

# SHADOW TRIALS, OR A HISTORY OF SEXUAL ASSAULT TRIALS IN THE JIM CROW SOUTH

Scott W. Stern\*

## ABSTRACT

*Based on an immense and heretofore underutilized archive of trial transcripts and legal briefs, this Article provides the first holistic study of sexual assault trials in the Jim Crow south. It reveals that, rather than merely procedures for determining legal guilt or innocence, these trials were also (and often primarily) rituals for discerning which member or members of a community had violated that community's social mores in such a way as to warrant violence—the violence of ostracism, incarceration, or death. Sexual assault certainly represented a violation of the Jim Crow south's social mores, but to many it was not the most significant such violation. Rather, transgressing the race, sexual, gender, and class hierarchies on which Jim Crow society depended was the far greater crime. To juries in the Jim Crow south, a white woman behaving promiscuously or a Black woman refusing to act subordinately might be more deserving of punishment than her rapist. Likewise, a white man who acted too effeminately or a Black man who acted too familiarly with white women might deserve punishment regardless of whether he had committed a rape; indeed, his violation of these social mores might be more significant to his neighbors than rape.*

*For generations, scholars have closely examined sexual assault trials. Undergirding nearly all of their analyses is the presumption*

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*that these trials represent sites where adversaries debate whether the interaction between the accused and the accuser was, in fact, sexual assault. According to this idea, attorneys and witnesses in such trials seek to persuade jurors that their version of the facts is actually true, and jurors seek to determine whether a sexual assault actually occurred. In other words, implicit or explicit in nearly all of the voluminous scholarship on sexual assault trials is the idea that, for all of the problems with these trials, the pursuit of truth—the resolution of the question of what actually happened—is their impetus, or at least one of their animating features. Even scholars that argue that jurors rely on dominant cultural myths or narratives in deciding rape trials appear to presuppose that jurors do so in order “to assess what ‘really happened’” or decide whom they will “ultimately believe.” Likewise, even those scholars a generation ago that approached trials (sexual assault trials or otherwise) from a “legal storytelling” perspective—rejecting the idea of a unitary, objective truth and arguing that decisionmakers choose among truths—still presumed that jurors seek a truth.*

*This Article suggests that, at least in a particular place and at a particular moment in time, this idea is wrong—or, rather, that it is incomplete, reflecting only a fraction of what was happening. It posits that sexual assault trials at this place and time, in fact, consisted of two distinct yet complementary procedures: an inquiry to determine whether a sexual assault had occurred (called the “surface trial”) and an inquiry to determine whether the accuser or the accused deserved punishment for violating a rigid but unwritten social code (called the “shadow trial”). In the shadow of the surface trial was a simultaneous inquisition in which community members adjudicated violations of social mores. Shadow trials were largely unconcerned with the demands of procedural or substantive law, but nonetheless featured highly ritualized hearings for assessing perceived wrongdoing. These shadow trials took place in courthouses, featuring lawyers and a judge, but they were fundamentally not legal procedures; nor were they lawless. They were, rather, procedures for determining the guilt or innocence of multiple parties in an extra-legal sense. Often, the shadow trial supplanted the surface trial as the primary inquiry; often, the outcome of the shadow trial informed the verdict of the surface trial. This “shadow trial” model challenges legal scholars to think more expansively about how trials—and the law itself—are part of broader systems and structures of oppression; about how ostensibly neutral legal procedures serve to reinforce society’s punitive hierarchies; and about how the language of the law can obscure this reality.*

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## INTRODUCTION

Few legal procedures capture the attention of scholars and the public at large quite like criminal trials, and few trials are subject to as much scrutiny or condemnation as sexual assault trials. From fictional trials (like that of Tom Robinson in *To Kill a Mockingbird*) to real trials (like that of Harvey Weinstein in 2020), sexual assault trials have consumed academic and popular audiences. Given this degree of attention, it is striking that so many observers regard these trials as profoundly unfair. To many in the public at large—and especially to those seeking an end to gendered violence—sexual assault trials are notable for how rare they are, and how rarely they deliver justice to survivors in the form of a conviction.<sup>1</sup> To many criminal law scholars, sexual assault trials are rife with egregious burdens of persuasion placed on survivors—burdens that were supposed to have been excised from the law decades ago.<sup>2</sup> To a number of others within (and adjacent to) legal academia, these trials not only disserve sexual assault survivors but actually function as an additional site of violence,<sup>3</sup> a humiliating ritual of revictimization<sup>4</sup> that some scholars have labeled “the second rape.”<sup>5</sup>

Such views began to gain prominence roughly half-a-century ago,<sup>6</sup> in the wake of a powerful feminist movement to expose the

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1. See, e.g., Barbara Bradley Hagerty, *The Weinstein Verdict Shows Why Rape Convictions Are So Rare*, ATLANTIC. (Feb. 24, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/rape-conviction-rare/607009> [<https://perma.cc/D3SW-B8P7>]; *The Criminal Justice System: Statistics*, RAINN, <http://rainn.org/statistics/criminal-justice-system> [<https://perma.cc/W3MF-C4KG>] (last visited Feb. 11, 2022).

2. See, e.g., I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 863–64 (2013); Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 956–57 (2000); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 321–22 (2000); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997).

3. On the use of the term “violence” in the legal context, see Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). See also Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J.L. & GENDER 183, 184–85 (2017) (invoking this usage in the context of a rape trial).

4. JOHN M. CONLEY & WILLIAM M. O’BARR, *The Revictimization of Rape Victims*, in JUST WORDS: LAW, LANGUAGE, AND POWER (2nd ed. 2005). See also Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1099 (1987) (“Rape victims often perceive that the legal system adds to their injuries. . .”).

5. LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM* (1991).

6. Although the modern anti-rape movement is typically periodized as beginning in the 1970s, there is a much longer history of anti-rape activism. See, e.g., ESTELLE B. FREEDMAN, *REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF*

widespread nature of sexual violence, to delineate the deep inadequacies of the criminal legal system in addressing sexual violence, and ultimately to reform rape laws and change rape trials.<sup>7</sup> Influenced by this anti-rape activism, numerous legal scholars began scrutinizing the procedures governing rape trials and the demands imposed on survivors by rape laws.<sup>8</sup> Further influenced by the work of sociologist Erving Goffman and theorists Michel Foucault and Jacques Derrida, scholars also began to pay especial attention to the language used in these trials, arguing that linguistic analyses could reveal much that legal analyses could not. This focus on language was informed by (and, indeed, was part of) the “legal storytelling” movement,<sup>9</sup> which argued that narrative approaches to legal scholarship allowed previously ignored voices to penetrate previously exclusive spaces<sup>10</sup> and that analyses of narratives in the law—for instance, trial testimony—revealed much that had previously been overlooked.<sup>11</sup> Considering the language of sexual assault trials,

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SUFFRAGE AND SEGREGATION (2013); DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* (2010).

7. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); see also NANCY GAGER & CATHLEEN SCHURR, *SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA* (1976); JEAN MACKELLAR, *RAPE: THE BAIT AND THE TRAP: A BALANCED, HUMANE, UP-TO-DATE ANALYSIS OF ITS CAUSES AND CONTROL* (1975); DIANA E. H. RUSSELL, *THE POLITICS OF RAPE: THE VICTIM’S PERSPECTIVE* (1975). For more on this movement, see CATHERINE O. JACQUET, *THE INJUSTICES OF RAPE: HOW ACTIVISTS RESPONDED TO SEXUAL VIOLENCE, 1950–1980* (2019).

8. See, e.g., SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987); Susan Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 *LOY. L.A. L. REV.* 567, 569 (1983); *The Rape Corroboration Requirement: Repeal Not Reform*, 81 *YALE L.J.* 1365 (1972).

9. This movement was closely linked to the emergence of critical race theory within legal scholarship. See, e.g., Stephanie B. Goldberg, *The Law, a New Theory Holds, Has a White Voice*, *N.Y. TIMES*, July 17, 1992, at A23; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411 (1989); Derrick Bell, *The Final Report: Harvard’s Affirmative Action Allegory*, 87 *MICH. L. REV.* 2382 (1989).

10. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807 (1993); Richard A. Matasar, *Storytelling and Legal Scholarship*, 68 *CHI.-KENT L. REV.* 353, 353, 361 (1992); Kathryn Abrams, *Hearing the Call of Stories*, 79 *CALIF. L. REV.* 971 (1991); Delgado, *supra* note 9; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 *MICH. L. REV.* 2320 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323 (1987).

11. Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 2, 2–3 (Peter Brooks & Paul Gewirtz

legal scholars (joined by numerous linguists and sociologists) found that at almost every stage—from prosecutors’ framings<sup>12</sup> to defense attorneys’ cross-examinations<sup>13</sup> to jurors’ deliberations<sup>14</sup>—these trials obscured the truth, favored defendants, and harmed survivors.<sup>15</sup> Across decades, scholars reached similar conclusions in analyses of sexual assault trials in Britain,<sup>16</sup> Canada,<sup>17</sup> Hong Kong,<sup>18</sup> Israel,<sup>19</sup> and

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eds., 1996) [hereinafter *LAW’S STORIES*]; Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in *LAW’S STORIES* 61, 62; Robert A. Ferguson, *Untold Stories in the Law*, in *LAW’S STORIES* 84; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1 (1990). See also Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 *L. & SOC’Y REV.* 197, 199–200 (1995).

12. Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class and Gender Ideologies in Prosecutorial Decisionmaking*, 31 *L. & SOC’Y REV.* 531 (1997); see also Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 *JUST. Q.* 651 (2001).

13. Paul Drew, *Contested Evidence in Courtroom Cross-Examination: The Case of a Trial for Rape*, in *TALK AT WORK: INTERACTION IN INSTITUTIONAL SETTINGS* 470–520 (Paul Drew & John Heritage eds., 1992).

14. Lynda Olsen-Fulero & Solomon Fulero, *Commonsense Rape Judgments: An Empathy-Complexity Theory of Rape Juror Story Making*, 3 *PSYCH. PUB. POL’Y & L.* 402 (1997).

15. Perhaps most influentially, Gregory M. Matoesian argued that the language used in rape trials delegitimizes and revictimizes rape survivors. See GREGORY M. MATOESIAN, *REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM* (1993); Gregory M. Matoesian, “*You Were Interested in Him as a Person?*”: *Rhythms of Domination in the Kennedy Smith Rape Trial*, 22 *L. & SOC. INQUIRY* 55 (1997); Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 *L. & SOC’Y REV.* 669 (1995). See also ROGER W. SHUY, *THE LANGUAGE OF SEXUAL MISCONDUCT CASES* (2012); Diane Ponterotto, *The Repertoire of Complicity vs. Coercion: The Discursive Trap of the Rape Trial Protocol*, in *THE LANGUAGE OF SEXUAL CRIME* 104 (Jane Cotterill ed., 2007); June Luchjenbroers & Michelle Aldridge, *Conceptual Manipulation by Metaphors and Frames: Dealing with Rape Victims in Legal Discourse*, 27 *TEXT & TALK* 339 (2007); SUSAN EHRlich, *REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT* (2001).

16. SUE LEES, *CARNAL KNOWLEDGE: RAPE ON TRIAL* (1996); CAROL SMART, *FEMINISM AND THE POWER OF LAW* 4–25 (1989). See also Jennifer Temkin, *Prosecuting and Defending Rape: Perspectives from the Bar*, *J.L. & SOC’Y* 219 (2000).

17. Susan Ehrlich, *Legal Discourse and the Cultural Intelligibility of Gendered Meanings*, 11 *J. SOCIOLINGUISTICS* 452 (2007); Susan Ehrlich, *Legal Institutions, Nonspeaking Reciprocity and Participants’ Orientations*, 13 *DISCOURSE & SOC’Y* 731 (2002).

18. Ester S. M. Leung & John Gibbons, *Purposes, Roles and Beliefs in the Hostile Questioning of Vulnerable Witnesses*, in *THE LANGUAGE OF SEXUAL CRIME* 139 (Jane Cotterill ed., 2007).

19. Bryna Bogoch, *Courtroom Discourse and the Gendered Construction*

the Netherlands.<sup>20</sup> Relatedly, numerous scholars analyzed trial testimony to demonstrate the failure of rape law reforms to effectively remedy the myriad problems with sexual assault trials that feminist activists and scholars identified in the 1970s.<sup>21</sup>

Undergirding nearly all such legal, linguistic, sociological, and popular analyses of sexual assault trials is the presumption that these trials represent sites where adversaries debate whether the interaction between the accused and the accuser was, in fact, sexual assault. According to this idea, attorneys and witnesses in sexual assault trials seek to persuade jurors that their version of the facts is actually true, and jurors seek to determine whether a sexual assault actually occurred. In other words, implicit or explicit in nearly all of the voluminous scholarship on sexual assault trials is the idea that, for all of the problems with these trials, the pursuit of truth—resolving the question of *what actually happened*—is their impetus, or at least one of their animating features. Indeed, these scholars' concern with the various injustices common in sexual assault trials is not merely that these injustices inflict dignitary harm on accusers, but also that they prevent decisionmakers from being able to reach an accurate verdict—that is, to determine whether the accuser consented to the alleged sexual contact, or whether this sexual contact occurred at all. Even scholars that argue that jurors rely on dominant cultural myths or narratives in deciding sexual assault trials<sup>22</sup> appear to presuppose that jurors do so in order “to assess

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*of Professional Identity*, 24 L. & SOC. INQUIRY 329 (1999).

20. Louise Elaine Ellison, *A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems* (July 1997) (Ph.D. dissertation, University of Leeds) (on file with author).

21. See, e.g., Capers, *supra* note 3, at 184–85; Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C.L. REV. 205 (2017); Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119 (2004); ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* (1999); STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998); Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 871 (1996); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123 (1992); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

22. See, e.g., TASLITZ, *supra* note 21, at 7–8; Kimberlé Crenshaw, *Whose Story is it Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in *RACE-ING JUSTICE AND EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* 402, 409 (Toni Morrison ed., 1992); Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 130–31 (1992).

what ‘really happened’<sup>23</sup> or decide whom they will “ultimately believe.”<sup>24</sup> Likewise, even those scholars a generation ago that approached trials (sexual assault trials or otherwise) from a legal storytelling perspective—rejecting the idea of a unitary, objective truth and arguing that decisionmakers choose among truths—still presumed that jurors seek *a* truth.<sup>25</sup>

I suggest that, at least in a particular place and at a particular moment in time, this idea is wrong—or, rather, that it is incomplete, reflecting only a fraction of what was happening. I posit that sexual assault trials at this place and time, in fact, consisted of two distinct yet complementary procedures: an inquiry to determine whether a sexual assault had occurred (called the “surface trial”) and an inquiry to determine whether the accuser or the accused deserved punishment for violating a rigid but unwritten social code (called the “shadow trial”). In the shadow of the surface trial was a simultaneous inquisition in which community members adjudicated violations of social mores. Shadow trials were hearings that were largely unconcerned with the demands of the law but that nonetheless featured highly ritualized processes for assessing perceived wrongdoing. These shadow trials took place in courthouses, featuring lawyers and a judge, but they were fundamentally not legal procedures; nor were they lawless. They were, rather, procedures for determining the guilt or innocence of multiple parties in an extralegal sense. Often, the shadow trial supplanted the surface trial as the primary inquiry; often, the outcome of the shadow trial informed the verdict of the surface trial.

In arriving at this conclusion, I analyzed one hundred sexual assault trials that took place in Arkansas between 1915 and 1955.<sup>26</sup>

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23. Capers, *supra* note 3, at 193 (quoting VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 204 (1986)).

24. Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 436, 437 (2006).

25. Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2088–94 (1989); Scheppele, *supra* note 4, at 1106–1111. See also Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 257 (1994); J. M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1153 (1991); Catharine P. Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1743 (1990).

26. These cases include: *Alford v. State*, 266 S.W.2d 804 (Ark. 1954); *Allison v. State*, 164 S.W.2d 442 (Ark. 1942); *Amos v. State*, 189 S.W.2d 611 (Ark. 1945); *Bailey v. State*, 219 S.W.2d 424 (Ark. 1949); *Bender v. State*, 151 S.W.2d 668 (Ark. 1941); *Bethel v. State*, 21 S.W.2d 176 (Ark. 1929); *Bradshaw v. State*, 199 S.W.2d 747 (Ark. 1947); *Boyd v. State*, 182 S.W.2d 937 (Ark. 1944); *Boyett v. State*, 56 S.W.2d 182 (Ark. 1933); *Braswell v. State*, 280 S.W. 367 (Ark. 1926); *Brock v. State*, 270 S.W. 98 (Ark. 1925); *Brust v. State*, 240 S.W. 1079 (Ark. 1922); *Burks v. State*, 120 S.W.2d 345 (Ark. 1938); *Cabe v. State*, 30 S.W.2d 855 (Ark. 1930); *Caldwell v. State*, 168 S.W.2d 807 (Ark. 1943); *Cates v. State*, 4 S.W.2d 952

Each of these trials resulted in a conviction, though the crimes for which defendants were convicted varied: they were found guilty of rape, assault with intent to rape, or carnal abuse (that is, statutory rape), with the exception of one defendant who was convicted of

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(Ark. 1928); *Cauley v. State*, 247 S.W. 772 (Ark. 1923); *Clack v. State*, 212 S.W.2d 20 (Ark. 1948); *Clayton v. State*, 89 S.W.2d 732 (Ark. 1935); *Comer v. State*, 257 S.W.2d 564 (Ark. 1953); *Cook v. State*, 276 S.W. 583 (Ark. 1925); *Cureton v. State*, 174 S.W. 810 (Ark. 1915); *Cutts v. State*, 288 S.W. 883 (Ark. 1926); *Daniels v. State*, 53 S.W.2d 231 (Ark. 1932); *Davis v. State*, 244 S.W. 750 (Ark. 1922); *De Voe v. State*, 97 S.W.2d 75 (Ark. 1936); *Doss v. State*, 157 S.W.2d 499 (Ark. 1941); *Durham v. State*, 16 S.W.2d 991 (Ark. 1929); *Fanning v. State*, 136 S.W.2d 1040 (Ark. 1940); *Fields v. State*, 159 S.W.2d 745 (Ark. 1942); *Franks v. State*, 272 S.W. 648 (Ark. 1925); *Gann v. State*, 141 S.W.2d 834 (Ark. 1940); *Gerlach v. State*, 229 S.W.2d 37 (Ark. 1950); *Goodnaugh v. State*, 85 S.W.2d 1019 (Ark. 1935); *Green v. State*, 46 S.W.2d 8 (Ark. 1932); *Hamm v. State*, 214 S.W.2d 917 (Ark. 1948); *Harrison v. State*, 262 S.W.2d 907 (Ark. 1953); *Hawthorne v. State*, 204 S.W. 841 (Ark. 1918); *Hays v. State*, 278 S.W. 15 (Ark. 1925); *Head v. State*, 297 S.W. 828 (Ark. 1927); *Hedrick v. State*, 279 S.W. 785 (Ark. 1926); *Hildreth v. State*, 223 S.W.2d 757 (Ark. 1949); *Hodges v. State*, 197 S.W.2d 52 (Ark. 1946); *Hogan v. State*, 282 S.W. 984 (Ark. 1926); *Hogan v. State*, 86 S.W.2d 931 (Ark. 1935); *Houston v. State*, 79 S.W.2d 999 (Ark. 1935); *Jackson v. State*, 218 S.W. 369 (Ark. 1920); *James v. State*, 188 S.W. 806 (Ark. 1916); *Kazzee v. State*, 299 S.W. 354 (Ark. 1927); *Korsak v. State*, 154 S.W.2d 348 (Ark. 1941); *Lewis v. State*, 271 S.W. 708 (Ark. 1925); *Lindsey v. State*, 209 S.W.2d 462 (Ark. 1948); *Lipsmeyer v. State*, 266 S.W. 275 (Ark. 1924); *Martin v. State*, 283 S.W. 29 (Ark. 1926); *Maxwell v. State*, 225 S.W.2d 687 (Ark. 1950); *Maxwell v. State*, 232 S.W.2d 982 (Ark. 1950); *McDonald v. State*, 244 S.W. 20 (Ark. 1922); *McDonald v. State*, 279 S.W.2d 44 (Ark. 1955); *McGee v. State*, 223 S.W.2d 603 (Ark. 1949); *McGill v. State*, 189 S.W.2d 646 (Ark. 1945); *McGlosson v. State*, 286 S.W. 931 (Ark. 1926); *McLaughlin v. State*, 174 S.W. 234 (Ark. 1915); *Morgan v. State*, 76 S.W.2d 79 (Ark. 1934); *Mynett v. State*, 18 S.W.2d 335 (Ark. 1929); *Needham v. State*, 224 S.W.2d 785 (Ark. 1949); *Palmer v. State*, 214 S.W.2d 372 (Ark. 1948); *Perkinson v. State*, 172 S.W.2d 18 (Ark. 1943); *Powell v. State*, 232 S.W. 429 (Ark. 1921); *Priest v. State*, 163 S.W.2d 159 (Ark. 1942); *Pugh v. State*, 210 S.W.2d 789 (Ark. 1948); *Reed v. State*, 299 S.W. 757 (Ark. 1927); *Reynolds v. State*, 246 S.W.2d 724 (Ark. 1952); *Rose v. State*, 184 S.W. 60 (Ark. 1916); *Rowe v. State*, 244 S.W. 463 (Ark. 1922); *Sanders v. State*, 296 S.W. 70 (Ark. 1927); *Sherman v. State*, 279 S.W. 353 (Ark. 1926); *Smith v. State*, 210 S.W.2d 913 (Ark. 1948); *Snetzer v. State*, 279 S.W. 9 (Ark. 1926); *Sutton v. State*, 122 S.W.2d 617 (Ark. 1938); *Terrell v. State*, 2 S.W.2d 87 (Ark. 1928); *Thomas v. State*, 11 S.W.2d 771 (Ark. 1928); *Thomas v. State*, 116 S.W.2d 358 (Ark. 1938); *Thornsberry v. State*, 92 S.W.2d 203 (Ark. 1936); *Tugg v. State*, 174 S.W.2d 374 (Ark. 1943); *Underdown v. State*, 250 S.W.2d 131 (Ark. 1952); *Venable v. State*, 5 S.W.2d 716 (Ark. 1928); *Wadlington v. State*, 227 S.W.2d 940 (Ark. 1950); *Ward v. State*, 160 S.W.2d 864 (Ark. 1942); *Warford v. State*, 216 S.W.2d 781 (Ark. 1949); *Waterman v. State*, 154 S.W.2d 813 (Ark. 1941); *Watt v. State*, 261 S.W.2d 544 (Ark. 1953); *West v. State*, 234 S.W. 997 (Ark. 1921); *West v. State*, 192 S.W.2d 135 (Ark. 1946); *Whittaker v. State*, 286 S.W. 937 (Ark. 1926); *Willis v. State*, 252 S.W.2d 618 (Ark. 1952); *Wills v. State*, 98 S.W.2d 72 (Ark. 1936); *Wilson v. State*, 7 S.W.2d 969 (Ark. 1928); *Wise v. State*, 164 S.W.2d 897 (Ark. 1942); *Young v. State*, 221 S.W. 478 (Ark. 1920).

murdering a woman while in the process of raping her.<sup>27</sup> Because each of these trials led to an appeal, each produced a trial transcript or a collection of lengthy briefs that survive in the archive of the University of Arkansas at Little Rock. Together, these 100 extant case files contain more than 20,000 pages of testimony and legal argumentation, an invaluable and heretofore underutilized assemblage of primary sources.

Based on these archival documents, this Article provides the first holistic study of sexual assault trials in the Jim Crow south.<sup>28</sup> It aims to explicate the role of trials in maintaining Jim Crow-era race, gender, sexual, and class hierarchies. Rather than operating as mere procedures for determining legal guilt or innocence, these one hundred trials in fact doubled as rituals to determine which member or members of a community had violated that community's social mores in such a way as to warrant violence—the violence of ostracism, incarceration, or death. Rape certainly represented a violation of the Jim Crow south's social mores, but—to many in early-twentieth-century Arkansas—it was not the most significant such violation. Rather, transgressing the race and gender orders on which Jim Crow society depended was the far greater crime. To Jim Crow juries, a white woman behaving promiscuously or a Black woman refusing to act subordinately might be more deserving of punishment than her rapist. Likewise, a white man who acted too effeminately or a Black man who acted too familiarly with white women might deserve punishment regardless of whether he had committed a rape; indeed, his violation of these social mores might be more significant to his neighbors than rape. Jim Crow's social hierarchies determined who was charged and who was on the jury; it structured what witnesses could say and how they had to present

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27. This Article primarily uses the term accuser, rather than victim, survivor, complainant, or the once-predominant prosecutrix. It also analyzes only cases with male defendants and female accusers. In so doing, my intent is not to erase the sexual assault survivors of this era that were not female; rather, I am constrained by which case files remain in the archive (reflecting which were prosecuted under rape laws). In distinguishing between male defendants and female accusers, moreover, I do not intend to reinforce a gender binary or presume the gender identities of any of these parties. The records in the archive, which reflect the biases and assumptions of those who produced them, identify the accusers as female.

28. Although there are no clear start- or end-dates, the Jim Crow era lasted roughly from the end of Reconstruction (and the passage of racially discriminatory state laws in the late nineteenth century), *see, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Hall v. De Cuir*, 95 U.S. 485 (1877), to the dawn of the “classical” period of the Civil Rights Movement (and the Supreme Court's rejection of “separate but equal”), *see, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See also* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

themselves; it informed how the judge instructed the jury and the verdict the jury ultimately reached. Especially after the trial was completed, these hierarchies were critical in determining who deserved mercy and who deserved to die.

Close readings of the archival documents reveal that the questions debated at trial were not primarily what happened and to whom, but rather who was respectable, who was promiscuous, and who had violated Jim Crow's ironclad code of conduct. When social mores were transgressed, courts and juries recognized that there had to be punishment—but not necessarily for an alleged sexual assault. This punishment began during the trial itself, as accusers, defendants, and others were shamed for all manner of conduct that was utterly irrelevant to determining whether a sexual assault had taken place. This punishment continued after the trial, either when the defendant was convicted or when the accuser's neighbors wielded the knowledge they had gained during the trial to shun or even imprison her. Thus, the Jim Crow sexual assault trial served as both a site for preliminary punishment and a site for determining the appropriateness (and extent) of further punishment.

This study is not a statistical analysis, nor was it intended to be, nor could it be. These case files are not data points; rather, they are the primary sources for this purely qualitative historical study. For one thing, these trials are not representative of all sexual assault trials in Arkansas during this time, as they all ended in convictions. (Otherwise, they would not have been appealed, and the case files would not have been preserved.) For another, though I selected these cases as randomly as possible, I did not control that selection to ensure that the defendants in them were representative (by race, age, income, etc.) of defendants in sexual assault trials in Arkansas writ large. I could not have controlled the trials in this way, as I was constrained by what survived in the archive. Nonetheless, it is my belief that these hundred case files can provide an extraordinarily revelatory window into the dynamics of sexual assault trials in the Jim Crow south, as well as some insights into sexual assault trials more broadly.

Context for such an analysis can be found in other historical studies of sexual assault trials. Over the past few decades, many historians have analyzed these trials, part of a broader methodological turn toward telling the stories and recovering the voices of so-called "ordinary people."<sup>29</sup> By scrutinizing legal filings, pre-tri-

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29. Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 *COLUM. L. REV.* 640, 649–50 (2001) ("To legal historians, trial records offer great promise because there are few historical documents in which

al records, or trial testimony, these historical studies have shown that the reputation, social status, and perceived moral standing of the accuser were closely tied to whether the trial resulted in a conviction.<sup>30</sup> Likewise, many historians have shown how the race of the accuser or the accused shaped the prosecution and defense questioning and ultimately informed the trial outcomes.<sup>31</sup> By collectively demonstrating how these trials were shaped by broader cultural narratives, the forces of racism and sexism, and specific geographies, these studies inform—and, indeed, complement—my interpretation of Jim Crow sexual assault trials. In particular, the importance of situating these trials within their respective local contexts was a key insight.<sup>32</sup>

Nonetheless, this Article departs from these historical accounts in several ways. First, geography and scope: this is, as mentioned, the first holistic study of sexual assault trials in the Jim Crow south. For example, while Lisa Lindquist Dorr's incisive analysis looked at case files from early twentieth-century Virginia, she only examined "cases of Black-on-white rape."<sup>33</sup> My analysis, by contrast, considers cases with white accusers, Black accusers, white defendants, and Black defendants. Other studies have been narrower—focusing only on sex crimes against children,<sup>34</sup> for instance—or considered other parts of the United States, such as Los Angeles,<sup>35</sup> New York,<sup>36</sup>

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ordinary people speak, or even appear. . .").

30. See, e.g., Terry L. Chapman, *Sex Crimes in the West, 1890–1920*, 35 ALTA. HIST. 6 (1987); Barbara S. Lindemann, "To Ravish and Carnally Know": Rape in Eighteenth-Century Massachusetts, 10 SIGNS 63 (1984).

31. See, e.g., DAWN RAE FLOOD, RAPE IN CHICAGO: RACE, MYTH, AND THE COURTS (2012); Bonni Kay Cermak, In the Interest of Justice: Legal Narratives of Sex, Gender, Race and Rape in Twentieth Century Los Angeles, 1920–1960 (2005) (Ph.D. dissertation, University of Oregon) (on file with author); LISA LINDQUIST DORR, WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA, 1900–1960 (2004).

32. See Hal Goldman, "A Most Detestable Crime": Character, Consent, and Corroboration in Vermont's Rape Law, 1850–1920, in SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA 178, 178–79 (Merril D. Smith ed., 2001) ("Rape law was the product of an almost exclusively local and state process. . . . If we want to understand how rape law really worked on real people, we must study it in the way it acted on them, that is, as a local and state phenomenon."). See also LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (2009) (arguing for the importance of seeing the southern legal system as fundamentally localized).

33. DORR, *supra* note 31, at 5.

34. See, e.g., STEPHEN ROBERTSON, CRIMES AGAINST CHILDREN: SEXUAL VIOLENCE AND LEGAL CULTURE IN NEW YORK CITY, 1880–1960 (2005).

35. See Cermak, *supra* note 31.

36. See BRIAN DONOVAN, RESPECTABILITY ON TRIAL: SEX CRIMES IN NEW

or Ingham County, Michigan.<sup>37</sup> Conversely, my analysis considers sex crimes against both children and adults and contemplates a much broader geographical region. Second, methodologically, this study is based primarily on an analysis of trial transcripts. A number of the other historical studies of sexual assault trials lacked trial transcripts altogether,<sup>38</sup> or cited just a handful of transcripts.<sup>39</sup> Yet transcripts allow scholars access to quotidian courtroom dynamics, as well as valuable information about the individuals involved in these trials.<sup>40</sup> Finally, in terms of focus, this study situates sexual assault trials within a racial, sexual, gendered, and classed context. Several other studies were less theoretically expansive or were limited in focus by their sources—as mentioned, Dorr’s looked only at “cases of Black-on-white rape”; Kathleen Ruth Parker’s exhaustive analysis of 544 “forced-sex crime cases” adjudicated in one county over a century included virtually no accusers or defendants of color;<sup>41</sup> and Dawn Rae Flood’s study of rape trials in Chicago noted that Black accusers only began appearing in its case files halfway through its chronology.<sup>42</sup> This Article’s broader focus allows broader conclusions to be drawn about the role of race, gender, sex, and class hierarchies within Jim Crow-era courtrooms.

This Article’s central claim does not, however, appear *sui generis* in the literature. Decades ago, legal scholar Anne M. Coughlin argued that rape law must be understood within a broader context of laws that disciplined nonmarital sex, including fornication and adultery laws.<sup>43</sup> Likewise, Martha Chamallas argued that rape law should also be understood as “inseparable from . . . the

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YORK CITY, 1900–1918 71–104 (2016).

37. See Kathleen Ruth Parker, *Law, Culture, and Sexual Censure: Sex Crime Prosecutions in a Midwest County Circuit Court, 1850–1950* (1993) (Ph.D. dissertation, Michigan State University) (on file with author).

38. See, e.g., *id.* at 20.

39. See, e.g., DORR, *supra* note 31, at 12–13, 268 n.18, 298 n.86; ROBERTSON, *supra* note 34, at 252 n.14. See also DONOVAN, *supra* note 36, at 73 (clarifying that he uses transcripts not to elucidate trial dynamics, but rather to elucidate “two important arenas of sexual revolution: work and leisure”).

40. In her study of nineteenth-century rape law, based largely on published appellate decisions, Mary R. Block wrote, “All primary sources have limitations and the ones used here are no exception. Appellate cases often do not reveal much about the individuals involved, especially with regard to race and class. This may be one of their greatest limitations.” Mary R. Block, “An Accusation Easily to Be Made”: A History of Rape Law in Nineteenth-Century America 7 (2001) (Ph.D. dissertation, University of Kentucky) (on file with author).

41. Parker, *supra* note 37, at 59.

42. FLOOD, note 31, at 19.

43. Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998).

subordinant social and economic position of wives and the double standard of sexual morality.”<sup>44</sup> What this Article adds to such analyses is the assertion that rape law must be understood within an even broader context: the race, gender, sexual, and class hierarchies of the Jim Crow south.<sup>45</sup> To be clear, this approach is not intended to dismiss or minimize the role these trials played in victimizing or subjugating women, but rather to point out how these trials were part of even more capacious systems of social control, which disciplined not only sexual assault survivors but all parties and even many witnesses.

Numerous other scholars have argued that community “attitudes and biases” can “affect”<sup>46</sup> or can even “nullify”<sup>47</sup> jurors’ decisions in sexual assault trials, and that “extralegal characteristics”<sup>48</sup> or “extra-evidential factors”<sup>49</sup>—including the race and attractiveness of the accuser and the defendant—impact sexual assault trial outcomes.<sup>50</sup> Recently, the legal scholar Dan M. Kahan showed empirically that jurors’ “cultural predispositions” have a greater impact on rape trial outcomes than legal definitions.<sup>51</sup> What this Article adds to these analyses is the assertion that southern social hierarchies did not merely inform or impact or even structure Jim Crow sexual assault trials; they were literally the subject of these trials. This is not to say that every trial worked in the same

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44. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 788 (1988).

45. Cf. RANA M. JALEEL, *THE WORK OF RAPE* 3 (2021) (arguing that scholars’ understandings of rape are inseparable from a racialized, imperial, and settler colonial context).

46. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 204 (1986). See also Kaarin Long, Caroline Palmer & Sara G. Thorne, *A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule Its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases*, 31 *HAMLIN J. PUB. L. & POL’Y* 569, 571–72 (2010); Scheppele, *supra* note 4, at 1107–08.

47. SCHULHOFER, *supra* note 21, at 17.

48. GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 53 (1989). See also Parker, *supra* note 37, at pt. II.

49. HUBERT S. FIELD & LEIGH B. BIENEN, *JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW* 141 (1980).

50. See FREEDMAN, *supra* note 6, at 162 (arguing that age of the parties “may have influenced” rape trial outcomes); BROWNMILLER, *supra* note 7, at 2 (arguing that jurors reach conclusions “according to [rape] myths”).

51. Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010). See also Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter*, 35 *LOY. LA. L. REV.* 757, 768 (1992) (“The way people think about the evidence they hear is more important than any rule.”).

way, or that they completely ignored factual matters. Nonetheless, the one hundred trials studied reveal remarkable similarities in focus, and this focus was on social mores, not sexual assault.

In sum, this Article aims to show that Jim Crow rape trials really were not trials as nearly all legal scholars understand trials to be. They consisted, instead, of surface trials accompanied by shadow trials. This Article seeks to revive, unite, and expand upon the foundational interventions of the legal realists—that trial courts are not truly interested in determining the truth<sup>52</sup>—and legal storytellers—that jurors consider not “the facts of the case” but rather conflicting stories.<sup>53</sup> It intends to demonstrate just how divorced the stories recounted in Jim Crow rape trials were from the realities of sexual violence in the Jim Crow south. It counsels legal historians—and legal scholars more broadly—to be profoundly skeptical of the presumption that courts, lawyers, or juries are primarily concerned with the matter they are tasked with adjudicating.

Part I of this Article both outlines and interrogates the basic structure of Jim Crow sexual assault trials. It shows that while attorneys did debate motions and question witnesses in ways designed to meet the legal requirements set forth by rape laws, these colloquies also served as inquiries into accusers’, defendants’, or even witnesses’ violations of social mores, especially sexual mores and norms of respectability (including gender and class norms). Part II considers how courtroom procedures and testimony likewise served as inquisitions into whether individuals had transgressed the Jim Crow south’s racial hierarchy. Part III looks specifically at the ways that many procedures and lines of questioning served no purpose other than humiliating the accuser, defendant, or witness, which in turn exposes how trials themselves could be forms of preliminary punishment for violating social mores. Part IV explores how the trials’ verdicts and their aftermaths reflect the true purpose of sexual assault trials in the Jim Crow south: policing and punishing transgressions of overlapping social hierarchies.

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52. See JEROME FRANK, *The “Fight” Theory Versus the “Truth” Theory*, in *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80 (1949) (arguing that courts are not truly interested in finding the truth, but rather in judging competing arguments).

53. Scheppele, *supra* note 25, at 2082–83; Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 *Geo. L.J.* 281, 285 (2013); W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981).

## I. THE SOCIAL CODE ON TRIAL

Each of the trials studied in this Article included some attempt to meet the legal requirements laid down by the Arkansas criminal code. Indeed, the accuser and the defendant testified in nearly every trial, along with several witnesses for each side and, quite frequently, medical experts. At first glance, the primary purpose of this testimony appears to have been proving whether sex took place, whether it was against the woman's will, whether the girl was truly below the age of consent, and so on. Yet a deeper analysis of these trials reveals that the letter of Arkansas's rape law was only incidentally related to the focus of nearly all of these trials: whether specific individuals had violated the Jim Crow south's social mores. Indeed, questions about morality predominated these trials, and witnesses often spent far more time discussing the respectability or deviance of themselves and others than they did testifying about what actually happened in the case at hand. Women, and even young girls, were asked endless questions about their sex lives, their dating histories, and even matters such as whether they swore or disobeyed their parents. Men were accused of promiscuity, general criminality, or even specific acts of gender deviance. Questioning invariably came to focus on alleged violations of the unwritten social code governing gender, sex, and class.

In these sexual assault cases, then, the shadow trials often overshadowed the surface trials, as jurors considered whether a woman had breached the norms against sexual promiscuity or resistance to patriarchal authority, and whether a man had breached the norms against nonmarital sex, alternative gender presentation, or subversion of the rules of plantation capitalism. Testimony therefore functioned not so much to reveal the facts of the alleged assault but rather to enable jurors to assess the morality of a particular man and a particular woman in their small community—and, based on this assessment, to determine whom to punish: the man, with prison (or death), or the woman, with ignominy.<sup>54</sup>

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54. In this respect, testimony in Jim Crow rape trials largely tracked the contemporary evidentiary category of character evidence. Today, character evidence is generally not admissible to show the character of a witness (that is, their propensity to act in accordance with a character trait) but is admissible for other purposes, including the demonstration of motive or to impeach a witness's credibility. *See* FED. R. EVID. 404. In Jim Crow rape trials, character evidence—evidence about a person's morality—was not “admissible” in the surface trial (concerned, as it was, with the elements of the crime) but was “admissible” and, indeed, the object of the shadow trial.

A. *Accuser Testimony*

The accuser's testimony was legally and rhetorically critical in sexual assault trials: it was essential to prove that an assault had taken place, and it was needed to fulfill the three requirements demanded by Arkansas rape law: that the rape had been forcible, that the woman had resisted, and that penetration had been complete. In cases where the sex was not necessarily forcible but rather unlawful because the accuser was underage, much of the young accusers' testimony addressed the question of whether they were competent to testify. Girls as young as ten were often questioned at length about whether they understood the stakes of their testimony and what would happen to them if they lied. Leading questions and intimidation tactics were common, both in the process of establishing competency and during accusers' testimony about the assault itself.

Yet the accuser's testimony—whether she was underage or not—quite often came down to questions of morality and immorality. Defense attorneys frequently questioned women and girls regarding their respectability, their trustworthiness, and especially their promiscuity. In carnal abuse trials, defense attorneys also sought to cast doubt on whether they were truly underage at all. In response, accusers asserted their adherence to bourgeois sexual norms.<sup>55</sup> Their testimony was thus a battle over their obedience to a code of conduct that prescribed how young women had to act. If they had acted in defiance of their community's social mores, they might not only be disbelieved but also suffer significant consequences themselves.<sup>56</sup> Thus, lawyers did not so much have to convince the jury whether or not to believe a woman's claim that she'd been raped or was too young to consent; they had to convince jurors whether or not to care. As the shadow trial subsumed the surface trial, the true focus of the accuser's testimony was whether the woman herself had violated social norms that were more prized than the norm against rape. The following Subparts reveal the predominance of

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55. These norms generally demanded that women abstain from premarital and extramarital sex, perform femininity and adherence to traditional gender roles, and generally avoid drugs, alcohol, and other such manifestations of "vice." These norms were, of course, perpetually contested. See generally JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS A HISTORY OF SEXUALITY IN AMERICA 171–238* (3d ed. 2012); Nancy MacLean, *The Leo Frank Case Reconsidered: Gender and Sexual Politics in the Making of Reactionary Populism*, in *JUMPIN' JIM CROW: SOUTHERN POLITICS FROM CIVIL WAR TO CIVIL RIGHTS 183–218* (Jane Dailey, Glenda Elizabeth Gilmore & Bryant Simon eds., 2000).

56. See *infra* Part I.

this dynamic in the questioning and testimony required to show each element of sexual assault under Arkansas law.

### 1. Force

Throughout much of the nineteenth century, most medical and legal authorities agreed that it was impossible for a healthy adult woman to be raped.<sup>57</sup> Such a woman could only truly be raped if she were drugged, outnumbered, disabled, or subjected to extreme physical force. In the absence of these circumstances, physicians and judges concluded, the sex must have been consensual.<sup>58</sup> This consensus began to fracture by the last quarter of the nineteenth century, yet as late as 1917, one physician could write (in a widely cited essay) that rape is a physical impossibility so long as a woman “remains conscious.”<sup>59</sup> Well into the twentieth century, grand juries consistently dismissed rape charges brought by women who had been threatened into submission but not physically subdued.<sup>60</sup> The Arkansas Supreme Court had long held that “[f]orce is an essential element in the crime of rape,”<sup>61</sup> but by the 1920s it had refined this requirement somewhat: “It is necessary for the jury to find that the accused intended to use whatever force was necessary to overcome the prosecuting witness and have sexual intercourse with her, and that he intended to use as much force as would be necessary to accomplish that purpose and overcome her resistance.”<sup>62</sup>

One interpretation of this requirement is that it essentially demanded that the accuser be an “ideal victim,” one whose consent could not be “implied through status or behaviour [*sic*].”<sup>63</sup>

57. See Stephen Robertson, *Signs, Marks, and Private Parts: Doctors, Legal Discourses, and Evidence of Rape in the United States, 1823–1930*, 8 J. HIST. SEXUALITY 345, 350–52 (1998).

58. See *id.*

59. Charles Mapes, *Sexual Assault*, 21 UROLOGIC & CUTANEOUS REV. 430, 433–34 (1917); see also Robertson, *supra* note 57, at 361–62. Stephen Robertson notes that by this point—a couple decades into the twentieth century—such a view was in the minority among physicians. *Id.* at 362. Note, though, the cross-examination in one Arkansas trial from 1948, wherein the attorney brought in a book called *Medical Jurisprudence* by Herzog and quoted from it as follows: “It has been found that in such cases generally the libido of both male and female cooperating are needed to produce such results.” Transcript of Record at 47–48, *Smith v. State*, 210 S.W.2d 913 (Ark. 1948) (No. 4492). The attorney asked the witness (a medical doctor) whether he agreed with this statement, and the doctor replied, “I agree with reservations.” *Id.*

60. Robertson, *supra* note 57, at 385.

61. *Bradley v. State*, 32 Ark. 704, 710 (Ark. 1878).

62. *Brock v. State*, 270 S.W. 98, 99 (Ark. 1925).

63. Kim Stevenson, *Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases*, 8 FEMINIST LEGAL STUD.

Yet an alternative or additional interpretation is that lawyers and jurors were undertaking this inquiry not only to decide whether the accuser was one who aroused their sympathy, but also (and, perhaps, primarily) to determine whether she had committed a “crime” of her own—violating her community’s social mores by suborning nonmarital sex.<sup>64</sup> As one South Carolina woman wrote in 1940, in the aftermath of a much-publicized allegation of rape in her community, women “wearing shorts and similar garments” were to blame for the “provocation of evil thoughts” and thus bore “responsibility in leading on evil deeds.”<sup>65</sup>

In the trials studied, the question of physical force came up often. In the trial of Tug Terrell, for instance, the accuser noted—at the urging of the prosecutor on redirect examination—that she did not lay down voluntarily: “I just laid down on it; but it was all forced upon me. I was out, out of the car and out there in the woods by myself with five men, and there is no woman living that can stand up and fight five men.”<sup>66</sup> In some trials, the prosecution made sure to ask about the accuser’s physical injuries,<sup>67</sup> which was a common strategy toward fulfilling the force requirement elsewhere in the country as well.<sup>68</sup> By emphasizing the degree of force that these women faced, prosecutors sought to convince jurors that accusers would not have gotten near enough to the defendants to be assaulted at all but for violence or credible threats of violence. Thus, these accusers had not transgressed the code of conduct that dictated women’s behavior around men who were not their husbands. Defense attorneys, meanwhile, sought to convince jurors that these women had not been subjected to force at all—both to argue that these women had consented to nonmarital intercourse and to imply that they were the sort of women that would (and did) consent to

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343, 352 (2000).

64. See *ESTRICH*, *supra* note 8, at 5 (“If it is so difficult for the man to establish his innocence, far better to demand that a woman victim prove hers . . .”).

65. *A Woman of Georgetown Asks a Question*, *GEORGETOWN TIMES*, Dec. 20, 1940 (on file in Folder 8, Box II:B 128, NAACP Records).

66. Transcript of Record at 51, *Terrell v. State*, 2 S.W.2d 87 (Ark. 1928) (No. 3423). For other examples, see Transcript of Record at 31–34, *Alford v. State*, 266 S.W.2d 804 (Ark. 1954) (No. 4760); Transcript of Record at 48, *Boyd v. State*, 182 S.W.2d 937 (Ark. 1944) (No. 4368); Transcript of Record at 12, *Venable v. State*, 5 S.W.2d 716 (Ark. 1928) (No. 3459); Transcript of Record at 11, *Whittaker v. State*, 286 S.W. 937 (Ark. 1926) (No. 3134).

67. See, e.g., Transcript of Record at 21, *Snetzer v. State*, 279 S.W. 9 (Ark. 1926) (No. 3159).

68. See *DONOVAN*, *supra* note 36, at 73; *FREEDMAN*, *supra* note 6, at 25.

nonmarital intercourse. Indeed, further testimony suggests that this latter purpose was far more important in Jim Crow courtrooms.

## 2. Resistance

Throughout the nineteenth century, and even into the twentieth century, many laws demanded that women who accused men of rape be able to prove that they had fought back with all their might.<sup>69</sup> By the 1920s and 1930s, these extreme requirements had faded (though certainly not disappeared),<sup>70</sup> but courts continued to demand that women have resisted as much as could be reasonably expected, and throughout the entirety of the assault.<sup>71</sup> The Arkansas Supreme Court exemplified this trend by shying away from “superlative words, like ‘uttermost resistance,’ ‘resistance to the last extreme,’ and such like,” but it still adjudged a jury instruction demanding that “her resistance must not be a mere pretense, but was in good faith” to be “very fair.”<sup>72</sup> It later adopted a jury instruction that demanded that “unless you find from the evidence, beyond a reasonable doubt, that the victim used all the means within her power, consistent with her safety, up to the time when the act of sexual intercourse was actually accomplished, it will be your duty to find the defendants not guilty.”<sup>73</sup>

Much like the force requirement, the resistance requirement can be interpreted in two ways: first, as confirmation that it is the woman and her behavior (rather than her consent as a legal element) that are truly at the center of the trial,<sup>74</sup> or second, as part of an inquiry into whether the accusers themselves were guilty of a separate offense: relinquishing their sexual “purity” too easily.<sup>75</sup> The former interpretation transforms this requirement into a metric used to assess the defendant’s guilt, even if the burden is put on the accuser; the latter interpretation perceives this requirement as part of an investigation into the woman’s own wrongdoing, related to but ultimately distinct from her attacker’s.

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69. See DONOVAN, *supra* note 36, at 73; FREEDMAN, *supra* note 6, at 25.

70. See, e.g., *State v. Hoffman*, 280 N.W. 357 (Wis. 1938).

71. See Schwartz, *supra* note 8, at 569.

72. *Davis v. State*, 39 S.W. 356, 357 (Ark. 1897).

73. *Zinn v. State*, 205 S.W. 704, 707 (Ark. 1918) (cited approvingly in *Braswell v. State*, 280 S.W. 367, 368 (Ark. 1926)).

74. See, e.g., Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 8 (1977).

75. I am using “scare quotes” here to indicate that I find the concept of sexual “purity” to be misguided and offensive. Nonetheless, many people at this time believed in the importance of sexual “purity.” See generally D’EMILIO & FREEDMAN, *supra* note 55, at 171–238.

One accuser named Ruth<sup>76</sup> gave what might be considered typical resistance testimony: “I was resisting and fighting all I could and said God have mercy on me, don’t let this man over power me. . .”<sup>77</sup> Other women, such as Maxine, went into more detail: “I tried to get them to let me go and they wouldn’t let me. I fought with them and tried to get loose from them. . .I scuffled and screamed. . .”<sup>78</sup> After one of her assailants put his hand over her mouth to stifle her, “I bit his hand but he kept it on there. I kept trying to scream. . .”<sup>79</sup> Many other women recalled screaming, or trying to scream; on cross-examination, they might be asked about how much or how loudly they had screamed,<sup>80</sup> or about why other people in the area had not heard them scream.<sup>81</sup>

Defense attorneys’ strategy on cross-examination was often to imply that accusers had not resisted enough.<sup>82</sup> “Why didn’t you scratch him?” one accuser was asked.<sup>83</sup> “I did all I could.” The attorney pressed further: “Why didn’t you hit him in the face?” “I

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76. This Article identifies accusers only by their first names. I have done this not out of a desire to obscure the historical record, but rather in an attempt to protect the privacy of their descendants. Readers who wish to learn more about any of the trials analyzed in this Article will be able to easily discover the accusers’ full names by reading the case files or, often, the published opinions and press coverage of these trials, all of which are identified in the footnotes. My hope was simply that if a person were to look up the name of their grandmother in an internet search engine, her testimony in a trial that surely represented one of the most traumatic moments of her life would not appear among the results.

77. Transcript of Record, *Whittaker*, *supra* note 66, at 11.

78. Transcript of Record at 33–34, *Cook v. State*, 276 S.W. 583 (Ark. 1925) (No. 2616).

79. *Id.* at 34.

80. Transcript of Record at 80, *Cabe v. State*, 30 S.W.2d 855 (Ark. 1930) (No. 3654); Transcript of Record at 31, *Lewis v. State*, 271 S.W. 708 (Ark. 1925) (No. 3058); Transcript of Record, *Snetzer*, *supra* note 67, at 25.

81. Transcript of Record at 43–44, *Reed v. State*, 299 S.W. 757 (Ark. 1927) (No. 3395).

82. *See, e.g.*, Transcript of Record at 23, *Boyett v. State*, 56 S.W.2d 182 (Ark. 1933) (No. 45); Transcript of Record, *Lewis*, *supra* note 80, at 31–32. *See also* Transcript of Record, *Alford*, *supra* note 66, at 35; Transcript of Record at 105, 109, *Bailey v. State*, 219 S.W.2d 424 (Ark. 1949) (No. 4553); Transcript of Record at 49–51, *Bradshaw v. State*, 199 S.W.2d 747 (Ark. 1947) (No. 4437); Transcript of Record at 236–40, 252, 255, *Davis v. State*, 244 S.W. 750 (Ark. 1922) (No. 2709); Abstract and Brief for Appellant at 35–36, *Harrison v. State*, 262 S.W.2d 907 (Ark. 1953) (No. 4759); Transcript of Record at 20–21, *Lindsey v. State*, 209 S.W.2d 462 (Ark. 1948) (No. 4486); Transcript of Record, *Smith*, *supra* note 59, at 32–33; Transcript of Record at 14–15, 17, *Underdown v. State*, 250 S.W.2d 131 (Ark. 1952) (No. 4692).

83. Transcript of Record at 38, *Mynett v. State*, 18 S.W.2d 335 (Ark. 1929) (No. 3559).

just fought with my hands and did everything I could to get away.”<sup>84</sup> Such questioning often bordered on the sarcastic: “You hadn’t learned how to break his hold then even the third time?”<sup>85</sup> Still other lines of questioning sought to portray the resistance of even young girls as insufficient:

Q: “Minnie, did you cry out or holler when he told you to go out there in the woods with him?”

A: “No, sir.”

Q: “Did you at any time cry out or holler?”

A: “No, sir.”

Q: “You just did what he told you to do?”

A: “Yes, sir.”

Q: “What do you weigh, Minnie?”

A: “I weigh 115.”

Q: “A hundred and fifteen pounds?”

A: “Yes, sir.”

Q: “You are a well developed girl, are you not?”

A: “Yes, sir.”

Q: “Strong and healthy.”

A: “Yes, sir.”<sup>86</sup>

The implication was clear: the defense meant to suggest that Minnie, who was only thirteen,<sup>87</sup> could have—and should have—fought harder.<sup>88</sup>

Later during the same trial, the prosecution asked Minnie why she didn’t exhibit more resistance. “I was afraid he would hit me,” she replied.<sup>89</sup> This response exemplifies another hallmark of accusers’ testimony regarding resistance: many stated that their resistance was stymied by fear for their safety or their lives. “Did you resist it? Did you holler or did you try to holler?” one defense attorney asked an accuser on cross-examination.<sup>90</sup> “I started to and he told me not to. He started to pick up a gun,” she replied; her attacker then threatened to kill her, she continued.<sup>91</sup> Other accusers gave nearly identical testimony.<sup>92</sup> Arkansas courts recognized

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84. *Id.*

85. Transcript of Record, *Venable*, *supra* note 66 at 17.

86. Transcript of Record at 38, *Daniels v. State*, 53 S.W.2d 231 (Ark. 1932) (No. 4150).

87. *Id.*

88. For a similar line of questioning, see Transcript of Record, *Bradshaw*, *supra* note 82, at 56–57.

89. Transcript of Record, *Daniels*, *supra* note 86, at 51.

90. Transcript of Record at 44, *Head v. State*, 297 S.W. 828 (Ark. 1927) (No. 3353).

91. *Id.* at 44–45.

92. *See, e.g.*, Transcript of Record at 36, *Sanders v. State*, 296 S.W. 70 (Ark. 1927) (No. 3349); Transcript of Record at 14, *Sherman v. State*, 279 S.W.2d 353

fear of mortal danger as a valid exception to the resistance requirement. A woman need not be “compelled to continue her resistance as long as she was conscious or had strength to offer any resistance, without regard to the effect of this resistance on her safety,” wrote the state supreme court in 1924.<sup>93</sup> “If, for instance, appellant’s conduct had induced the fear that an outcry would cost her her life, she was not required to thus imperil her life or safety.”<sup>94</sup>

When women did not fear for their lives, failure to adequately resist could be interpreted as tacitly allowing—or even encouraging—nonmarital sex. Respectable women in the Jim Crow south were expected to guard their “purity” with, if not their lives, then certainly herculean efforts. Accordingly, defense attorneys unceasingly sought to imply that accusers had failed to do so. This line of questioning, therefore, not only served to cast doubt on whether these women had truly been raped; it also enabled jurors to consider whether these women had committed the distinct offense of provoking immoral sex.

### 3. Establishing competency

For underage accusers, the first questions they faced were usually those meant to establish their competency to testify in the first place. Yet even these questions were inquiries into morality and, in particular, whether these children had violated social mores surrounding the familiarity girls were allowed to have with regard to sex.

In his study of sexual assault cases involving children in New York City, Stephen Robertson noted that, in the early twentieth century, girls (some as young as five) frequently testified at trial,<sup>95</sup> but their testimony was fraught with complications. First, they had to be found competent to testify. In order to do this, “judges asked girls about their families and schooling and about what would happen to them if they lied . . . When girls as young as seven years old answered that they would go to hell if they lied, they were allowed to give sworn testimony.”<sup>96</sup> This was true in Jim Crow Arkansas, as well as turn-of-the-century New York. Virtually every young accuser who testified in the cases studied (both forcible rape cases and

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(Ark. 1926) (No. 3158); Transcript of Record at 20, *Korsak v. State*, 154 S.W.2d 348 (Ark. 1941) (No. 4218); *See also* Transcript of Record, *Terrell*, *supra* note 66, at 48 (attesting to how common a defendant’s threats of violence were).

93. *Kindle v. State*, 264 S.W. 856, 857 (Ark. 1924).

94. *Id.* *See also* *Braswell v. State*, 280 S.W. 367, 368 (Ark. 1926).

95. ROBERTSON, *supra* note 34, at 47–49.

96. *Id.* at 49.

statutory rape cases)<sup>97</sup> was asked some version of, “Do you know what happens to little girls that don’t tell the truth?” and nearly all responded, “Go to the bad man,” often using that precise wording.<sup>98</sup>

In his examination of New York cases, Robertson also found that prosecutors had to walk a fine line in the questions they asked and the testimony they solicited. On the one hand, they had to “clearly establish that the offense had taken place.”<sup>99</sup> But on the other hand, they did not want the young girls to appear to be too knowledgeable about sex, which might tar them as promiscuous.<sup>100</sup> Robertson found that prosecutors “sought to negotiate that tension, first, by asking leading questions that provided girls with language that was appropriate, yet still had a clear meaning for jurors, and, second, by convincing judges to allow girls to point to the parts of the body that they referred to in their testimony.”<sup>101</sup> The girls, in turn, “typically testified vaguely that the defendant ‘did something to me’ or ‘done bad,’ or else they used the more descriptive, but sexually inexplicit, phrases ‘he took out his thing and put it in me’ or ‘he put his privates in my privates.’”<sup>102</sup>

This vagueness was often present in the Arkansas trials. Most accusers claimed that the defendant “[h]urt me real bad,”<sup>103</sup> or “started doing it,”<sup>104</sup> or used some other euphemism.<sup>105</sup> “Do you

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97. Although the charge of statutory rape (i.e., “carnal abuse”) was available to prosecutors in all cases with underage accusers, they often charged men with forcible rape (which carried much harsher penalties) in cases that more clearly involved the use of force.

98. See, e.g., Transcript of Record at 25, *Burks v. State*, 120 S.W.2d 345 (Ark. 1938) (No. 4103); Transcript of Record at 12–13, *De Voe v. State*, 97 S.W.2d 75 (Ark. 1936) (No. 4012); Transcript of Record at 27, *Durham v. State*, 16 S.W.2d 991 (Ark. 1929) (No. 3550); Abstract and Brief for Appellant at 24–25, *Needham v. State*, 224 S.W.2d 785 (Ark. 1949) (No. 4577); Transcript of Record at 16, *Reynolds v. State*, 246 S.W.2d 724 (Ark. 1952) (No. 4680); Transcript of Record at 22, *Rose v. State*, 184 S.W. 60 (Ark. 1916) (No. 2039); Transcript of Record, *Sherman*, *supra* note 92, at 75; Transcript of Record at 66, *Sutton v. State*, 122 S.W.2d 617 (Ark. 1938) (No. 4102); Transcript of Record at 8–9, *Watt v. State*, 261 S.W.2d 544 (Ark. 1953) (No. 4749). Some children failed to clear such examinations. See, e.g., Transcript of Record at 32–34, *Cutts v. State*, 288 S.W. 883 (Ark. 1926) (No. 3295). In one trial, the prosecutor questioned a supposedly intellectually challenged 21-year-old woman in this manner; she replied: “I’d go to prison and go to the devil.” Transcript of Record, *Bradshaw*, *supra* note 82, at 42.

99. ROBERTSON, *supra* note 34, at 48.

100. *Id.*

101. *Id.*

102. *Id.*

103. Transcript of Record, *Durham*, *supra* note 98, at 29.

104. Transcript of Record, *De Voe*, *supra* note 98, at 18–19.

105. See Transcript of Record, *Sanders*, *supra* note 92, at 25 (A: “I could

know what your private parts are, your sexual organs?" a prosecutor asked thirteen-year-old Dorothy.<sup>106</sup>

A: "No sir."

Q: "Where did he put this part he took out of his pants, what part of your body did he put it on or in?"

A: "Down in my front part."<sup>107</sup>

Much of this questioning was quite leading. "Did you walk under the bridge with him honey?" was a typical question.<sup>108</sup> Sometimes judges even tacitly permitted it. "Avoid leading questions," one judge instructed the prosecutor in the trial of Joe Head, before adding, "Of course this is a young witness."<sup>109</sup> In the trial of R.C. Burks, the judge even asked his own leading questions.<sup>110</sup>

This testimony, as well as that analyzed by Robertson, reveals that girls had to present themselves as ignorant of sexual matters; to do otherwise was to risk appearing excessively conversant in the vocabulary of intercourse, which in turn risked prompting a jury to consider how precisely a child would have obtained such knowledge. In this way, inquiries into underage accusers' competency to testify were carefully choreographed to avoid the implication that these girls had transgressed the social order through promiscuity, or, at the very least, an unnatural interest in prurient matters.

Indeed, as part of their attempt to portray young accusers as ignorant of sexual matters and therefore compliant with the moral demands placed on girls in this society, prosecutors frequently emphasized the girls' physical size and characteristics at trial. This tied the girls' appearances to their innocence, and thus their adherence to social mores. "I will just ask the court to let this child stand up," one lawyer said of six-year-old Martha, who had been permitted to testify, "for you to observe her size and apparent underweight for a child of her age, her angelic innocence and those other physical facts, in determining her maturity."<sup>111</sup> For a girl to be other than angelically innocent was for her to be in violation of a rigid social more.

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feel his thing." Q: "Could you tell whether it was on the inside or the outside?" A: "On the inside.").

106. Transcript of Record, *Sutton*, *supra* note 98, at 38.

107. *Id.*

108. Transcript of Record, *Burks*, *supra* note 98, at 32.

109. Transcript of Record, *Head*, *supra* note 90, at 44.

110. Transcript of Record, *Burks*, *supra* note 98, at 42.

111. Transcript of Record, *Durham*, *supra* note 98, at 31.

#### 4. Cross-examination

When accusers in Jim Crow sexual assault trials were cross-examined, the questioning almost invariably turned to their alleged promiscuity or immorality. To be sure, some women were asked about inconsistencies in their testimony<sup>112</sup> or openly accused of lying.<sup>113</sup> Underage accusers in particular were questioned aggressively—bullied, really—about whether they were mistaken.<sup>114</sup> But the bulk of their testimony on cross-examination focused on their morality and respectability. These questions were only tenuously connected to legal arguments or even the defendant's case; instead, they appear to have been part of inquisitions into the largely unrelated matter of whether the accuser herself was guilty of transgressing her community's unwritten social code.

The most common tactic was to accuse the women of promiscuity. It was routine for a defense attorney to ask questions that implied that a woman had several lovers;<sup>115</sup> that she dated many men;<sup>116</sup> that she “ha[d] been going out driving at night considerably . . . [w]ith men”;<sup>117</sup> or that she “kept company” with various “sweethearts.”<sup>118</sup> At the trial of Bennett Mynett, the defense attorney asked questions meant to imply that the accuser was having sex in exchange for food or money.<sup>119</sup> In the case of Bill De Voe, the eight-year-old accuser was questioned at length about whether

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112. Transcript of Record, *Reed*, *supra* note 81, at 53–54; Transcript of Record, *Rose*, *supra* note 98, at 29–37; Transcript of Record, *Sanders*, *supra* note 92, at 29; Transcript of Record at 18–19, *Wills v. State*, 98 S.W.2d 72 (Ark. 1936) (No. 4013).

113. Abstract and Brief for Appellant at 4–5, *Doss v. State*, 157 S.W.2d 499 (Ark. 1941) (No. 4233); Transcript of Record at 59–60, *Priest v. State*, 163 S.W. 2d 159 (Ark. 1942) (No. 4260).

114. *See, e.g.*, Transcript of Record, *Burks*, *supra* note 98, at 47–50. *See also* Transcript of Record at 28–42, *Comer v. State*, 257 S.W.2d 564 (Ark. 1953) (No. 4734).

115. Transcript of Record at 14, *Brock v. State*, 270 S.W. 98 (Ark. 1925) (No. 3053).

116. Transcript of Record, *Boyd*, *supra* note 66, at 60–64.

117. Transcript of Record, *Snetzer*, *supra* note 67, at 34.

118. Transcript of Record, *Sherman*, *supra* note 92, at 18. *See also* Transcript of Record at 32, *Cureton v. State*, 174 S.W. 810 (Ark. 1915) (No. 1944) (accusing the accuser of coming on to the defendant); Transcript of Record at 9, *McLaughlin v. State*, 174 S.W. 234 (Ark. 1915) (No. 1932) (accusing the accuser of “being seen riding about with a married man”).

119. Transcript of Record, *Mynett*, *supra* note 83, at 33–34. In response, some accusers strenuously insisted on their respectability. *See, e.g.*, Transcript of Record, *Lewis*, *supra* note 80, at 20 (“I never begged anyone for money in my life,” she retorted. “I have a father I could to if I wanted money.”); *Id.* at 27 (“I have a daddy and I never asked a man in my life for any money, but my daddy.”).

she played with boys in the backyard. Through these questions, the defense attorney implied that she may have been sexually active with “the boys at school.”<sup>120</sup>

In carnal abuse cases such as *De Voe*’s, the accuser’s chastity or promiscuity should not have been raised in trial at all. “It is a well established doctrine,” wrote the Arkansas Supreme Court in 1922, “that in prosecutions for carnal abuse, the victim being under the age of consent, her illicit relations with other men, showing want of chastity, are immaterial, because in such a prosecution the chastity of the victim is not in issue and testimony tending to prove specific acts of sexual intercourse with others than the accused is not relevant.”<sup>121</sup> However, this did not stop defense attorneys from frequently asking questions meant to imply that young accusers were promiscuous.<sup>122</sup> “Who else has been keeping company with you?” a defense attorney asked a girl named Bessie.<sup>123</sup> Since the defendant in this trial admitted that he’d had sex with Bessie,<sup>124</sup> this question (and the several that followed) should not have been permitted.<sup>125</sup> In another trial, a fourteen-year-old was asked whether she’d gone to a man’s house and “stay[ed] there without the lights on for as

120. Transcript of Record, *De Voe*, *supra* note 98, at 24, 30, 44. See also Transcript of Record at 18–21, *Clack v. State*, 212 S.W.2d 20 (Ark. 1948) (No. 4971).

121. *McDonald v. State*, 244 S.W. 20, 23 (Ark. 1922). See also *Davis v. State*, 234 S.W. 482, 483 (Ark. 1921); *Smith v. State*, 119 S.W. 655, 656 (Ark. 1909). See also Transcript of Record, *Clack*, *supra* note 120, at 53–54.

122. See, e.g., Transcript of Record at 12–14, *Green v. State*, 46 S.W.2d 8 (Ark. 1932) (No. 464); Transcript of Record at 35, *McGlosson v. State*, 286 S.W. 931 (Ark. 1926) (No. 3261); Transcript of Record at 27, 31, *Thomas v. State*, 11 S.W.2d 771 (Ark. 1928) (No. 3515); Transcript of Record at 27–28, *Bender v. State*, 151 S.W.2d 688 (Ark. 1941) (No. 4210); Transcript of Record at 52, *Caldwell v. State*, 168 S.W.2d 807 (Ark. 1943) (No. 4280); Abstract and Brief for Appellant, *Doss*, *supra* note 113, at 27–29; Transcript of Record at 23, *James v. State*, 188 S.W. 806 (Ark. 1916) (No. 2094); Transcript of Record, *Korsak*, *supra* note 92, at 18; Transcript of Record at 22–23, 25–26, *Lipsmeyer v. State*, 266 S.W. 275 (Ark. 1924) (No. 3009); Transcript of Record at 45, *McGill v. State*, 189 S.W.2d 646 (Ark. 1945) (No. 2907); Transcript of Record, *Rose*, *supra* note 98; Transcript of Record at 20, 23, 25, *Rowe v. State*, 244 S.W. 463 (Ark. 1922) (No. 2710); Transcript of Record at 28–29, *Tugg v. State*, 174 S.W.2d 374 (Ark. 1943) (No. 4324); Transcript of Record at 26–27, 33, *Waterman v. State*, 154 S.W.2d 813 (Ark. 1941) (No. 4222); Transcript of Record at 44–50, *Willis v. State*, 252 S.W.2d 618 (Ark. 1952) (No. 4715).

123. Transcript of Record at 53, *Hedrick v. State*, 279 S.W. 785 (Ark. 1926) (No. 3157), Bessie’s age was contested at trial, but she was likely about fifteen.

124. Abstract and Brief for Appellant at 18, *Hedrick*, 279 S.W. 785 (No. 3157).

125. *McDonald*, 244 S.W. at 23.

much as 30 minutes” and whether she “ever le[ft] the school [to] go riding with any of the boys at school.”<sup>126</sup>

Defense attorneys also asked accusers questions designed to depict them as lacking in respectability. A nurse named Frances, who testified about being assaulted by two men, was asked aggressively about how much alcohol she drank when she was with them.<sup>127</sup> Another woman was forced to admit that on the night of her assault she’d gone out on a date without her father’s permission.<sup>128</sup> Yet another woman was asked about how much she had danced after her assault, and whether she had danced with her assailant.<sup>129</sup> In 1921, a woman named Irene was asked whether she had told a group of people that “they could ‘kiss your ass,’” and “that you didn’t give shit what they thought.”<sup>130</sup> One woman named Daisy was subject to a particularly galling cross-examination. She was accused of “run[ning her] husband off,”<sup>131</sup> prostituting her daughter,<sup>132</sup> having sex in exchange for food or money or shoes,<sup>133</sup> and having sex with married men.<sup>134</sup> “Wasn’t your conduct so bad your neighbors came in there to visit you and asked you to stop it and if you didn’t, they would have to report you to court?” the defense attorney asked.<sup>135</sup> “It didn’t happen,” Daisy replied.<sup>136</sup>

In response to such insinuations, some accusers vehemently asserted their respectability.<sup>137</sup> “John Bailey tried to get fresh with me and then he tried to push me down in the back of the car. I told him I wasn’t that kind of a girl,” testified one accuser. “I screamed and screamed so much that he got up and he said, ‘I am sorry—I didn’t know you were a nice girl.’”<sup>138</sup> Another accuser recalled, “He got in the car and he tried to kiss me and make love to me; then he said, ‘come on and let’s do it,’ and I said, ‘I’m not going to do it, I’m not that kind of a girl.’”<sup>139</sup>

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126. Transcript of Record, *Venable*, *supra* note 66, at 22.

127. Transcript of Record at 62–63, *Fanning v. State*, 136 S.W.2d 1040 (Ark. 1940) (No. 4153).

128. Transcript of Record at 27–29, *Morgan v. State*, 76 S.W.2d 79 (Ark. 1934) (No. 3906).

129. Transcript of Record, *Sanders*, *supra* note 92, at 45.

130. Transcript of Record, *Brust*, *supra* note 82, at 87.

131. Transcript of Record, *Mynett*, *supra* note 83, at 30.

132. *Id.* at 31.

133. *Id.* at 33–34, 39–40.

134. *Id.* at 35.

135. *Id.* at 31.

136. *Id.*

137. *See, e.g.*, Transcript of Record, *Snetzer*, *supra* note 67, at 18 (“I am just a nice lady that is all you can say.”).

138. Transcript of Record, *Bailey*, *supra* note 82, at 93.

139. Transcript of Record, *Lindsey*, *supra* note 82, at 19.

Strikingly, questions about morality were rarely part of explicit defense arguments that accusers were therefore untrustworthy or had consented. Rather, it seems more accurate to conclude that these questions arose as part of a defense inquiry into an altogether unrelated question—whether the accuser herself was guilty of violating social mores. Nowhere does this become more apparent than in the defendants’ arguments on appeal. In numerous briefs, the defendants raised the accuser’s promiscuity or lack of respectability for no clear legal purpose. More specifically, they connected the accusers’ violations of the prevailing moral code to no clear argument about impeachment or consent, or only made such connections very tenuously. Indeed, in some of these briefs the defense attorneys admitted that their purpose was distinct from legal argumentation.

In Bill De Voe’s appeal from his conviction for assault with intent to rape, for instance, the defendant included the following passage:

The testimony shows that both of those children [including the eight-year-old accuser] should have been wards of the State; that their mother worked at night and they ran around all over the city at all hours of the night; that their mother lived at 910 West Sixth Street with [a man named] Bryant as husband and wife.

This information was irrelevant to De Voe’s legal argument on appeal; indeed, it was largely unconnected with any legal arguments. It is best understood as an indictment unconnected with the allegations of rape, an argument that the accuser and her mother were living in violation of the prevailing community expectations for women and girls.

In another brief, the defense attorneys devoted multiple pages to cataloging the accuser’s alleged promiscuity, ostensibly in service of an argument that she had not denied the defendant consent but rather was “merely stalling, trying to lead him to the conclusion that she was not a pushover.”<sup>140</sup> Yet the gratuitous nature of the language in this appeal (and its general irrelevance) suggests that such an argument was less about consent and more about the woman’s behavior itself: “When viewed in its most refined light, we visualize a good-looking, well-developed, nineteen year old girl, half clothed as usual, seeking out and arranging a date with a man who tried to rape her, yes, a married man, going out with him in a

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140. Appellant’s Brief and Argument at 52–54, *Boyd v. State*, 182 S.W.2d 937 (Ark. 1944) (No. 4368).

car and doing the very same hugging and kissing act that she says she did just before she says she was assaulted.”<sup>141</sup>

Occasionally, defense attorneys even outright stated that their aims in introducing such morals evidence were largely unconnected to specific legal arguments. In one brief, the defense attorney argued that the court should have allowed testimony about the accuser’s “indecent, vulgar and disgusting language and conduct . . . to impeach her, *as well as to show her generally degraded moral character.*”<sup>142</sup> Indeed, the brief continued, the accuser “could have been convicted” of testifying falsely on the basis of her “vulgar remarks.”<sup>143</sup> In another brief, the defense attorneys quoted at length from a California case in which the court had written that “instances of lewdness” on behalf of the accuser, the type of evidence they were arguing ought to have been admitted, “were not introduced so much for the purpose of impeaching her evidence directly as for the purpose of doing away with the presumption that there was a total absence of assent on her part.”<sup>144</sup> That is to say, doing away with the presumption that the accuser was a woman who abided by the prevailing moral norms of her society. Note that the defense attorneys were not outright asserting that the accuser had consented to sex; rather, they were asserting that she had not totally *not* consented, an incoherent and legally irrelevant comment that nonetheless served to imply that, in effect, she had wanted it.

##### 5. Black accusers

For Black women in particular, courts were sites of harsh scrutiny of their adherence to sexual or gender norms. Indeed, it appears that when Black women who were considered less-than-respectable were raped, their assailants routinely escaped trial altogether. For the most part, only two categories of cases with Black accusers appear to have made it inside courtrooms at all: the first (the majority) involved assaults against Black children, and the second involved assaults against especially prominent Black women. A typical example of the second was the prosecution of a white man named James Whittaker who was accused of raping an educated Black woman named Ruth.<sup>145</sup> Ruth was a teacher and a social worker who “assist[ed] the County superintendent in

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141. *Id.* at 53.

142. Brief for Appellee at 70–71, *Brust v. State*, 240 S.W. 1079 (Ark. 1922) (No. 2637) (emphasis added).

143. *Id.* at 71.

144. Abstract and Brief of Appellant at 72, *Rose v. State*, 184 S.W. 60 (Ark. 1916) (No. 2039).

145. *Whittaker v. State*, 286 S.W. 937 (Ark. 1926).

educational work among the negroes . . . visit[ed] the county schools and help[ed] the teachers in methods of teaching . . . help[ed] the boys and girls throughout the community to be better home makers and better house keepers.”<sup>146</sup> Quite unusually, after Whitaker was convicted, the newspaper did not even print Ruth’s race, likely indicating the deference the press paid her on account of her social prominence.<sup>147</sup> This is consistent with the findings of the historian Barbara S. Lindemann, who considered a very different time and place (eighteenth-century Massachusetts) but found that rape allegations did not lead to a trial at all unless the accuser’s community “acknowledged that the attacker had no right to the woman sexually” (a right husbands and many male bosses were perceived to possess).<sup>148</sup>

Occasionally, however, a case did land before the jury involving a Black woman who had, allegedly, strayed from conventional sexual mores. In one case in which a Black man had allegedly raped a married Black woman who lived in a tenant house on a plantation, much of the defendant’s argument centered around the woman’s supposed vocation. The defendant’s lawyer claimed that she was “a common prostitute that [the defendant] had been using ever since she was 13 years old,” and that she “was a degenerate and operating a rendezvous for crap shooters and drunken negroes.”<sup>149</sup> Such an argument was quite similar to several made about white accusers—namely, that jurors should focus their ire on the accusers for their violations of sexual or gender norms, rather than on the defendants for committing rape.

Accordingly, several Black accusers were asked questions designed to show their inadequate obeisance to sexual or gender norms. For instance, one defense attorney asked Aurelia, a sixteen-year-old Black girl, about “other negro boys” she went out with;

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146. Transcript of Record, *Whittaker*, *supra* note 66, at 8.

147. *Man Given Life Term in Pen Files Appeal*, *ARK. GAZETTE*, July 2, 1926, at 10. Press accounts in white newspapers almost always specified when accusers were Black, which implicitly served to communicate to readers that they should discount these women or girls. Thus, by not indicating her race, the newspaper was paying Ruth an unusual degree of deference.

148. Lindemann, *supra* note 30, at 79. Note, Lindemann’s study was not focused on Black women specifically.

149. Appellant Brief in Reply at 2–3, *Cauley v. State*, 247 S.W. 772 (Ark. 1923) (No. 2749); Appellee Brief on Motion for Rehearing at 4, *Cauley v. State*, 247 S.W. 772 (Ark. 1923) (No. 2749). See also Transcript of Record at 104–09, *McDonald v. State*, 279 S.W.2d 44 (Ark. 1955) (No. 2706) (defense attorney cross-examining the 15-year-old Black accuser about other men she had allegedly spent time with, about being truant from school, about associating with “lewd wom[e]n,” “whore[s],” and “strumpet[s]”).

how old they were; and whether one of them “gave you \$10.00 to put it on the defendant here.”<sup>150</sup> To counter such implications, the prosecutors in several rape cases involving Black girls attempted to use their questioning to imply that the girls came from prominent or otherwise respectable families. This was an effort to generate sympathy for the accusers among members of all-white juries—and to show that they had not violated their society’s sexual mores by embodying the racialized stereotype of a promiscuous Black woman. The evidence thus served to establish the accuser’s racial and sexual respectability. In one case, the prosecutor asked questions that led the fifteen-year-old accuser to testify that she had attended school and even played the piano; in his opening statement, the prosecutor characterized her father as “a hard working man.”<sup>151</sup> In another, the prosecutor put the girl’s mother on the stand and asked her a series of repetitive questions that revealed that she was the wife of the pastor of a sizeable church.<sup>152</sup> Such questions reveal the primary focus of these Black women’s testimony—their own sexual morality, rather than their sexual assaults. They also reveal that Black accusers in Jim Crow sexual assault trials had to contend not merely with a heightened form of the scrutiny endured by white accusers; rather, they faced an onslaught of distinctly sexualized and racialized questions.

### B. *Defendant Testimony*

For decades, scholars have been analyzing the testimony of rape trials. Such analyses have focused disproportionately on the questioning and testimony of accusers, often to the exclusion of other witnesses’ testimony.<sup>153</sup> This is understandable, as survivors are not only the most marginalized and the most harmed by rape trials, but also their most vital witnesses, as information that only they can provide is often legally and narratively pivotal. But, by focusing on the defendants’ and other witnesses’ testimony, this Article reveals the extent to which not just accusers but also defendants, and even some witnesses, were effectively put on trial for violating community norms. In this way, rape trials doubled as shadow trials through which prosecutors and jurors—defendants’ and witnesses’

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150. Transcript of Record at 15–16, *Jackson v. State*, 218 S.W. 369 (Ark. 1920) (No. 2405). By “put it on” the defense attorney meant falsely accuse. See Transcript of Record, *Whittaker*, *supra* note 66, at 49–51, 71–75.

151. Transcript of Record, *McDonald*, *supra* note 149, at 10, 13–15.

152. Transcript of Record at 13–15, *Pugh v. State*, 210 S.W.2d 789 (Ark. 1948) (No. 4494).

153. See, e.g., AMANDA KONRADI, *TAKING THE STAND: RAPE SURVIVORS AND THE PROSECUTION OF RAPISTS* (2007).

neighbors—could scrutinize a range of behaviors and determine whether these individuals had transgressed the Jim Crow south's social hierarchies.

It is thus unsurprising that issues of morality dominated the questioning of the accused rapists. To be sure, defendants used their testimony to deny the charges against them.<sup>154</sup> For example, in carnal abuse cases, some defendants admitted intercourse occurred but claimed that the accuser was over sixteen at the time.<sup>155</sup> Yet a considerable share of the questioning of defendants revolved around inquiries disconnected from the alleged rape. Many of these inquiries elicited responses that fit into the now-familiar pattern of men accusing women of promiscuity or indecency. But what is more surprising is that much of the questioning focused instead on the morality of the defendants themselves. Some were accused of criminality or untrustworthiness, while several were even accused of promiscuity themselves. This questioning was not relevant to the alleged assault; it was, instead, key to inquiries into morality. When defendants accused their accusers of immorality, they were often attempting to indict these women for violating social mores. When defendants were, in turn, accused of immorality, this was the prosecution's attempt to hold these men accountable for crimes only sometimes related to sexual assault.

### 1. Testimony regarding accusers' morality

Many defendants used their testimony to impugn the character of the accusers, alleging that these women had acted out of keeping with prevailing notions of southern womanhood. While this testimony could be viewed as relevant to the surface trial—for instance, by impeaching an accuser's testimony or implying that she had in fact consented—the testimony defendants gave regarding their accusers' morality was so wide-ranging and so gratuitously insulting that it appears much more like standalone evidence regarding accusers' morality, disconnected from the allegation of rape.

Numerous defendants accused the women of being promiscuous,<sup>156</sup> or of being prostitutes,<sup>157</sup> often with shocking frankness.

154. See, e.g., Transcript of Record at 178, *Franks v. State*, 272 S.W. 648 (Ark. 1925) (No. 3080); Transcript of Record, *Venable*, *supra* note 66, at 38.

155. See, e.g., Transcript of Record, *Hedrick*, *supra* note 123, at 136.

156. See Transcript of Record at 61–62, *Braswell v. State*, 280 S.W. 367, 368 (Ark. 1926) (No. 3168); Transcript of Record, *Clack*, *supra* note 120 at 35–36; Transcript of Record, *Davis*, *supra* note 82, at 327–28; Transcript of Record, *Morgan*, *supra* note 128, at 109–10; Transcript of Record, *Mynett*, *supra* note 83, at 85; Transcript of Record at 95–98, *Young v. State*, 221 S.W. 478 (Ark. 1920) (No. 398).

157. See Transcript of Record, *Fanning*, *supra* note 127, at 87, 108, 125;

“We were going to take this girl out for intercourse, because that is what I drove up there for,” Tug Terrell testified. “Of course, she was going to go as they had already asked her about it and she said ‘If there was any pay in it she would go.’ Then I got out of my car and went back to get this girl and asked her if she was ready to go; and she said she was.”<sup>158</sup>

Q: “When I asked you about where you were going, you said ‘We were going to have intercourse.’ What did you mean by that?”

A: “You know what whores are, don’t you?”

Q: “I am not asking bout whores.”

A: “Well, you know they will take them all on.”

Q: “Oh, then you were going to try the whole gang on her and treat her like a bunch of dogs, were you?”

A: “The boys that paid for it could do it and the boys that didn’t pay for it didn’t touch her.”<sup>159</sup>

Another defendant was asked, “You could look at her and tell she was only a child?” and responded, “I could not tell it; she had on overalls down to her feet and had on a lot of rouge and had a lipstick and stuff on.”<sup>160</sup> Later, he testified, “Anybody looking at them would think they were eighteen or twenty year old girls.”<sup>161</sup> (The girl in question was fourteen.)<sup>162</sup> Such responses—versions of which appeared in many trials—show how defendants used their testimony not only to rebut the charges against them, but also to charge the *accusers* with irrelevant sexual immorality.

## 2. Inquiries into the defendants’ morality

Yet questioning about morality could also be turned against the men. Indeed, several defendants were asked about their prior criminal history.<sup>163</sup> Other defendants were asked how often they

Transcript of Record, *Terrell*, *supra* note 66, at 171.

158. Transcript of Record, *Terrell*, *supra* note 66 at 179.

159. *Id.* at 179–80.

160. Transcript of Record, *Cabe*, *supra* note 80, at 288.

161. *Id.* at 303.

162. *Id.* at 60.

163. *See, e.g.*, Transcript of Record at 403, 465–66, *Bethel v. State*, 21 S.W.2d 176 (Ark. 1929) (No. 4860); Transcript of Record, *Bradshaw*, *supra* note 82, at 108; Transcript of Record, *Caldwell*, *supra* note 122, at 93–95; Transcript of Record, *Davis*, *supra* note 82, at 305–06; Transcript of Record at 177–79, *Hawthorne v. State*, 204 S.W. 841 (Ark. 1918) (No. 2281); Transcript of Record at 63–64, *Houston v. State*, 79 S.W.2d 999 (Ark. 1935) (No. 1411); Transcript of Record, *McGill*, *supra* note 122, at 83–86; Transcript of Record, *Morgan*, *supra* note 128, at 107–08; Transcript of Record, *Smith*, *supra* note 59, at 71–74; Transcript of Record, *Sutton*, *supra* note 98, at 106–108; Transcript of Record, *Tugg*, *supra* note 122, at 46.

were drunk,<sup>164</sup> whether they used “vulgar” language,<sup>165</sup> or whether they were “fussing around and raising the Dickens.”<sup>166</sup> The purpose of such questioning was obvious. In responding to an objection, one prosecutor outright said, “I want to show his immoral tendency.”<sup>167</sup>

Defendants were also accused of violations of the prevailing social order that could implicate their masculinity or associate them with gender deviance. For instance, in the trial of two white men, John Davis and C.F. Johnson, multiple witnesses testified that Davis had donned the accuser’s “princess slip”—“a woman’s undergarment.”<sup>168</sup> The defendant was then questioned aggressively about his penis size.<sup>169</sup> Only occasionally did these questions relate explicitly to the assault; rather, they were clearly about a defendant’s “immoral tendency.”

Perhaps the most surprising method of questioning was when prosecutors brought up the men’s supposed promiscuity on cross-examination as a means of impeaching their credibility.<sup>170</sup> “With how many different women have you had sexual intercourse?” the prosecutor asked Clarence Bryney, who was accused of rape.<sup>171</sup>

- A: “I have had it with several.”  
 Q: “How many?”  
 A: “Four or five.”  
 Q: “How many different times in your life?”  
 A: “I couldn’t keep account of that.”  
 Q: “When did you start in with such behavior?”  
 A: “That wasn’t behavior.”  
 Q: “When did you start in misbehaving?”<sup>172</sup>

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164. See, e.g., Transcript of Record, *Lewis*, *supra* note 80, at 114; Transcript of Record, *Morgan*, *supra* note 128, at 107–08; Transcript of Record, *Sutton*, *supra* note 98, at 108–109.

165. Transcript of Record, *Priest*, *supra* note 113, at 130.

166. Transcript of Record, *Lewis*, *supra* note 80, at 116.

167. Transcript of Record, *Whittaker*, *supra* note 66, at 45.

168. Transcript of Record, *Davis*, *supra* note 82, at 228–29, 231–59, 266.

169. Transcript of Record at 88–90, *Fields v. State*, 159 S.W.2d 745 (Ark. 1942) (No. 4249).

170. See, e.g., Transcript of Record, *Clack*, *supra* note 120, at 38–39; Transcript of Record, *Lindsey*, *supra* note 82, at 77; Transcript of Record at 106–07, *Powell v. State*, 232 S.W. 429 (Ark. 1921) (No. 2741); Transcript of Record, *Rowe*, *supra* note 122, at 58–59; Transcript of Record, *Tugg*, *supra* note 122, at 49; see also Abstract and Brief of Appellant at 15, *McDonald v. State*, 279 S.W.2d 44 (Ark. 1955) (No. 2706); Transcript of Record, *Mynett*, *supra* note 83, at 88.

171. *Id.*

172. *Id.* at 88–89.

Eventually Bryney admitted that he sometimes paid for sex; the highest price he'd ever paid was two dollars.<sup>173</sup> The prosecutor then asked Bryney's co-defendant identical questions.<sup>174</sup> In other cases, such questioning even turned sarcastic:

Q: "Howard, you go out with quite a few girls, don't you?"

A: "Well, not many."

Q: "Those who do go out with you assume the attitude that they will do what you want them to or walk back in, don't you?"

A: "No, sir."

Q: "Did you ever make a girl walk home?"

A: "No, sir, I never made one walk home."

...

Q: "You are one of these high-steppers, aren't you, you go out with a lot of girls and you try them all out and do your best to have intercourse with them?"

A: "No, sir."

Q: "You don't do that?"

A: "No, sir."<sup>175</sup>

Questions about promiscuity sometimes took on a different meaning in carnal abuse cases. "How often have you taken little girls up to your room to give them a drink?" a defense attorney asked the defendant, J.G. Cabe, in a carnal abuse trial.<sup>176</sup> "What do you mean by little?" he replied.<sup>177</sup> "How often have you taken girls that gave you the same impression as to size and age as these two, to take them up to your room to give them a drink?" the attorney clarified.<sup>178</sup> "I cannot say how often, I have taken them up there."<sup>179</sup> Another prosecutor's cross-examination of the defendant began, "You say you love little children?"<sup>180</sup> Such questioning was not meant to show that the man had had sex with the underage girl in question; rather, it was meant to imply that he was the sort of man who might have sex with an underage girl.

In their appeals several defendants objected to the prosecution's invocation of their own supposed immorality or promiscuity.<sup>181</sup>

173. *Id.* at 89–90.

174. *Id.* at 97–98.

175. Transcript of Record, *Priest*, *supra* note 113, at 142–43. *See also* Transcript of Record, *Fanning*, *supra* note 127, at 12 (remarkably similar questioning).

176. Transcript of Record, *Cabe*, *supra* note 80, at 292.

177. *Id.*

178. *Id.*

179. *Id.*

180. Transcript of Record, *Fields*, *supra* note 169, at 75. *See also* Transcript of Record, *Lipsmeyer*, *supra* note 122, at 54–55.

181. *See, e.g.*, Abstract and Brief for Appellant at 2–3, *Amos v. State*, 189 S.W.2d 611 (Ark. 1945) (No. 4396).

One man argued that it was improper for the prosecutor to have asked his wife whether she had divorced him “on account of his misconduct with other women,”<sup>182</sup> while another man argued that the court should not have allowed the prosecutor to have asked him about his expulsion from school.<sup>183</sup> One of the same defendants that repeatedly raised the accuser’s alleged immorality in his appeal also objected to the prosecutor saying to the jury, “You will be doing this defendant’s wife and babies a favor if you will put him in the penitentiary for twenty-one years.”<sup>184</sup> These appeals did not succeed.<sup>185</sup>

It is important to emphasize that questioning focused on men’s promiscuity served a different purpose than when similar questions were directed at women. For women, to be accused of promiscuity was to imply that they deserved to be raped; for men, to be accused of promiscuity was to imply that they were disreputable characters. Yet for both men and women, allegations of promiscuity or other “immoral” behavior functioned as indictments for conduct unrelated to sexual assault—conduct that was at the heart of the shadow trial.

### C. *Witness Testimony*

As with accusers and defendants, witnesses testified in the sexual assault trials studied not only so that they could establish particular facts, but also so that they could establish or impugn the morality of the accuser and the accused. Of course, many witnesses did testify about their observations—about conditions at the scene of a crime, for instance<sup>186</sup>—but their primary purpose often was as arbiters of the morality of others. Through their testimony, a jury could determine whether the accuser or the defendant had violated the social mores of the Jim Crow south.

At the time, Arkansas case law made clear that evidence regarding an accuser’s sexual behavior was admissible, but only for certain purposes. “Her reputation for chastity may not be put in issue to shake her credit as a witness,” wrote the state supreme court in 1909, “but only to show her consent, and so no rape. Her

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182. Abstract and Brief of Appellant at 58, *Cabe v. State*, 30 S.W.2d 855 (Ark. 1930) (No. 3645).

183. Abstract and Brief for Appellee at 46, *Cook v. State*, 276 S.W. 583 (Ark. 1925) (No. 3076).

184. Appellant’s Brief and Argument, *Boyd*, *supra* note 140, at 5.

185. *Boyd v. State*, 182 S.W.2d 937 (Ark. 1944); *Cabe v. State*, 30 S.W.2d 855 (Ark. 1930); *Cook v. State*, 276 S.W. 583 (Ark. 1925).

186. *See, e.g.*, Transcript of Record, *Morgan*, *supra* note 128, at 75; Transcript of Record, *Wills*, *supra* note 112, at 24.

credit as a witness may be impeached by evidence that her general reputation for truth or immorality renders her unworthy of belief, but not by evidence of particular wrongful acts. The reason for admitting evidence concerning her chastity is that a jury might more readily infer assent to the intercourse in an unchaste woman than in a virtuous one.<sup>187</sup> The court later clarified that the prosecution could only introduce “evidence of her reputation for chastity” to rebut the defense’s “evidence of reputation for unchastity.”<sup>188</sup>

In practice, however, the line between showing consent and attacking credibility was blurry, and witnesses invoked women’s unchastity with abandon. Specifically, it was common for defense witnesses to testify that an accuser’s reputation for morality was “bad.”<sup>189</sup> For example, after the defense attorney questioned an accuser named Daisy, he paraded forth sixteen witnesses who each testified that Daisy had a bad reputation for virtue and chastity.<sup>190</sup> In another case, a defense witness accused the accuser of being a prostitute.<sup>191</sup> In response, the prosecution called the sheriff to testify that he’d searched the accuser’s bag and found no money<sup>192</sup>; the accuser herself was then recalled and said the accused men had not offered her any money and she “would not have taken it if they had.”<sup>193</sup> Such rebuttal witnesses were not uncommon. In Daisy’s

187. *Jackson v. State*, 122 S.W. 101, 101 (Ark. 1909).

188. *Smith v. State*, 233 S.W. 1081, 1082 (Ark. 1921); *see also McDonald v. State*, 244 S.W. 20, 23 (Ark. 1922) (making clear that testimony about “chastity” was only relevant if the victim claimed that she had borne the defendant’s child; the defendant could then introduce testimony “in rebuttal, tending to prove that another might have been the father of the child. . .”).

189. *See, e.g.,* Transcript of Record, *Burst*, *supra* note 82, at 268, 273, 280–81, 286–93, 301–18, 329, 334, 340–44, 365–67; Abstract and Brief for Appellee, *Cook*, *supra* note 183, at 11,14; Transcript of Record, *Cuerton*, *supra* note 118, at 59, 92; Abstract and Brief for Appellant at 7–8, *Kazzee v. State*, 299 S.W. 354 (Ark. 1927) (No. 3386); Transcript of Record, *Powell*, *supra* note 170, at 36; Transcript of Record, *Rose*, *supra* note 98, at 76, 83–84; Transcript of Record, *Tugg*, *supra* note 122, at 19; Transcript of Record at 69–70, *Warford v. State*, 216 S.W.2d 781 (Ark. 1949) (No. 4537); Transcript of Record, *Willis*, *supra* note 122, at 95–97, 100–04, 118–19. In the *Burst* case, the defense attorney was explicit on appeal that the accuser’s swearing and other “indecent” behavior showed that she “was so lost to all sense of decency” and therefore “would be much more likely to consent to an act of intercourse than a young girl of pure mind or chaste thought and words.” Abstract and Brief of Appellant, *Burst*, *supra* note 142, at 72–73.

190. Transcript of Record, *Mynett*, *supra* note 83, at 55–82.

191. Transcript of Record, *Terrell*, *supra* note 66, at 144–62. *See also* Transcript of Record, *Cook*, *supra* note 78, at 62–63; Abstract and Brief for Appellant, *Harrison*, *supra* note 82, at 61.

192. Transcript of Record, *Terrell*, *supra* note 66, at 194.

193. *Id.* at 198.

case, the prosecution called a neighbor of hers named G.S. Clark to testify that he had never observed any immoral conduct by Daisy or her daughters.<sup>194</sup>

The defense pushback to these rebuttal witnesses could be brutal, however. “What color is [Daisy’s] hair?” the defense attorney asked Clark.

A: “Dark.”

Q: “What color is [Daisy’s] baby’s hair?”

A: “Light hair.”

Q: “It is very much like you isn’t it.”

A: “No sir. It looks more like you.”

Q: “You sleep in the same room with her?”

A: “Yes sir.”

Q: “Sleep in the same bed?”

A: “No sir.”<sup>195</sup>

This exchange reveals that the questioning of witnesses occasionally led to inquiries into the witnesses’ own behavior—that is, whether individuals who were neither the accuser nor the accused had violated the prevailing social order.

The presence of the tactic of scrutinizing morality in the jury selection process indicates just how widespread and common this approach was. Under Arkansas law, jurors could be excused for “good cause,”<sup>196</sup> and while much of the surviving voir dire questioning of prospective jurors consisted of what are still standard inquiries<sup>197</sup>—jurors were asked if they knew the defendants, had made up their minds, knew any of the witnesses, or had “any conscientious scruples against capital punishment”<sup>198</sup>—occasionally such questioning led to defendants raising jurors’ alleged violations of the moral order. In one trial, the defendant argued that a juror “deliberately failed and refused to disclose certain facts of which he had intimate knowledge [that] would have disqualified him”—namely, that his family had “mingled together and bec[o]me intimately acquainted and associated” with the family of the accuser.<sup>199</sup> In another trial, allegations of jury bias led the defense attorney to question a juror about whether one of his daughters had ever “r[u]n away from home with a man,” and whether another daughter had

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194. Transcript of Record, Mynett, *supra* note 83, at 111.

195. *Id.* at 112–13.

196. Crawford & Moses Digest, § 6366 (1921).

197. See J. Thomas Sullivan, *An Overview of the Law of Jury Selection for Arkansas Criminal Trial Lawyers*, 15 U.A.L.R. L.J. 37 (1992).

198. See, e.g., Transcript of Record, Bethel, *supra* note 164, at 3–4, 7.

199. Reply Brief of Appellant at 17–19, *Thornsberry v. State*, 92 S.W.2d 203 (Ark. 1936) (No. 3978).

borne a child out of wedlock.<sup>200</sup> While the matter of juror bias was undoubtedly relevant, the ease with which inquiries into juror bias became inquisitions into juror immorality is revealing.

Some witness testimony focused not on sexual morality but rather on the defendant or accuser's devotion to or violations of class respectability. In the trial of John Sherman, for instance, the defense attorney asked the defendant's son questions that underlined his father's penury, apparently to underscore his virtue by showing his acceptance of the class hierarchy:

Q: "Your father is a very hard working man?"

A: "Yes sir."

Q: "And all of his family work?"

A: "Yes sir."

Q: "He is a poor man?"

A: "Yes sir."

Q: "A renter?"

A: "Yes sir."<sup>201</sup>

In contrast, the prosecutor in the trial of B.T. McGlosson asked the defendant about finances in order to imply that he was dissolute and immoral:

Q: "At the time you talked to Mrs. McDermott [a probation officer] wasn't your wife and family in destitute circumstances?"

A: "No; that was a mistake; it come out in the newspapers, but it was a mistake."

Q: "And didn't she investigate your family's condition?"

A: "No."

Q: "Didn't she go to your family, to your home, and find your family in destitute circumstances and you buying clothes for other women?"

A: "No, she did not."<sup>202</sup>

Similarly, witnesses routinely invoked or impugned the parties' adherence to conventional gender roles. For instance, after an accuser named Lenora testified that she spent a lot of time with her father (who was accused of raping her), and little time with other young men,<sup>203</sup> a neighbor testified that he frequently saw Lenora working with her father on their farm. "At times it seemed that the girl was taking the boys' place [in doing farm labor]. I had raised girls and boys, and it looked funny; I couldn't understand it; such as sawing. It looked peculiar."<sup>204</sup> Here, the witness relied on gender

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200. Transcript of Record, *Brust*, *supra* note 82, at 477–79.

201. Transcript of Record, *Sherman*, *supra* note 92, at 64–65.

202. Transcript of Record, *McGlosson*, *supra* note 122, at 150.

203. Transcript of Record, *Sherman*, *supra* note 92, at 17–18, 31.

204. *Id.* at 36.

norms to note the perceived peculiarity of men and women violating them. In another trial, the defense attorney asked the accuser's husband if she "is of a highly excitable nature, isn't she?"<sup>205</sup> "Seems to be that way some of the time." He responded.<sup>206</sup> "More than the ordinary woman?" "Probably so."<sup>207</sup> This too implied that she acted contrary to the accepted behavior of an "ordinary woman." Much of this evidence was irrelevant.

Finally, the questioning of witnesses was vital to the probes of the defendants' supposed moral transgressions. Many witnesses testified to the morality or immorality of the defendant. Often the prosecution would bring in several witnesses to claim that the alleged rapist's reputation for morality was "bad."<sup>208</sup> In one trial, a deputy sheriff testified (irrelevantly) that he had found pornography on the defendant; the prosecutor then showed the pornography to the jury.<sup>209</sup> In another, the prosecution brought in a woman with whom the defendant had conceived a child out of wedlock, to show his "course of conduct."<sup>210</sup>

The defense would, in turn, call witnesses to counter that his reputation for morality was "good."<sup>211</sup> In the trial of Tug Terrell, for instance, five defense witnesses claimed the defendant had an upstanding moral reputation.<sup>212</sup> On cross-examination, one of them was asked, "If [Terrell] admits that he and a bunch of boys took a girl out into the woods and one after another went out to her to have intercourse with her that night, then that would be all right?" The witness responded, "No; that isn't the best—But that is no more than lots of other young folks do." "You make an allowance for that?" "Yes."<sup>213</sup> While much of this testimony was brief—just a few background inquiries and then a specific question about whether the defendant's reputation for morality was good or bad—sometimes

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205. Transcript of Record, *Durham*, *supra* note 98, at 34.

206. *Id.*

207. *Id.*

208. *See, e.g.*, Transcript of Record, *De Voe*, *supra* note 98, at 95–104 (where four witnesses testified).

209. *See* Transcript of Record at 123–24, *Maxwell v. State*, 232 S.W.2d 982 (Ark. 1950) (No. 4587).

210. *See* Transcript of Record, *Tugg*, *supra* note 122, at 13.

211. Transcript of Record, *Priest*, *supra* note 113, at 110–12; Transcript of Record, *Reed*, *supra* note 81, at 65–66; Transcript of Record, *Sherman*, *supra* note 92, at 56–61; Transcript of Record, *Wills*, *supra* note 112; Transcript of Record, *Bender*, *supra* note 122, at 79; Transcript of Record, *Bradshaw*, *supra* note 82, at 93–95; Transcript of Record, *Clack*, *supra* note 120, 54–58, 60–64; Transcript of Record, *Smith*, *supra* note 59, at 80, 82, 84, 87; Transcript of Record at 189, 191, 194, *West v. State*, 192 S.W.2d 135 (Ark. 1946) (No. 6473).

212. Transcript of Record, *Terrell*, *supra* note 66, at 183–89.

213. *Id.* at 187.

witnesses went into more detail. In a number of cases, women testified that the defendant was so upstanding that they trusted him around their young daughters.<sup>214</sup> In one trial, a witness testified “that when [defendant] is not going to school he loafs,”<sup>215</sup> while in another trial a witness accused the defendant of “loaf[ing] around.”<sup>216</sup> None of this testimony was directly relevant to the question of whether the defendant had assaulted the accused. But it was highly relevant to inquiries into whether the defendant had violated dominant social mores.

#### D. *Medical Testimony*

The final category of witnesses that routinely testified in sexual assault trials consisted of medical professionals (mostly doctors, but some nurses and health officers). The ostensible reason these individuals testified was to establish whether sex (or sexual assault) had taken place.<sup>217</sup> “There is no question but what she had been penetrated; no question whatever,” went the typical testimony.<sup>218</sup> In sexual assault cases involving children, medical testimony often focused on whether the rape as described was even physically possible.<sup>219</sup> Yet medical testimony also served another purpose: it was a vehicle for men to shame women and girls through insinuation for their sexual behavior, thus indicting these women and girls for violating their communities’ sexual mores.

Often, medical testimony turned to questions about an accuser’s promiscuity or venereal disease. “There was evidence that she had had intercourse lots of times,” testified one physician.<sup>220</sup> “You

214. *See, e.g.*, Transcript of Record, *Priest*, *supra* note 113, at 144–47; Transcript of Record, *Wills*, *supra* note 112, at 32–33; *see also* Transcript of Record, *Tugg*, *supra* note 122, at 4.

215. Abstract and Brief for Appellee, *Cook*, *supra* note 183, at 11.

216. Transcript of Record, *Reed*, *supra* note 81, at 82–83. *See also* Transcript of Record, *Bender*, *supra* note 122, at 61–64.

217. *See, e.g.*, Transcript of Record, *Alford*, *supra* note 66, at 46; Transcript of Record, *Bailey*, *supra* note 82, at 122; Transcript of Record, *Burks*, *supra* note 98, at 70; Transcript of Record, *Franks*, *supra* note 154; Transcript of Record at 79–80, 92, *Hogan v. State*, 86 S.W.2d 931 (Ark. 1935) (No. 3954); Transcript of Record, *Mynett*, *supra* note 83, at 45; Transcript of Record, *Priest*, *supra* note 113, at 17–18; Transcript of Record, *Warford*, *supra* note 189, at 58–62.

218. Transcript of Record, *Hogan*, *supra* note 217, at 92.

219. *See, e.g.*, Transcript of Record, *Burks*, *supra* note 98, at 71; Transcript of Record, *Cabe*, *supra* note 80, at 234; Transcript of Record, *Caldwell*, *supra* note 122, at 53; Transcript of Record, *Lipsmeyer*, *supra* note 122, at 80–85, 98–100; Transcript of Record, *McGlosson*, *supra* note 122; Transcript of Record, *Reynolds*, *supra* note 98, at 83–84; Transcript of Record, *Sutton*, *supra* note 98, at 76–77; Transcript of Record, *Willis*, *supra* note 122, at 61.

220. Transcript of Record, *Sherman*, *supra* note 92, at 43. *See also*

thought she was suffering with a venereal disease?” a defense attorney asked another physician on cross-examination. There was no obvious tactical purpose to this question other than to castigate the accuser (and the physician admitted he had been “of that opinion,” though he later learned he was “mistaken,” rendering it even less relevant).<sup>221</sup> In the trial of J.G. Cabe, where the accuser was just fourteen, a doctor testified that he found “[e]vidence of extreme foul odor with a discharge from the vagina field”<sup>222</sup> and that he believed this odor was caused by “uncleanliness.”<sup>223</sup> Such discussions of “uncleanliness” were, at this time, inescapably linked in the public mind to venereal disease and deviant women.<sup>224</sup> And while these inquiries were sometimes relevant to the surface trial—the transmission of sexually transmitted infections could be crucial evidence supporting an allegation that intercourse had taken place<sup>225</sup>—this questioning also provided an opportunity for men to debate a subject of the shadow trial: a woman or girl’s obeisance to sexual norms. As Part III shows, this was also closely tied to humiliating these accusers as a form of punishment in itself.

## II. ADJUDICATING DEFERENCE TO THE RACIAL HIERARCHY

Of the one hundred trials analyzed in this Article, most had white accusers and defendants. Yet sixteen trials had Black defendants and white accusers,<sup>226</sup> two had Black defendants and Black accusers,<sup>227</sup> and another five had white defendants and Black accus-

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Transcript of Record, *McGill*, *supra* note 122, at 50.

221. Transcript of Record, *Franks*, *supra* note 154, at 75.

222. Transcript of Record, *Cabe*, *supra* note 80, at 233.

223. *Id.* at 235.

224. MARY SPONGBERG, *FEMINIZING VENEREAL DISEASE: THE BODY OF THE PROSTITUTE IN NINETEENTH-CENTURY MEDICAL DISCOURSE* 32–33 (1997).

225. Robertson, *supra* note 57, at 376–78, 382; Transcript of Record, *Durham*, *supra* note 98, at 45–59; Transcript of Record, *De Voe*, *supra* note 98, at 53.

226. *Alford v. State*, 266 S.W.2d 804 (Ark. 1954); *Allison v. State*, 164 S.W.2d 442 (Ark. 1942); *Clayton v. State*, 89 S.W.2d 732 (Ark. 1935); *Cutts v. State*, 288 S.W. 883 (Ark. 1926); *Daniels v. State*, 53 S.W.2d 231 (Ark. 1932); *Hamm v. State*, 214 S.W.2d 917 (Ark. 1948); *Hawthorne v. State*, 204 S.W. 841 (Ark. 1918); *Hildreth v. State*, 223 S.W.2d 757 (Ark. 1949); *Hodges v. State*, 197 S.W.2d 52 (Ark. 1946); *Martin v. State*, 283 S.W. 29 (Ark. 1926); *Maxwell v. State*, 225 S.W.2d 687 (Ark. 1950); *Maxwell v. State*, 232 S.W.2d 982 (Ark. 1950); *McGee v. State*, 223 S.W.2d 603 (Ark. 1949); *Palmer v. State*, 214 S.W.2d 372 (Ark. 1948); *Thomas v. State*, 116 S.W.2d 358 (Ark. 1938); *West v. State*, 234 S.W. 997 (Ark. 1921).

227. *Cauley v. State*, 247 S.W. 772 (Ark. 1923); *Pugh v. State*, 210 S.W.2d 789 (Ark. 1948).

ers.<sup>228</sup> These figures in and of themselves indicate that the legal system did not view all alleged sexual assaults equally. Black women and girls, for instance, undoubtedly represented a much higher share of total sexual assault survivors,<sup>229</sup> but the racism implicit in Jim Crow-era policing and prosecution ensured that their assailants rarely faced trial. These hundred cases indicate that intraracial assaults within the Black community were unlikely to be adjudicated in criminal courts. This almost certainly reflects decades-old racist assumptions, particularly the idea that crimes within the Black community were not suitable for adjudication within the white-dominated legal system (both because Black lives were not valued and because intraracial crime did not trouble the prevailing economic order as much as did interracial crime). As far back as 1859, the Mississippi Supreme Court had reversed the rape conviction of an enslaved man who had assaulted an enslaved child, ruling, “our laws recognize no marital rights as between slaves; their sexual intercourse is left to be regulated by their owners. The regulations of law, as to the white race, on the subject of sexual intercourse, do not and cannot, for obvious reasons, apply to slaves; their intercourse is promiscuous.”<sup>230</sup>

It is likewise notable that Black men appear to be slightly underrepresented in these hundred trials. Between the years 1910 and 1950, the demographics of Arkansas remained fairly consistent, with white people representing between 72 and 78 percent of the state’s population, and Black people representing 22 to 28 percent.<sup>231</sup> Note, however, that the trials studied here were all appealed, which may explain the underrepresentation given Black people’s relative lack of access to dedicated legal counsel. In fact,

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228. *Gerlach v. State*, 229 S.W.2d 37 (Ark. 1950); *Jackson v. State*, 122 S.W. 101 (Ark. 1909); *McDonald v. State*, 244 S.W. 20 (Ark. 1922); *Watt v. State*, 261 S.W.2d 544 (Ark. 1953); *Whitaker v. State*, 286 S.W. 937 (Ark. 1926).

229. See generally McGUIRE, *supra* note 6. Black women and girls represent a disproportionate share of contemporary survivors of sexual assault. See MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, NAT’L CTR. FOR INJ. PREVENTION & CONTROL, CTR. FOR DISEASE CTR. & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 20 (2011), [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) [<https://perma.cc/5RJA-89RR>].

230. *George (a Slave) v. State*, 37 Miss. 316, 317 (Miss. 1859).

231. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, (Population Division, U.S. Census Bureau, Working Paper No. 56, 2002), <https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf> [<https://perma.cc/TEQ3-L64F>].

other records indicate that Black men were often overrepresented in Arkansas sexual assault trials, likely reflecting racist charging practices. According to one archival source, between 1921 and 1922, white men accounted for just 64 percent of those charged with rape; further, they accounted for 54 percent of those convicted, and they served far shorter sentences than their Black counterparts.<sup>232</sup>

In many respects, the 22 trials with Black parties were quite similar to the 78 trials with white accusers and defendants: accusers still had to establish that an assault took place; defendants still had to deny such allegations; witnesses still had to serve as arbiters of trustworthiness; and medical experts still provided the least impeachable kind of evidentiary validation. Yet these surface trials likewise doubled as shadow trials—debates not over whether the evidence met the requirements of rape laws, but over the parties' alleged violations of social mores. And while lawyers and witnesses did invoke the kinds of transgressions of gender norms discussed in Part I, these trials were distinctive because of how often racial norms arose.

Indeed, the testimony in these trials was dominated by a focus on race and the prevailing racial order. White accusers often emphasized the defendants' Blackness, apparently to underscore just how egregious was a defendant's transgression of the racial hierarchy (in the form of sex with a white woman); witnesses, too, invoked racist tropes to condemn accused Black men. Black accusers and defendants, in contrast, invoked other racial tropes: their testimony sought to assert their deference and respectability. To survive, they needed to show that they were not trying to disturb the fragile racial hierarchy of the Jim Crow south—especially not its most ironclad rule: Black men could not have sex with white women. Likewise, Black accusers sought to portray their obedience to racial subordination, similarly showing that they were not trying to trouble the hierarchy. Perhaps most tellingly, some witnesses or attorneys mentioned an accuser's or defendant's violation of racial mores even in trials with all-white or all-Black parties,<sup>233</sup> which illuminates how overtly the shadow trial could subsume the surface trial.

#### A. *Accuser Testimony*

Accusers in sexual assault trials were, we must remember, on trial too. The charge: violating prevailing social norms surrounding

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232. J.S. Utley, *Criminal Statistics* (1921–1922) (on file at SMC.0174.0001, Arkansas State Archives).

233. *See infra* Part I.

gender and race. Thus, in addition to establishing that a sexual assault took place, that it was forcible, that there was resistance, and that the attack was “complete,”<sup>234</sup> white accusers strove to show through their testimony that they had conformed to these norms while the Black defendants had committed the additional “crime” of being insufficiently deferential and obedient to white capital.

White accusers often added details that served to suggest that Black defendants had transgressed the racial hierarchy in ways other than the rape itself. For instance, an accuser named Ada recounted that she had told her alleged assailant, William Cutts, “he better go on and shut up his black mouth.”<sup>235</sup> (Relatedly, several white accusers testified that their Black assailants used “vulgar” language.)<sup>236</sup> Another white accuser recalled calling her attacker a “dirty black devil.”<sup>237</sup> Indeed, accusers frequently brought up defendants’ Blackness—as if, at this time and place, the jurors could have forgotten. One accuser named Mabel almost invariably referred to her attackers as “the tall negro” and “the short negro.”<sup>238</sup> Another white accuser testified that she knew her attacker was Black because she’d felt his “kinky” hair.<sup>239</sup> All of this language undoubtedly reflected the racist discourse of the time, but it also functioned to condemn the Black defendants for the crime of being too close to or too comfortable around white women.

In questioning accusers, prosecutors also regularly brought up Black defendants’ race or took care to emphasize it—in an effort to underscore that such sex could not have been consensual, and to remind the jurors of the breadth of the defendant’s offense. In the trial of William Cutts, for instance, the prosecutor frequently referred to the defendant as “the negro” and engaged in this exchange with Ada:

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234. See Statement, Abstract, and Brief of Appellants at 13–14, Clayton v. State, 89 S.W.2d 732 (Ark. 1935) (No. 3944–45); Transcript of Record, *Cutts*, *supra* note 98, at 14–16; Transcript of Record, *Daniels*, *supra* note 86, at 21–28; Abstract and Brief for Appellant at 12, Thomas v. State, 116 S.W.2d 358 (Ark. 1938) (No. 4084).

235. Transcript of Record, *Cutts*, *supra* note 98, at 24.

236. *Id.* at 18; Brief for Appellee at 16, Thomas v. State, 116 S.W.2d 358 (No. 4084). See also Transcript of Record at 18–20, Hodges v. State, 197 S.W.2d 52 (Ark. 1946) (No. 4420) (accuser testifying that Black defendant said, “God damn” repeatedly). Note that later in the *Hodges* trial, the defendant claimed, “so far as cuss words I never cussed them one time.” *Id.* at 71.

237. Transcript of Record at 13, McGee v. State, 223 S.W.2d 603 (Ark. 1949) (No. 4584).

238. See, e.g., Abstract and Brief for Appellant, *Thomas*, *supra* note 234, at 12; Brief for Appellee, *Thomas*, *supra* note 236 at 16.

239. Transcript of Record, *Hawthorne*, *supra* note 163, at 82.

Q: "When he got hold you got badly scared?"

A: "Yes, sir; if anything grabs you right now it scares you."

Q: "Especially a boy like that."<sup>240</sup>

Prosecutors also emphasized the accusers' whiteness and innocence. For example, in the state's brief, Ada was described as "a little white girl," and the prosecutor asked questions that highlighted that she was picking flowers with her eight-year-old friend at the time of the assault.<sup>241</sup> In another trial, meanwhile, the prosecutor and accuser casually referred to the defendant as "the [n-word]."<sup>242</sup> During the closing arguments of still another trial, the prosecutor "repeatedly dubbed [the defendant] a [n-word] while the prosecutrix was a young white woman and mother of children."<sup>243</sup>

Yet the accusers' whiteness did not insulate them completely in cross-examinations. Indeed, in trials with Black defendants, white accusers were still asked questions designed to imply that they were promiscuous,<sup>244</sup> or that they had not adequately resisted.<sup>245</sup> Defense attorneys had to phrase these questions carefully, and they were less probing than those in non-racialized trials; to do otherwise risked inflaming the wrath of the predominantly white courtroom audience.<sup>246</sup> Nonetheless, the existence of this questioning supports the contention that, in an effort to tacitly confirm likely rumors or suspicions of voluntary miscegenation, defense attorneys sought to bring up the accuser's alleged violation of social mores.

Rarely is this clearer than in the appeals. As the historian Lisa Lindquist Dorr has noted, it was much safer for Black defendants to raise a white accuser's alleged promiscuity or immorality after trial.<sup>247</sup> In the Arkansas trials analyzed in this Article, Black

240. Transcript of Record, *Cutts*, *supra* note 98, at 25.

241. Brief for Appellee at 3, *Cutts v. State*, 288 S.W. 883 (Ark. 1926) (No. 3295); Transcript of Record, *Cutts*, *supra* note 98, at 4.

242. Transcript of Record, *Hawthorne*, *supra* note 163, at 31–34, 95.

243. Brief for Appellant at 3, *Hodges v. State*, 197 S.W.2d 52 (Ark. 1946) (No. 4420).

244. Statement, Abstract, and Brief of Appellants, *Clayton*, *supra* note 234, at 15 (defense questioning the white accuser about dating a man, whether they were alone in a car together, whether they turned off the lights); Abstract and Brief for Appellants, *Thomas*, *supra* note 234, at 27, 31 (defense questioning the white accuser about how long she spent alone in a car with a man she'd been dating).

245. Transcript of Record, *Daniels*, *supra* note 83, at 38.

246. This accords with the findings of Lisa Lindquist Dorr. See DORR, *supra* note 31, at 11.

247. DORR, *supra* note 31, at chs. 2 & 4. *But see* Transcript of Record, *Maxwell*, *supra* note 209, at 173 (Black defendant testifying that the white accuser told him that if he *didn't* have sex with her, "she would scream and the house would be surrounded and I wouldn't have a chance . . . I didn't know

defendants invoked Matthew Hale's infamous comment that rape "is an accusation easily to be made and hard to be proved,"<sup>248</sup> or wrote, "we believe that it is impossible to commit the crime of rape upon a woman without a great deal of personal violence, such violence as would render the victim unconscious. Yet in this case there is little resistance shown by the prosecuting witness."<sup>249</sup> By relying on the same tropes regarding morality and promiscuity as white defendants, Black defendants sought to redirect the jurors' ire toward the white women, implicitly arguing that the white women had defied the social order in far more fundamental ways.

### B. *Defendant Testimony*

In their own testimony, Black defendants' primary task was to convince the white jurors that they were not seeking to trouble the racial hierarchy of the Jim Crow south. Thus, several of these defendants took care to assert their respectability and deference, which reflected a survival strategy.<sup>250</sup> Bubbles Clayton testified that he had "been farming all my life for different white men."<sup>251</sup> He "farmed ten and seventy-nine hundredths acres last year. I had it rented," he continued.<sup>252</sup> "I make a good hard honest living."<sup>253</sup> Another defendant, William Cutts, recounted what he said to his accuser and made sure to couch this recollected dialogue in the most polite, deferential terms: "I stumbled and fell, and jumped up and said, 'Oh, 'scuse me,' and went and got a drink of water and went back . . . "[S]he said 'get out of the way.' I said 'Scuse me, I didn't mean no harm.'"<sup>254</sup> Still another Black defendant, Emanuel West, mentioned that he was the leader of his church's choir and testified that he assisted the investigating officers in every way he could.<sup>255</sup>

Relatedly, much of these defendants' testimony focused on their fear and suffering—an implicit reminder to white jurors of the defendants' supposedly willing place at the bottom of the racial hierarchy. Freeling Daniels admitted that he told one authority that he "ma[d]e an assault on this girl," but he only said so because "I

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nothing else to do but go on through with it").

248. Supplemental Brief for Appellants at 2, *Clayton v. State*, 89 S.W.2d 732 (Ark. 1935) (No. 3944-45).

249. Abstract and Brief for Appellants, *Thomas*, *supra* note 234, at 25.

250. See Cermak, *supra* note 31, at 11-12.

251. Statement, Abstract, and Brief of Appellants, *Clayton*, *supra* note 234, at 19.

252. *Id.* at 20.

253. *Id.* at 22.

254. Transcript of Record, *Cutts*, *supra* note 98 at 49-50.

255. Transcript of Record at 458, 464, *West v. State*, 234 S.W. 997 (Ark. 1921) (No. 1).

was scared . . . I thought they might hurt me.”<sup>256</sup> Several other Black defendants testified about their fear of police abuse, often in wrenching terms.<sup>257</sup> One claimed that he did not confess “until they brought me and whipped me and knocked a hole in my head and said if I didn’t say I was the one that raped that woman, they was going to kill me.”<sup>258</sup> In another trial, the Black defendant gestured to the place where his handcuffs had cut his wrists and his attorney remarked, “You are a mistreated negro, now, we know that.”<sup>259</sup>

Once again, Black defendants’ arguments on appeal are revealing. In appellate briefs, defense attorneys routinely invoked racist stereotypes in an effort to save their clients, tacitly arguing that their clients were Black men that obeyed the racial diktats of the time and would never seek to trouble the racial hierarchy. In one case, the lawyers wrote, “We entreat that this Court inspect the wording and the surroundings of this purported confession and ascertain in the light of the evidence if it believes that it was [the] free and voluntary statement of the 19 years old illiterate Negro [defendant].”<sup>260</sup> In another, the lawyer wrote, “The defendant is just a common negro, and I have no interest in him in the world, but I do believe that an innocent negro is just as innocent as any body else, and entitled to be given the benefit of his innocence. The punishment of a man because he is a negro, and charged with some heinous offense, is not much reward for good behavior, when he is innocent.”<sup>261</sup> Likewise, one attorney called his own client “practically

256. Transcript of Record, *Daniels*, *supra* note 83 at 76.

257. *See, e.g.*, Transcript of Record, *Alford*, *supra* note 66, at 93–94; Statement, Abstract and Brief of Appellants, *Clayton*, *supra* note 234, at 30; Transcript of Record, *Hodges*, *supra* note 236, at 68–69 (“These other three arresting officers. . .beat me with a black jack trying to beat a confession that I did raper her [sic] . . .after they had threatened me if I didn’t tell them something I knew it meant death anyway and I figured we could get into court and I just as well tell him something”); Transcript of Record, *Maxwell*, *supra* note 209, at 180 (testifying that one police official said, “leave him with me a few minutes, and he will talk”); Transcript of Record, *Pugh*, *supra* note 152, at 60 (testifying that he told the authorities, “If that will stop you from beating me, I will confess anything you say I did”).

258. Transcript of Record at 35–36, *Palmer v. State*, 214 S.W.2d 372 (Ark. 1948) (No. 4522); *see also id.* at 116–20.

259. Statement, Abstract and Brief of Appellants, *Clayton*, *supra* note 234, at 23. *See also* Transcript of Record at 80–81, *Hildreth v. State*, 233 S.W.2d 757 (Ark. 1949) (No. 4573); Abstract and Brief for Appellant, *Thomas*, *supra* note 234, at 18.

260. Transcript and Brief for Appellant at 34, *Allison v. State*, 164 S.W.2d 442 (Ark. 1942) (No. 4266). *See also id.* at 36.

261. Abstract and Brief for Appellant at 44, *Hawthorne v. State*, 204 S.W. 841 (Ark. 1918) (No. 111).

illiterate,” a “common labor[er of] utter ignorance,” “a member of a class whose mental and social processes are beyond the power of any member of this court to fully understand, because in the present social order they live in different worlds and have since birth.”<sup>262</sup>

### C. *Witness Testimony*

Witness testimony in racialized rape trials served several purposes simultaneously. For the prosecution, the first purpose was to provide the kinds of details necessary for any conviction: to support or contradict the accuser’s story. (This was relevant to the surface trial.) The second purpose was to make the sort of comments regarding sex and gender norms discussed in Part I. The third, and often most significant, purpose was to invoke and reinforce racist tropes, thus indicting the defendant for violating racial norms that were more prized than the norm against rape. (This was relevant to the shadow trial.) For the defense, it would have been remarkably fraught for witnesses to do the equivalent, to outright impugn a white woman’s obedience to racial norms—in particular, the norm against having sex with Black men. Thus, defense witnesses in racialized trials were far more likely to emphasize the Black defendant’s compliance with the rules of white supremacy.

The primary way that white prosecution witnesses fulfilled the aforementioned third purpose was by invoking the postbellum racist myth that Black men were sexual threats to white women.<sup>263</sup> For instance, one prosecution witness in the trial of Willie Martin recalled seeing the defendant walk in front of his sister’s house

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262. Brief for Appellant at 8, *Palmer v. State*, 214 S.W.2d 372 (Ark. 1948) (No. 4522). See also Abstract and Brief for Appellant at 64, *Hamm v. State*, 214 S.W.2d 917 (Ark. 1948) (No. 4534) (“The liberty of a man, even though he be a poor, humble Negro, should not be taken from him on this kind of testimony, merely because of the heinousness of the charge preferred against him.”). Relatedly, lawyers for Black defendants sometimes felt they had to be careful or conciliating in their appeals. See, e.g., Brief and Argument for Appellant at 1, *Hildreth v. State*, 233 S.W.2d 757 (Mo. Ct. App. 1950) (No. 4573) (“Grave social problems are ever present in cases of this kind. The experiences which evolve out of the social perplexedness help make progress in the field of human relations. The customs and prejudices in the local community where such a crime is committed are strained in the effort to promote justice . . . It is respectfully urged that this Court assume for the purpose of setting a precedent on the throne of justice in Arkansas by giving impetus to a slow but sure desire of the local communities to mete out justice to all people regardless of race or color.”).

263. See Mara Keire, *Women and Sexual Assault in the United States, 1900–1940*, in OXFORD RSCH. ENCYC. OF AM. HIST. 2–5 (2019), <http://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-495?print=pdf> [<https://perma.cc/GT5S-ZXNY>].

before the assault and claimed “he was watching the house and I knew my sister was alone.”<sup>264</sup> This implication was fairly oblique; however, some witnesses were far more direct. As one white witness testified in another trial, regarding the Black defendant: “he and some more boys had talked about having intercourse with white women and one of them had told him he had been with white women and [the defendant] said he wanted to see how it was himself.”<sup>265</sup>

Indeed, many white witnesses were quite explicit in testifying that they found the defendant’s Blackness threatening, especially in white spaces and around white women. One prosecution witness testified, of seeing the defendant: “at first I thought it was a white man and then I decided it wasn’t, that it was a colored man and that’s what scared me.”<sup>266</sup> Even when witnesses didn’t clearly see the Black defendant, they invoked his Blackness. “In my opinion, that is the man I saw,” testified a witness in the trial of Willie Martin, “the reason I say so is that he was very black; he looks like the [n-word]; I could not describe his face because I was not close enough.”<sup>267</sup> Another witness, in the trial of Bubbles Clayton and Jim X. Carruthers, who was with the accuser the night she was allegedly assaulted, claimed that Clayton “[t]alked like any other negro.”<sup>268</sup> He admitted that he “[d]idn’t see his face on the road that night. Didn’t see his mouth, didn’t see his kinky hair, couldn’t see the flat nose,”<sup>269</sup> and he repeatedly mentioned “the negro,” “the negroes,” “the little negro,” and so on.<sup>270</sup>

Prosecutors egged on such testimony. After the mother of one defendant testified that she always made sure to watch when “strange children come around,” the prosecutor clarified, “You watch that boy when little white girls come around, do you?”<sup>271</sup> Another prosecutor repeatedly asked a witness if he recalled seeing “a darkey” or “a strange darkey.”<sup>272</sup>

Defense attorneys too invoked racist tropes, but they apparently did so to underscore the notion that Black people were

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264. Transcript of Record at 33, *Martin v. State*, 283 S.W. 29 (Ark. 1926) (No. 346).

265. Transcript of Record, *Maxwell*, *supra* note 209, at 134.

266. Transcript of Record, *McGee*, *supra* note 237, at 27–28.

267. Transcript of Record, *Martin*, *supra* note 264, at 36–37.

268. Statement, Abstract and Brief of Appellants, *Clayton*, *supra* note 234, at 6.

269. *Id.* at 9–10.

270. *Id.* at 6–7. For similar racist testimony, see Transcript of Record, *Hawthorne*, *supra* note 163, at 68–69.

271. Transcript of Record, *Cutts*, *supra* note 98, at 48.

272. Transcript of Record, *Daniels*, *supra* note 86, at 47.

interchangeable, and thus white prosecution witnesses might be mistaken in identifying the defendant. “Did he walk like any other negro looking over his back shoulder?” one defense attorney asked an eyewitness on cross-examination.<sup>273</sup> “Aint there hundreds of negroes walk along about the same way?” he continued.<sup>274</sup> In another trial, when a prosecution witness claimed he could identify the defendant by his “thick lips,” the defense attorney asked, “Is there any difference between his chin and lips and any ordinary [n-word]?”<sup>275</sup> Still another defense attorney invoked the “old Southern saying that all negroes look alike.”<sup>276</sup> Such questioning from defense attorneys almost certainly served an additional purpose: to telegraph to the jurors that the defense attorney believed the same racist myths that they did. This both enhanced the defense attorney’s credibility and sought to make his client appear less menacing to white jurors.

Race thus became a tool wielded by both prosecution and defense. For the prosecution, the invocation of racist tropes served to remind the judge and the jury of their duty to uphold white supremacy; for the defense, reliance on racist tropes served to reassure everyone present that the defense was not seeking to undermine white supremacy, but simply to operate within it. By implying that all Black people walked alike, for instance, the defense attorney sought to exculpate his client from the shadow charge even while potentially incriminating any other member of his race.

#### D. *Medical Testimony*

Medical evidence played a significant role in very few of the trials studied that included Black parties. Yet, significantly, in two of the trials, the defense attempted to introduce expert testimony indicating that the Black defendant was mentally incompetent. The prosecution, in turn, countered by asking whether all Black people were equally incompetent—a question the physicians either answered in the affirmative or qualified in such a way as to reinforce racist and eugenic stereotypes. Thus, these trials functioned to validate race science in the public square; no testimony challenged the prevailing notion of racial difference. But the fact that it was the *defense* attorneys that introduced such testimony indicates that they believed it was a potential means of salvation. Indeed, as with broader witness testimony, medical testimony in racialized rape

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273. Transcript of Record, *Martin*, *supra* note 264, at 34.

274. *Id.* at 35.

275. Transcript of Record, *West*, *supra* note 255, at 116.

276. Transcript of Record at 45, *Hamm v. State*, 214 S.W.2d 917 (Ark. 1948) (No. 4534); *see also id.* at 40.

trials apparently represented an attempt on the part of the defense to show that Black defendants were not seeking to transgress Jim Crow Arkansas's rigid racial hierarchy.

The trial of Freeling Daniels hinged on testimony from three physicians. Daniels had not appeared to be terribly lucid on the stand—he had stumbled over his own name and age,<sup>277</sup> and when asked whether he assaulted “this little girl,” he replied, “I don’t—I don’t— . . . I can’t remember.”<sup>278</sup> He had suffered an industrial accident long before, he explained, and ever since then had suffered pains in his head and episodes of blindness.<sup>279</sup> The defense then called on three medical experts, all of whom testified that Daniels was of “low mentality,” with the intelligence of a fourteen- or fifteen- or sixteen-year-old boy.<sup>280</sup> Significantly, this testimony led to inquiries predicated on racial difference. “Doctor, did you find him any different mentally than the ordinary negro of his age and his raising and his training?” the prosecutor asked on cross-examination.<sup>281</sup> “I don’t think he is quite up to the average,” the doctor replied.<sup>282</sup> The prosecutor later asked whether Daniels would be able “to distinguish between right and wrong,” to which the doctor admitted that he could.<sup>283</sup> Another of the doctors testified that “his mind is about the average mind of a person who has been born and brought up under the conditions that he has.”<sup>284</sup>

The trial of Willie Martin came down to dueling medical testimony. Two physicians testified that the defendant had the mind of a young child; then a physician for the prosecution testified that he had noticed no mental defect in the defendant; and then another physician testified for the defense that the defendant was of average intelligence.<sup>285</sup> Once again, this testimony was thoroughly steeped in the ideology of racial difference. Consider this exchange between the prosecutor and the first medical expert:

Q: “Did you find that he was suffering from any disease of the brain?”

A: “No, just a case of low mentality.”

Q: “The average negro is of a low grade of mentality?”

A: “Yes.”

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277. Transcript of Record, *Daniels*, *supra* note 86, at 70–71.

278. *Id.* at 75–76.

279. *Id.* at 78–79.

280. *Id.* at 82–90.

281. *Id.* at 83–84.

282. *Id.* at 84.

283. *Id.*

284. *Id.* at 86.

285. Transcript of Record, *Martin*, *supra* note 264, at 191–209.

Q: "Did you find any difference between him and the average negro?"

A: "No, not the average cotton field negro that never had any schooling or education and could not read or write."<sup>286</sup>

It is notable that even physicians testifying on behalf of Black defendants denigrated the intelligence of all Black people in their testimony. Nonetheless, this can once again be read as a survival strategy on the part of the defense, an attempt to prevail in the shadow trial. It would have done the defense no favors with an all-white jury to trouble the racial hierarchy by openly asserting their equality.

#### E. *Testimony and Argumentation in All-White or All-Black Trials*

Nowhere is it clearer that Jim Crow rape trials doubled as shadow trials to adjudicate the parties' alleged violations of racial mores than in the trials with only white or only Black parties. Indeed, in two of the trials studied, parties or witnesses clearly attempted to impugn their adversaries by bringing up the latter's alleged transgressions of Arkansas's racial hierarchy, even though all parties were white. In the first such trial, one white defendant testified that his white accuser was too comfortable around Black men.<sup>287</sup> He claimed that he "told her she had no business walking out there [with] a bunch of negroes."<sup>288</sup> He testified that he'd had to tell her this "time after time," but still "people down town were talking about her coming through negro town by herself."<sup>289</sup> In the second trial, that of two white men named John Davis and C.F. Johnson, the prosecutor spent more time establishing that the defendants had brought in a Black man to have sex with the accuser than proving that the defendants had raped the accuser themselves.<sup>290</sup>

None of this testimony was remotely relevant, yet it would be a mistake to interpret it as simply one side attempting to impeach the witnesses of other. Rather, the specifically racialized subject matter of this testimony, coupled with its disconnection from the facts at issue and the context of a society suffocatingly governed by

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286. *Id.* at 197. This same prosecution strategy is exhibited at *id.* at 201–02.

287. See Abstract and Brief for Appellant, *Doss*, *supra* note 113, at 63–64. Note that a white defendant could allege a white accuser's transgression of racial norms, but a Black defendant almost certainly could not allege the same violation of racial norms.

288. *Id.*

289. *Id.*

290. Transcript of Record, *Davis*, *supra* note 82, at 228–29, 231–59, 266.

white supremacy, suggests that such testimony served to indict the accuser or the defendant for a crime that some apparently viewed as more serious than rape: race-mixing.

Meanwhile, in the trial of a Black man named Otis Cauley (accused of raping a Black woman), the prosecutor told the jurors that Cauley “should be convicted in order to protect the white women of the State from such assaults, and that if he was turned loose our wives and sisters and daughters would be in danger of such assaults by the defendant.”<sup>291</sup> Cauley’s attorney later recalled immediately noticing the jurors—white men—suddenly sit up straight and stare intently at the prosecutor; “in some of their faces it could be distinguished that their blood began to boil.”<sup>292</sup> Such a statement implicitly valued the safety of white women over the safety of Black women—and it explicitly impugned Cauley for a future violation of racial mores, not a current violation of the law. According to Cauley’s attorney, the “case was regarded by everyone as a joke, until this argument started, and it took such an argument to raise the ire of the jury and divert their minds from the facts in the case and turn their attention to the future security of their mothers, wives, and daughters.”<sup>293</sup>

Yet even Cauley’s lawyer—a white man—made racist and gendered arguments in seeking to save his client’s life. He worried about the “dangerous precedent” the prosecutor’s statement would set: “What chance will a negro have who (as practically all of this class do, and always have done and always will do), after fooling a prostitute of his own race, and trying to get away without paying her, gets arrested for rape?”<sup>294</sup> He sought to distinguish the case from another that the prosecution relied on, which involved a Black man convicted of raping a white woman. In that case, argued the defense attorney, statements such as those made by the prosecutor were relevant. But, in this case, the defendant “had only bilked a negro prostitute who he had used for many years. He had never invaded the white race, but the jury were made to believe that if they didn’t convict him, he would do that.”<sup>295</sup> This statement made clear that, to so many in Jim Crow society, a Black man committing rape only mattered if he also violated racial mores, and a Black woman being raped only mattered if she had not violated sexual mores by supporting herself through sex work.<sup>296</sup>

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291. *Cauley v. State*, 247 S.W. 772, 772 (Ark. 1923).

292. Brief on Motion for Rehearing, *Cauley*, *supra* note 149, at 4.

293. Appellant’s Brief in Reply, *Cauley*, *supra* note 149, at 2.

294. Appellant’s Brief in Reply, *Cauley*, *supra* note 149, at 3.

295. Appellant’s Brief in Reply, *Cauley*, *supra* note 149, at 3–4.

296. Cauley’s attorney continued by arguing that “Negroes, it is true,

### III. TRIAL BY HUMILIATION, TRIAL AS HUMILIATION

Writing about rape trials almost half-a-century ago, the scholar Vivian Berger noted that “when one considers the embarrassment caused by the inquisition, the frequently leering innuendo, one might conclude that—insofar as the woman is concerned—this type of questioning in open court wreaks almost as much psychological havoc as would the necessity of responding.”<sup>297</sup> Indeed, in the years since, many scholars have compared the ordeal rape survivors suffer in the courtroom to be comparable to the assault itself.<sup>298</sup> Yet Berger also wrote, “However personal or embarrassing, all these inquiries at least touch on the actual charge.”<sup>299</sup>

This Part considers circumstances in which that is not the case, in which the prosecution’s questioning is *simply* about inflicting humiliation and does not, in any meaningful way, touch on the actual charge. Indeed, much of the questioning discussed in Parts I and II seemed to be at least as much about shaming various parties as it was about determining whether they had violated their communities’ social mores (or, for that matter, committed sexual assault). Consider, for instance, the questions posed to defendants about their penis size or whether they had used “vulgar” language.<sup>300</sup> This Part briefly delves into the questioning of accusers, showing similar moments when a lawyer’s inquiries were about exacting or promulgating information that could be used to discipline an accuser—either at trial itself, or in its aftermath. Sexual assault trials thus literally functioned as a site of preliminary punishment for violations of social mores, as well as an opportunity to assess the appropriateness of further punishment.

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are to be tried under the same laws as the whites, but convicting them under charges of immoral conduct among themselves does not afford protection to colored society or improve their morals because there is no foundation in the race upon which morality can be built.” *Id.* at 2–3. Courts too embraced the same racist stereotypes. “What has been said by some of our courts about an unchaste female being a comparatively rare exception is no doubt true where the population is composed largely of the Caucasian race,” wrote the Florida supreme court in 1918, “but we would blind ourselves to actual conditions if we adopted this rule where another race that is largely immoral constitutes an appreciable part of the population.” *Dallas v. State*, 79 So. 690, 691 (Fla. 1918).

297. Berger, *supra* note 74, at 15.

298. See Conley & O’Barr, *supra* note 4; Scheppele, *supra* note 4; Madigan & Gamble, *supra* note 5; see also Nadia B. Soree, *Show and Tell, Seek and Find: A Balanced Approach to Defining a Fourth Amendment Search and the Lessons of Rape Reform*, 43 SETON HALL L. REV. 127, 168 (2013).

299. Berger, *supra* note 74, at 14.

300. See Transcript of Record, *Priest*, *supra* note 113, at 130; Transcript of Record, *Fields*, *supra* note 169, at 88–90.

The primary party subjected to the preliminary punishment of humiliation was the accuser. Sometimes, lawyers undertook this shaming by mentioning gratuitous details that young women in the early twentieth century undoubtedly found mortifying. In one trial, the defense attorney asked the accuser, “Did it enter your body? In other words did it go in?”<sup>301</sup> “Yes sir,” the woman replied. “How far?” he pressed. “I don’t know.”<sup>302</sup> On the surface, such an inquiry might seem somewhat relevant, since, in addition to the requirements for force and resistance, discussed above, Arkansas rape law specified that there must be “[p]roof of actual penetration.”<sup>303</sup> But once the accuser had affirmatively answered the first question (“did it go in?”) the matter of how far was immaterial. Even prosecutors sometimes asked questions that seemed to serve no purpose other than shaming the accusers. “The defendant is married?” one prosecutor asked one sixteen-year-old.<sup>304</sup> “Yes, sir.” she responded.<sup>305</sup> “You knew that he was married when you ran away with him?” “Yes, sir.”<sup>306</sup>

This burden of humiliation fell unequally on different accusers. Indeed, scholars have documented the almost universal post-traumatic stress suffered by sexual assault survivors, especially Black women and girls in the Jim Crow south.<sup>307</sup> For Black accus-

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301. Transcript of Record, *Sanders*, *supra* note 92, at 40. For similar questioning, see Transcript of Record, *Snetzer*, *supra* note 67, at 27.

302. *Id.* For nearly identical questioning, see Transcript of Record, *Underdown*, *supra* note 82, at 18–19.

303. See T.D. CRAWFORD & HAMILTON MOSES, A DIGEST OF THE STATUTES OF ARKANSAS § 2718 (1921), WALTER L. POPE, A DIGEST OF THE STATUTES OF ARKANSAS § 3404 (1937). Though one state supreme court opinion from 1910 clarified that the hymen need not have been broken, *Poe v. State*, 129 S.W. 292, 294 (Ark. 1910), this requirement that there actually have been penetrative intercourse was a veritable obsession in the trials studied. Many accusers were asked at length about whether there was “complete” or “full” intercourse, or whether “[h]e actually penetrated your body.” See Statement, Abstract and Brief of Appellants, *Clayton*, *supra* note 234, at 13–14; Transcript of Record, *Sutton*, *supra* note 98, at 38–39; Transcript of Record, *Terrell*, *supra* note 66, at 24; Transcript of Record, *Head*, *supra* note 90, at 74. See also Transcript of Record, *Sanders*, *supra* note 92, at 25; Transcript of Record at 25, *Perkinson v. State*, 172 S.W.2d 18 (Ark. 1943) (No. 4302); Transcript of Record, *Sherman*, *supra* note 92, at 116; Transcript of Record, *Caldwell*, *supra* note 122, at 44; Transcript of Record, *McGill*, *supra* at 122, at 32–33.

304. Transcript of Record, *Green*, *supra* note 122, at 16.

305. *Id.*

306. *Id.*

307. See, e.g., Ruth Thompson-Miller & Lesli H. Picca, “There Were Rapes!”: *Sexual Assaults of African American Women in Jim Crow*, 23 VIOLENCE AGAINST WOMEN 934, 937 (2017).

ers, then, posing such questions at trial undoubtedly exacerbated this disproportionate trauma.

Yet the questioning of accusers was far from the sole means of preliminary punishment; attorneys also shamed these women in their questioning of other witnesses. In one trial, the defense attorney asked the defendant's brother-in-law about the accuser's body at great length; such questions had virtually no probative value. Clearly, they were designed to shame, and thus punish, the fifteen-year-old accuser:

Q: "What size girl was she?"

A: "Just a small girl. Just big enough to dance, but I have seen lots of girls smaller than she was dancing."

Q: "Was she fat?"

A: "Yes, sir, always was chunky."<sup>308</sup>

Doctors could also provide humiliating testimony, couched in the language of science. "Was she dirty?" one prosecutor asked a physician.<sup>309</sup> "Yes, sir." "Around her private parts?" "Yes, sir."<sup>310</sup>

Perhaps most revealingly, even judges participated in this shaming. In one trial with a minor accuser, the judge asked: "Don't you know as a matter of fact, Doctor, that the girls of today with the violent exercise that they undertake and hoeing cotton, climbing fences, running and playing, suttin sprouts and doing different things, that is, taking different violent exercises, in a measure destroys the hymen?"<sup>311</sup> (To which the doctor responded, "No sir. No sir.")<sup>312</sup> The judge then asked whether it was true that "any woman who had gone through the process of intercourse" would be in "a very nervous condition?"

A: "Well it would depend a whole lot on whether it would be a legitimate or illegitimate intercourse."

Q: "And it would depend on the temperament of the person?"

A: "Yes sir."

Q: "Some can withstand more punishment than others, cannot they, Doctor?"

A: "The word punishment, I don't know whether that would apply to legitimate intercourse."

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308. Transcript of Record, *Powell*, *supra* note 170, at 92.

309. Transcript of Record, *Terrell*, *supra* note 66, at 91.

310. *Id.* In another trial, after a physician testified that the 13-year-old accuser's hymen was ruptured, the defense attorney asked him on cross-examination whether it could have been ruptured "[b]y means of masturbation." Transcript of Record, *Fields*, *supra* note 169, at 51. Although this last statement could be seen as relevant to the question of whether a rape had occurred, it no doubt humiliated the child.

311. Transcript of Record, *Head*, *supra* note 90, at 150.

312. *Id.*

Q: "Cannot one person stand more punishment in illegitimate intercourse than another?"

A: "If sexual intercourse is held between the male and female, if it is where both parties are willing and both parties assist in the manipulation of things, I do not consider that there would be much punishment about it."

Q: "What [e]ffect does fear have on the nervous system?"

A: "It is owing to the person. Some persons will get very excited; others will not show it at all."

Q: "As I understand, fear in some people would develop a highly excited condition?"

A: "Yes."<sup>313</sup>

Eventually, the judge asked what effect a 23-year-old man of the defendant's size raping a 13-year-old girl of the accuser's size would have.<sup>314</sup> The physician responded that it would vary.<sup>315</sup> Surely this testimony was mortifying and degrading for the thirteen-year-old accuser, as well as others present.<sup>316</sup> And, coming after such gratuitous previous questioning, its probative value was surely lost in its tendency to demean.

#### IV. AFTERMATHS—THE SHADOW TRIAL CONTINUES

In spite of their flaws,<sup>317</sup> trial transcripts are extraordinary primary sources, allowing modern scholars to scrutinize testimony and legal machinations with the tools of close-reading and semantic analysis imported from other disciplines. After trials ended, however, recordkeeping was less consistent, and thus fewer sources survive that allow scholars to analyze the aftermaths of criminal trials with the same degree of rigor. While appellate briefs or clemency petitions can contain considerable information, their contents are not as regularized as trial records and their survival is not as consistent. Nonetheless, traces remain in the archive that are quite revealing. Considered collectively, these traces provide perhaps the clearest window into shadow trials. As the following Part shows, the surviving records of jury deliberations, sentencing outcomes,

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313. *Id.* at 152–53.

314. *Id.* at 153.

315. *Id.*

316. In another trial, a physician testified that rape caused more "shock" for an older woman than for a younger woman or a "child of tender years," on account of the latter's "small appreciation of the harm done." Transcript of Record, *Rose, supra* note 98, at 49.

317. Trial transcripts may inaccurately capture what was said; they may accurately reproduce the words said but they cannot reflect the nuances of tone, volume, body language, etc.; the act of transcription may flatten or "correct" dialects or non-normative ways of speaking.

aftermaths for defendants (e.g., appeals, releases, or executions), and aftermaths for accusers (e.g., ostracism or incarceration) clearly show that decisionmakers continued to focus not only on whether the defendant had committed sexual assault, but also—and, often, primarily—on whether the defendant or the accuser had violated their community's unwritten social code. Indeed, it is the post-trial phase of these cases that is often most revealing of the main focus of the jury, judge, and broader community.

#### A. *Jury Deliberations*

Although little evidence survives of jury deliberations, hints from trial records and press accounts reveal that the primary subject of the deliberations in many trials was not guilt or innocence per se, but rather how harshly or leniently to punish sexual assailants. This, in turn, strongly suggests that the primary focus of the trials themselves was not guilt or innocence; instead, jurors debated the seriousness of their neighbors' violation of social mores. In this way, the shadow trial could supplant the surface trial.

Surviving documents indicate that jurors often agreed as to guilt or innocence but sharply diverged on the degree of the defendant's wrongdoing—and thus the appropriate punishment. Transcripts make clear that sexual assault jurors routinely deadlocked,<sup>318</sup> though the subject of these deadlocks is often unknown. In one case, however, the transcript reflects jurors asking the judge if they could sentence the defendant to a less severe penalty than those permitted by law,<sup>319</sup> indicating internal disagreements as to the appropriate penalty and at least some degree of sympathy toward the guilty defendant. In a rare newspaper interview, the foreman of one rape trial jury claimed that the jurors had no question as to the defendants' guilt but could not "agree on the punishment," debating for hours.<sup>320</sup> In a newspaper account of another trial, the journalist summarized: "At the start, it is understood, one juror held out for the death penalty, five desired to sentence the youths to life imprisonment, and one desired in advocating 10 and 15 year sentences. No member of the jury is said to have favored acquittal."<sup>321</sup>

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318. See, e.g., Statement, Abstract and Brief of Appellants, *Clayton*, *supra* note 234, at 51; Transcript of Record, *Lewis*, *supra* note 80, at 129–30; Transcript of Record, *Reed*, *supra* note 81, at 11; Transcript of Record, *Wills*, *supra* note 112, at 47.

319. Abstract and Brief for Appellant at 40, *Durham v. State*, 16 S.W.2d 991 (Ark. 1929) (No. 287).

320. S.R. McCulloch, *Miscarriage of Justice in Arkansas Alleged*, ST. LOUIS POST-DISPATCH, Mar. 1, 1936, at 3-I.

321. *Bethel and Wallace Get 18 Years*, BLYTHEVILLE COURIER NEWS, Apr. 13, 1929, at 1.

The main focus of many Jim Crow-era rape trials becomes further apparent when one scrutinizes what the jurors were permitted to consider during their deliberations. Although judges usually refused to give instructions allowing jurors to consider a woman's "immorality" as a defense,<sup>322</sup> they did generally allow jurors to consider the accuser's reputation when assessing her credibility.<sup>323</sup> Judges also allowed evidence of the defendant's morality, so that jurors could consider "whether it is probable that a man of such reputation and character would commit such a crime."<sup>324</sup> More significantly, judges allowed jurors to consider the accuser's alleged immorality when determining sentencing. In one case of alleged carnal abuse, the judge instructed the jurors, "You may also consider whether or not the actions of the prosecutrix . . . were such as to invite and entice the defendant to have sexual relations with her, in considering the question of punishment."<sup>325</sup> By expressly permitting jurors to use an accuser's alleged immorality as a factor in determining the defendant's sentence for sexual assault, judges were acknowledging that it was literally a less serious crime to sexually assault a less "moral" woman. This suggests that the primary crime was not the assault but the deviation from accepted social mores.

#### B. *Sentence*

It is the sentences that juries handed down that are for more revealing of their deliberations than the few documentary traces that remain of those deliberations themselves. And these sentences reveal that, at least in the cases studied, Jim Crow juries were largely—though not uniformly—merciful when it came to sexual assault; they generally sentenced defendants to brief terms behind bars.<sup>326</sup> This mercy is itself telling—it may reveal a skepticism that sexual assault, and especially carnal abuse, should truly be so criminalized. But this mercy was also fickle. Certain defendants—those

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322. See, e.g., Transcript of Record, *Reed*, *supra* note 81, at 99; Abstract and Brief for Appellant at 27–28, *Franks v. State*, 272 S.W. 648 (Ark. 1925) (No. 1); Abstract and Brief for Appellant, *Harrison*, *supra* note 82, at 106; Transcript of Record, *Snetzer*, *supra* note 67, at 90.

323. See, e.g., Abstract and Brief for Appellee, *Cook*, *supra* note 183, at 31–32; Transcript of Record, *Whitaker*, *supra* note 66, at 76.

324. Transcript of Record, *Terrell*, *supra* note 66, at 206.

325. Transcript of Record, *Caldwell*, *supra* note 122, at 107. See also Transcript of Record, *Fields*, *supra* note 169, at 113.

326. Recall, again, that the transcripts studied here are all of cases that resulted in convictions, so Jim Crow juries can be understood as even more sympathetic toward sexual assailants when one recalls that many trials resulted in acquittals.

involved in the most brutal or gruesome rapes, and those who were not white—were largely deprived of it. This, in turn, reveals that—as the records regarding deliberations suggest—juries were often primarily concerned with the seriousness of a defendant’s transgression of the broader social order.

Arkansas law clearly stated that the penalty for rape was “the punishment of death.”<sup>327</sup> The penalty for assault with intent to rape was between three and twenty-one years,<sup>328</sup> and the penalty for carnal abuse (i.e. statutory rape) was between one and twenty-one years.<sup>329</sup> Most of the defendants in the cases studied were charged with rape, but a sizeable majority of their juries convicted them of either assault with intent to rape or carnal abuse, less serious charges. Of the seventy-seven trials with white defendants and white accusers, just twelve resulted in a conviction for rape.<sup>330</sup> Of these, defendants in five were sentenced to death,<sup>331</sup> and those in the other seven were sentenced to life imprisonment.<sup>332</sup> Of the rest of the white men convicted of assault with intent to rape, most were sentenced to only a handful of years, far closer to three years than to twenty-one. Of the white men convicted of carnal abuse, few were sentenced to substantially more than one year, the statutory minimum. Notably, of the five white men convicted of assaulting Black women or girls, four were sentenced to just a few years in prison.<sup>333</sup>

There were two exceptions to this broadly merciful trend. The first was cases involving Black defendants. Of the sixteen trials with

327. CRAWFORD & MOSES, *supra* note 303, at § 2719; POPE, *supra* note 303, at § 3405.

328. CRAWFORD & MOSES, *supra* note 303, at § 2721; POPE, *supra* note 303, at § 3407.

329. CRAWFORD & MOSES, *supra* note 303, at § 2720; POPE, *supra* note 303, at § 3406.

330. *Bailey v. State*, 219 S.W.2d 424 (Ark. 1949); *Brust v. State*, 240 S.W. 1079 (Ark. 1922) ; *Davis v. State*, 234 S.W. 482 (Ark. 1921) (one of the two defendants); *Fields v. State*, 159 S.W.2d 745 (Ark. 1942); *Gann v. State*, 141 S.W.2d 834 (Ark. 1940); *Hogan v. State*, 86 S.W.2d 931 (Ark. 1935); *Houston v. State*, 79 S.W.2d 999 (Ark. 1935); *McDonald v. State*, 279 S.W.2d 44 (Ark. 1955); *McGill v. State*, 189 S.W.2d 646 (Ark. 1945); *McLaughlin v. State*, 174 S.W. 234 (Ark. 1915); *Needham v. State*, 224 S.W.2d 785 (Ark. 1949); *West v. State*, 192 S.W.2d 135 (Ark. 1946).

331. *Davis*, 234 S.W. 482; *Hogan*, 86 S.W.2d 931; *McLaughlin*, 174 S.W. 234; *Needham*, 224 S.W.2d 785; *West*, 192 S.W.2d 135.

332. *Bailey*, 219 S.W.2d 424; *Brust*, 240 S.W. 1079; *Fields*, 159 S.W.2d 745; *Gann*, 141 S.W.2d 834; *Houston*, 79 S.W.2d 999; *McDonald*, 279 S.W.2d 44; *McGill*, 189 S.W.2d 646.

333. *Jackson v. State*, 218 S.W. 369 (Ark. 1920) (3 years); *Watt v. State*, 261 S.W.2d 544 (Ark. 1953) (4 years); *McDonald v. State*, 244 S.W. 20 (Ark. 1922) (7 years); *Gerlach v. State*, 229 S.W.2d 37 (Ark. 1950) (10 years). The exception was *Whitaker*, discussed *infra* note 348.

Black defendants and white accusers,<sup>334</sup> eleven led to death sentences,<sup>335</sup> and another three to sentences of life imprisonment.<sup>336</sup> The two cases with lesser sentences (the exceptions to the exception) generally had unusually sympathetic defendants. William Cutts, who was just thirteen-years-old and accused only of talking “ugly” to a twelve-year-old white girl and tearing her bloomers,<sup>337</sup> was sentenced to three years in “the negro boys’ Industrial school.”<sup>338</sup> Robert McGee—a Black man in a “zoot suit”<sup>339</sup> accused of “molesting [white] women and furthering his plan to commit rape”<sup>340</sup>—was charged just with an attempt, and not with rape, and the defense raised substantial doubts as to his guilt.<sup>341</sup> The two trials with Black defendants and Black accusers led to a life sentence and death sentence,<sup>342</sup> respectively, though there are indications that any such cases that reached trial were already unusually extreme, given prosecutors’ apparent hesitance to try such cases; in one, the victim was just two years old, and even the defense attorney wrote that

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334. *Alford v. State*, 266 S.W.2d 804 (Ark. 1954); *Allison v. State*, 164 S.W.2d 442 (Ark. 1942); *Clayton v. State*, 89 S.W.2d 732 (Ark. 1935); *Cutts v. State*, 288 S.W. 883 (Ark. 1926); *Daniels v. State*, 53 S.W.2d 231 (Ark. 1932); *Hamm v. State*, 214 S.W.2d 917 (Ark. 1948); *Hawthorne v. State*, 204 S.W. 841 (Ark. 1918); *Hildreth v. State*, 233 S.W.2d 757 (Ark. 1949); *Hodges v. State*, 197 S.W.2d 52 (Ark. 1946); *Martin v. State*, 283 S.W. 29 (Ark. 1926); *Maxwell v. State*, 225 S.W.2d 687 (Ark. 1950); *Maxwell v. State*, 232 S.W.2d 982 (Ark. 1950); *McGee v. State*, 223 S.W.2d 603 (Ark. 1949); *Palmer v. State*, 214 S.W.2d 372 (Ark. 1948); *Thomas v. State*, 116 S.W.2d 358 (Ark. 1938); *West v. State*, 234 S.W. 997 (Ark. 1921).

335. *Alford*, 266 S.W.2d 804; *Allison*, 164 S.W.2d 442; *Clayton*, 89 S.W.2d 732; *Daniels*, 53 S.W.2d 231; *Hildreth*, 233 S.W.2d 757; *Hodges*, 197 S.W.2d 52; *Martin*, 283 S.W. 29; *Maxwell*, 232 S.W.2d 982; *Maxwell*, 232 S.W.2d 982; *Palmer*, 214 S.W.2d 372; *Thomas*, 116 S.W.2d 358.

336. *Hamm*, 214 S.W.2d 917; *Hawthorne*, 204 S.W. 841; *West*, 234 S.W. 997.

337. Transcript of Record, *Cutts*, *supra* note 98, at 14–16.

338. Brief for Appellee, *Cutts*, *supra* note 241, at 2. At this time, “industrial school” often was a euphemism for juvenile reform school. It was a penal facility, but generally less feared than a prison or jail.

339. The “zoot suit” was a wide-labeled style of suit in the 1940s. “The zoot suit was associated with racial and ethnic minorities and working-class youth, celebrated in the world of jitterbug, jive, and swing, and condemned by government authorities seeking to conserve precious textiles for the war effort. It was a style that sparked the imagination, whether as an object of fear or admiration.” KATHY PEISS, *ZOOT SUIT: THE ENIGMATIC CAREER OF AN EXTREME STYLE 2* (2011).

340. Brief for Appellant at 1–2, *McGee v. State*, 223 S.W.2d 603 (Ark. 1949) (No. 5911).

341. Abstract and Brief for Appellant at 12, *McGee*, 223 S.W.2d 603 (Ark. 1949) (No. 5911).

342. *Cauley v. State*, 247 S.W. 772 (Ark. 1923); *Pugh v. State*, 210 S.W.2d 789 (Ark. 1948).

it was “a crime of such atrocious nature that the whole community was aroused.”<sup>343</sup>

The second exception to the trend of lenience involved men convicted of particularly violent rapes. Of the four white men sentenced to death, one had assaulted an eight-year-old,<sup>344</sup> one had violently raped an eleven-year-old,<sup>345</sup> another had abducted a ten-year-old and raped her within earshot of several distraught neighbors,<sup>346</sup> and the fourth was accused of bringing a Black man to have sex with the accuser.<sup>347</sup> It appears that these men—either through their violence or their alleged transgression of the racial order—had committed such monstrous violations of tacit Jim Crow social mores that they needed to pay with their lives or with decades behind bars. Men who had committed statutory rape, or who committed less violent rapes, did not. Thus, it appears that jurors were substantially considering violations of the social order in determining sentences. An interesting example of this dynamic is the case of James Whitaker, the sole white man who received a life sentence for raping a Black woman. Whitaker appears to have been different from the other four because his accuser was an especially prominent and well-regarded woman.<sup>348</sup> Apparently, assaulting her was thus considered a more serious assault against the community and its values.

### C. *Aftermath (Defendants)*

A conviction in criminal court was far from a guarantee that a man would actually serve out his sentence behind bars (or in the electric chair). Indeed, a significant number of convicted rapists were free men just a few years after their convictions. They were able to achieve this freedom by appealing their convictions to the Arkansas supreme court, or, if the court failed to grant relief, by appealing to the governor for a furlough, a commutation, parole, or a pardon. Of the one hundred trials studied, defendants in almost half obtained some form of post-conviction relief and thus did not serve their full terms. Yet a close analysis of which defendants received this relief is revealing. Predictably, the defendants who could most credibly portray themselves as compliant with the Jim Crow south’s social mores, or the defendants who most convincingly

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343. Abstract and Brief for Appellant at 1, *Pugh v. State*, 210 S.W.2d 789 (Ark. 1948) (No. 4494).

344. *Needham v. State*, 224 S.W.2d 785 (Ark. 1949).

345. *West v. State*, 192 S.W.2d 135 (Ark. 1946).

346. *Hogan v. State*, 282 S.W. 984 (Ark. 1926).

347. *Davis v. State*, 244 S.W. 750 (Ark. 1922).

348. Transcript of Record. *Whitaker*, *supra* note 66, at 8.

argued that they were not seeking to trouble its rigid hierarchies, were most successful in securing post-conviction relief (especially gubernatorial clemency). Less successful defendants either did not secure such relief or, upon winning their freedom, nonetheless faced ostracism from their neighbors. Accusers, meanwhile, might also face social sanction—which could be quite severe—if they lost the shadow trials, emerging with their reputations in tatters, revealed to have violated their community’s social mores.

### 1. Appeals

Defendants’ most straightforward path to freedom ran through the Arkansas supreme court. Each of the one hundred cases studied was appealed to that court, the highest in the state (indeed, this is why the case files survived in the archive). The verdicts in fourteen of these were reversed.<sup>349</sup> A close examination of the court’s opinions in these cases shows that, while the court did often reverse decisions based on evidentiary deficiencies or procedural errors,<sup>350</sup> defendants could likewise succeed on appeal by arguing that they should have been allowed to introduce evidence of the accusers’ violations of social mores. In one case, the state supreme court reversed the verdict because the judge should have allowed evidence of accuser’s “illicit relationships” with other men, though ostensibly for the sole reason that this evidence could contradict the accuser’s claim that the defendant was the father of her child.<sup>351</sup> In another case, the supreme court likewise ruled that the judge should have allowed evidence of the accuser’s promiscuity, because, “if the State elects to put in issue the question whether or not the injured girl has had intercourse with a man other than the defendant, then the accused has the right to introduce proof, in contradiction and impeachment of the witness, to show that she had in fact had sexual intercourse with other men.”<sup>352</sup>

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349. *Alford v. State*, 266 S.W.2d 804 (Ark. 1954); *Brock v. State*, 270 S.W. 98 (Ark. 1925); *Comer v. State*, 257 S.W.2d 564 (Ark. 1953); *Hays v. State*, 278 S.W. 15 (Ark. 1925); *Hogan v. State*, 282 S.W. 984 (Ark. 1926); *Maxwell v. State*, 225 S.W.2d 687 (Ark. 1950); *Maxwell v. State*, 232 S.W.2d 982 (Ark. 1950); *McDonald v. State*, 244 S.W. 20 (Ark. 1922); *Rowe v. State*, 244 S.W. 463 (Ark. 1922); *Sanders v. State*, 296 S.W. 70 (Ark. 1927); *Terrell v. State*, 2 S.W.2d 87 (Ark. 1928); *Thomas v. State*, 11 S.W.2d 771 (Ark. 1928); *West*, 192 S.W.2d 135; *Young v. State*, 221 S.W. 478 (Ark. 1920).

350. *See, e.g., Hays*, 278 S.W. at 16; *Hogan v. State*, 86 S.W.2d 931, 933–34 (Ark. 1935); *Sanders*, 296 S.W. at 71; *Terrell*, 2 S.W.2d at 87–88; *West*, 192 S.W.2d at 136.

351. *Thomas*, 11 S.W.2d at 771–72.

352. *Young*, 221 S.W. at 479–80.

Nonetheless, the state supreme court's decisions are not especially revealing of the legal system's fixation on individual transgressions of social mores. It is possible this is because state supreme justices felt more constrained by precedent than trial court judges (who, historians have shown, exercised extraordinary, virtually unchecked authority in their domains<sup>353</sup>) or, as we shall see, governors dispensing clemency. This was likely informed by developments in the common law governing rape in the early twentieth century, including the loosening of sexist demands such as "force" and "resistance."<sup>354</sup>

This should not be confused for an assertion that the appellate process was fair. Indeed, the state supreme court's decisions in the hundred cases studied reveals a clear pattern of racial bias. The defendants in eleven of the fourteen cases that were reversed on appeal were white, in spite of compelling arguments from many Black men that their trials had represented a violation of their constitutional rights.<sup>355</sup> The state supreme court was unpersuaded by claims that Black people were excluded from the jury,<sup>356</sup> or that threats of mob violence had influenced the jury,<sup>357</sup> or that prosecutors had made prejudicial, racially inflammatory comments.<sup>358</sup> Indeed, the only Black defendants whose convictions were reversed, Samuel Alford and Herman Maxwell (twice) had appealed in the 1950s, by which point the state courts were under close scrutiny from federal officials. Further, Maxwell was represented by a prominent civil rights attorney (a rarity for Black defendants).<sup>359</sup>

## 2. Clemency

Of the eighty-six cases that the Arkansas supreme court did not reverse, the defendants in at least thirty-one—over a third—did

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353. Story L. Matkin-Rawn, "We Fight for the Rights of Our Race": Black Arkansans in the Era of Jim Crow 72–73 (2009) (Ph.D. dissertation, The University of Wisconsin – Madison) (ProQuest).

354. See, e.g., *Brock*, 270 S.W. at 99; *Zinn v. State*, 205 S.W. 704, 707 (Ark. 1918).

355. See, e.g., Abstract and Brief for Appellant, *Thomas*, *supra* note 234, at 3–4; Abstract and Brief for Appellant at 2, 5, 7–16, *Maxwell v. State*, 232 S.W.2d 982 (Ark. 1950) (No. 4636); Brief for the Appellant, *Palmer*, *supra* note 262, at 1–7; Abstract and Brief of Appellant at 117–18, *West*, 192 S.W.2d 135 (Ark. 1946) (No. 4400).

356. Statement, Abstract and Brief of Appellants, Clayton, *supra* note 234, at 38.

357. Transcript of Record, Daniels, *supra* note 83, at 18.

358. Brief for Appellant, Hodges, *supra* note 243, at 3.

359. See Judith Kilpatrick, *Extraordinary Men: African-American Lawyers and Civil Rights in Arkansas Before 1950*, 53 ARK. L. REV. 299, 378, 381–82, 385, 387, 388, 391–93 (2000).

not serve their full sentences because they were ultimately paroled, pardoned, granted an indefinite furlough, or had their sentence reduced.<sup>360</sup> At least another two were pardoned after being released

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360. *Amos v. State*, 189 S.W.2d 611 (Ark. 1945); *16 Prisoners Released on Paroles*, ARK. GAZETTE, Nov. 8, 1946, at 5; *Bailey v. State*, 219 S.W.2d 424 (Ark. 1949); *Editors Examine Clemency Situation*, ARK. GAZETTE, Dec. 15, 1954, at 4; *Bethel v. State*, 21 S.W.2d 176 (Ark. 1929); *Indefinite Furloughs for Two Convicted of Attack*, ARK. GAZETTE, Oct. 10, 1931, at 24; *Boyett v. State*, 56 S.W.2d 182 (Ark. 1933); *Clemency to 10, With 11 Refused*, ARK. GAZETTE, Feb. 7, 1934, at 18; *Braswell v. State*, 280 S.W. 367 (Ark. 1926); *Governor Terral Grants Clemency*, ARK. GAZETTE, Jan. 8, 1927, at 8 (noting that Braswell's sentence had been reduced from five years to one); *Brust v. State*, 240 S.W. 1079 (Ark. 1922); U.S. SELECTIVE SERV. SYS., D.S.S. FORM 1, Basil Edward Brust, Serial No. 2688, Order No. 12624 (1941) (on file with author); BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, MISSOURI, ST. LOUIS, E.D. No. 96-476, Sheet No. 6A, 11. 18-19 (Apr. 1940) (on file with author); BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, MISSOURI, ST. LOUIS, E.D. No. 96-367, Sheet No. 7B, 1. 69 (Apr. 10, 1930) (on file with author); *Davis v. State*, 244 S.W. 750 (Ark. 1922); *Brought Back to Walls*, ARK. GAZETTE, Nov. 22, 1922, at 1; *Furlough of Life Termer Revoked*, ARK. GAZETTE, Mar. 4, 1936, at 16; *Doss v. State*, 157 S.W.2d 499 (Ark. 1941); *Other Paroles Granted by State Board*, ARK. GAZETTE, May 5, 1944, at 2; *Fanning v. State*, 136 S.W.2d 1040 (Ark. 1940); *Nine Pardons Issued by Governor*, ARK. GAZETTE, Nov. 22, 1940, at 15; *Fields v. State*, 159 S.W.2d 745 (Ark. 1942); *Missco Convicts Approved for Yule Furloughs*, BLYTHEVILLE COURIER NEWS, Dec. 17, 1953, at 1; *Franks v. State*, 272 S.W. 648 (Ark. 1925) (defendant was sentenced to 21 years for rape in 1924, but was out by 1930); BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, ARKANSAS, SERVIER, E.D. No. 67-8, Sheet No. 12A, 11. 42-43 (Apr. 18, 1930) (on file with author); *Gann v. State*, 141 S.W.2d 834 (Ark. 1940); *57 Lifers Sentences Commuted*, ARK. DEMOCRAT, Nov. 17, 1950, at 32; *Gerlach v. State*, 229 S.W.2d 37 (Ark. 1950); *Life Sentence of Slayer Cut to 21 Years*, ARK. GAZETTE, Jan. 4, 1952, at 5; *Hamm v. State*, 214 S.W.2d 917 (Ark. 1948); *Robber of State Trooper One of 84 to Be Paroled*, ARK. GAZETTE, Dec. 8, 1967, at 13; *Harrison v. State*, 262 S.W.2d 907 (Ark. 1953); *Six Sentences Are Commuted*, ARK. DEMOCRAT, Aug. 17, 1954, at 16; *Hays v. State*, 278 S.W. 15 (Ark. 1925); *Clemency Granted*, ARK. GAZETTE, Nov. 6, 1930, at 20; *James v. State*, 188 S.W. 806 (Ark. 1916); *3 More Are Pardoned*, ARK. GAZETTE, Oct. 14, 1916, at 8; *Lindsey v. State*, 209 S.W.2d 462 (Ark. 1948); *Hempstead Man One of Parolees*, HOPE STAR, Oct. 5, 1950, at 1; *McDonald*, 279 S.W.2d 44 (Ark. 1955); *Couple Among 62 Parolees, Board Reveals*, ARK. GAZETTE, Jan. 5, 1967, at 14; *McGill v. State*, 189 S.W.2d 646 (Ark. 1945); *Paroles Okayed for 89*, ARK. DEMOCRAT, Oct. 8, 1964, at 40; *McLaughlin v. State*, 174 S.W. 234 (Ark. 1915); *M'Laughlin Once Came Near Death*, ARK. GAZETTE, Jan. 10, 1925, at 1; *Reed v. State*, 299 S.W. 757 (Ark. 1927); *Suspension of Sentence for Four Convicted Men*, ARK. GAZETTE, Dec. 8, 1927, at 11; *Rose v. State*, 184 S.W. 60 (Ark. 1916); *Richard Rose Pardoned*, NEV. COUNTY PICAYUNE, Apr. 26, 1917, at 4; *Thornsberry v. State*, 92 S.W.2d 203 (Ark. 1936); *Kelly Booe Among Four Persons Pardoned*, ARK. GAZETTE, Nov. 1, 1940, at 11; *Underdown v. State*, 250 S.W.2d 131 (Ark. 1952); *35 Granted Paroles by State Board*, ARK. DEMOCRAT, Jan. 7, 1954, at 9; *Warford v. State*, 216 S.W.2d 781 (Ark. 1949); *Hall Named Assistant to Henslee*,

from prison, so their citizenship rights were restored.<sup>361</sup> At least three more were granted temporary reprieves by the governor.<sup>362</sup> Surviving archival records make clear that, in seeking to win gubernatorial mercy, defendants knew to express obedience to the social mores of the Jim Crow south. Surviving records likewise suggest that this strategy worked.

The clemency process was structured in such a way that it virtually invited defendants to argue that they deserved mercy because of their adherence to prevailing social norms. To obtain a temporary furlough, an indefinite furlough, or a pardon, prisoners had to make a formal application to the governor; to obtain parole, they had to make a formal application to the five-man Penitentiary Board, though the governor had considerable influence over the Board's decisions.<sup>363</sup> Before granting furlough or clemency, gover-

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ARK. DEMOCRAT, Aug. 4, 1949, at 19; *Watt v. State*, 261 S.W.2d 544 (Ark. 1953); *Governor Commutes Sentences*, ARK. DEMOCRAT, Nov. 8, 1954, at 2; *West v. State*, 234 S.W. 997 (Ark. 1921); *Emanuel West Is Granted Clemency*, ARK. GAZETTE, Mar. 13, 1928, 5; *Willis v. State*, 252 S.W.2d 618 (Ark. 1952); Marriage License Coupon for Curtis Willis and Delcie M. Cotton, County Clerk, Saline County, Arkansas (Mar. 23, 1961) (on file with author and the Arkansas Bureau of Vital Statistics).

361. *Hedrick v. State*, 279 S.W. 785 (Ark. 1926); *Citizenships Restored*, ARK. GAZETTE, May 6, 1927, at 8; *Kazzee v. State*, 299 S.W. 354 (Ark. 1927); *Citizenship Restored*, ARK. GAZETTE, June 12, 1929, at 10.

362. *Head v. State*, 297 S.W. 828 (Ark. 1927); *Christmas Furloughs Granted Two Life Termers*, ARK. GAZETTE, Dec. 23, 1928, at 14; *Hogan*, 86 S.W.2d 931 (Ark. 1935); *Christmas Liberty for 54 Convicts*, ARK. GAZETTE, Dec. 22, 1940, at 19; *Morgan v. State*, 76 S.W.2d 79 (Ark. 1934); *Four Receive Clemency from Governor Futrell*, ARK. GAZETTE, Sept. 20, 1935, at 7.

363. Letter from Private Secretary of J.M. Futrell to A.O. Colburn (Mar. 18, 1935) (on file in Folder 133, Box 4, J.M. Futrell Papers, Arkansas State Archives). See Letter from George Washington Donaghey to Duvall Purkins (June 8, 1933) (on file in Folder 134, Box 4, J.M. Futrell Papers, Arkansas State Archives); George W. Hays, *The Motives That Guided Me in Exercising the Pardon Power*, DEARBORN INDEP., Sept. 25, 1926, at 3, 4, 18 (on file in Folder 4, Box 2, George Washington Hays Miscellaneous Papers, University of Arkansas Libraries).

nors typically required written endorsements from the prosecutor who tried the case and the judge who heard it.<sup>364</sup> Those applying for parole had to wait until after they had served a third of their sentence.<sup>365</sup> It also took some money to apply for relief—the Penitentiary Board required those seeking parole to post a \$100 bond to indemnify the state against loss, which one lawyer wrote is “a severe hardship on many a poor boy.”<sup>366</sup> In this way, the clemency system favored men with access to capital and those in the good graces of the local authorities.

Considering the clemency process more broadly, it was not uncommon for prisoners seeking post-conviction relief to receive recommendations from the judge, the prosecutor, the sheriff, the warden, and a small army of “responsible citizens.”<sup>367</sup> One murderer was granted an indefinite furlough after “three or four hundred

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364. Letter from Harvey Parnell to William Edgar Kniep (Mar. 18, 1930) (on file in Folder 472, Box 16, Harvey Parnell Papers, Arkansas State Archives); Letter from J.M. Futrell to Barnett Brothers (Nov. 19, 1934) (on file in Folder 133, Box 4, J.M. Futrell Papers, Arkansas State Archives). *See also* Letter from Private Secretary of D.L. Purkins to G.O. Patterson Jr. (Apr. 14, 1933) (on file in Folder 432, Box 17, J.M. Futrell Papers, Arkansas State Archives) (laying out Governor Futrell’s pardon application requirements); Letter from Secretary of D.L. Purkins to Maggie Felty (June 6, 1934) (on file in Folder 433, Box 17, J.M. Futrell Papers, Arkansas State Archives) (laying out Governor Futrell’s furlough application requirements).

365. Letter from Private Secretary of J.M. Futrell to A.O. Colburn, *supra* note 363.

366. Letter from E.E. Alexander to Harvey Parnell (June 27, 1929) (on file in Folder 465, Box 16, Harvey Parnell Papers, Arkansas State Archives). Alexander also reported hearing of an additional \$50 bond individuals were required to post and inquired whether this was true.

367. *See* Record of Six Month Furlough Granted to Norman Hudson, Prisoner No. 20708 (Jan. 9, 1930) (on file in Folder 470, Box 16, Harvey Parnell Papers, Arkansas State Archives); Record of Sixty Day Furlough Granted to A. E. Hornaby, Prisoner No. 20708 (Dec. 19, 1929) (on file in Folder 470, Box 16, Harvey Parnell Papers, Arkansas State Archives); Record of Indefinite Furlough Granted to Frank (Dude) Horne, Prisoner No. 27374 (Feb. 24, 1930) (on file in Folder 470, Box 16, Harvey Parnell Papers, Arkansas State Archives); Record of Indefinite Furlough Granted to Thomas Hope, Prisoner No. 25567 (May 23, 1929) (on file in Folder 470, Box 16, Harvey Parnell Papers, Arkansas State Archives); Record of Indefinite Furlough Granted to John D. Holt, Prisoner No. 9470 (Aug. 29, 1929) (on file in Folder 470, Box 16, Harvey Parnell Papers, Arkansas State Archives); Record of Indefinite Furlough Granted to Clem Holman, Prisoner No. 26257 (Oct. 9, 1929) (on file in Folder 470, Box 16, Harvey Parnell Papers, Arkansas State Archives); Record of Indefinite Furlough Granted to Jack Miller, Prisoner No. 26588 (Dec. 2, 1929) (on file in Folder 470, Box 16, Harvey Parnell Papers, Arkansas State Archives); Record of Indefinite Furlough Granted to Ernest Applegate (March 15, 1929) (on file in Folder 470, Box 16, Harvey Parnell Papers, Arkansas State Archives) [hereinafter *Furlough Records*].

responsible citizens” signed a petition on his behalf.<sup>368</sup> Individuals also wrote to the governor or the Penitentiary Board themselves to plead their case.<sup>369</sup> Notably, these recommendations and pleas routinely invoked the prisoner’s obeisance to their communities’ social mores. One county sheriff wrote to the governor asking that a man recently convicted of perjury be allowed to go home: “I dont [sic] feel that he should be made to suffer for I really dont [sic] think he was guilty. He has always born a good reputation. He is a hard worker, sober and faithful to his employer . . . It will soon be time to start another crop and we need many more just such farmers as he is in this county,” he wrote.<sup>370</sup> Meanwhile, one woman wrote to the governor asking for clemency for her son, who was “on the county farm for hiten (sic) his wife but I know as every one Down here you wood say she ant no wife at all.”<sup>371</sup>

In the cases studied, many of the convicted rapists were granted reprieves in a short amount of time and served far less than one-third of their sentences.<sup>372</sup> A white man named Leon Fanning, for instance, was sentenced to three years for assault with intent to rape on March 9, 1940. By April 30, however, he was already released on probation; the judge, the sheriff, the county treasurer, a state representative, and dozens of other prominent people (men as well as women)<sup>373</sup> wrote to the governor, recommending clemency; by the end of November, Franks had secured a pardon.<sup>374</sup> The case of Neal McLaughlin, another white man convicted of rape, is particularly illustrative of the way that some white defendants enjoyed tremendous community support, which translated into official mercy. In the midst of McLaughlin’s trial, a crowd of 300 gathered outside the courthouse to cheer him, as he declared that the authorities were “persecuting” him.<sup>375</sup> He later constructed a ladder out

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368. Record of Indefinite Furlough Granted to Robert James, Prisoner No. 23317 (Dec. 23, 1929) (on file in Folder 471, Box 16, Harvey Parnell Papers, Arkansas State Archives).

369. See, e.g., Letter from M.B. Burns to harvest parnel [sic] (Sept. 1929) (on file in Folder 465, Box 16, Harvey Parnell Papers, Arkansas State Archives); Letter from Luke Winters to Harvey Pernell [sic] (July 3, 1929) (on file in Folder 478, Box 16, Harvey Parnell Papers, Arkansas State Archives).

370. Letter from J.A. Bass to Harvey Parnell (on file in Folder 465, Box 16, Harvey Parnell Papers, Arkansas State Archives).

371. Letter from Mrs. M.J. Greer to J.M. Futrell (July 16, 1935) (on file in Folder 434, Box 17, J.M. Futrell Papers, Arkansas State Archives).

372. See, e.g., *Indefinite Furloughs for Two Convicted of Attack*, ARK. GAZETTE, Oct. 10, 1931, at 24.

373. See Transcript of Record, *Fanning*, *supra* note 127, at 20–28.

374. *Nine Pardons Issued by Governor*, ARK. GAZETTE, Nov. 22, 1940, at 15.

375. *Declare Officers Persecute Them*, ARK. GAZETTE, June 4, 1916, at 8.

of rags and escaped from prison. The authorities located him but he refused to surrender and remained in hiding for some time.<sup>376</sup> Eventually, his accuser suffered fatal burns and, on her deathbed, recanted her testimony. McLaughlin then walked into the governor's office, introduced himself, and requested a pardon, which was granted on the spot.<sup>377</sup> A few years later, facing several more criminal charges, he barricaded himself in an iron structure near his home and exchanged shots with authorities. Shortly thereafter, he agreed to submit to arrest and was released on bond hours later.<sup>378</sup> McLaughlin died a free man.<sup>379</sup>

Unsurprisingly, racial inequity pervaded the parole, pardon, and furlough systems, and only two Black defendants<sup>380</sup> received any mercy from the governor.<sup>381</sup> Yet it is notable how petitions on behalf of Black defendants framed these men in the clemency process. Namely, many of their advocates presented these defendants as deferential and respectable—that is, highly unlikely to transgress the Jim Crow south's racial hierarchy. For example, a pastor from Magnolia wrote to the governor, asking him to parole his “negro” cook, who had been caught “making some kind of an intoxicating drink. She has paid more than the cost of this fine. She like all other poor negroes is having a hard time to live.”<sup>382</sup> The pastor called his cook “a very faithful servant” and asked for her to be pardoned.<sup>383</sup> A petition requesting clemency for a man named Nathan Clayton called him “an ignorant negro” and wrote, “his family needs him for crop purposes.”<sup>384</sup> A few years later, a man wrote on behalf of a “Darky,” requesting furlough because “this negro's family need him at home to support them.”<sup>385</sup> These records further reveal the

376. *McLaughlin Once Came Near Death*, *supra* note 360.

377. *Id.*

378. *Neal McLaughlin In Jail At Ozark*, *ARK. GAZETTE*, Oct. 2, 1929, at 2.

379. *Neal McLaughlin*, *ARK. DEMOCRAT*, Oct. 20, 1950, at 24.

380. *Hamm v. State*, 214 S.W.2d 917 (Ark. 1948); *West v. State*, 234 S.W. 997 (Ark. 1921).

381. This racial disparity too has analogues in other states. In South Carolina, for instance, between 1910 and 1914 the Governor “pardoned more than a few White men convicted of raping Black women. His view was clear: ‘I am of the opinion, as I always been, and have very serious doubts as to whether the crime of rape can be committed upon a negro.’” Osagie K. Obasogie, *Anything but a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond*, 18 *YALE J.L. & FEMINISM* 451, 468 (2006).

382. Letter from J.B. Luck to Harvey Parnell (May 10, 1932) (on file in Folder 476, Box 16, Harvey Parnell Papers, Arkansas State Archives).

383. *Id.*

384. Petition to Harvey Parnell (1931) (on file in Folder 466, Box 16, Harvey Parnell Papers, Arkansas State Archives).

385. Letter from George E. Cherry to Freed Hutto (Apr. 16, 1934) (on file

importance of a defendant's obeisance to the social hierarchy to his chances of obtaining clemency.

Governors' surviving correspondence likewise makes clear that they were more likely to release Black inmates perceived to abide by the Jim Crow social code—though, in this context, release should not be confused with freedom. Indeed, although Arkansas had eliminated convict leasing in the early 1910s,<sup>386</sup> a system continued at least into the 1930s whereby the governor often secured the parole of certain Black prisoners and then effectively gave them to wealthy white friends of his to do labor. For instance, in 1929 the governor wrote to the superintendent of Tucker Prison Farm on behalf a former member of the Penitentiary Board, who “wants to get a negro woman,” adding, “I will be glad to see him taken care of with a good cook if you have one.”<sup>387</sup> In another letter, he referred a “Mrs. M.L. Sigman, of Monticello” to the superintendent, asking if he could “select for her a good negro woman for a cook,”<sup>388</sup> while in still another one he mentioned “a very close personal and political friend of the Governor [who] is very anxious to secure a yard boy from the Farm . . . He does not care if he is a middle-aged man.”<sup>389</sup> Sometimes, prominent citizens even wrote to the governor asking for a “negro woman to stay around our home here in DeWitt and work for us and we will look after her, etc.,”<sup>390</sup> or complaining about a delay in receiving the Black man he wanted.<sup>391</sup> Thus, the wealthy, white Arkansans' desire for “good” (i.e., untroublesome and obedient) Black servants substantially informed which Black inmates obtained clemency.

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in Folder 134, Box 4, J.M. Futrell Papers, Arkansas State Archives).

386. See generally Calvin R. Ledbetter Jr., *The Long Struggle to End Convict Leasing in Arkansas*, 52 ARK. HIST. Q. 1 (1993); Jane Zimmerman, *The Convict Lease System in Arkansas and the Fight for Abolition*, 8 ARK. HIST. Q. 171 (1949).

387. Letter from the Secretary of Governor Harvey Parnell to T.C. Cogbill (Dec. 4, 1929) (on file in Folder 12, Box 2, Harvey Parnell Papers Supplement, Arkansas State Archives).

388. Letter from Governor Harvey Parnell to T.C. Cogbill (July 29, 1931) (on file in Folder 12, Box 2, Harvey Parnell Papers Supplement, Arkansas State Archives).

389. Letter from Governor Harvey Parnell to T.C. Cogbill (Mar. 28, 1930) (on file in Folder 12, Box 2, Harvey Parnell Papers Supplement, Arkansas State Archives).

390. Letter from Tom Davis to Governor Harvey Parnell (Jan. 10, 1931) (on file in Folder 480, Box 16, Harvey Parnell Papers Supplement, Arkansas State Archives).

391. Letter from I.E. Moore to Harvey Parnell (Apr. 5, 1929) (on file in Folder 473, Box 16, Harvey Parnell Papers Supplement, Arkansas State Archives).

### 3. Executions

In all, defendants in seventeen trials were sentenced to die: five of these trials involved white defendants,<sup>392</sup> and twelve involved Black defendants.<sup>393</sup> Predictably, the ultimate fates of these men diverged sharply along the color line. Of the white defendants, just one was executed,<sup>394</sup> two others were spared by the governor,<sup>395</sup> and the convictions of two others were overturned<sup>396</sup> or reduced to life imprisonment<sup>397</sup> by the state supreme court. Of the Black defendants, however, those in nine of the trials were executed,<sup>398</sup> while those in three were granted reprieves by the state supreme court.<sup>399</sup> No Black defendant sentenced to death received any mercy from the governor. Obviously, the racism of powerful state actors informed these results. Yet, as the two previous Subparts

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392. *Davis v. State*, 244 S.W. 750 (Ark. 1922) (one of the two defendants); *Hogan v. State*, 86 S.W.2d 931 (Ark. 1935); *McLaughlin v. State*, 174 S.W. 234 (Ark. 1915); *Needham v. State*, 224 S.W.2d 785 (Ark. 1949); *West v. State*, 192 S.W.2d 135 (Ark. 1946).

393. *Alford v. State*, 266 S.W.2d 804 (Ark. 1954); *Allison v. State*, 164 S.W.2d 442 (Ark. 1942); *Clayton v. State*, 89 S.W.2d 732 (Ark. 1935); *Daniels v. State*, 53 S.W.2d 231 (Ark. 1932); *Hildreth v. State*, 223 S.W.2d 757 (Ark. 1949); *Hodges v. State*, 197 S.W.2d 52 (Ark. 1946); *Martin v. State*, 283 S.W. 29 (Ark. 1926); *Maxwell v. State*, 225 S.W.2d 687 (Ark. 1950); *Maxwell v. State* 232 S.W.2d 982 (Ark. 1950); *Palmer v. State*, 214 S.W.2d 372 (Ark. 1948); *Pugh v. State*, 210 S.W.2d 789 (Ark. 1948); *Thomas v. State*, 116 S.W.2d 358 (Ark. 1938).

394. *Needham v. State*, 224 S.W.2d 785 (Ark. 1949); *Blytheville Rapist Dies in Chair*, ARK. DEMOCRAT, Mar. 17, 1950, at 1.

395. See *McLaughlin*, 174 S.W. 234; *Laughlin Once Came Near Death*, *supra* note 360; *Davis*, 244 S.W. 750; *Brought Back to Walls*, *supra* note 360.

396. *West*, 192 S.W.2d 135.

397. *Hogan*, 86 S.W.2d 931; see also *Death Sentence Reduced to Life*, ARK. GAZETTE, Oct. 15, 1935, at 3.

398. *Allison*, 164 S.W.2d 442; Certificate of Death for Stoney Allison (Nov. 20, 1942) (on file with author and the Arkansas Bureau of Vital Statistics); *Execution of Two Negroes November 20*, ARK. GAZETTE, October 14, 1942, at 16; *Clayton*, 89 S.W.2d 732; *Ark. Governor Fails to Act; 3 Go to Chair*, CHI. DEFENDER, July 15, 1939, at 7; *Daniels*, 53 S.W.2d 231; *Cigarettes Last Request of Negro*, ARK. GAZETTE, Nov. 25, 1932, at 13; *Hildreth*, 223 S.W.2d 757; *Negro Rapist Put to Death in Chair at Tucker Prison*, ARK. GAZETTE, Dec. 17, 1949, at 9; *Hodges*, 197 S.W.2d 52; *State's Post-War Crime Wave Apparently Didn't Materialize*, BLYTHEVILLE COURIER NEWS, Dec. 4, 1947, at 11; *Martin*, 283 S.W. 29; *Negro Murderer to Chair Friday*, ARK. GAZETTE, Mar. 14, 1926, at 12; *Palmer*, 214 S.W.2d 372; *Negro Rapist Calm as He Dies in Chair*, ARK. GAZETTE, June 18, 1949, at 14; *Pugh*, 210 S.W.2d 789; *Pugh Admits Guilt Before Electrocution*, ARK. GAZETTE, July 3, 1948, at 16; *Thomas*, 116 S.W.2d 358; *Execution of Two Rapists Set Today*, ARK. GAZETTE, June 24, 1938, at 7.

399. *Alford v. State*, 266 S.W.2d 804 (Ark. 1954); *Negro Rapist May Never Be Retried*, ARK. DEMOCRAT, Apr. 26, 1955, at 1; *Maxwell v. State*, 225 S.W.2d 687 (Ark. 1950); *Maxwell v. State*, 232 S.W.2d 982 (Ark. 1950).

have shown, it is also likely (albeit impossible to confirm, given absences in the archive) that the morals-based rhetoric that was present in the appeals process, and, even more so, in the clemency process informed the defendants' ultimate fates. In other words, a defendant's ability to show his compliance with social mores could literally determine whether he would live or die.

#### 4. Exile

Finally, the various transgressions of the social code that were debated at trial—and relitigated on appeal—appear to have informed the way that men were treated following their release from state custody. Because criminal trials (especially explosive ones) were such social affairs, they ensured that a significant proportion of a community could assess the extent to which the defendant (and, as we shall see, accuser) had violated that community's mores. This, in turn, enabled community members to discipline a man even if he was spared incarceration—to impose some social cost on him even if members of this same community had decided that he did not deserve to completely lose his freedom.

Little evidence survives to document what happened to defendants in rape trials following their brush with the criminal legal system, but the traces that remain are suggestive. Consider, for instance, the case of Frank Bethel. Following his furlough from prison, Bethel's wife divorced him (the cause listed on the divorce petition was "Indignities"),<sup>400</sup> and his son's name was changed from Frank Bethel Jr. to John Junior Bethel.<sup>401</sup> Bethel Sr. then moved to Michigan, where he remained for the rest of his life.<sup>402</sup> This rapid series of events suggests a degree of notoriety sufficient to cleave Bethel from his family and force him to leave the place he had lived his entire life. Apparently, in spite of his freedom (and eventual

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400. Divorce Petition Coupon for Frank Bethel and Gladys Bethel (Aug. 11, 1930) (on file with the Arkansas Bureau of Vital Statistics).

401. *Compare Boys, 7 and 11, Sentenced to Industrial School*, ARK. GAZETTE, Aug. 9, 1937, at 2 ("Frank Bethel Jr.") with BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, ARKANSAS, CRAIGHEAD COUNTY, BUFFALO, E.D. No. (16-10), Sheet No. 13A, ll. 10-12 (Apr. 11, 1930) (on file with author) ("John J. Bethel").

402. See MICH. DEP'T CMTY. HEALTH, DIV. VITAL RECS. & HEALTH STATISTICS, Death Record, Guy Frank Bethel (Dec. 6, 1952) (on file with Mich. Div. Vital Recs. & Health Statistics); POLK'S FLINT CITY DIRECTORY 69 (1947); BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, MICHIGAN, GENESEE COUNTY, FLINT, E.D. No. (16-10), Sheet No. 11B, ll. 64-65 (Apr. 13, 1940) (on file with author) ; POLK'S FLINT CITY DIRECTORY 98 (1937); POLK'S FLINT CITY DIRECTORY 102 (1934).

gubernatorial pardon),<sup>403</sup> Bethel's neighbors and family felt that he still deserved social sanction. Another such example of community members imposing extrajudicial, extralegal punishment is the case of Albert James, convicted of carnal abuse in 1916. After the governor pardoned James, his office issued a statement noting that "among the signers of the petition for clemency was the father of the prosecuting witness, who asked that James be pardoned if he would promise to join the state guard and go to Mexico."<sup>404</sup> These examples indicate that community members were reaching their own judgments about defendants, somewhat apart from the legal matter of guilt or innocence.

#### D. *Aftermath (Accusers)*

Although the documentary record in this regard is even sparser, it appears that accusers, too, could suffer real consequences for their participation in Jim Crow rape trials. Even though women faced no formal criminal consequence for reporting a rape, they nonetheless exposed themselves to significant social discipline if their neighbors determined that these women had violated prevailing social mores. This discipline could manifest as ostracism, physical violence, incarceration, or exile.

At a time when many women's financial prospects depended on marriage, and when marriage depended on a woman's reputation, the reputational harm that accusers suffered as a result of their participation in rape trials was significant.<sup>405</sup> Indeed, in one Arkansas trial, a witness affirmed that the deputy sheriff had pressured her sister to not "go through with" accusing a man of rape, telling "her it would be rather embarrassing."<sup>406</sup> Accusers also feared violence if they reported a rape. One woman recounted not alerting passersby to the sexual assault because "I was afraid of Daddy, that he would punish me."<sup>407</sup> Notably, the testimony in this trial suggests that her father punished her<sup>408</sup> not because she was raped, per se, but because her clothing after the assault suggested that she had been with boys.<sup>409</sup> To even be exposed to the possibility of sexual violence implied that a woman had allowed herself to be dangerously

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403. *Frank Bethel Given Pardon*, BLYTHEVILLE COURIER NEWS, Aug. 15, 1936, at 1.

404. *3 More Are Pardoned*, ARK. GAZETTE, Oct. 14, 1916, at 8.

405. See ROBERTSON, *supra* note 34, at 76–78.

406. Transcript of Record, *Bailey*, *supra* note 82, at 115.

407. Transcript of Record, *Underdown*, *supra* note 82, at 20.

408. *Id.* at 53 (the accuser's father testifying that he "punished her," though denying that he "beat the hell out of her").

409. *Id.* at 27, 53.

proximate to men (either voluntarily or through insufficient resistance), which in turn often violated the social code governing women's behavior.

Indeed, women and girls could even face incarceration for reporting a rape. On the stand, many young women and girls in Arkansas trials mentioned that, after informing the authorities of what had happened to them, they were taken to a reform school or detention home, where they were placed in the custody of probation officers.<sup>410</sup> In theory, this was supposed to be for their protection and health, but in reality, this was a form of punishment. Such facilities were often coldly regimented and exposed girls to corporal punishment and even eugenic sterilization.<sup>411</sup> Reform schools were so unpleasant and punitive that some rapists even threatened their victims with being sent there. "What did he say to you about telling it?" one prosecutor asked twelve-year-old Edna. "He told me not to . . . He said I would be sent to the reform school."<sup>412</sup> Perhaps it is telling that when ten-year-old Mary was asked what would happen if she lied on the stand, she replied not that she would go to hell or the "bad place," but rather that she would "[g]o to the reform school."<sup>413</sup>

It is true that in the press women did retain some privacy. Only in rare trials did press coverage disclose the identity of the accuser,<sup>414</sup> revealing a notable and gendered restraint on the part of southern journalists. Yet trials were nonetheless public spectacles, and it is likely that many if not most of their neighbors were aware

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410. See, e.g., Transcript of Record, *Cabe*, *supra* note 80, at 74; Brief for Appellant, *McDonald*, *supra* note 170, at 4.; Transcript of Record, *McGlosson*, *supra* note 122, at 20; Abstract and Brief for Appellant, *Doss*, *supra* note 113, at 2.

411. See KARIN L. ZIPF, *BAD GIRLS AT SAMARCAND: SEXUALITY AND STERILIZATION IN A SOUTHERN JUVENILE REFORMATORY* (2016); MOLLY LADD-TAYLOR, *FIXING THE POOR: EUGENIC STERILIZATION AND CHILD WELFARE IN THE TWENTIETH CENTURY* (2017). See also SAIDIYA HARTMAN, *WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF RIOTOUS BLACK GIRLS, TROUBLESOME WOMEN, AND QUEER RADICALS* 28–29 (2020). In one of the Arkansas trials, an official at the reform school incarcerating the fifteen-year-old accuser claimed she was "hard to control," but added that her institution did not use corporate punishment. "We generally make them scrub, or maybe put a dunce cap on them, give them demerits for minor offenses until they get so many, and then we give them some other punishment. Then we use a dress, a long dress, and make them scrub the floors." Abstract and Brief for Appellant, *Doss*, *supra* note 113, at 50, 53.

412. Transcript of Record, *Reed*, *supra* note 81, at 29.

413. Transcript of Record, *Burks*, *supra* note 98, at 25.

414. See *Fine Substituted for Prison Sentence*, ARK. GAZETTE, NOV. 17, 1936, at 9.

of their testimony, and thus that they had been raped. Their neighbors also would have heard rumors of these women's misbehavior (which allegedly led to the assault) or observed their humiliation on cross-examination. Indeed, their neighbors had likely attended the trials. "What the country has lacked in public religious spectacle we have replaced with public narratives of crime, justice, and redemption," wrote David J. Gottlieb.<sup>415</sup> "A century before we became addicted to simulated spectacles of triumph, tragedy, life, and death in movie theaters and sports arenas, we sought out the real thing in criminal trials and executions. These legal proceedings were often the most widely-attended public events in the community."<sup>416</sup>

Even after a trial's conclusion, women who had not been incarcerated could nonetheless face such notoriety as a result of their testimony that they might be forced to leave town. One apparent example is the experience of a woman named Pearl, who accused two men (Frank Bethel and Mike Wallace) of raping her in 1928. During the trial of Pearl's assailants, she was subjected to what a newspaper called a "long and strenuous"<sup>417</sup> cross-examination, in which the defense attorney implied that she'd had an affair with her married employer,<sup>418</sup> that she had been forced to move out of her boarding house because of a "misunderstanding with the boys that run the hotel," and that she was "a drinking woman."<sup>419</sup> Thus, through his questioning, the defense attorney accused Pearl of violating the mores that governed the behavior of an unmarried, bourgeois white woman. The defense attorney also implied through his questioning that Pearl only "feebly struggled," and that she didn't do enough to "make them stop" assaulting her.<sup>420</sup> This line of questioning communicated to jurors and spectators that Pearl had inadequately resisted her assailants, thus implying that she may have actually desired sex with them, further insinuating her transgression of social norms. Indeed, Pearl's own testimony suggested her fear of community sanction even in the midst of an assault:

Q: "Why didn't you do anything further when you saw they weren't going to stop? Why didn't you holler help?"

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415. David J. Gottlieb, *Special Issue on the History of the Trial: Criminal Trials as Culture Wars: Southern Honor and the Acquittal of Frank James*, 51 U. KAN. L. REV. 409, 409 (2003).

416. *Id.*

417. *School Teacher State Witness in Bethel Trial*, BLYTHEVILLE COURIER NEWS, Apr. 11, 1929, at 1.

418. Transcript of Record, *Bethel*, *supra* note 163, at 167–68.

419. *Id.* at 165–171, 178.

420. *Id.* at 159–60, 185.

A: "You wouldn't holler for help."

Q: "[Yes, I would.] Why didn't you?"

A: "Because I didn't want to create a scene and cause a lot of gossip."<sup>421</sup>

The gossip that resulted from her accusation and subsequent testimony may indeed have been significant, for within a year of her assailants' conviction, Pearl had moved nearly a hundred miles away,<sup>422</sup> and just a few years later, she had moved west to California.<sup>423</sup> Her name changed repeatedly as she married and remarried; so thoroughly did she distance herself from her previous life that it is not even clear when or where she died.<sup>424</sup> Thus, while a newspaper at the time of the trial had described Pearl approvingly as a "pretty young school marm,"<sup>425</sup> it appears that her reputation may have been so harmed by the inquisition into her behavior that she felt forced to flee.

### A CONCLUDING PROVOCATION

Though such an argument is beyond the scope of this Article, it nonetheless seems likely that the "shadow trial" model could be applied more broadly. One wonders what archival records would reveal about the primary fixations of historical murder trials, treason prosecutions, or war crimes tribunals—especially those held in apartheid societies, like the Jim Crow south. Indeed, to what extent are contemporary trials actually focused on their ostensible subjects? Do these trials ever double as shadow trials to adjudicate violations of social mores or transgressions of social hierarchies? Do those shadow trials ever supplant or influence the outcomes of the surface trials?

This Article challenges scholars to think more expansively about how trials—and the law itself—are part of broader systems and structures of oppression; about how ostensibly neutral legal procedures serve to reinforce society's punitive hierarchies; and about how the language of the law can obscure this reality. It also advocates a methodology that locates and foregrounds the voices of those most harmed and most erased by the casual rituals of violence we call the legal system.

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421. *Id.* at 160.

422. BUREAU OF THE CENSUS, U.S. DEP'T COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, ARKANSAS, LAWRENCE COUNTY, E.D. No. (38-5), Sheet No. 5A, ll. 32-35 (Apr. 23, 1930) (on file with author).

423. U.S. SELECTIVE SERV. SYS., D.S.S. FORM 1, Barton Earl Jordan, Serial No. (256A), Order No. (12734A) (1941) (on file with author).

424. As part of a book project on the trial of Pearl's assailants, I hired a professional genealogist to learn more about Pearl's later life, but still nothing of her death surfaced.

425. *School Teacher State Witness in Bethel Trial*, *supra* note 417, at 1.