March 4, 1902. The Justices present were Frank A. Hooker (Chief Justice), Joseph B. Moore, Claudius B. Grant, and Robert M. Montgomery.

31. Jason Gowen. See the discussion of this case on pages 12-13 of the present chapter.

32. (D'Emilio and Freedman 1988, 195)

33. Kathy Peiss, "Charity Girls and City Pleasures," Passion and Power: Sexuality and History, eds. Kathy Peiss and Christine Stansell (Philadelphia: Temple University Press, 1989), 63.

34. (Peiss 1989, 63-64) Peiss cites Leslie Woodcock Trentler's Wage Earning Women: Industrial Work and Family Life in the United States, 1900-1930 (New York: 1979), 110-113.

35. Lydia Pinkham, Lydia Pinkham's Private Textbook, Revised Edition (Lynn, Massachusetts: C.1885), 37.

36. (Brandt 1985, 127)

37. Versile Babcock of Mason, Michigan, interview by author, 6 March 1992. Babcock was a sheriff in Ingham County in the period from 1947 to 1977.

38. (Babcock, Mason, Michigan, 1992)

39. People v. Louis Stanley, RG89-284, B568, F3764.

40. People v. Le Roy Nestell, RG89-284, B--, F5484. The judge

wrote in his statement that he offerred probation to Nestell if he would agree to pay for the medical treatment his victim needed, since she had become infected with gonorrhea from the attack of forced intercourse. When Nestell refused to agree to such an arrangement, the judge sentenced him to prison.

41. People v. Abram N. Durling, RG80-109, B184, F18.

42. (Brumberg 1984, 252)

43. People v. Paul Karn, RG80-109, B206, F22.

44. People v. Millard Foreman, RG898-284, B570, F3882.

45. People v. James Conran, RG89-284, B613, F5820.

46. People v. Regenal Haynes, RG889-284, B646, F7263.

47. People v. Robert Lair, RG89-284, B675, F8335.

48. Robert Lair.

49. People v. Gordon Zeigler, RG89-284, B689, F8880.

50. State Journal, 31 January 1948. On microfilm, Library of Michigan.

51. People v. James G. Tingley, RG89-284, B661, F7803.

52. Ernest Carr. In telling Lilah that her disease was only "a chancre", her physician was reiterating the pattern seen before in the case against William Cummings, in which his seventeen-year old daughter was deceived into thinking her gonorrhea was "womb trouble." I refer here again to Allan M. Brandt's enlightening discussion on this subject in No Magic Bullet, p. 18.

53. LeRoy Nestell.

54. People v. William Secor, RG89-284, B521, F1638.

55. William Secor.

56. People v. Elmer Verguson, RG89-284, B525, F1788.

57. Elmer Verguson.

58. People v. Willard Fleming, RG89-284, B536, F2334.

59. People v. Wesley Morrison, RG89-284, B606, F5561.

60. Paul Kurn (Minnie), RG80-109, B206, F22; Arthur Hall (Sarah), RG80-109, B217, F25; William Secor (Pearl), RG89-284, B521, F1638; J.C.Stewart (Margaret), RG89-284, B574, F4070; Patrick McBride (Frances), RG89-284, B601, F5319; Donald Jones (Barbara), RG89-284, B650, F7401; Allen Messner (Margaret), RG89-284, B651, F7441; Otto Bennett (Geraldine), RG89-284, B655, F7592.

61. These multiple-defendant situations are not to be confused with gang rape. At least ostensibly, these were circumstances in which girls were sexually involved sequentially and willingly with several young men.

62. People v. Don Taylor, RG89-284, B633, F6770; People v. Arthur Hall, Jr., RG89-284, B633, F6771; People v. Benny Bolinger, RG89-284, B633, F6772; People v. Tony Janueski, RG89-284, B633, F6773; People v. Ernest Cox, RG89-284, B633, F6774; People v. Robert Gallop, RG89-284, B633, F6775.

63. People v. Hugh Langemeyer, RG89-284, B556, F3245; People v. John Wilson, RG89-284, B556, F3247; People v. Harold Winnings, RG89-284, B556, F3248; People v. Mathew Mack, RG89-284, B556, F3251.

64. Hugh Langemeyer.

65. Mathew Mack.

66. Harold Winnings.

67. John Wilson.

68. People v. Arthur Hall, Jr., RG89-284, B633, F6771.

69. People v. John Keltner, RG89-284, B565, F3646.

70. People v. Judson Pound, RG89-284, B540, F2533. People v. Casper Wolf, RG89-284, B540, F2534.

71. People v. J.C. Stewart, RG89-284, B574, F4070.

72. James Conran.

73. People v. Glenn E. Clements, RG89-284, B631, F6661.

74. People v. Ed Mesick, RG89-284, B663, F7866.

75. People v. Myron Potter, RG89-284, B523, F1696.

76. People v. Clifford Smythe, RG89-284, B526, F1842.

77. People v. Donald Jones, RG89-284, B650, F7401.

78. LeRoy Nestell.

79. Regenal Haynes.

80. People v. Kenneth Zimmerman, Jr., RG89-284, B650, F7414.

81. People v. Arthur Hall, RG80-109, B217, F25. People v. Frank Cone, RG89-284, B517, F1448.

82. People v. Millard Foreman, RG898-284, B570, F3882.

83. People v. Carl Briggs, RG89-284, B649, F7369.

84. People v. Allen Messner, RG89-284, B651, F7441.

85. People v. Glenn Van Cleve, Jr., RG89-284, B652, F7489.

86. People v. Floyd Strayer, RG89-284, B665, F7944.

87. The thirteen multiple-defendant case groups are listed according to year, record numbers, and outcomes: (1) 1898: RG80-109, B190, F51 & F52, nolle prosequi; (2) 1900: RG80-109, B192, F20 & F21, nolle prosequi and not guilty; (3) 1901: RG80-109, B193, F4, F5, & F6, deferred sentence, nine months in Ionia, not guilty; (4) 1923: RG89-284, B521, F1638, F1652, & F1656, 1-10 years in Jackson, nolle prosequi, not guilty; (5) 1926: RG89-284, B551, F3033; B552, F3045, F3047, F3053, F3065; B553, F3095. probation for three, 1-5 years in Ionia for three; (6) 1926: RG89-284, B556, F3245, F3247, F3248, F3251, probation for two, 4 mos. jail of one, 3-10 yrs in Jackson for one; (7) 1927: RG89-284, B558, F3314 & F3351. nolle prosequi for both; (8) 1928: RG89-284, B570, F3872, F3873, and F3911, probation for all; (9) 1928: RG89-284, B576, F4151, F4152, F4153, F4154, & F4181, probation for all; (10) 1939: RG89-284, B633, F6770, F6771, F6772, F6773, F6774, F6775, 1-3 years in Jackson for all; (11) 1941: RG89-284, B647, F7278, F7279, & F7280, probation for all; (12) 1943: RG89-284, B653, F7534 & F7535, probation for both; (13) 1945: RG89-284, B671, F8177 & F8178, probation for both.

88. People v. Don Taylor, RG89-284, B633, F6770; People v. Arthur Hall, R089-284, B633, F6771; People v. Benny Bolinger, RG89-284, B633, F6772; People v. Tony Janueski, RG89-284, B633, F6773; People v. Ernest Cox, RG89-284, B633, F6774; People v. Robert Gallop, RG89-284, B633, F6775.

89. People v. Paul Kurn, RG80-109, B206, F22.

90. Wesley Morrison.

91. Elmer Verguson.

92. John Keltner.

93. Gordon Zeigler.

94. People v. Joseph May (alias Joe Turfey), RG80-109, B198, F39.

95. People v. Rudolph Slimak, RG80-109, B212, F33.

96. Rudolph Slimak.

97. People v. Alex McIntyre, RG89-284, B582, F4461.

98. Alex McIntyre. Freeman uses terms like "his organ", "rubbed it back and forth on the tip of the bone", "entered about an inch through the opening of the womb," etc.

99. Alex McIntyre.

100. People v. Herman Saravia, RG89-284, B653, F7508.

101. People v. Sidney Hinds, RG80-109, B197, F13.

102. Sidney Hinds.

103. People v. Clarence Rocha, RG80-109, B215, F49.

104. Clarence Rocha.

105. Clarence Rocha.

106. People v. Andrew White, RG89-284, B648, F7321.

107. Andrew White.

108. Andrew White.

109. Andrew White.

110. People v. Vonda Lee Bellah, RG89-284, B662, F7839.

111. Vonda Lee Bellah.

112. Vonda Lee Bellah.

113. People v. Pat Moran, RG89-284, B600, F5267.

114. People v. Ed Fagan, RG89-284, B602, F5370.

115. People v. Fred Powell, RG89-284, B621, F6138.

116. People v. Andy Puckett, RG898-284, B647, F7307.

117. Andy Puckett.

118. Andy Puckett.

119. People v. Willie Everett, RG89-284, B644, F7182.

120. Willie Everett.

121. (Babcock, Mason, Michigan, 1992)

122. People v. Charles Kregear, RG89-284, B558, F3306.

123. State Journal, 5 November 1926. On microfilm, Library of Michigan.

124. Ingham County Circuit Court Calendar, Criminal Division. RG89-284, Volume 105.

125. People v. Norman W. Hall, RG89-284, B615, F5889.

126. Norman Hall.

127. Normal Hall. Court Calendar, RG89-284, Vol. 107.

128. People v. Alfred Sessions, RG89-284, B646, F7242.

129. Court Calendar, RG89-284, Vol. 108.

130. People v. Fred King, RG89-284, B606, F5544.

131. Fred King.

132. Fred King.

133. Fred King.

134. Samuel Beach.

Notes for Chapter Four

1. People v. John Densmore. RG89-284, B666, F7951. This quote is taken from the judge's statement to the prison authorities at Jackson, where Densmore was sentenced for five to fifteen years for incestuous rape.

2. Lucy Berliner, "The Child and the Criminal Justice System," Rape

and Sexual Assault: A Research Handbook, ed. Ann Wolbert Burgess (New York: Garland Publishing, Inc., 1985), 199.

3. (Berliner 1985, 199). Also see Linda Gordon and Paul O'Keefe's "The 'Normality' of Incest: Father-Daughter Incest as a Form of Family Violence--Evidence from Historical Case Records" in (Burgess 1985, 70); Ann Wolbert Burgess, "Sexual Victimization of Adolescents" in (Burgess 1985, 126); and Judith Herman, "Father-Daughter Incest" in (Burgess 1985, 83) for other references.

4. Kee MacFarlane, "Sexual Abuse of Children" in The Victimization of Women, eds. Jane Roberts Chapman and Margaret Gates (Beverly Hills, California: Sage Publications, 1978), 81-109.

5. (Berliner 1985, 201)

6. (Gordon 1988, 204-249)

7. (Gordon 1988, 204)

8. (Burgess 1985, 126) (Herman 1985, 83)

9. (Herman 1985, 83)

10. (Herman 1985, 83)

11. (Herman 1985, 84)

12. (Burgess 1985, 127)

13. (Herman 1985, 87)

14. (Herman 1985, 87)

15. (Gordon 1988, 209)

16. (Herman 1985, 90)

17. (Gordon and O'Keefe 1985, 78)

18. (Herman 1985, 85)

19. (Herman 1985, 84)

20. (Gordon and O'Keefe 1985, 78-79) (Herman 1985, 86)

21. Average sentence minimums were computed by taking sentences for life as thirty years and probations as zero years, each counting as one sentence nonetheless.

22. (Herman 1985, 83)

23. (Gordon 1988, 208; 212) The anthropologist Gordon refers to is Claude Levi-Strauss, who has been taken to task by feminists in Gayle Rubin's "The Traffic in Women: Notes on the 'Political Economy' of Sex" in Toward an Anthropology of Women, ed. Rayna Reiter (New York: Monthly Review, 1975), 157-210.

24. People v. Delbert Booker, RG80-109, B196, F18; People v. George Frederickson, RG80-109, B200, F31; People v. Charles Frederickson, RG80-109, B200, F32; People v. Michael Frederickson, RG80-109, B200, F17. People v. Daniel Pierow, RG80-109, B209, F17; People v. Frank Fuller, RG80-109, B214, F19; People v. Sam Reese, RG80-109, B216, F19; People v. Sam Wise, RG89-284, B578, F4250; People v. Vern Spinner, RG89-284, B595, F5070; People v. Elmer Smith, RG89-284, B656, F7626; People v. John Densmore, RG89-284, B666, F7951.

25. (Gordon and O'Keefe 1985, 78)

26. Delbert Booker. People v. William Atherton, RG89-284, B547, F2862. People v. Peter Schur, RG89-284, B591, F4879; People v. Vern Spinner, RG89-284, B595, F5070; People v. Fred Hogue, RG89-284, B649, F7355.

27. Mary Hanemann Lystad, "Violence in the Home: A Public Problem" (ed. Burgess 1985, 64)

28. (Gordon 1988, 230-234)

29. (Herman 1985, 83)

30. Delbert Booker.

31. Frank Fuller.

32. Vern Spinner.

33. People v. John Austin, RG89-284, B636, F6879.

34. People v. Fred Hogue, RG89-284, B649, F7355.

35. (Gordon and O'Keefe 1985, 79; 70)

36. (Herman 1985, 86)

37. (Herman 1985, 85) Herman states that other studies show a correlation between absence or disability of mothers and frequency of incest in the home.

38. (Gordon and O'Keefe 1985, 75)

39. George Frederickson. Charles Frederickson. Michael Frederickson.

40. Sam Reese.

41. People v. Joseph Owens, RG89-284, B568, F3760.

42. People v. Henry Bravender, RG89-284, B589, F4798.

43. People v. Jesse Ellis, RG89-284, B627, F6483.

44. People v. Cyrus Wheeler, RG80-109, B179B, F14.

45. Delbert Booker.

46. John Densmore.

47. (Gordon 1988, 235)

48. Delbert Booker.

49. Fred Hogue.

50. Frank Fuller.

51. Frank Fuller.

52. Samuel Wise.

53. Delbert Booker. Questions about school attendance were directed at school age victims under cross-examination for several reasons: to determine to age, to establish that she was mentally competent, and to assess whether she was responsible and credible as a witness.

54. (MacFarlane 1978, 91)

55. People v. David Wright, RG80-109, B179B, F16.

56. George Frederickson, Charles Frederickson, Michael Frederickson.

57. Sam Reese.

58. William Atherton.

59. Joseph Owens.

60. Jesse Ellis.

61. People v. William Earl Wheeler, RG89-284, B654, F7546.

62. Vern Spinner. People v. Kenneth Bailey, RG89-284, B621, F6175. John Austin. Fred Hogue.

63. Delbert Booker.

64. Frank Fuller.

65. People v. Theodore Hodges, RG89-284, B585, F4608.

66. Peter Schur.

67. Peter Schur.

68. People v. Harry Winters, RG89-284, B694, F9052.

69. Delbert Booker.

70. Delbert Booker.

71. Delbert Booker.

72. Delbert Booker.

73. Delbert Booker.

74. Vern Spinner.

75. Vern Spinner.

76. Vern Spinner.

77. People v. Gustus Havens, RG80-109, B206, F47. Theodore Hodges. Peter Schur.

78. George Frederickson. Charles Frederickson. Michael Frederickson.

79. Frederickson cases.

80. William Earl Wheeler.

81. William Earl Wheeler.

82. Theodore Hodges.

83. Gustus Havens.

84. (Gordon 1988, 236)

85. Sheila A. Redmond, "Christian 'Virtues' and Recovery from Child

Sexual Abuse," Christianity, Patriarchy, and Abuse: A Feminist Critique, eds. Joanne Carlson Brown and Carole R. Bohn (New York: The Pilgrim Press, 1989), 79. Redmond theorizes that a patriarchal religious orientation, such as that which is prevalent in Christianity, "allows for a tolerance of violence against children by fathers and other authority figures...for the sake of the child's soul."

86. (Brownmiller 1975, 275-276) Brownmiller recounts how Freud was at first willing to believe his female patients who reported childhood experiences of rape or molestation that were had usually at the hands of their fathers. Later, she reports, he revised his assessment, describing these assault narratives as "fantasies that the child contrived as a defense against her own genital pleasure and her guilty wish to sleep with her father." Brownmiller further notes that much of subsequent psychoanalytic literature focused on "the child victim's 'seductive' behavior" and her "hidden complicity."

87. (Herman 1985, 83-84) The reference here is to Kinsey's 1956 study. Herman states: "Kinsey and his associates conducted extensive interviews with over 4000 women regarding their sexual experiences. Included in the questionnaire was a section on childhood sexual contact with adults. The results, largely ignored at the time, indicated that female children are regularly subjected to sexual approaches by adult males who are part of their intimate social world. Twenty-five percent...reported a sexual encounter with an adult male before age twelve. Six percent reported a sexual experience wth an adult male relative...findings that have been replicated by others." Herman further cites the 1983 findings of Diane Russell, who discovered that "only 2 percent of the women who gave a history of sexual abuse by a family member indicated the incidents had been reported to the police."

88. (Redmond 1989, 78-80)

89. Compiled Laws of the State of Michigan, 1897. Section I of Public Act 153 of 1887, being How. 9314b.

90. Compiled Laws of the State of Michigan, 1948. Vol. IV, Section 750.332, p. 14088.

91. Virtually all complaints for indecent liberties were written with the word "assault" in the charge.

92. People v. Eli Sheldon, RG80-109, B195, F29 and B197, F21.

93. People v. Albert Welton, RG89-284, B530, F2081.

94. People v. Wayne Ryal, RG89-284, B611, F5736.

95. People v. Lewis Scott, RG89-284, B684, F8680.

96. Eli Sheldon, RG80-109, B197, F21.

97. Eli Sheldon, RG80-109, B197, F22.

98. Albert Welton.

99. Wayne Ryal.

100. John Gagnon, "Female Child Victims of Sex Offenses," Social Problems 13 (Fall 1965): 177.

101. Lewis Scott.

102. People v. William Haviland, RG80-109, B184, F47.

103. Haviland.

104. People v. George Walker, RG80-109, B191, F45.

105. A three-year sentence was given to George Putnam for statutory rape in 1902. People v. George Putnam, RG80-109, B193, F37.

106. People v. Henry Tanto, RG80-109, B194, F15.

107. Henry Tanto.

108. State Republican, 6 October 1903. On microfilm, Library of Michigan.

109. People v. Henry Kohler, RG80-109, B195, F4.

110. Henry Kohler.

111. People v. Edd Piper, RG80-109, B208, F10. People v. Raymond Pierce, RG89-284, B538, F2396.

112. People v. Allen Crawford, RG89-284, B576, F4141.

113. The defense attorney in the second case against Eli Sheldon accused Cora Hills of bringing the charge against Eli as a way to get money from him for their household and business expenses. See RG80-109, B197, F21.

114. Allen Crawford.

115. People v. Lee Morton, RG89-284, B633, F6786.

116. Lee Morton.

117. Lee Morton.

118. Lee Morton.

119. Lewis Scott.

120. Lewis Scott.

121. Lewis Scott.

122. Lewis Scott.

123. People v. Carl Carey, RG898-284, B569, F3826.

124. People v. John Smalley, RG89-284, B634, F6806.

125. People v. Delbert Jessie, RG89-284, B665, F7948.

126. Lee Morton. People v. William Kimball, RG898-284, B640, F7052. People v. Neal Bradley, RG89-284, B657, F7678.

127. Eli Sheldon (B195, F29). Edd Piper. Raymond Pierce. People v. Eber Moran, RG89-284, B626, F6398. People v. Jay Sheldon, RG89-284, B556, F3231. People v. Cleveland Gwynn, RG89-284, B629, F6576. People v. Earl Vaughn, RG89-284, B627, F6455.

128. (Gagnon, 1965, 177) Also, Christine Froula, "The Daughter's Seduction: Sexual Violence and Literary History," Signs: Journal of Women in Culture and Society 11 (Fall 1986): 629-630.

Notes for Chapter Five

1. John Locke, An Essay Concerning Human Understanding (1689), abridged, edited, and introduced by Maurice Cranston (New York: Collier Books, 1965), 61.

2. Susan Glaspell, "Jury of Her Peers," Every Week, 5 March 1917, reprinted in The Best Short Stories of 1917, ed. Edward O'Brien (Boston: Small, Maynard, 1918), 256.

3. Annette Kolodny, "A Map for Rereading: Gender and the Interpretation of Literary Texts," The New Feminist Criticism: Essays on Women, Literature, and Theory, ed. Elaine Showalter (New York: Pantheon Books, 1985), 57.

4. People v. Albert Raddick, RG898-284, B666, F7982.

5. These percentages refer only to those cases tried before a jury, and are not representative of all the cases that came before the justice

of the peace.

6. (LaFree 1989)

7. Barbara Shapiro, Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence, (Berkeley and Los Angeles: University of California Press, 1991), xiii; 1-6.

8. (Shapiro 1991, 7-9)

9. (Shapiro 1991, 11) She identifies Locke's criteria for evaluating testimony: the number of witnesses, their integrity, their skill at presenting evidence and its agreement with the circumstances, and last, the presence or absence of contrary testimony.

10. (Shapiro 1991, 22)

11. (Shapiro 1991, 22)

12. (Shapiro 1991, 24-26)

13. Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (Ithaca: Cornell University Press, 1990), 12.

14. (Minow 1990, 13-65)

15. (Minow 1990, 66)

16. (Minow 1990, 119; 113) Minow distinguishes the social relations approach in law (which tries to account for the interdependencies of people and groups), from the abnormal persons approach (which judges people according to how well they do or do not fit the norm set by the dominant group in society), and from the rights analysis approach (which judges conflict between persons or groups only from the perspective of competing individual rights).

17. (Minow 1990, 124)

18. (Minow 1990, 197; 208) Minow also cites Beverly Harrison and Nel Noddings as important social relations feminist ethicists. Harrison, relying on Christian traditions, argues that "ethics must reflect on women's real experiences" rather than on abstract principles that do not apply to real life experiences. Minow notes: "for Harrison, moral reasoning must start with the recognition that people's lives are interconnected." Noddings rejects traditional abstract ethical approaches and recommends a caring approach in which "ethics should use not detachment but relatedness and responsiveness."

19. (Minow 1990, 213)

20. Refer to: Vivian Berger, "Man's Trial, Women's Tribulation: Rape Cases in the Courtroom", Columbia Law Review; (Brownmiller 1975); (Estrich 1986); Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law, (Cambridge: Harvard University Press, 1987); (Tong 1984).

21. Robin West, "Jurisprudence and Gender," Feminist Legal Theory: Readings in Law and Gender, eds. Katharine T. Bartlett and Rosanne Kennedy, (Boulder, Colorado: Westview Press, 1991), 201, 207.

22. (West 1991, 220)

23. (West 1991, 229)

24. (West 1991, 230)

25. (West 1991, 231)

26. Martha Minow, "Feminist Reason: Getting It and Losing It," in (eds. Bartlett and Kennedy 1991, 358)

27. Deborah Rhode, Justice and Gender: Sex Discrimination and the Law (Cambridge: Harvard University Press, 1989) 109-321; also (Minow 1991, 357).

28. (Rhode 1989, 2)

29. (Rhode 1989, 19-23)

30. (Rhode 1989, 49)

31. Betty MacDowell and Rachel Brett Hartley, eds. Michigan Women: Firsts and Founders (Lansing: Michigan Women's Studies Association, 1992), 88.

32. (Rhode 1989, 20)

33. (Rhode 1989, 248)

34. (Rhode 1989, 252)

35. Richard Posner, Sex and Reason (Cambridge: Harvard University Press, 1992). Also see review of Posner in Martha C. Nussbaum, "Venus in Robes", New Republic 206.16 (April 20, 1992): 36-41. Summarizing Posner, Nussbaum notes, "[judges] approach these matters...with a personal experience that is likely to be somewhat narrow and uniform, given the effectiveness with which the background checking of judges weeds out members of sexual minorities."

36. (Posner 1992, 23) Posner's reference is to Michel Foucault,

History of Sexuality, trans. by Robert Hurley, 1985.

37. (Posner 1992, 37) Here, Posner contends that Western sex laws have been dominated by Christian sex ethics. In reacting to the loose sex practices of purportedly celibate Roman Catholic clergy, the mid-seventeenth century Puritans were among the sources of the most repressive attitudes toward sexuality, a legacy that Americans in particular live with today.

38. (Posner 1992, 70-73)

39. Richard A. Posner, The Problems of Jurisprudence (Cambridge: Harvard University Press, 1990), 39-40.

40. (Posner 1990, 46; 49)

41. (Posner 1990, 117-125)

42. Clifford Geertz, "From the Native's Point of View: on the Nature of Anthropological Understanding," Culture Theory: Essays on Mind, Self, and Emotion, eds. Richard Schweder and Robert LeVine (Cambridge: Cambridge University Press, 1984), 134. See also (Minow 1990, 185).

43. (Minow 1990, 213)

44. People v. Sam Beach, RG80-109, B193, F24.

45. Sam Beach.

46. Michigan Compiled Laws Annotated 39 (St. Paul: West Publishing Co., 1968), 393. Refer to Section 750.520, Subsection 56, People v. English (1942).

47. People v. Fred Stevens, RG89-284, B63, F6241.

48. People v. Joshua Lovell, RG89-284, B618, F6044.

49. People v. Fred Phelps, RG89-284, B614, F5865.

50. Fred Phelps.

51. People v. Wayne Ryal, RG89-284, B611, F5736.

52. (Michigan Compiled Laws Annotated 1968, 381). Refer to Section 750.520, Subsection 32, People v. Baker (1930).

53. People v. Myron C. Potter, RG89-284, B523, F1696.

54. People v. Charles Force, RG89-284, B550, F2983.

55. Charles Force.

56. People v. Harry Winters, RG89-284, B694, F9052.

57. People v. Steve Kunis, RG89-284, B652, F7469.

58. Steve Kunis.

59. People v. Albert Welton, RG89-284, B530, F2081.

60. Albert Welton.

61. Random House College Dictionary, 1984 Edition, 915.

62. (Shapiro 1991, 2)

63. Roy Torcasa v. Watkins, 367 U.S. 488, 1961.

64. People v. Harold Hanks, RG89-284, B626, F8416.

65. (Michigan Compiled Laws Annotated 1968, 374) Section 750.520, Subsection 8, Don Moran v. People (1872).

66. (Michigan Compiled Laws Annotated 1968, 374)) Section 750.520, Subsection 8, People v. Myers (1943).

67. (Michigan Compiled Laws Annotated 1968, 381). Section 750.520, Subsection 31, People v. Ryno (1907).

68. (Michigan Compiled Laws Annotated 1968, 380) Section 750.520, Subsection 31, People v. Cowles (1929).

69. (Michigan Compiled Laws Annotated 1968, 381) Section 750.520, Subsection 31, People v. Wilson (1912).

70. (Michigan Compiled Laws Annotated 1968, 380) Section 750.520, Subsection 31, People v. Eddy (1930).

71. People v. Roy S. Murphy, RG89-284, B529, F2033.

72. Roy S. Murphy.

73. Roy S. Murphy.

74. Roy S. Murphy.

75. Roy S. Murphy.

76. People v. Earl Chapin, RG89-284, B626, F6401.

77. Earl Chapin.

78. Earl Chapin.

79. Robin West, "Jurisprudence and Gender," in (eds. Bartlett and Kennedy, 1991, 220; 232).

80. Earl Chapin.

81. People v. Dale Young, RG89-284, B623, F6225.

82. Dale Young.

83. People v. George Middlebrook, RG89-284, B559, F3383.

84. People v. Everett Hastings, RG80-109, B216, F23.

85. Everett Hastings.

86. Everett Hastings

87. People v. Jack Hutton, RG89-284, B560, F3419.

88. Jack Hutton.

89. Jack Hutton.

90. Report of the Governor's Study Commission on the Deviated Sex Offender (State of Michigan, 1951), 92.

91. (Michigan Compiled Laws Annotated 1968, 386) Section 750.520, Subsection 42, People v. Brown (1884).

92. Henry Elliott.

93. Jason Gowen.

94. Jason Gowen.

95. Sam Beach.

96. Sam Beach.

97. Fred King.

98. Vern Spinner.

99. David Harris.

100. Pat Moran.

101. Refers to People v. Fred King.

102. (Report of the Governor's Study Commission 1951, 76)

103. (Report of the Governor's Study Commission 1951, 1)

104. People v. Virgil Sampson, RG89-284, B641, F7089.

105. People v. Carl Crosby, RG89-284, B671, F8163.

106. Virgil Sampson. Carl Crosby. Quote is composite taken from reports of four psychological assessments.

107. (Posner 1992, 23)

108. Carl Crosby.

109. (Report of the Governor's Study Commission 1951, 42-43)

110. James Henslin, "Toward the Sociology of Sex," The Sociology of Sex: An Introductory Reader, James M. Henslin and Edward Sagarin, eds. (New York: Schocken Books, 1978), 8-9.

111. (Report of the Governor's Study Commission 1951, 36; 29)

112. People v. Claude VanOrsdale, RG80-109, B199, F44.

113. People v. Lester Cornish, RG89-284, B551, F3017.

114. People v. Andrew Gogar, RG89-284, B572, F3989.

115. People v. William Rodgers, RG89-284, B672, F8206.

116. People v. Robert Emerson, Sr., RG89-284, B687, F8824

117. (Posner 1992, 52)

118. (Michigan Compiled Laws Annotated 1968, 388-395) Such categories include: "Resistance of Prosecutrix, Instructions"; "Children, Instructions"; "Time and Place of Offense, Instructions"; "Impeaching Evidence, Instructions"; and "Reasonable Doubt, Instructions".

119. People v. George Walker, RG80-109, B191, F45.

120. People v. Clyde Dale Nichols, RG89-284, B697, F9166.

121. People v. William Allen Coffee, RG89-284, B670, F8118.

122. People v. George Lawrence, RG89-284, B688, F8841.

123. People v. Martin E. Leseney, RG89-284, B685, F8748.

124. People v. Linton Stewart, RG89-284, B695, F9085.

125. People v. Gordon Lee Studt, RG89-284, B689, F8891.

126. People v. Paul Stanfield, RG89-284, B694, F9040.

127. People v. Henry Patrick, RG89-284, B647, F7308.

128. The quoted expression, again, is that of Clifford Geertz, referred to in Minow, Making All the Difference, p. 185. See also Clifford Geertz, in Culture Theory, Schweder and LeVine, eds., p. 123.

129. See for example: People v. Lee Graves, RG89-284, B525, F1802; People v. Emma Koppel, RG89-284, B528, F1982; People v. Edward Moore, RG89-284 B607, F5613; and People v. John Miller, RG89-284, B684, F8709.

130. (Gary LaFree 1989, 159-160) In the Indianapolis trials, LaFree found that "in six (15.8 percent) trials, victims were on the stand less than 30 minutes" but "in about 75 percent of the cases, the victim's testimony lasted from 30 to 90 minutes." One victim was "on the stand for two and a half hours." By contrast, "the average length of the defendant's testimony was shorter than that of victims. Of those defendants who testified, 17 (57 percent) were on the stand for less than 30 minutes; 10 defendants were on the stand for 30 to 60 minutes and only 3 were examined for more than 60 minutes." LaFree concludes, "these facts...reinforce the courtroom impression that it is the victim rather than the offender who is really on trial."

131. (Scott 1988, 172-173)

132. (Minow 1990, 189) See also Michel Foucault, "What is an Author?" in The Foucault Reader, ed. Paul Rabinow, (New York: Pantheon Books, 1984), 64; 141-167.

133. (Posner 1990, 223-261)

134. (Minow 1990, 97)

135. (Posner 1990, 48)

136. (Rhode 1989, 19)

137. (Minow 1991, 365)

138. (Rhode 1989, 246-247)

139. (Rhode 1989, 244-247)

140. Carol Poston and Karen Lison, Reclaiming Our Lives: Hope for Adult Survivors of Incest (Boston: Little, Brown and Company, 1989), 12.

141. (Poston and Lison 1989, 44)

142. (Poston and Lison 1989, 46-56)

143. (Poston and Lison 1989, 49)

144. (Michigan Compiled Laws Annotated 1968, 383) Section 750.520, Subsection 35, People v. Baker (1930).

145. (Poston and Lison 1989, 38-39) The remainder of this passage tells how Cheryl's father set up a fan near her hand, where he had tied it to the bars of her crib. Turning the fan on and walking away, he warned that God would make sure her hand would come off (as punishment for touching her genital area). He apparently claimed the authority to issue such a warning by virtue of his being a minister.

146. (Poston and Lison 1989, 39)

147. Diana E. H. Russell, The Politics of Rape: The Victim's Perspective (New York: Stein and Day, 1975).

148. (Russell 1975, 203)

149. (Russell 1975, 203)

150. (Russell 1975, 205)

151. (Russell 1975, 206)

152. (Russell 1975, 206)

153. (Rhode 1989, 247)

154. (Minow 1990, 221)

155. (Kolodny 1985, 58)

156. (Posner 1992, 32)

157. (Posner 1992, 33)

Notes for Chapter Six

1. Sarah Slavin, "Authenticity and Fiction in Law: Contemporary Case Studies Exploring Radical Legal Feminism," Journal of Women's

History 1 (Winter 1990): 141.

2. Census Reports Volume I, Twelfth Census of the United States 24; 785.

3. (Posner 1992, 383) Posner comments on the fact that with heavier punishments, juries respond with greater leniency toward the defendant.

4. (Minow 1990, 66)

5. (Minow 1990, 67)

6. (Rhode 1989, 245-246)

7. (Gary LaFree 1989, 35)

8. (Gary LaFree 1989, 37-38)

9. (Gary LaFree 1989, 133)

10. (Gary LaFree 1989, 134-135)

11. (Hall 1983, 328-329); (Hine 1989, 912-921); (Jones 1985, 157); (Jennings 1990, 45-74). Cited in Note 12 of the Introduction to this work and Note 34 of Chapter One, these historians are among those contributing to a new understanding of how gender distinctions in slave roles influenced later stereotypes of black women.

12. People v. Willie Everett, RG89-284, B644, F7182.

13. People v. Henry Hudson, RG89-284, B656, F7642.

14. People v. John Henry Doan. RG89-284, B667, F8001.

15. People v. Andrew White, RG89-284, B648, F7321; People v. Robert Reglund, RG89-284, B651, F7462; People v. James Davis, RG89-284, B651, F7463.

16. People v. Jack Burns, RG89-284, B592, F4923; People v. James Wright, RG89-284, B698, F9192.

17. People v. Ira Winslow, RG80-109, B181, F34.

18. People v. William Cline, RG80-109, B184, F40.

19. People v. James Terrill, RG89-284, B582, F4470.

20. People v. William Bockbrader, RG89-284, B631, F6680.

21. (LaFree 1989, 34-38)

22. (Minow 1990, 271)

23. (Posner 1992, 388)

24. "Mrs. Paul C. Younger..." State Journal, 19 April 1959.

25. (LaFree 1989, 239)

26. (LaFree 1989, 240)

27. (Posner 1992, 180)

28. (Posner 1992, 390)

29. Jeanne C. Marsh, Alison Geist, and Nathan Caplan, Rape and the Limits of Law Reform (Boston: Auburn House Publishing Company, 1982), 13-18.

30. Carole Living of Lansing, Michigan, interview by author. Office of State Representative Barbara Dobb, Lansing, Michigan, August 16, 1991.

31. "Rape and the Law", Newsweek, 20 May 1985, 62.

32. (Marsh, Geist, and Caplan 1982, 25-65)

33. Ronald Berger, Patricia Searles, and W. Lawrence Neuman, "The Dimensions of Rape Reform Legislation," Law and Society Review, 22.2 (1988): 331-332.

34. (Berger, Searles, and Neuman 1988, 336)

35. (Berger, Searles, and Neuman 1988, 345)

36. Linda Maloney of Lansing, Michigan, phone interview by author, 9 December 1992, Lansing, Michigan.

37. People v. Charles Webb.

38. Susan Caringella-Macdonald, "Sexual Assault Prosecution: An Examination of Model Rape Legislation in Michigan," Criminal Justice Politics and Women, (Haworth Press, 1985): 67-74.

39. (Caringella-Macdonald 1985, 75)

40. (Caringella-Macdonald 1985, 78; 80)

41. (Michigan Compiled Laws Annotated 1968, 485) Section 750.520j.

42. (Maloney, Lansing, 1992)

43. (Maloney, Lansing, 1992)

44. "Rape and the Law," Newsweek, 20 May 1985, 62.

45. (Maloney, Lansing, 1992)

46. David Margolick, "Smith Acquitted of Rape Charge After Brief Deliberation by Jury," New York Times, 12 December 1991. Lisa Levitt Ryckman, "Tyson Guilty of Rape," Lansing State Journal, 11 December 1992.

47. Robert Hanley, "Woman Gives an Account of Sex Abuse," New York Times, 10 December 1992; Jane Fritsch, "Assault Trial Tests Defense of Consent," New York Times, 13 December 1992.

48. Michael deCourcy Hinds, "Child Sex-Abuse: Hard to Prove, to Much Dismay," New York Times, 6 November 1992.

49. Kerstie Borysowicz of East Lansing, Michigan, interview by author, 23 May 1992, in East Lansing.

50. (Hinds 1992)

51. People v. Earl Chapin, RG89-284, B626, F6401.

52. Rose E. Milloy, "Furor Over a Decision Not to Indict in a Rape Case," New York Times, 28 October 1992.

53. (Slavin 1990, 129)

54. (Slavin 1990, 130; 149)

55. (Minow 1991, 359)

56. Sara Ruddick, "Remarks on the Sexual Politics of Reason," in Women and Moral Theory, eds. Eva Feder Kittay and Diana T. Meyers (Rowman and Littlefield Publishers, Inc. 1985): 239; 257. Ruddick writes, "On a more intellectual level, it is difficult even to state women's difference without adopting the dichotomies that male reason has invented."

57. (Minow 1991, 360)

58. (Berger, Searles, and Neuman 1988, 330; 348-349)

59. (Rhode 1989, 19-23) Rhode writes: "What is notable about virtually all of these decisions is the utter lack of self-consciousness with which an exclusively male judiciary interpreted texts written by

exclusively male assemblies to determine issues of male power and exclusivity."

BIBLIOGRAPHY

BIBLIOGRAPHY

Primary Sources

Babcock, Versile, former deputy sheriff in Ingham County. Interview by author, 6 March 1992.

Borysowicz, Kerstie, member of Ingham County Court Watch. Interview by author, 29 May 1992. East Lansing, Michigan.

Census Reports, Volume I. Twelfth Census of the United States, 1900. Washington, United States Census Office, 1901.
Sixteenth Census of the United States: 1940. Volume I. Population. Washington: United States Government Printing Office, 1942.

Compiled Laws of the State of Michigan, Volume II. Sections 11; 13; 20; 21. Lansing: W.S. George and Company, 1871.

Compiled Laws of the State of Michigan, Volume III. Section I of Public Act 153 of 1887. Lansing: Robert Smith Printing Co., 1897.

Compiled Laws of the State of Michigan, Volume IV. Sections 41.11; 171.13 750.85; 750.333; 750.520; 766.3; 767.40; 767.41; and 767.42. Ann Arbor: Ann Arbor Press, 1948.

Glaspell, Susan. "Jury of Her Peers." Every Week, 5 March 1917. Reprinted in The Best Short Stories of 1917, ed. Edward O'Brien Boston: Small, Maynard, 1918.

Governor's Study Commission. Report of the Governor's Study Commission on the Deviated Criminal Sex Offender. State of Michigan: 1951

Ingham County Circuit Court, Criminal Division Case Files and Court Calendars 94, 95, 104-110, 1850-1950. Record Groups 80-109 and 89-284. State of Michigan Archives, Lansing, Michigan.

Lansing Journal Daily, 8 March 1889. On microfilm. Library of Michigan.

Lansing Republican TriWeekly, 6 December 1881. On microfilm, Library of Michigan.

Living, Carole, aide to former State Senator Gary Byker. Interview by author, 16 August 1991. Lansing, Michigan.

Locke, John. An Essay Concerning Human Understanding (1689). Abridged, edited, and introduced by Maurice Cranston. New York: Collier Books, 1965.

Maloney, Linda, prosecutor in Ingham County. Interview by author, 9 December 1992. Lansing, Michigan.

Michigan Compiled Laws Annotated, Volume 39. Section 750.520. St. Paul, Minnesota: West Publishing Co., 1968.

Michigan Compiled Laws Annotated, Section 750.520j. St. Paul, Minnesota: West Publishing Co., 1991.

Michigan Law and Practice Encyclopedia, Volume 19. St. Paul, Minnesota: West Publishing Co., 1957.

Michigan Manual. State of Michigan: Legislative Service Bureau, 1989-90.

Michigan Manual. Lansing: State of Michigan, 1965.

Michigan Rules of Court--State. "Rules of Evidence." Rule 404. State of Michigan, 1992.

Michigan State Chamber of Commerce. State Legislation Report. "Courts of Limited Jurisdiction." October 13, 1967. SL 12-67.

Pinkham, Lydia E. Lydia E. Pinkham's Private Text-Book. Revised Edition. Lynn, Massachusetts: The Lydia E. Pinkham Medicine Co., c.1885.

Public Acts and Concurrent Resolutions of the Legislature of the State of Michigan, Number 191, Section 25. Lansing: W.S. George and Company, 1875.

Public Acts and Joint Concurrent Resolutions of the Legislature of the State of Michigan, Number 135, Section 25. Lansing: Darius D. Thorp, 1889.

Public Acts of the Legislature of the State of Michigan, Number 63, Section 1. Lansing: Wynkoop Hollenbeck Crawford Co., 1911.

Public Acts of the Legislature of the State of Michigan, Number 330, Section 2. Lansing: Robert Smith Co., 1925.

Public Acts of the Legislature of the State of Michigan, Number 37, Section 1. Lansing: Robert Smith Co., 1927.

Public Acts of the State of Michigan, Number 328. Sections 85; 336; 349-350; 455; 459; 520. Lansing: Franklin DeKleine Co., 1931.

Revised Statutes of the State of Michigan. Chapter 163, Sections 2,3, and 6; Chapter 153, Sections 20 and 21. Detroit: Bogg and Harmon, 1846.

State Journal, 5 November 1926; 31 January 1948; 19 April 1959. On microfilm, Library of Michigan.

State Republican, 12 November 1886; 28 September 1903; 30 September 1903; 6 October 1903. On microfilm, Library of Michigan.

Secondary Sources

Arnold, Marybeth Hamilton. "'The Life of a Citizen in the Hands of a Woman': Sexual Assault in New York City, 1820." In Passion and Power: Sexuality in History, ed. Kathy Peiss and Christina Simmons, 35-56. Philadelphia: Temple University Press, 1989.

G.J. Barker-Bentfield. Horrors of the Half-Known Life: Male Attitudes Toward Women and Sexuality in Nineteenth-Century America. New York: Harper and Row, Publishers, 1976.

_____. "The Spermatic Economy: A Nineteenth-Century View of Sexuality." In The American Family in Social-Historical Perspective, second edition, ed. Michael Gordon, 374-402. New York: St. Martin's Press, 1978.

Bechhofer, Laurie and Andrea Parrot. "What is Acquaintance Rape?" In Acquaintance Rape: The Hidden Crime, ed. Andrea Parrot and Laurie Bechhofer, 9-25. New York: John Wiley and Sons, Inc., 1991.

Berger, Ronald J., Patricia Searles, and W. Lawrence Neuman. "The Dimensions of Rape Reform Legislation." Law and Society Review 22.2 (1988): 329-57.

Berger, Vivian. "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom." Columbia Law Review 77 (January 1977): 2-103.

Berliner, Lucy. "The Child and the Criminal Justice System." In Rape and Sexual Assault: A Research Handbook, ed. Ann Wolbert Burgess, 199-221. New York: Garland Publishing, Inc., 1985.

Bohmer, Carol. "Acquaintance Rape and the Law." In Acquaintance Rape: The Hidden Crime, ed. Andrea Parrot and Laurie Bechhofer, 317-33. New York: John Wiley and Sons, Inc., 1991.

Bourque, Linda B. A Review of Rape and Criminal Justice: The Social

Construction of Sexual Assault, by Gary D. LaFree. Contemporary Sociology: An International Journal of Reviews 19.5 (September 1990): 727.

Brandt, Allan M. No Magic Bullet: A Social History of Venereal Disease in the United States Since 1880. New York: Oxford University Press, 1985.

Brownmiller, Susan. Against Our Will: Men, Women, and Rape. New York: Simon and Schuster, 1975.

Brumberg, Joan. "'Ruined' Girls: Changing Community Responses to Illegitimacy in Upstate New York, 1890-1920." Journal of Social History 18 (Winter 1984): 247-272.

Burnham, John C. "The Progressive Era Revolution in American Attitudes toward Sex." Journal of American History 59.4 (March 1973): 885-908.

Burt, Martha R. "Cultural Myths and Supports for Rape." Journal of Personality and Social Psychology 38.2 (1980): 217-230.

_____. "Rape Myths and Acquaintance Rape." In Acquaintance Rape: The Hidden Crime, ed. Andrea Parrot and Laurie Bechhofer, 26-40. New York: John Wiley and Sons, Inc., 1991.

Calhoun, Karen S. and Ruth M Townsley. "Attributions of Responsibility for Acquaintance Rape." In Acquaintance Rape: The Hidden Crime, ed. Andrea Parrot and Laurie Bechhofer, 57-69. New York: John Wiley and Sons, Inc., 1991.

Caringella-MacDonald, Susan. "The Comparability in Sexual and Nonsexual Assault Case Treatment: Did Statute Change Meet the Objective?" Crime and Delinquency 31.2 (April 1985): 206-222.

_____. "Sexual Assault Prosecution: An Examination of Model Rape Legislation in Michigan." In Criminal Justice Politics and Women: The Aftermath of Legally Mandated Change, ed. Claudine ScWeber and Clarice Feinman, 65-82. New York: Haworth Press, 1985.

Chapman, Terry L. "Sex Crimes in the West, 1890-1920." Alberta History 35.4 (Autumn 1987): 6-18.

Chappell, Duncan, Gilbert Geis, Stephen Schafer, and Larry Siegel. "Forcible Rape: A Comparative Study of Offenses Known to Police in Boston and Los Angeles." In The Sociology of Sex: An Introductory Reader, Revised Edition, ed. James M. Henslin and Edward Sagarin, 107-22. New York: Schocken Books, 1971, 1978.

The Criminal Justice System: An Introduction. Boston: Houghton Mifflin

Company, 1980.

Cummins, Marvin. "Police and Petting: Informal Enforcement of Sexual Standards." In The Sociology of Sex: An Introductory Reader, Rev. Ed., ed. James M. Henslin and Edward Sagarin, 123-139. New York: Schocken Books, 1971, 1978.

Davis, David Brion. "Life and Death in Slavery." Review of Celia: A Slave, by Melton A. McLaurin, and Bloody Dawn: The Christiana Riot and Racial Violence in the Antebellum North, by Thomas P. Slaughter. The New York Review, 30 January 1992, 6-9.

Degler, Carl N. "What Ought to Be and What Was: Women's Sexuality in the Nineteenth Century." In The American Family in Social Historical Perspective, ed. Michael Gordon, 403-25. New York: St. Martin's Press, 1978.

D'Emilio, John and Estelle B. Freedman. Intimate Matters: A History of Sexuality in America. New York: Harper and Row, 1985.

Epstein, Barbara. "Family, Sexual Morality, and Popular Movements in Turn-of-the-Century America." In Powers of Desire: The Politics of Sexuality, ed. Ann Snitow, Christine Stansell, and Sharon Thompson, 117-130. New York: Monthly Review Press, 1983.

Estrich, Susan. "Rape." In Yale Law Journal 95.6 (May 1986): 1087-1184.

Fee, Elizabeth. "Venereal Disease: The Wages of Sin?" In Passion and Power: Sexuality in History, ed. Kathy Peiss and Christina Simmons, 178-198. Philadelphia: Temple University Press, 1989.

Feild, Hubert S. and Leigh B. Bienen. Jurors and Rape: A Study in Psychology and Law. Lexington, Massachusetts and Toronto: Lexington Books, 1980.

Ferdinand, Theodore N. "The Criminal Patterns of Boston since 1849." The American Journal of Sociology 73 (July 1967): 84-99.

Foucault, Michel. "What is An Author?" In The Foucault Reader, ed. Paul Rabinow, 64; 141-67. New York: Pantheon Books, 1984.

Freedman, Estelle. "'Uncontrolled Desires': The Response to the Sexual Psychopath, 1920-1960." In Passion and Power: Sexuality in History, ed. Kathy Peiss and Christina Simmons, 178-98. Philadelphia: Temple University Press, 1989.

Fritsch, Jane. "Assault Trial Tests Defense of Consent." New York Times, 13 December 1992.

Froula, Christine. "The Daughter's Seduction: Sexual Violence and

Literary History." Signs: Journal of Women in Culture and Society 11.4 (1986): 621-44.

Gager, Nancy and Cathleen Schurr. "The Rapist: Psychopath or Everyman?" Chapter in Sexual Assault: Confronting Rape in America. New York: Grossett and Dunlap, 1976.

Gagnon, John H. "Female Child Victims of Sex Offenses." Social Problems: Official Journal of the Society for the Study of Social Problems 13.2 (Fall 1965): 176-92.

Geertz, Clifford. "From the Native's Point of View: On the Nature of Anthropological Understanding." In Culture Theory: Essays on Mind, Self, and Emotion, ed. Richard Schweder and Robert LeVine, 134. Cambridge: Cambridge University Press, 1984.

Goldberg, Jacob and Rosamond Goldberg. Girls on City Streets: A Study of 1400 Cases of Rape. New York: Foundation Books, 1940.

Gordon, Linda. Heroes of Their Own Lives: The Politics and History of Family Violence, Boston 1880-1960. New York: Penguin, 1988.

Gordon, Linda and Paul O'Keefe. "The 'Normality' of Incest: Father-Daughter Incest as a Form of Family Violence, Evidence from Historical Case Records." In Rape and Sexual Assault: A Research Handbook, ed. Ann Wolbert Burgess, 71-82. New York: Garland Publishing, Inc., 1985.

Gordon, Michael. "From an Unfortunate Necessity to a Cult of Mutual Orgasm: Sex in American Marital Education Literature, 1830-1940." In The Sociology of Sex: An Introductory Reader, Rev. Ed., ed. James M. Henslin and Edward Sagarin, 59-83. New York: Schocken Books, 1971, 1978.

Gould, Leroy C. "The Changing Structure of Property Crime in an Affluent Society." Social Forces 48.1 (September 1969): 50-59.

Graff, Harvey J. "'Pauperism, Misery, and Vice': Illiteracy and Criminality in the Nineteenth Century." Journal of Social History 11.2 (Winter 1977): 245-68.

Griffin, Susan. "Rape: The Power of Consciousness." Delinquency 31 (April 1985): 206-22.

Gurr, Ted Robert. "Development and Decay: Their Impact on Public Order in Western History." In History and Crime: Implications for Criminal Justice Policy, ed. James A. Inciardi and Charles E. Faupel, 31-52. Beverly Hills and London: Sage Publications, 1980.

Hall, Jacqueline Dowd. "'The Mind That Burns in Each Body': Women, Rape, and Racial Violence." In Powers of Desire: The Politics of Sexuality, ed. Ann Snitow, Christine Stansell, and Sharon Thompson, 328-49. New York: Monthly Review Press, 1983.

Hanley, Robert. "Woman Gives an Account of Sex Abuse." New York Times, 12 December 1991.

Hartmann, Heidi I. and Ellen Ross. "Comment on 'On Writing the History of Rape.'" Signs: Journal of Women in Culture and Society 3.4 (1978): 931-35.

Henslin, James M. "Toward the Sociology of Sex." In The Sociology of Sex: An Introductory Reader, Rev. Ed., ed. James M. Henslin and Edward Sagarin, 1-25. New York: Schocken Books, 1971, 1978.

Herman, Judith. "Father-Daughter Incest." In Rape and Sexual Assault: A Research Handbook, ed. Ann Wolbert Burgess, 83-96. New York: Garland Publishing, 1985.

Hinds, Michael deCourcy. "Child Sex-Abuse: Hard to Prove, to Much Dismay." New York Times, 6 November 1992.

Hine, Darlene Clark. "Rape and the Inner Lives of Black Women in the Middle West: Preliminary Thoughts on a Culture of Dissemblance." Signs: Journal of Women in Culture and Society 14.4 (Summer 1989): 912-21.

Hobson, Barbara Meil. Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition. New York: Basic Books, 1987.

Jennings, Thelma. "'Us Colored Women Had to Go Through a Plenty': Sexual Exploitation of African-American Slave Women." Journal of Women's History 1.3 (Winter 1990): 45-74.

Johnson, Allan Griswold. "On the Prevalence of Rape in the United States." Signs: Journal of Women in Culture and Society 6.1 (Autumn 1980): 136-46.

Jones, Jacqueline. Labor of Love, Labor of Sorrow: Black Women, Work, and the Family, from Slavery to the Present. New York: Vintage Books, Random House, 1985.

Katzenstein, Mary Fainsod and David D. Laitin. "Politics, Feminism, and the Ethics of Caring." In Women and Moral Theory, ed. Eva Feder Kittay and Diana T. Meyers, 261-81. Rowman and Littlefield Publishers, Inc., 1987.

Kay, Herma Hill. Text, Cases and Materials on Sex-Based Discrimination, Third Edition. American Casebook Series. St. Paul, Minnesota:

West Publishing Co., 1988.

Kolodny, Annette. "A Map for Rereading: Gender and the Interpretation of Literary Texts." The New Feminist Criticism: Essays on Women, Literature, and Theory, ed. Elaine Showalter, 46-62. New York: Pantheon Books, 1985.

LaFree, Gary. Rape and Criminal Justice: The Social Construction of Sexual Assault. Belmont, California: Wadsworth Publishing Company, 1989.

Lane, Roger. "Crime and Criminal Statistics in Nineteenth-Century Massachusetts." Journal of Social History 2.2 (Winter 1968): 156-63.

_____. "Urban Homicide in the Nineteenth Century: Some Lessons for the Twentieth." In History and Crime: Implications for Criminal Justice Policy, 91-109. Beverly Hills and London: Sage Publications, 1980.

Lindemann, Barbara S. "'To Ravish and Carnally Know': Rape in Eighteenth-Century Massachusetts." Signs: Journal of Women in Culture and Society 10.1 (Autumn 1984): 63-82.

Loh, Wallace D. Loh. "The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study." Washington Law Review 55.3 (June 1980): 543-625.

Lystad, Mary Hanemann. "Violence in the Home: A Public Problem." In Rape and Sexual Assault: A Research Handbook, ed. Ann Wolbert Burgess, 61-69. New York: Garland Publishing, Inc., 1985.

MacDowell, Betty and Rachel Brett Hartley, eds. Michigan Women: Firsts and Founders. Lansing: Michigan Women's Studies Association, 1992.

MacFarlane, Kee. "Sexual Abuse of Children." In The Victimization of Women, ed. Jane Roberts Chapman and Margaret Gates, 81-109. Beverly Hills and London: Sage Publications, 1978.

MacKinnon, Catharine A. "Difference and Dominance: On Sex Discrimination." In Feminist Legal Theory: Readings in Law and Gender, ed. Katharine T. Bartlett and Roseanne Kennedy, 81-94. Boulder, San Francisco, and Oxford: Westview Press, 1991.

_____. Feminism Unmodified: Discourses on Life and Law. Cambridge: Harvard University Press, 1987.

Manegold, Catherine S. "Abuse Trial Jury Overrun in Minutiae." New York Times, 19 January 1993.

Margolick, David. "Smith Acquitted of Rape Charge After Brief Deliberation by Jury." New York Times, 12 December 1991.

Marsh, Jeanne. C., Alison Geist, and Nathan Caplan. Rape and the Limits of Law Reform. Boston, Massachusetts: Auburn House Publishing Company, 1982.

Masson, Jeffrey Moussaieff. The Assault on Truth: Freud's Suppression of the Seduction Theory. New York: Farrar, Straus, and Giroux, 1984.

May, Elaine Tyler. Great Expectations: Marriage and Divorce in Post-Victorian America. Chicago: University of Chicago Press, 1980.

Milloy, Rose E. "Furor Over a Decision Not to Indict in a Rape Case." New York Times, 28 October 1992.

Mills, James. The Prosecutor. New York: Farrar, Straus, and Giroux, 1968, 1969.

Minow, Martha. "Feminist Reason: Getting It and Losing It." In Feminist Legal Theory: Readings in Law and Gender, ed. Katharine T. Bartlett and Roseanne Kennedy, 357-369. Boulder: Westview Press, 1991.

Minow, Martha. Making All the Difference: Inclusion, Exclusion, and American Law. Ithaca and London: Cornell University Press, 1990.

Moneymaker, James and Fred Montanino. "The New Sexual Morality: A Society Comes of Age." In The Sociology of Sex: An Introductory Reader, Rev. Ed., ed. James M. Henslin and Edward Sagarin, 27-40. New York: Schocken Books, 1971, 1978.

Monkkonen, Eric. "The Quantitative Historical Study of Crime and Criminal Justice." In History and Crime: Implications for Criminal Justice Policy, ed. James A. Inciardi and Charles E. Faupel, 53-73. Beverly Hills and London: Sage Publications, 1980.

Mosher, Clelia Duel. The Mosher Survey: Sexual Attitudes of 45 Victorian Women, ed. James MaHood and Kristine Wenburg, with introduction by Carl N. Degler. New York: Arno Press, 1980.

Mueller, Gerhard O.W. Sexual Conduct and the Law. Legal Almanac Series No. 9. Dobbs Ferry, New York: Oceana Publications, Inc., 1980.

Newsweek. 20 May 1985, 62-64. "Rape and the Law."

Nussbaum, Martha C. "Venus in Robes." A review of Sex and Reason by Richard Posner. New Republic, 20 April 1992, 36-41.

Olsen, Frances. "Statutory Rape: A Feminist Critique of Rights Analysis." In Feminist Legal Theory: Readings in Law and Gender, ed. Katharine T. Bartlett and Roseanne Kennedy, 305-317. Boulder: Westview Press, 1991.

Padgug, Robert A. "Sexual Matters: On Conceptualizing Sexuality in History." In Passion and Power: Sexuality in History, ed. Kathy Peiss and Christina Simmons, 14-31. Philadelphia: Temple University Press, 1989.

Peiss, Kathy. "'Charity Girls' and City Pleasures: Historical Notes on Working-Class Sexuality, 1880-1920." In Passion and Power: Sexuality in History, ed. Kathy Peiss and Christina Simmons, 57-69. Philadelphia: Temple University Press, 1989.

Peiss, Kathy and Christina Simmons. "Passion and Power: An Introduction." In Passion and Power: Sexuality in History, ed. Kathy Peiss and Christina Simmons, 3-13. Philadelphia: Temple University Press, 1989.

Pistono, Stephen P. "Susan Brownmiller and the History of Rape." Women's Studies 14.3 (February 1988): 265-76.

Pivar, David J. Purity Crusade: Sexual Morality and Social Control, 1868-1900. Westport, Connecticutt and London, England: Greenwood Press, 1973.

Pleck, Elizabeth. Domestic Tyranny: The Making of American Social Policy against Family Violence from Colonial Times to the Present. New York and Oxford: Oxford University Press, 1987.

Posner, Richard. The Problems with Jurisprudence. Cambridge, Massachusetts, and London, England: Harvard University Press, 1990.

_____. Sex and Reason. Cambridge, Massachusetts, and London, England: Harvard University Press, 1992.

Poston, Carol and Karen Lison. Reclaiming Our Lives: Hope for Adult Survivors of Incest. Boston: Little, Brown and Company, 1989.

Quindlen, Anna. "21 Going on 6." New York Times, 13 December 1992.

Random House College Dictionary, 1984 Edition.

Redmond, Sheila A. "Christian 'Virtues' and Recovery from Child Sexual Abuse." In Christianity, Patriarchy, and Abuse: A Feminist Critique, ed. Joanne Carlson Brown and Carole R. Bohn, 70-88. New York: The Pilgrim Press, 1989.

Reed, James. From Private Vice to Public Virtue: The Birth Control

Movement and American Society Since 1830. New York: Basic Books, Inc., 1978.

Reskin, Barbara F. and Christy A. Visher. "The Impacts of Evidence and Extralegal Factors in Jurors' Decisions." Law and Society Review 20.3 (1986): 423-38.

Rhode, Deborah L. Justice and Gender: Sex Discrimination and the Law. Cambridge, Massachusetts: Harvard University Press, 1989.

_____. "Feminist Critical Theories." In Feminist Legal Theory: Readings in Law and Gender, ed. Katharine T. Bartlett and Rosanne Kennedy, 333-50. Boulder, San Francisco, and Oxford: Westview Press, 1991.

Richardson, Deborah R. and Georgina S. Hammock. "Alcohol and Acquaintance Rape." In Acquaintance Rape: The Hidden Crime, ed. Andrea Parrot and Laurie Bechhofer, 83-95. New York: John Wiley and Sons, Inc., 1991.

Robinson, Paul. The Modernization of Sex: Havelock Ellis, Alfred Kinsey, William Masters and Virginia Johnson. New York: Harper and Row, 1976.

Rosenberg, Gerald N. The Hollow Hope: Can Courts Bring About Social Change? Chicago and London: The University of Chicago Press, 1990.

Rothman, Sheila M. Woman's Proper Place: A History of Changing Ideals and Practices, 1870 to the Present. New York: Basic Books, Inc., 1978.

Ruddick, Sara. "Remarks on the Sexual Politics of Reason." In Women and Moral Theory, ed. Eva Feder Kittay and Diana T. Meyers, 237-60. Rowman and Littlefield Publishers, Inc., 1987.

Russell, Diana E.H. The Politics of Rape: The Victim's Perspective. New York: Stein and Day, 1975.

Russell, Diana E.H. and Nancy Howell. "The Prevalence of Rape in the United States Revisited." Signs: Journal of Women in Culture and Society 8.4 (Summer 1983): 688-95.

Ryckman, Lisa Levitt. "Tyson Guilty of Rape." Lansing State Journal, 11 December 1992.

Scheppele, Kim Lane. "The Re-Vision of Rape Law." University of Chicago Law Review 54.3 (1987): 1095-1116.

Schram, Donna D. "Rape." In The Victimization of Women, ed. Jane Roberts Chapman and Margaret Gates, 53-79. Beverly Hills and London: Sage

Publications, 1978.

Scott, Joan Wallach. Gender and the Politics of History. New York: Columbia University Press, 1988.

_____. "Women's History." Chapter in New Perspectives on Historical Writing, ed. Peter Burke, 42-66. University Park: The Pennsylvania State University Press, 1991.

Shapiro, Barbara J. "Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence. Berkeley, Los Angeles, and Oxford: University of California Press, 1991.

Simmons, Christina. "Modern Sexuality and the Myth of Victorian Repression." In Passion and Power: Sexuality and History, ed. Kathy Peiss and Christina Simmons, 157-77. Philadelphia: Temple University Press, 1989.

Shorter, Edward. "On Writing the History of Rape." Signs: Journal of Women in Culture and Society 3.2 (Winter 1977): 471-82.

Slavin, Sarah. "Authenticity and Fiction in Law: Contemporary Case Studies Exploring Radical Legal Feminism." Journal of Women's History 1.3 (Winter 1990): 123-59.

Smith, Daniel Scott. "The Dating of the American Sexual Revolution: Evidence and Interpretation." In The American Family in Social Historical Perspective, ed. Michael Gordon, 427-38. New York: St. Martin's Press, 1978.

Smith, Daniel Scott and Michael S. Hindus. "Premarital Pregnancy in America 1640-1971: An Overview and Interpretation." Journal of Interdisciplinary History 5.4 (Spring 1975): 537-70.

Sundin, Jan. "Keeping Sex Within Marriage: Legal Prosecution of Extra-Marital Sex in Sweden c.1600-1850." Unpublished paper presented at the Social Science History Association conference, Washington, D.C. (November 1989). Session 3j: Criminal Law and the Moral Community.

Tong, Rosemarie. Women, Sex, and the Law. Towowa, New Jersey: Rowman and Allanhead, 1984.

Walby, Sylvia, Alex Hay, and Keith Soothill. "The Social Construction of Rape." Theory, Culture, and Society: Explorations in Critical Social Science 2.1 (1983): 86-98.

Welter, Barbara. "The Cult of True Womanhood: 1820-1860." American Quarterly 18.2 (Summer 1966): 151-74.

West, Robin. "Jurisprudence and Gender." In Feminist Legal Theory: Readings in Law and Gender, ed. Katharine T. Bartlett and Rosanne Kennedy, 201-34. Boulder, San Francisco, and Oxford: Westview Press, 1991.

Whitman, Christina Brooks. "Review Essay: Feminist Jurisprudence." Feminist Studies 17.3 (Fall 1991): 493-507.

Wilcox, Leonard. "Sex Boys in a Balloon: V.F. Calverton and the Abortive Sexual Revolution." Journal of American Studies (Special Issue: Sex and Gender in American Culture) 23.1 (April 1989): 7-26.