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UMI
"THE WRONGS THAT ARE BORN AND SUFFERED IN SILENCE": SEXUAL ASSAULT AND LEGAL FRATERNITY IN NINETEENTH CENTURY OHIO

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy in the Graduate School of The Ohio State University

By

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2001

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ABSTRACT

This study is an examination of the socio-legal dynamics surrounding the charge and prosecution of rape and other sex crimes in nineteenth-century Ohio's legal fraternity. The goal is to document the impact of gender and race assumptions upon the women who brought forth charges, the structure and power of the male dominated legal system, changing definitions of the crime, rules of evidence, the experiences of women in court, state supreme court decisions on sexually related crimes, the prosecution, sentencing, and release rate of offenders, and the impact of the efforts of moral reformers and individual women who desired to create more protective legislation. The numerous legal documents, cases, and statutes examined are contextualized within broader social, political, and economic forces at work throughout the century that influenced the developing legal system in the emerging state of Ohio in ways that affected the experiences of both men and women in court. As the nation entered the “market revolution” the basic function of law transformed. In colonial America the primary emphasis of law was the protection of morality, by the early nineteenth century, however, the primary emphasis of law became the protection of property, goods, and capital gain. The prosecution of rape, once considered a moral crime deserving severe punishment now lost prosecutorial precedence to economically based crimes like theft, burglary and forgery. In the newly admitted state of Ohio (1803) this shift in the function of law began
early in the state's history and continued until well into the 1800s. What complicated matters were the severely overcrowded state penitentiary and saturated court system. The result was the early release of convicted offenders, and a legal system that was forced to decide what crimes were the most important to prosecute, and ensure proper punishment. Rape, a crime suffered primarily by women but defined, judged and sentenced by male legal authority lost importance throughout the course of this dynamic century. Punishments for rape were reduced, convicted sex offenders were pardoned at a higher rate then other offenders, and state Supreme Court Justices overturned convictions made in the lower courts. By the end of the century, however, issues of morality and the legal protection of women reemerged by the efforts of moral reformers and new legislation was written. Within this context, what at first appears to be a very intimate crime between two (or more) individuals results in a very complex interaction involving litigants, juries, witnesses, courtroom officials, high-level state officials, and the local community who anxiously came to view the drama at hand.
Dedicated to Olaseni and Manu
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CHAPTER 1

INTRODUCTION

More than thirteen years separated the two courtroom appearances Eliza Johnson made in her lifetime. The first time she stood before the Court of Common Pleas of Montgomery County, in 1836, she was a mere eight years old, not old enough to have brought the charges of rape against fifteen year old James Bowles herself, but none-the-less the most crucial witness for the State’s case against Bowles.¹ By the second occasion, Eliza Johnson was a young adult of twenty-one years and working as a seamstress in the town of Dayton. This time she was on trial for “shooting with the intent to kill one James O. Bowles,” the same man who had sexually assaulted her years ago. Particularities about the events remain unknown, but the two indictments were no doubt intimately linked. Documents reveal that although James Bowles was charged with rape, the punishment for which was life in prison, he was eventually found guilty of a lesser charge, “assault with the intent to ravish,” a crime carrying a sentence of three to seven years in the penitentiary. The original charge of rape could not withstand the strict rules of evidence whereby women had to prove that force and non-consent occurred. Johnson’s bruises and lacerations were not “severe” enough. And her declarations of rape occurred four days after the crime, which according to legal authority was too long to be entirely believable.

Ultimately, Bowles received the minimum sentence of three years. But he did not remain there long as prison officials and state governors regularly afforded early releases

¹ Bowles v. the State of Ohio 7 O. 243 (1836)
to sex offenders. Bowles spent a mere two months and nine days at the state penitentiary before receiving a pardon from Governor Lucas. 2 Ironically, when Eliza Johnson was sentenced for her crime, she received one year in the same penitentiary, and she served the entire sentence before being discharged. 3

Cases such as these reveal interesting forces at play on the lives of Ohio's most ordinary citizens. The legal experiences of both Johnson and Bowles should not be viewed in isolation from larger societal forces at work on the courtroom. When a man and woman entered Ohio's nineteenth-century courtrooms to have a rape case decided, an array of factors affected the trial's outcome: the state legislature's changing definitions of rape and rape sentencing, gender based assumptions, standards of sexual morality, the population status at the state penitentiary, challenges facing the state's court structure, and the state's transforming economic status as a result of the "market revolution." That both litigants were Black adds a complexity to the dynamics of rape in nineteenth-century Ohio because of the highly charged debates over the status of Blacks that loomed large in the minds and discussions of many whites.

Consider the implications of Eliza Johnson, a young, poor, biracial girl who along with her Black mother considered the all white, male courtroom a proper place to charge the defendant for assaulting her body. In the face of popular culture, pseudo-scientific writings, and legal treaties that described Black women as sexually insatiable and legally un-rapeable, Johnson and her mother displayed a marked challenge to race and gender based ideologies and defended their own self-perceptions that contradicted the perspective of the dominant culture. By pressing charges, they told the courtroom that a Black woman's body was valuable and deserving of protection.

As with numerous other cases discussed in this study, the legal system's treatment of Eliza Johnson is evidence of its ambiguous relationship to victims of rape. In one

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2 The Ohio Penitentiary: Register of Prisoners GR3627 (1829-1855).
3 Ibid.
instance the legal system reflected paternalistic notions of protecting women’s virtue, while at the same time, it belittled the crime of rape by allowing convicted offenders to get off with little or no punishment. Although Eliza Johnson might have thought she received some justice in the original case, she was nonetheless slighted by the mere two months that James Bowles was punished, particularly when one considers that the legal system punished her longer for the crime she committed as an adult. But what occurred on the individual and community level was deeply affected by external national and state concerns that ultimately impacted every person who entered Ohio’s legal system for sex crime matters.

Eliza Johnson was probably unaware of the problem consecutive Ohio governors faced with prison overcrowding which forced them to release hundreds of prisoners like Bowles before the expiration of their sentences. She was no doubt also unaware that governors discriminately allowed sex offenders, both black and white, to go free more frequently than offenders of other crimes.

In addition, Johnson was probably unaware that as a result of the state’s dramatically increasing population, courtroom dockets were filled to capacity putting the legal structure in chaos. As a result, judges made decisions within a legal culture that supported spending less time and finding fewer convictions on “crimes of morality” like rape, and more on economically based crimes like theft and forgery, which were considered more important as the nation entered a market revolution. This shift in prosecutorial emphasis impacted nearly every branch of the legal system.

One last aspect of Eliza Johnson’s experience serves to illustrate the basis of this study, and that is women’s resistance to a male defined legal system for crimes in which they were the primary victims. Although most did not shoot their abusers, numerous women in Ohio like Eliza Johnson made individual assaults against the power of patriarchy in sex crime litigation by entering male dominated courtrooms and emphatically declaring
retribution for the crimes they endured. When they did so, they faced public scrutiny about their moral character and sexual history, strict rules of evidence to prove that force had occurred, definitions of rape made by all-male legislatures, male medical experts who were trained to assume that most women lied about rape, all male juries who were reluctant to convict and regularly reduced charges or released offenders, and male judges who generally gave minimal sentences.

In addition, the lower courts did not make final decisions. State Supreme Court justices whose duty it was to clarify legal definitions and rules of evidence would hear numerous appeals throughout the century and overturn convictions found in the lower courts, thereby allowing offenders to be released from prison. And if convicted offenders did not appeal, their chances of receiving a pardon or early release long before the expiration of their sentence were still very good. For thousands of women in Ohio, like Eliza Johnson to have withstood and challenged the patriarchal values that were deeply entrenched in Ohio’s legal system gives testimony to their desire to control the politics at play upon their bodies. Such resistance occurred on an individual and collective level as noted in the reform efforts of social purity activists who pushed the state legislature for increased protection for women.

This study is an examination of the socio-legal dynamics surrounding the charge and prosecution of rape and other sex crimes in nineteenth-century Ohio’s legal fraternity. The goal is to document the impact of gender and race assumptions upon the women who brought forth charges, the structure and power of the male dominated legal system, changing definitions of the crime, state supreme court decisions on sexually related crimes, the prosecution and sentencing of offenders, and the impact of the efforts of moral reformers and individual women who strove to impact the law in a manner more favorable to sexual assault victims. The numerous cases and legal codes examined are contextualized within broader social, political, and economic forces that influenced the
developing legal system in nineteenth century Ohio. Analyzed within this context, what at first appears to be a very intimate crime between two (or more) individuals results in a very complex interaction involving litigants, juries, witnesses, court room officials, high level state officials, and members of the local community who anxiously came to view the drama at hand.

Although unique, this study draws upon the many works that have examined rape historically. One of the most influential studies on rape is Susan Brownmiller’s Against Our Will (1975). Although not entirely historical, Brownmiller’s work cited several historical examples of rape to illustrate her contention that rape is not a matter of individual pathology but that of a highly political social structure. That is, rape reflects efforts to maintain patriarchal power. Brownmiller’s theoretical contribution was critical to a feminist understanding of rape, and served as a catalyst for feminist historians to add to our historical understanding of the crime. Criticism that Brownmiller’s thesis was too broad, and that the racial dimension was problematic were true, yet her work has had continuing influence on subsequent scholars. Brownmiller’s work influenced this study in that rape and other sex crimes are examined within the power of a male controlled legal system where gender based biases were institutionalized.

Historian Shani D’ Cruze has expanded upon Brownmiller’s thesis by contributing to the theoretical understanding of rape. In her article, “Approaching the History of Rape

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and Sexual Violence" (1993), D'Cruze states that she has "worked towards a conceptual framework that pays attention to patriarchy, power, and social relations. Within this framework sexual violence is seen as a critical point of intersection and of separation of power relations by gender, class, and age."^6 Similar to Brownmiller, D'Cruz falls short in her analysis because she does not pay attention to the separation of power relations by race. As other scholars have noted, the issue of one's race becomes paramount in the commission, prosecution and sentencing of the crime of rape.\(^7\) Aside from such shortcomings, feminist historians of rape and other sex crimes have established the major trends in the social and legal history of the crime. The issues they have begun to interrogate include: prosecution rates, conviction rates, changes in sentencing, the effects of class upon trial outcomes, issues of female consent and male privilege, blaming the victim, women's physical resistance to rape, and the impact of a woman's moral character and age upon prosecution.\(^8\) Each of these factors is examined here as it appears that similar issues affect the phenomenon of rape in different locals and periods in history. An analysis of these and other factors are extended here however, in that rape and other sex crimes are examined from several different branches of a state legal system over the nineteenth century. The impetus for this framework comes from Cornelia Hughes Dayton's Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789,

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which examines the experiences of women who entered male dominated courtrooms about a variety of issues pertinent to their experiences. In her important study, Dayton calls this male dominated courtroom the “legal fraternity.” She describes the legal fraternity in Connecticut as being the judges, justices of the peace, and professional attorneys, jurors, and grand jurors who were always propertied men connected to each other in a manner that allowed them to influence legal decisions that reflected their beliefs and interests. Moreover, Dayton documents how the legal fraternity expanded during the period of her study, such that women’s cases were filtered through several layers of men dispensing legal advice and decrees which resulted in a decrease in the appearance of women before the bar.

Dayton’s theoretical concept, the legal fraternity, is an important one that compliments the feminist perspective that rape is not a personal crime but a reflection of the politics of the larger society where patriarchy is maintained by its major institutions. By describing the early courtroom as a fraternity one is able to imagine how crimes were tried by several different men who had the power to decide guilt or innocence and the length of sentences. It enables us to see how the maintenance of patriarchal power worked in early legal systems. Dayton’s concept serves as the theoretical framework for this study in that a similar fraternity was at work in Ohio throughout the century. Her concept is, however, expanded here to include other branches of the fraternity that had decisive authority over the many women who filed charges of rape and other sex crimes. These include medical experts, legal authorities on rules of evidence, state assemblymen, state Supreme Court justices, governors, and prison officials who along with justices of the peace, juries, attorneys, and lower court judges played significant roles in sex crime litigation. In this study, each branch of the legal fraternity is examined separately and as a

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10 Ibid., 5.
collective force to describe the role of these officials, their perspectives on sex crimes, the reasons for those perspectives and the changes they made to sex crime litigation over time. As a part of this analysis those same branches of the justice system are also viewed in relation to each other, as different branches utilized each others’ theories to validate claims, and at times disagreed over the particularities of rape and who had the ultimate authority over deciding those particularities.

The major contribution here is the examination of areas of the legal fraternity that have never been analyzed in rape literature. The studies cited above analyze rape by using cases tried on the lower court level. In this study, cases are examined beyond the lower court level because the legal process continued on to other branches of the legal fraternity. In particular, examined here are those cases that were appealed to the state Supreme Court, and the convicted men whose cases came under review by governors and prison officials for early release. Halting a legal examination of rape at the lower court level disallows us the ability to follow cases as they continued through the legal system. It also does not enable us to see the impact that legal definitions of rape established by state legislatures, medical examinations that determined whether or not charges of rape could be filed, and rules of evidence treatises that narrowly defined acceptable evidence had on female litigants. Each of these factors significantly affected the believability of a woman’s claims long before she entered the courtroom. Utilizing Dayton’s theory then, this study hopes to provide a more thorough understanding of the relationship between women, rape and the dynamic, interactive, and transforming arenas of legal authority in the nineteenth century.

Still another body of literature on the topic of rape that assisted the framework of this study considers the southern United States during the antebellum and post emancipation periods. Voluminous, these studies primarily discuss the sexual ideology of
Black men and the "rape myth." These studies reveal not only the importance of race and legal status, but how sexual mythology evolves over time in ways that reveal the dominant society's anxieties over race relations and systems of power. For example, Peter Bardaglio documents how, during the antebellum period, male slaves accused of raping white women received relatively fair trials, in contrast to the widespread outrages against African American men charged with similar crimes committed after emancipation. Scholarly studies have also focused on the frequent sexual abuse of Black women in slavery and during the reconstruction period. As often as scholars have noted the rape of Black women historically, they have called for more research in this area.

The rape of Black women by white men during the slave period has been discussed not

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only as a sexually violent attack upon Black women with economic undertones, but as an attack upon the entire slave community, one that affected slave women’s husbands, parents, and the mixed-race children that frequently resulted.\textsuperscript{16} The literature also notes that the sexual abuse of Black women had ramifications upon the relationship between white mistresses and enslaved women. Often, white mistresses took out their anger at their husbands’ infidelity upon the victims of the crime, slave women.\textsuperscript{17} Based on the dominant society’s construction of Black female sexuality as “lascivious” by nature, many in the white community believed it to be a “legal impossibility” to rape a Black woman because she was always willing.\textsuperscript{18} Historian Deborah White states that this legal vulnerability opened up the possibility that Black women were also the victims of rape by Black men.

Historian Catherine Clinton and others discuss the rape of Black women during the reconstruction period in the context of an overall climate of violence and intimidation facing the New South. In her work, Clinton documents the very real threat Black women faced as a result of white violence against newly freed African Americans. She argues that the plea by many black women for the status of “lady” was not solely to model white womanhood, but “a plea for gentlemanly behavior from white males who had corrupted the status of slave women and intended to perpetrate this degradation past emancipation.”\textsuperscript{19} Importantly, historians have discussed the rape of Black women during

\textsuperscript{16} Jacqueline Jones, \textit{Labor of Love, Labor of Sorrow: Black Women Work and the Family, From Slavery to the Present} (Basic Books, 1985); also see Malone, Blassingame, Davis, Clinton, and King above.

\textsuperscript{17} For an autobiographical account of this reaction by white women see Jacobs, and Bynum: 36-39.

\textsuperscript{18} Deborah G. White, \textit{Ain't I a Woman?: Female Slaves in the Plantation South} (Norton, 1985).

\textsuperscript{19} Clinton, Catherine, “Bloody Terrain: Freedwomen, Sexuality and Violence During Reconstruction,” \textit{The Georgia Historical Quarterly}, LXXVI, no. 2 (1992): 313-332. Also see Gutman for a discussion of rape during the Civil War and reconstruction periods.
the enslavement and post-emancipation eras as an area where resistance occurred. Whether through the use of abortions of unwanted children, physical assaults upon offenders, or the use of such liaisons to establish a better life for their children, many Black women strove to maintain some sort of power in an otherwise powerless situation.

Although the foundations have been laid, studies are needed to expand our understanding of this important area of American history. Of particular need is research on the historical occurrence of the rape of Black women by Black men. Darlene Clarke Hine offers an approach to this crime by theorizing that rape and the threat of rape influenced the development of a culture of dissemblance among Black women. Hine’s thesis provides a crucial understanding of the historic silence around this issue, yet it is still possible to document and discuss rape within the African American community, because several Black women like Eliza Johnson did come before Ohio’s courts to press charges of rape regardless of their community’s silence on such issues. Although this study is not based in the south, nor is restricted to one particular era, nor focuses exclusively upon African Americans and race dynamics, each of the areas of research mentioned were important to its theoretical framework. They were important in that these studies documented an understanding of the way larger economic, social, and political forces impacted the dynamics of rape. In this study, economic, political and social forces facing the legal system in the state of Ohio provide many of the explanations for the actions of the legal fraternity. Overcrowded prisons, a saturated and chaotic court structure, the efforts of social reform groups, socially accepted ideologies about women and African Americans, and an increasingly active state economy that affected legal precedence were each critical factors that impacted the way the legal fraternity handled rape charges, defined sex crimes, decided the length of punishments, and the treatment of those

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20 Melton A. McLaurin, Celia A Slave (Univ. of Georgia Press, 1991). Also see Gutman, and King above.
The extensive records that survived the century make this study possible. Court documents in particular establish the possibility of understanding the dynamics of rape, an otherwise personal, and generally undocumented crime. Since neither women nor men generally left diaries or letters describing rape incidents, court documents serve as a revealing way to view not only the crime itself, but attitudes towards sexuality, gender roles, medical beliefs, racial mythology, paternalism, and women’s resistance. When detailed court trial transcripts and legal opinions are used, one is able to view these dynamics in an even closer manner. In addition, an important legal source used here are the changing state statutes that defined sex crimes, and rules of evidence books that officials referred to at every level of the legal structure. These documents reveal the different ideas about rape that the state legislature had as opposed to definitions women had. They also inform us of the many changes made to the definitions and punishments of rape over time and the reasons for those changes. In addition, rules of evidence treatises describe the rigorous standards that were required to substantiate rape claims and the gendered assumption that lay behind those standards.

There are, however, drawbacks to utilizing legal documents as sources. At times it is difficult to determine the identity of the woman who brought the charges. Since rape was a capital crime in Ohio throughout the century, charges were brought on behalf of the state rather than in the woman’s name. Also, we are not always able to know what actually took place in the past. Charges and convictions were influenced by the race, class, ethnicity, and age of the litigants. Thus the assumption that all the charges of rape were true would be inaccurate as would the assumption that all of the charges documented give us an accurate account of the occurrence of sex crimes. Court documents will never inform us accurately about the prevalence of this crime since rape was most often an
unreported, personal crime which took a great deal of physical evidence to have ones’ charges accepted. For this reason, we cannot be sure of how often the crime occurred. We can only examine how frequently women sought legal redress. Importantly, however, legal documents can tell us why convictions or acquittals occurred, what actions fit legally acceptable definitions of sex crimes, and what aspects of the litigant’s character were at play during the trial.

Other sources support legal documents, making this study a social and not solely legal one. Newspapers graphically described rape scenes, identified persons involved, and provided contemporary social commentary on the crime. In addition, newspaper reports are utilized to show why many assaults did not result in official charges. Ethnological writings and medical treatises, both of which influenced juries, lawyers, and judges at every level of the court system, are also used. Women’s organizational commentaries are used to document the discussions women had about the need to influence rape law in ways favorable to women. And prison records inform us about the differences in sentencing, the early release system, and the prison experiences of convicted male and female sex offenders.

The state of Ohio serves as a particularly important place for such a study. Admitted into the union in 1803, Ohio struggled to define its political and economic outlook in an era of rapid national change. Reform movements—including temperance, abolition, social purity, women’s rights, and prison reform—were all considerably strong in the state, with each movement having numerous active chapters. These movements influenced Ohio’s political mood in two important ways. First, they brought issues of race and women’s rights to the forefront of political thought, and secondly, they trained and empowered numerous black and white women for collective political activism. Throughout the century, Ohio also experienced a continual population explosion as European immigrants, native-born whites, and African Americans from the south sought
to improve their lives. Although Ohio is representative of other newly admitted western states, the diversity provides the means for analyzing the impact of race and ethnicity upon the legal system and rape crimes. Further, national trends in law and economics influenced the state in important ways that had ramifications upon sex crime law.

Important here is a discussion about what is rape. Although most of us have an idea in our minds about what the term means, historically it becomes a rather slippery concept. This is due to the many legal and social understandings of the crime that have changed over time, even up to the present. For this reason, the definition of this crime used in this study is very broad, one that includes both historic and modern conceptions of the crime of rape. The following examples illustrate my reasons.

For the greater part of the nineteenth-century the legal definition of rape in Ohio (and other states) necessitated both penetration and the emission of sexual fluids by the male perpetrator. Thus, numerous cases came before Ohio’s courts in which the legal system would not convict for rape because emission had not occurred. Take, for example, the 1871 charge of rape by Mary Donnelly against William Blackburn before the Montgomery County Court of Common Pleas.22 During the alleged incident, Blackburn violently pulled Donnelly off a public street into a nearby alley. Despite her struggles and cries Blackburn managed to sexually penetrate Donnelly for “several minutes,” and would have continued except for the interruption of the assault by a passerby who came to aid Donnelly. Important legally, the interruption occurred before emission could occur. Because the courts strictly adhered to the emissions requirement, Blackburn was acquitted of all charges and released from prison. In 1884, a young woman, Jennie Fulmer, filed for divorce against her recently wedded husband, Daniel Fulmer, before the Summit County Superior Court.23 The grounds for her divorce were “brutal conduct and extreme cruelty.” Mrs. Fulmer testified (and others confirmed) that her husband forced her to have

sex three times per night, all night long every night. Ohio statutes, like those of other states, in no way recognized marital rape as a crime and did not do so until late into the twentieth-century. In fact, during the course of the trial the term “rape” was never used by lawyers from either side.

In 1886, The State of Ohio filed charges of sodomy on behalf of Christian Ramsayer against Robert Foster, Micheal O’Conner, and John Wilson. Court documents describe a violent and forced gang rape committed upon a young man, Ramsayer. However, like marital rape, Ohio’s courts did not acknowledge the rape of men as a crime under rape law. Consequently, this case led the General Assembly to add sodomy to its personal crime statutes. It’s definition of sodomy, however, was not one that exclusively required force. In fact, Ohio’s definition of sodomy included both forced and consensual same-sex acts. What each of these cases illustrates is the need for this study to use modern and historic definitions of rape in order to provide a thorough discussion of rape and other related sex crimes. Without doing so, one excludes the definition of rape that women had of their own experiences, for their definition usually diverged sharply from those imparted by the legal fraternity.

This study begins by providing an in-depth discussion of Ohio’s legal fraternity and the role of different authorities within that fraternity. Before a woman entered a courtroom, there were several levels of authority through which she would have to pass. Justices of the Peace and male medical physicians served as the important first step a woman had to traverse before her claims would be heard. The men who served in these functions played a crucial part in determining whether or not the woman’s claims were legitimate, warranting further actions. Gender assumptions, legal definitions and rules of evidence requirements were decisively at play in the minds of these men as they informed the female victim of her legal options. If her claims of sexual abuse were accepted and a

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24 Robert Foster et. al. v. The State of Ohio, 10 C.C. 467 (1886).
trial ensued, then the woman entered the most visible center of the legal fraternity. Again, it would be men who served in every capacity of the court, as jurors, judges, attorneys, and experts who would weigh the evidence and decide upon the alleged crime. By analyzing the lower level court proceedings of *The State vs. Edward Comfort* rape trial of 1889, one is able to carefully examine tactics utilized by defense attorneys to discredit female litigants.25 Every effort was used to describe the victim in this case, Alice Grubbs Pennington, as immoral and sexually dysfunctional thereby placing the blame for the assault on her. In addition, this chapter explores the impact of the higher levels of the legal fraternity—the prison system and the State Supreme Court—as a means of documenting the collaborative way in which patriarchy functioned in Ohio’s legal structure.

Chapter three examines the changing definitions and punishments for rape throughout the century and the forces behind those changes. The most crucial force was the legal culture’s emerging emphasis on protecting property and the government’s role in promoting economic expansion. This force shifted the fraternity’s emphasis from ensuring “proper moral” behavior of its citizens to ensuring that goods, property, and the ability to accumulate wealth were protected. Since rape was primarily considered a moral issue, convicting and punishing offenders lost importance over time. A discussion of the wealth of literature on this topic helps provide the context in which state legislatures made decisions over definitions of rape and why those decisions were made. Also important here are the divergent ideas of what constituted rape as held by men versus women, and the punishments which decreased in severity over the century. Definitions changed numerous times, sometimes as a result of national legal trends and sometimes as a result of individual cases. What was consistent was that women had little part in making these definitions and repeatedly found their ideas of rape more encompassing than those defined by the legislature. In addition, this chapter analyzes the rules of evidence guidelines that

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were required for a woman to prove force and the lack of consent. Satisfying these strict guidelines proved to be extremely difficult as sexual emission, bruises, rupturing of the hymen, age, evidence of pregnancy, and sexually transmitted diseases, male collaboration of women's claims, and the time a woman reported the crime were all scrutinized.

Chapter four examines the highest level of Ohio's legal fraternity, the state Supreme Court. By the 1830s a political shift occurred whereby State Supreme Courts were given increased power over legislatures. This resulted in the Court's increased authority to alter legal definitions of rape established by the legislature, and the power to determine rules of evidence for sex crime litigation. This chapter provides an analysis of the rape cases brought before the Supreme Court on appeal. Importantly, Supreme Court justices decided upon these cases at length and tended to scrutinize legal aspects concerning a woman's reputation, her words after the crime had been committed, the age of the female victim and whether or not female children could willingly submit to sexual relations, the mental capacity of the woman, the requirement for the emission of sexual fluids in the case of rape, and legally based technicalities about sexual offense. It is at this level of the legal fraternity that one can most clearly see those aspects of rape law that different branches of the legal fraternity disagreed upon. Female age of consent, and sexual emission prove to be the most highly debated topics. In addition, the state Supreme Justices repeatedly overruled convictions won in the lower courts, and when they did, revealed their race and gender based biases as they related to sexual assault and the impact that mounting state pressures had on their decisions. An interesting aspect of this phenomenon is how often supreme court officials declared a patriarchal commitment to protecting the "sanctity of womanhood," especially as it related to female children, while at the same time they allowed convicted offenders to be released and freed from prison.

Chapter five examines yet another level of the legal fraternity. In relation to sex crimes, the role of governors and the prison system have not been examined prior to this...
study, yet they played a crucial role in understanding the far reaching power of male authority in Ohio’s nineteenth century legal system. Prison records reveal that sex offenders were often granted gubernatorial pardons or released early as a result of Ohio’s “good time laws” that resulted from reform efforts. This chapter takes an intimate look at how these processes worked to the disadvantage of women who had won convictions. Consistently throughout the century, men convicted and sentenced to the states’ only prison for sex crimes were released after serving less than half of their original sentences. Like James Bowles, whose case opened this chapter, many sex offenders only served months when they had been sentenced to several years. This included repeat offenders, female child rapists, and those who committed the most violent sexual crimes. What is particularly revealing about this process is that although all convicted criminals could be released by the good time laws and by pardon, sex offenders were released at a significantly higher rate than any other sort of criminal. Explored in this chapter are how the overcrowded prison system, gender bias, and the legal culture’s emphasis on punishing those who were convicted of committing economic crimes and not morally based ones affected release rates.

In addition, this chapter examines how the pardon and release system cut across race lines, showing the way patriarchal collusion worked more powerfully than racism in this aspect of the legal system. Finally, this chapter examines aspects of the character of Ohio’s sex offenders. An analysis of the offenses they committed, their race, ethnicity, and gender provides insight into the lives of the men and women who were committed to one of the nation’s earliest and largest state penitentiaries for having committed sexually based crimes.

Chapter six examines the impact of the social purity movement upon many aspects of sex-based crimes. Purity reformers came in many forms, through temperance, women’s rights organizations, and Christian based ideologies. This reform movement had a
significant impact upon sex crime legislation. New sex crimes were defined and added to the list of abuses against women and the definition of rape changed in two significant ways that made convictions sought by women easier to obtain. Although the emphasis of the reform depended upon who was calling for it, this movement reveals the voices of Ohio’s women’s rights activists who considered the abuses suffered by women to be of great importance. Thus, women in Ohio’s history served as agents of change in defining the crimes in which they were the primary victims. Although women’s role in this process was crucial, ultimately their efforts fell short in face of the immense power of the legal fraternity and their own beliefs that only the “chaste” should be protected. New legislation did not always result in increased convictions, nor did it impact the power of governors to release those convicted. The result was that of all the new sex crime legislation, only sodomy received significant attention and according to Ohio’s legal fraternity it was men who were the victims of sodomy. Thus the experiences of women who suffered sexually based crimes again lost precedence as men in the legal fraternity had the ultimate authority to define and control their own priorities.

Ultimately, this study sheds new light on the historic occurrence of sex crimes and nature of the legal system that acted upon such crimes. It illuminates the way in which many levels of the legal system worked collectively, consciously and subconsciously, to the disadvantage of women who sought justice in Ohio’s courts. Working against the interests of women were widely agreed upon assumptions about the believability of women, beliefs about women’s “true nature,” a disregard of the effect of these sorts of crimes on women’s lives, sexual double standards, racial misconceptions, social, economic, and political forces at work in the state, and the virtual exclusion of women from having the ability to define and judge such crimes. Persistently, women fought against each of these dynamics, whether collectively as in Cleveland’s Women’s Protective Association which sought increased legal protection, or individually as in the case of Eliza
Johnson who not only withstood the rigors of a biased court system but who decided to take justice into her own hands by shooting her offender. Ultimately, this study details how rape is a dynamic phenomenon involving many facets of a given historical time period.
Throughout the nineteenth century, women in Ohio had limited legal rights. Restrictions were placed upon divorce, property ownership, child custody, the ability to control wealth and inheritance, and of course women were not granted suffrage until the following century. The limitations were even more restrictive for black and native women who faced segregation, racial hostility, and the limited ability to testify against whites. Important as well is that all women were unable to hold public office, serve as jurors, and for most of the century, excluded from practicing law. Men completely defined and controlled the legal system, and women had marginal official authority in this realm. But they were the primary victims of sex crimes. Over the course of the century, thousands of Ohio’s women and young girls would enter this male dominated legal arena to file complaints of rape and other sex crimes only to confront a powerful patriarchal legal system whose influence was far reaching.

Through an analysis of Ohio’s legal fraternity and concomitant role of administrators within this legal system, we are further able to explain the legal process in relationship to sexual assault victims. An understanding of this legal hierarchy reveals multiple layers of obstacles women were required to traverse in order to find legal satisfaction when filling sexual assault and abuse charges. An in-depth analyses of the
legal infrastructure existent in Ohio during the nineteenth century enables us to understand the frustration and difficulty experienced by women in finding legal redress through convictions and how, for many, the very nature of their charges were not considered creditable enough to warrant the pursuant of legal due process.

The legal fraternity was not removed from societal pressures. Economic trends that impacted the focus of prosecution, increasing state populations, and political constraints impacted the way this fraternity functioned. In addition, societal norms about proper female behavior in general, and notions about female sexuality in particular proved to be the most potent force at work in each level of Ohio’s legal fraternity. From the low level local officials to the highest ranking state officials, decisions about the believability of women’s claims, their experiences in court, and the treatment of male offenders were shaped by nineteenth century standards of the nature of male and female sexual morality. Women were to be pure, chaste, religious, and domestic. Chastity was considered essential to young women’s acceptance in society. They were to be sexually delicate and devoid of desire. Barbara Welter’s characterization remains the classic articulation of the nineteenth century ideal:

A “fallen woman” was a “fallen angel.” To contemplate the loss of purity brought tears; to be guilty of such a crime, in the women’s magazines, brought madness or death.... The marriage night was the single great event of a woman’s life, when she bestowed her greatest treasure upon her husband. Therefore True Women were urged, in the strongest possible terms, to maintain their virtue.1

Yet the double standard allowed that men were naturally more sensual than women; one nineteenth century male writer admitted that, as a sex, men would “sin and sin again, they could not help it.” He advised his female readers against the dangers of letting men “take liberties.” “If you do, you will be left in silent sadness to bewail your credibility,

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imbecility, duplicity, and premature prostitution."^2 The sexual double standard placed an extraordinarily high premium on women’s virtue at the same time that it excused men’s infidelity. These ideas permeated nearly every aspect of the legal system and influenced the lens through which members of the legal fraternity viewed claims of rape.

Interestingly, the lowest level of Ohio’s legal fraternity, the Justice of the Peace, held immense power over deciding the believability of a woman’s initial charges. The Justice of the Peace was considered the “peacemaker of the community,” and served as a mediator who encouraged peaceful resolution between conflicting parties.^3 If no other judges could be located, Justices of the Peace often served expediently in the role of an intermediary between the community and the written law. Other duties assigned to a Justice of the Peace included appearances at the Court of Common Pleas (the lowest level of the trial court system) to give official responses to charges rendered, and to commit those accused and convicted to local jail facilities, whipping posts, or the pillory. Despite the fact that the duties of Justices were legally regulated, the qualifications for the position were simply that, “he should have homely wisdom and common sense and the human element in the administration of justice . . . and be recognized for his good behavior.”^4

Justices of the Peace, beginning with statehood in 1803, obtained their position through election to three-year terms by members of the township in which they were to serve. Generally they were someone with whom the voters had close familiarity and respect. This familiarity was a two-way relationship by virtue of the Justices having more than passing acquaintance with many of the constituents of their jurisdiction. Ironically,

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^2 Ibid. Welter quotes from Thomas Branagan’s *The Excellency of the Female Character Vindicated: Being an Investigation Relative to the Cause and Effects on the Enroachments of Men Upon the Rights of Women, and the Too Frequent Degradation and Consequent Misfortunes of the Fair Sex* (New York, 1807), 277-278.


^4 Ibid., 490.
this same familiarity could work to the disadvantage of many female victims of sexual crimes if, for instance, the woman charging sexual violation had a reputation of being either sexually promiscuous or demonstrating a pattern of dishonesty. In addition, female accusers were subject to generalized predispositions in the form of race- or class-based prejudices, in which case their allegations of sexual abuse were not considered credible and thus not officially filed by Justices. An example of such bias was exhibited in the case of a chambermaid who worked at a hotel in Cleveland called The Weddell House. The maid experienced the result of negative assumptions about her social status upon pressing charges of attempted rape against one Judge Reed, a wealthy and influential man in comparison to the unnamed maid.5

While visiting Cleveland, Judge Reed became entangled in a variety of scandals, one of which included the commission of adultery with another man's wife. As a result of this affair, the Judge was physically assaulted by the husband, which forced him to be bedridden for several days. It was during this period that he attacked the chambermaid. When Justice Barr, the presiding Justice of the Peace, was presented with the charge of attempted rape, he dismissed them based on the grounds that “although Judge Reed had taken improper liberties with the said chambermaid, the act complained of was only one of a series of indecent liberties, and thereby relieved him from the criminal penalties of the individual act.” Justice Barr continued, “Since I have heard that women of that level of occupation are prone to dishonesty and this woman in particular, I believe my decision is sound.”6

As extemporaneous judges who resided at the lowest level within the hierarchy of legal procedure, Justices of the Peace’s decisions nonetheless determined further legal

5 The Cleveland Herald (Cleveland), 17 November 1847.

6 Ibid. The record indicates that Judge Reed was never charged with any of the reported “indecent liberties”.
action. If a Justice of the Peace believed that the charges being filed were creditworthy and the evidence to support such charges could be substantiated, the case would proceed to the Court of Common Pleas for the county in which the crime occurred. Conversely, if the Justice did not feel the charges being leveled met legal requirements, and he did not deem the accuser to be an honest and reliable witness, the matter would cease to have life within the legal system. As case in point, Sandra Sturges, a thirteen year-old black girl from Cleveland, experienced this exclusionary practice on March 13, 1854 when she alleged that Mr. Johnson, also black, had committed rape against her. Although Johnson was arrested, he was immediately released because the Justice of the Peace presiding over the charges stated that it was "proven that the girl (Sturges) did not sustain a good character." Rather than experiencing judicious procedure a female accuser was often subjected to moral judgment by Justices of the Peace without regard to the facts of the case.

Medical doctors, who were predominantly male throughout the century, played a crucial role at this level of the legal fraternity as well. This was primarily so because they worked along side Justices of the Peace to substantiate or refute claims. Their role was a vital one in that they determined the authenticity of physical rape evidence. Justices of the Peace regularly called upon physicians to substantiate claims and to testify in court. Through medical journals local doctors were informed by the experts of their field regarding ideas about rape. The general consensus among medical writers was that large numbers of rape cases brought to court were unfounded. Not only were men falsely accused, these writers contended, but they were also wrongly convicted. One medical authority argued:

For a man to have the finger of a woman pointed at him with a charge of a sexual offense is ... to secure that man's extinction, no matter what the

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7 The Ohio State Journal (Columbus), 13 March 1854.
verdict of the jury may be, and that is ... almost certain to be against him,
no matter what the evidence may be.\(^8\)

To explain what they perceived as a high incidence of false accusations, physicians
pointed to many motives, including revenge, blackmail, hallucinatory or delusional ideas, a
desire to inflict suffering, an attempt to preserve a "chaste" reputation, and an attempt to
force marriage.\(^9\) One of the reasons most commonly used by physicians to explain why
women cried rape was their concern over their reputation: "Not only innocent men but
those who have been actually seduced have ‘danced at the rope’s end’ on account of the
woman’s swearing away the life of the man in order to shield her priceless reputation!"\(^10\)
According to authorities, women willingly submitted to sex outside of marriage and later
falsely cried rape to preserve their reputation.

Thus, local doctors armed with the belief that most women lied about rape,
examined victims with the utmost particularity due to the belief that the charges were
likely fabricated. Evidence of force and non-consent had to be highly visible in the state of
her clothes, bruises on her body, and/or a rupturing of the hymen. In addition, doctors
looked for remnants of semen on the clothing or vaginal area, and/or the existence of
gonorrhea or syphilis to substantiate claims.\(^11\) However, even if found neither of these
areas was proof that a rape had occurred because physical evidence, it was believed, did
not always tell the story. A leading physician explained:

The relations between them ...prior to the offense were by no means on a
purely platonic plane. From secret loving glances to intimate amorous
carress, they have, to their mutual satisfaction traversed the whole via
voluptatis. At length the man’s erotic sensualism has attained its extremest

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\(^8\) Tait Lawson. “An Analysis of the Evidence in Seventy Consecutive Cases of Charges Made
\(^9\) Nicole Rafter and Elizabeth Stanko, Judge, Lawyer, Victim Thief: Women, Gender Roles, and
Criminal Justice (Northeastern Univ. Press 1982), 34.
\(^10\) Charles Mapes. “Higher Enlightenment Versus ‘Age of Consent,”’ The Medical Age 14 (1896),
106.
\(^11\) Nicole Rafter and Elizabeth Stanko, Judge, Lawyer, Victim Thief: Women, Gender Roles, and
Criminal Justice (Northeastern Univ. Press 1982), 44.

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tension, and he has therefore "suddenly" demanded complete possession—in other words he has arrived at the natural conclusion of all that has gone before. But at this point she hesitates.... She refuses that which appears sudden, insolent, and even criminal. But this revolt often comes too late. The man is now, in part owing to the woman's own actions, in a state of sexual hyperexcitability which has deprived him of the power of free rational self-determination.... Her sudden return to virtue is regarded by him as merely an incomprehensible mood or an underhand trick. Thus the amorous sport ends in an act of "rape" for which both parties are equally responsible, in the moral sense, but for which legally the man alone has to pay the hard and disgraceful penalty of imprisonment.12

Thus, even what appeared to be a rape by physical evidence may not have been a rape at all. The woman, it was said by medical experts, may have seduced the man causing him to lose all power over rational thought which resulted in the "amorous sport" that was later called rape. Overwhelmingly, the medical literature about rape described women as doubtful victims whose accusations were suspect. Male physicians who worked along side Justices of the Peace had inordinate power for determining the believability of a woman's claims, and even more power in deciding if the claims should go forward in Ohio's legal system.

In cases where the Justice of the Peace found that substantial evidence existed to sustain an accuser's charges, the assailant in question was then arrested and the matter would enter the next level of the legal fraternity, Ohio's Court of Common Pleas. The Court of Common Pleas refers to the fraternal legal arena in which testimony would be presented and defended by male attorneys, all male juries would deliberate, and levels of punishment would be determined by presiding male judges. The courtroom was the primary public arena in which propertied white men were given license to display their power by deciding the ultimate fate of each case presented. Women entered into this "theatre" of power as both litigants and witnesses. And, in so doing, women endured trying experiences. Female accusers were subjected to intense questioning regarding

12 Ibid., 35.
sexually taboo matters. During the course of the nineteenth century, society deemed women improper if they verbalized sexual issues within a public forum, yet within the courtroom environment they were required to engage in just such verbalization in the form of brutal questioning.

To demonstrate the line of harsh questioning revolving around sexual abuse legal proceedings, consider the case of Maria Gertsch, a white woman who in 1858 filed charges of rape against a man whom she was familiar with. During cross-examination, defense lawyers interrogated Gertsch with the objective of presenting her as a promiscuous and immoral woman with a highly questionable reputation. Questions posed by the defense lawyers included: “How many bastard children have you had?” “Did you ever prostitute yourself for money?” and, “How long were you and your present husband, Samuel Gertsch, living together as man and wife before you were married?” The questioning strategy utilized by defense lawyers in the case sought to destroy the moral reputation of Gertsch while simultaneously setting forth substantial doubt as to her honesty. Despite the fact that none of the allegations in the line of questions were true the lawyers knew that their strategy would negatively influence the men comprising the jury in this case.

The record indicates that the primary tactic used by defense attorneys was to place the woman’s moral and sexual reputation outside of nineteenth century notions of proper female behavior. Beginning on February 27, 1889, sixteen year old Alice Grubbs Pennington endured such tactics in a sexual assault case that would last for days in the Greene County courtroom. During the trial two primary issues were evident.

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14 For proceedings for this case see, *The State of Ohio vs. Edward Comfort*, Green County Court of Common Pleas, 1889. Testimony is quoted at length here as this is reportedly the only rape case from nineteenth century Ohio where detailed court transcripts were preserved. The testimony provides a descriptive understanding of women’s experiences within Ohio’s lower courts.
Pennington revealed the difficulty she had using sexually explicit language, and the defense attorneys sought to describe Pennington as a sexually aggressive woman who was not raped but who was promiscuous and willing.

Pennington was a native born Ohioan who lived with her mother, father, and siblings in Xenia, Ohio. In court, Pennington stated that she was poor, and that she had worked for many years in other people’s homes as a housekeeper to help support her family. At the time, however, she was working as a rope-maker in a factory. Nineteen-year-old Edward Comfort worked in the same factory. Comfort also came from moderate means in a family with eleven children. Although they were not well acquainted with each other, Pennington reported the following events:

On the 13th day of January, on Sunday evening I went to the mission meeting (religious preaching at the Salvation Army), and when I was coming away, just as I was starting out Mr. Ed. Comfort asked to go home with me, and I told him he could, and we came right along up Main Street and down Detroit … and we got past our house a little bit, and I said ‘Ed., I believe we are past our house’, and he said ‘No we haint’, and I said ‘I believe you are’. Then I says ‘I am going back’ and he says ‘Well you haint’ and I says ‘Well I will’, and I turned round to go back and he just grabbed me right around the arms this way and he jerked me so I screamed and put his hands over my mouth so that I hallowed, and I tried to get away from him the best I could … and he took me away over there where there is a lumber yard and he threw me over a pile of lumber there, …and he threw me down on some sawdust and jumped on my stomach, and choked me, and said ‘God damn you you bitch, you think you are so nice. I’ll show you whether you are or not.’ And, ‘God damn you, I’ll fuck you or kill you’, and he kind of raised up and opened his pants, and tore all the clothes off of me and got on me.15

Throughout the trial, Pennington was asked repeatedly to describe the events of that night. Particularly she was asked about how much she resisted, what her injuries were like, what the state of her clothing was like, and did she give consent for sexual intercourse with Comfort. Pennington describes being punched in the stomach, choked, 

15 Ibid., 2-3.
having blood on her underwear, screaming “mamma come and help me”, and trying to run away. She was also asked to describe the particularities of the sexual act. In one exchange the State’s Attorney, Mr. Trader, asked Pennington: “And what did he try to do? Why he did do it? Did he get his organs in yours?” For clarification, Pennington asked “Sir?” Trader explained, “Did he insert his privates in yours?” Pennington replied, “Yes sir....” Then Trader asked, “Do you know Alice, whether he completed his purpose when he got on you? Do you know whether there was an emission when he got on top of you? Whether he completed his....” Pennington interrupted and stated, “No sir, I don’t think he did”. Ed Comfort’s attorney, Mr. Scroggy, asked a similar line of questioning but was more forceful in doing so:

-What did you say you thought he did?
  (No answer)
- I pause for a reply.
  He asked me what he done and I told him.
- Told him what?
  I told him—
- Never mind looking at Mr. Trader (the State’s Attorney). Look at me or the jury.
  What did you tell him?
  I told him that- (hesitates)
- Well, you told it pretty glibly now when Mr. Trader asked you. Suppose you tell it now. What did you say to your father when Mr. Bruce was present?
  I told him that Ed. Comfort -- I didn’t come out and say the word to him, and he asked me what was the matter; and Mr. Bruce said ‘tell him’, and I said ‘He done it’. I didn’t come out and say the plain words.
- That is the language you used?
  That is what I told him. ....
- You stated a moment ago you told your father you thought he did?
  I did tell him I thought he did.
- Is that the way you think about it now?
  I nearly know he did.
- Do you know it?
  Yes sir.
- How do you know it?
  Because I know.
- Well, how?

16 Ibid., 5-11.
I know what he done to me.
-Now, you have been married since that? You know all about those things, and what I am asking you Did Ed. Comfort have connection with you?
Yes he did
-Did he have intercourse with you?
Yes sir.
-Did he spend?
I don’t know whether he did or not.
-You don’t?
No, sir.
-You are a married woman, are you?
Yes sir.
-And don’t know whether he spent or not?
(No answer)

Mr. Scroggy continued in this manner until Pennington described how the forced intercourse “hurt”, made her bleed, and caused her underwear to be wet. A witness would later report that after the rape occurred, Pennington stated that Comfort had, “tried to act mean and ornery with me,” to describe the sexual act. Throughout the transcript, Pennington reveals the difficulty she had in describing specific sexual details to her father after the rape occurred, and in the midsts of the fraternal courtroom. Her hesitation and lack of sexual knowledge inform us about the difficulties women like Pennington faced when forced to describe acts for which they did not have the language. In addition, Pennington’s hesitation was no doubt due to the embarrassment she must have felt about discussing such issues in a public manner.

As Pennington’s charge of rape was scrutinized, Mr. Scroggy began an assault on her character. Transcripts reveal his extensive interviews before the trial with Pennington’s neighbors, co-workers, employers, and people who knew her in a town she lived in prior to Xenia. He asked detailed questions about her reputation, unchaste words and behaviors. According to Ohio law however, Scroggy was restricted in this line of questioning. The State Supreme Court had ruled prior to this case that evidence about specific acts of sexual intercourse by the prosecuting female could not be entered as
evidence, but that a woman's "general reputation for chastity" could. Scroggy skirted around this restriction, and brought forth numerous witnesses that testified against Pennington, and introduced a series of questions targeted at demeaning her moral character:

- Did Louie Sneller work pretty near you?  
  Yes sir.  
- Did you talk to him very often?  
  No sir, not very much.  
- Did you ever kiss him?  
  No sir.  
- You never did?  
  No sir.  
- Didn't you kiss him pretty often?  
  No sir.  
- Didn't you talk to him about his brother Ed?  
  No sir, I didn't speak to him about his brother.  
- Didn't you tell him you were stuck on his brother?  
  No sir.  
- Did you know William Green?  
  Yes sir.  
- Didn't Lew Sneller in the presence of William Green offer you an orange one day?  
  No sir.  
- Didn't he tell you he would give you an orange if you would give him some fuck?  
  No sir.¹⁸

This question was objected to by the state, of which Mr. Scroggy replied:

The question is whether you did not say to Lew Sneller, while working at the Keller Twine and Cordage Factory, about Christmas last, in answer to the question whether you would give him some fuck for an orange. You did not say 'you little son of a bitch, it is too small. Mine would take one as big as that bobbin (pointing to a bobbin)?¹⁹

Pennington again stated that she didn't say anything of the kind. Scroggy continued overtly implying that Pennington was responsible for the assault.

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¹⁸ Ibid., 19-20.
¹⁹ Ibid., 20.
-Would you have gone home with anybody just because he asked you? No sir.
-Then why did you go home with a man you didn’t know anything about because he asked you?
I didn’t think there was any harm for him to walk up home with me.
-Well, you wouldn’t have thought it any harm for any one else to go home with you? Why did you go home with him?
Well, he had always acted like a nice boy to me. 20

As the trial proceeded, defense attorney Scroggy raised his voice and sometimes shouted at Pennington. He asked her if she had received a letter from a black man named Lewis, “on the subject of criminal intercourse,” he asked her if she had gone to a corn field with a little boy named Charles O. Stewart and tell him that she would “throw him down and fuck him.” He asked her if her boss had scolded her and some other female workers about using “indecent talk.” He asked her if she had said to Ed Sneller at a horse stable, “that he could feel her cotton (referring to your titties)” and that she would, “lay down for him.” Referring to that same occasion, Scroggy asked Pennington if she said she would “take hold of him and rub her person up and down against him?” Scroggy continued, “Didn’t Ed. Comfort give you a quarter the night you were going home together from the Salvation Army so that you would fuck him?” Scroggy’s final efforts to assault Pennington’s character involved allegations that her father had intercourse with her “more times than she had fingers and toes.” Allegedly, when Pennington lived in Wilmington, Ohio years prior to the rape, she had complained about sexual abuse by her father to a Mrs. Fillinghost, who later reported it to the town marshal. Pennington stated that none of this was true and her attorney objected to the line of questioning. Mr. Scroggy explained to the court his motive in asking such questions:

I propose to show that she told Mr. Bobby, the marshal, that her father had intercourse with her. My theory of this case is this, that this woman is

20 Ibid., 29.
21 Ibid., 50-55.
what is known as a nymphomaniac. That is what she is, and her father
produced it. And that accounts for the yelling that was going on.\(^\text{22}\)

Throughout the nineteenth century, nymphomania was considered a disease, a
mental and physical illness that only women could be subject to. As a disease, physicians
noted specific causes, symptoms and treatments. Thus, when Scroggy declared his theory
of nymphomania, he was arguing that she was a sexually insatiable woman who could not
get enough sexual intercourse, and who was screaming when Comfort had intercourse
with her because she was enjoying it. Indeed, he proposed that a rape had not occurred,
but that Pennington aggressively sought to have intercourse with Comfort as she had with
many men in her past. By the time the cross examination of Pennington was over,
Scroggy had successfully placed Pennington’s moral reputation into question before the
all-male jury. When it was the defense’s turn to present witnesses, Scroggy brought forth
fourteen young men who testified that Pennington’s reputation was “bad” and “unchaste,”
solidifying any doubt the jury might have had about Pennington’s morality. The trial
lasted for more than a week, during which Pennington’s character, the physical evidence,
and her statements made immediately after the rape occurred were the primary focus.

Scroggy’s tactics significantly altered the outcome of the case. The charge of rape
was not upheld by the jury. Pennington’s inability to describe the specifics of the sexual
act, and the maligning of her character were enough for the jury to dismiss her initial
claims. Comfort was, however, ultimately convicted of a lesser crime, an assault with the
intent to commit rape. The jury could not ignore the torn dress and bloody underwear, the
bruises, the choke marks, nor the eyewitnesses, Mr. and Mrs. Bruce, whose house
Pennington ran to in fear and desperation after the rape occurred. On reduced charges,
Comfort was sentenced to six years in the Ohio State Penitentiary.\(^\text{23}\) Ironically, the
courtroom was not the last aspect of the legal fraternity at work in this case. Ed Comfort,
\(^\text{22}\) Ibid., 55.
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like hundreds of other convicted sex offenders in nineteenth century Ohio, received an early release by prison officials enforcing Ohio’s new prisoner legislation. Of the six years of his sentence, Comfort spent a mere one and a half years in prison.

Seeking justice for the sexual crime committed against her, Pennington’s experience serves as an example of the public humiliation and social criticism many women may have experienced in the legal system. Yet, women displayed marked resistance to this legal framework by initiating legal proceedings against their male abusers, a resistance that did not cease at the first level of this legal hierarchical structure. At times, convicted defendants sought reviews of their convictions in higher levels of the court system and, if granted appeal, women found themselves subjected to the same pattern of harsh interrogation and humiliation already experienced.

If defense lawyers firmly believed that legal errors had been committed during a defendant’s trial in the lower court in which a conviction was won and defendants could afford additional attorney fees, they appealed to the Supreme Court of Ohio. The Supreme Court was initially comprised of five propertied men originating from various regions of the State and appointed by the Governor. The Ohio legislature divided the state into two circuits, of which any two judges could hold court. In each county throughout Ohio, the Supreme Court Justices heard the opinions of each side of a sexual assault case relating to any alleged errors that might have occurred. Their rulings were then based on the testimony given by lawyers of both sides, Ohio statutes, similar cases from other states in the Union, as well as cited cases in English law treaties. Judges were required to hold court one time annually for each county. If legal questions arose during this court session, the Judges met at the state’s capital to debate aspects of the law as

applicable to each particular case. However, from the onset the state Supreme Court system faced difficulties that impacted many legal areas, including sexual assaults.

At a time when the population of the State was sufficiently small enough to be supported by such a document, the 1803 Constitution of the State of Ohio was laid out in meticulous fashion by its drafters. Before long, however, problems arose that necessitated drastic changes be applied to the structure of the state court system as defined by the constitution. The foremost problems stemmed from the Ohio constitution creating a weak judicial branch. The state Supreme Court was originally to hear appeals stemming from both civil and criminal cases, but lacked the power of judicial review. This decision regarding the power of the judiciary was based on what were then national trends driven by the Jeffersonian crisis over the Federal judiciary. This decision was grounded in the belief that the judicial branch should fall under the aegis and control of the people, via the legislature.

By the 1830s, not only citizens of Ohio but justices themselves began to register complaints regarding the backlog of cases and general inefficiency of the legal system. With populations radically expanding in urban centers, criminal and civil litigation followed suit, thus fueling more problems with the court system’s inability to handle

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voluminous cases. In 1838 and 1848, due to caseload increases in the state's most populous cities, Cincinnati and Cleveland, the General Assembly created Superior Courts with jurisdiction for the respective Superior Courts limited to their particular city. This dramatic change indicated the gravity of the need to relieve the State Supreme Court dockets. Unfortunately, the alteration to the Ohio court system proved to be only a temporary solution to a critical situation. Litigation continued to block every level of the system, with the Superior Courts of both Cincinnati and Cleveland being dismantled for inefficient operations and problems inherent in overlapping jurisdictions with the Supreme Court.

Fortunately, the 1803 constitution allowed voters to elect delegates to write a new constitution after twenty years. In 1851 a constitutional convention was held, and the structure of the court system was an issue of paramount importance. The new constitution, which remains the basic law of Ohio, divided the state into nine districts, with each district allocated two resident judges in the Court of Common Pleas, and one Supreme Court justice. It also authorized the General Assembly to create Superior Courts when needed in order to alleviate the caseload dockets in specific cities or counties. Such courts were established for Cincinnati (1854-1921); Montgomery County (1856-1885); Franklin County (1857-1865); Greene County (1871-1875); and Cleveland (1873-1875).

When another State Constitutional Convention was held in 1873, the excessive caseload dockets of the court system still resulted in major judicial inefficiencies. Supreme Court justices complained that excessive work schedules disallowed efficient performance

28 Ohio's urban population increased from 2,540 in 1800 to 9,642 in 1820, increasing further to 36,6548 in 1830 and 83,491 in 1840, with a drastic increase to 242,418 by 1850, with a continued growth spurt throughout the century. Donald Dodd and Wynelle Dodd, Historical Statistics of the United States 1790-1970, vol. II: The Midwest. (Alabama UP 1976), 235.

as circuit court judges. Subsequent amendments to the old document relieved Supreme Court justices of these duties. Rather authority was handed to Common Plea justices, which resulted in their decisions losing prestige and a marked increase in appeals to an already overly saturated caseload docket for the State Supreme Court. Considering the gross inefficiency ensuing from these dramatic changes, one needs to consider the import these alterations in the legal system played in relation to issues facing women who brought charges of sexual assault in this time period.

At the onset of statehood courtroom procedure and rules of evidence procedures were unsystematic, with citizens leveling complaints that each circuit's practices differed markedly from one another. Lower court judges reached many legal decisions based not on legality so much as their own perceptions and opinions, an error that was to not see remedy until the General Assembly passed an 1831 Act to regulate court proceedings. In addition, local judges were quite often unknowledgeable regarding the multiple legal changes enacted to both laws and court structures at the state level. It was also patently obvious that communications within the system were severely deficient, demonstrated by the fact that women who sought justice in Ohio's court system received distinctly different modes of treatment and trial outcomes depending upon where the case was heard. For example, in the state capital of Columbus, Common Plea Court Justice Greene received the changes in legal proceedings in a timely fashion, enabling him to implement changes to the law immediately. On the other hand, in 1880, Justice Howard, presiding over the Court of Common Pleas in Wayne County, many miles distant from the Capital, refused to convict in a case of three rape charges on the grounds that these charges did not meet the sexual emission requirement. Tragically for the victim, the emission requirement had been abandoned by the General Assembly three years prior to Justice Howard's decision.\textsuperscript{30}

\textsuperscript{30} Records of the Court of Common Pleas of Wayne County, 1885-1890. GR4507.
Prior to the reforms of 1831, dissimilarities and distinctions from district-to-district could be discovered as well in the lack of any uniformity adhering to rules of evidence. A proportion of the justices adhered to respected treatises of law, while others showed complete disregard for legal precedence relying, instead, upon their own subjective perspectives and opinions regarding the definition of rape. As Justice of the Court of Common Pleas in Jackson County from 1824 to 1828, for instance, Justice Warren attained notoriety for his blatant disregard of formal rules of evidence, during which time he heard five sexual assault commissions, resulting in no convictions. As knowledge of Justice Warren’s decisions became widespread, note was taken by the State Supreme Court Justices, who consequently called for reform action.\textsuperscript{31}

The disorganization and non-systematization in Ohio’s early court system only added to the numerous appeals brought before the Supreme Court. Faced with overcrowding, Judges were forced to choose which crimes would take precedence over others in consideration of their harried schedules. Unfortunately, sexual assault crimes fell victims of this prioritizing, resulting in their being considered of lesser importance in terms of criminal legal proceedings. The most important reason pertaining to the decreasing emphasis upon prosecuting sex crime charges however, was the advent of the market revolution during the early part of the nineteenth century which gave impetus to the national and local trend of placing higher importance upon economically-based crimes than those moral in nature, such as sexually-based criminal actions. Several noted legal historians have documented this transformation on both national and local levels. Historian David Flaherty states that the statute books of various American colonies reveal a series of laws designed to regulate public morals. The concerns of Virginia and Maryland with drunkenness, fornication, adultery, blasphemy, bastardy, swearing, rape,

\textsuperscript{31} Ohio Attorney General Reports, 1824-1828. See Sinclair Former v. The State of Ohio, 13 O. 323 (1829) for comments by State Justices.
and the like were typical. In Virginia, as in the other colonies, the Assembly passed many more laws dealing with public morals than with offenses against the state, or religion, or the person, or property. Historian William Nelson, who has studied the criminal law of Massachusetts in the era of the Revolution, found an almost total collapse of prosecutions for immorality by the 1790s. Women began to bring paternity suits without being punished for their offenses. From a pre-revolutionary preoccupation with immorality, the courts now began to focus primarily on offenses such as theft. He also notes that in the debates over the American Revolution there were fewer and fewer references to the moral law as the natural source of laws for society. Nelson’s essential point is that there was a “shift in the law’s basic function between 1760 and 1810, from the preservation of morality to the protection of property.” Flaherty expands on Nelson’s thesis that Colonial law had always been preoccupied with the protection of property. But that as the state abandoned certain aspects of its old role in the enforcement of morals, emphasis on the protection of property became more apparent. In agreement with Nelson, Flaherty states that society began to abandon the law as a major vehicle for the enforcement of sexual morals. He also notes that it is suggestive that John Adams in 1778 would argue that “the foundations of national morality must be laid in private families,” rather than in the church or the statutory laws.

In discussing this legal transformation, historian Kermit Hall discusses how antebellum judges dethroned the English common law by Americanizing it. In the process, they added certainty to the ambiguity that had shrouded much colonial law. Corporation,

34 Ibid., 451.
36 Ibid., 248.
37 Ibid., 248.
labor, property, contract, and tort law emerged by 1861 as significantly different from what they had been in 1787. State courts played a dominant role in this transformation of American law, but federal courts and judges also contributed, giving a truly national scope to legal development. Hall contends that as a result, the ethical yardstick employed by colonial courts was replaced by a new measure that asked judges to consider how legal rules encouraged economic growth, individual risk taking, and the accumulation of capital. Hall documents how criminal law and the apparatus of criminal justice adapted to this change. Statutes dealing with economic crimes (theft, burglary, and such) began to appear in greater numbers. Prosecutors devoted less and less time to traditional moral offenses, leaving theses matters to private discretion and judgment, even though laws against fornication, adultery, and Sabbath breaking remained on the books. At the time of the Revolution, for example, in Middlesex County, Massachusetts, two-thirds of all prosecutions were for immorality, and crime was regularly described as a sinful act. By 1800 more than 50 percent of all prosecutions were for theft, and only 0.5 percent were for moral offences. Historians Kagen et. al. noted that the highest appellate courts of the states were not only increasingly busy throughout the century, but were deeply involved in the economy. From 1870-1900 more than one third (36.2 percent) of the cases decided in these courts dealt with business matters, such as contract, debt, corporations, and partnerships. Another one-fifth (21.4 percent) involved issues of real property. Noted legal historian Lawrence Friedman argues that the criminal justice system in the nineteenth century protected property and punished stealing. It tried to safeguard what people owned, their money and goods. He notes that property crimes were the most frequently punished crimes. Fifty eight percent of the offenses punished in Boston’s Municipal Court in 1830 were larceny cases, seventy one percent of the cases that year in The Philadelphia

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39 Ibid., 169.
Court of Quarter Sessions were also for larceny, and 50.8 percent of the cases in the city of New York were for the same crime.\footnote{Lawrence M. Friedman, Crime and Punishment in American History (Basic Books 1993), 109.}

Overwhelmingly these studies state that this transformation began to occur shortly after the American Revolution and continued through the 1830s. In the state of Ohio the transformation appears to have started later and continued throughout the century. Perhaps this is due to the fact that the territory did not become a state until 1803 and the larger cities such as Cincinnati and Cleveland took a few decades to develop into major commercial cities. Nonetheless, Ohio’s courts appear to have increasingly swelled with issues of economics that mirrored the same process in other states. By 1873, for instance, Ohio’s courts handed down over 15,000 civil judgments, involving monetary transfers of more than $8.5 million.\footnote{Kermit Hall, The Magic Mirror: Law in American History (NY: Oxford UP, 1989), 227.} Economics took precedence then in Ohio’s overloaded, and stressed court system and moral, in this case rape prosecution slowly fell to the wayside.\footnote{It is the intention of the author to document this legal and economic process and the result upon sex crime litigation more thoroughly by comparing prosecution rates, conviction rates, and changes in the number and punishment for economically-based crimes versus sex crimes.}

Within that court system, the state Supreme Court served as a crucial realm of male authority in Ohio’s legal fraternity. The Court served as the legal authority over unclear aspects of rules of evidence and allowable testimony in sexual assault cases, and made decisions that lower courts were to use as official guides to proper sex crime litigation. It is for this reason that the Courts’ record on rape cases is of importance. With influential voices, justices throughout the nineteenth century repeatedly belittled the issue of rape. Of the twenty nine rape convictions to go before the Supreme Court on appeal, five were declared guilty of the original charge, four were found guilty of lesser charges and had sentences reduced, and twenty convicted sex offenders were cleared of all charges and released from prison as result of the Court’s decisions. The disorder of the

\footnote{This is further evidenced in the way that punishments for all sexually based crimes decreased over time throughout the century. A discussion of this process is the subject of the next chapter.}
courts, the backlog of appeals, and the shift of importance from morally based crimes to crimes against property worked alongside Justices' gendered biases against rape convictions.

These issues were further complicated by the problem of extreme prison overcrowding in the Ohio Penitentiary—the final level of Ohio's legal fraternity. Remodeled to serve a capacity of 1,000 prisoners, the penitentiary housed 1,123 prisoners in 1859, with numbers rising to 1,348 prisoners in 1869. From 1876 to the close of the century, well over 2,000 prisoners usually composed the population of Ohio Penitentiary at any given time. During this time period, officials reported a maximum population that reached over 3,000. Justices presiding at all levels of the legal system were pressured by reformers, assemblymen, and the general public to both decrease conviction rates and reduce prison sentence duration.

As one way to alleviate prison overcrowding, governors consistently granted pardons to convicted offenders of sex crimes in gross disproportion to those offenders convicted of economically based crimes. As in the case of Edward Comfort, a hard won conviction of six years was significantly reduced when he was given an early parole. Prison Officials and successive state governors, then, were another arm of the legal fraternity at work against claims of rape made by women in Ohio. Either through the use of pardon or later in the century, by Ohio's early release laws, the majority of convicted sex offenders were released from prison well before their sentencing date. Although a variety of criminals were released by these means, prison records reveal that those convicted of sex crimes were released more frequently. 33%-55% of non-sex offending criminals received pardon compared to 66%-70% of those convicted of sex crimes. The rate of pardoning or early release depended on the time period, and prevailing prison

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44 Ohio Penitentiary: Register of Prisoners, GR3627-GR3635 (1824-1899).
legislation, but the pattern of releasing sex offenders more often remained consistent throughout the century.45 This phenomenon can be attributed to the legal fraternity's emphasis on punishing those convicted of the economically based crimes such as grand larceny, burglary, forgery and the like. Those who committed such crimes were not given early releases as often in a legal and economic culture that protected goods more readily then women.46

Ohio's legal fraternity extended its authority into numerous aspects of the judicial system. Justices of the Peace who individually decided the creditability of a case, male physicians who assumed that most rape claims were false, defense attorneys whose primary strategy was to label women as sexually promiscuous, Common judges and juries who eagerly denied the claims women made and either reduced charges or acquitted defendants, all worked collaboratively to belittle the experiences of Ohio's rape victims. Male power and authority was not confined to the lower realm of the legal structure as state Supreme Court Justices, caught up in chaotic change, relegated sex crimes to the bottom of their priorities, and overturned convictions made in the lower courts. And governors and prison officials readily released convicted sex offenders thereby enacting their belief that sex crimes were less significant than economically based ones. In combination, these factors were inextricably connected in such a manner that it was difficult for women claiming sexual abuse to find redress in the judicial system of the time. Without complete legal rights, women laid claims against a system in which they had little official influence. But the charges they filed were not ineffective. By declaring that they

45 Ohio Penitentiary: Register of Prisoners, GR3627-GR3640 (1832-1900).
46 Initial review of prison records indicates that this is the case, however, a more thorough and comparative study of prison records will provide a quantitative description of what occurred and illuminate the relationship between the litigation of economically based crimes and sex crimes. One of the major arguments in Cornelia Hughes Dayton's Women Before the Bar is that in Connecticut a similar process occurred and that by the end of the 1800s the shift in prosecuting economic issues resulted in a decrease in the number of women appearing in court for issues pertinent to their experiences.
had been raped, by insisting that charges be filed, by using whatever language they could to articulate their experiences, and by surviving an invasive and hostile courtroom they made an impact. They told Ohio’s legal fraternity time and time again that in their minds a crime had occurred, and by doing so took what ability they could to claim the experiences their bodies had endured. When sixteen-year-old Alice Grubbs Pennington stated emphatically, “I didn’t use those exact words but I know what he done--He tried to act ornery with me” her declarations were an important voice against the power of male authority in Ohio’s legal fraternity.
In 1834, Mary Hunter went before the Court of Common Pleas of Knox County and charged twenty six year old Ned Partner with the crime of rape. Only twenty years old at the time of the allegation, Hunter was described as a mature, bright-eyed young woman, perhaps due to the immense responsibility placed upon her as the head of household for four children. Hunter had known Partner for sometime since they grew up in the same small town, and since he had been to her house on several occasions to assist her with repairs. Thus, it was not odd that in the summer of 1834 Hunter requested that Partner assist her in rebuilding a broken fence on her property. Although they collectively agreed on the work to be done, by early evening these two individuals had distinctly different stories about what events took place that day.¹

Hunter testified before the court that, while both were working on the fence, Partner expressed a romantic interest in her. Hunter explained to him that although he had been kind to her over the years, her immense household responsibilities caused her to have no interest in “such things” at this point in time. According to Hunter, Partner then became very upset, pushed her to the ground, tore her clothes off and raped her. Reportedly, he yelled at her several times during the act that she had been misleading him and that she

was a "shameless whore". The assault occurred for a reported fifteen minutes, at which time Hunter's eldest sibling began calling after her. The fear of being caught in the act apparently scared Partner off because he quickly fled the area. When she called upon local authorities to report the rape, Hunter believed, in all probability, that she had more than sufficient evidence to support her charge. Her clothes were torn, there were small cuts and bruises on her body, and her brother was an eyewitness to the crime stating that he had seen Partner run away partially unclothed. In her own mind, Hunter firmly believed she had a solid case; one in which she would receive some retribution for the endured assault.

Once details of the case were compared to the prevailing legal requirements defining rape, however, Hunter soon realized that her assailant would either be set free or would be charged with a lesser crime. In 1834, as it was throughout much of the century, Ohio's legal fraternity required that "rape" must include not only penetration, but the emission of sexual fluids by the man. Although penetration had occurred, the act was, in fact, interrupted by Hunter's brother prior to the completion of ejaculation. Thus, the assault could not be considered legally within the realm of rape.

Partner's version of the events differed significantly from Hunter's. He reported that his sexual advance was welcome and that no force was involved. The evidence against him was overwhelming, however, and ultimately Partner was convicted of "an assault with the intent to commit rape," which state law defined as a less severe crime. The judge sentenced Partner to serve the minimum prison term the law required for such a crime—three years. Ohio's legal fraternity, which defined rape, significantly benefited Partner. Had he been convicted of rape, his sentence would have been between seven and twenty years at hard labor. What is significant about this case is that it was not unique. Hundreds of women in Ohio during the nineteenth-century found that their conception of rape differed in significant ways from the men who had the power to define crimes.
Through an analysis of rules of evidence and legal statutes, the following chapter will discuss the legal requirements adhering to sexual assault crimes in Ohio throughout the nineteenth century. The legal system at the time was neither stagnant nor immune to changing social forces existing in nineteenth-century society and, in fact, sexual assault laws dramatically changed over the course of the century. National economic trends that influenced prosecutorial emphasis, transforming ideologies about the nature of law and punishment, economic and social pressures facing state governments, as well as local community pressures all worked in combination to effect changes to existing laws. The most potent factor in determining sex crime laws, however, was the legal fraternity. That body of propertied, white men who with agreed upon notions of male and female sexuality, sexual development, and women’s “proper” behavior established legal requirements, decided over numerous sexual assault cases, handed out verdicts and sentences, and established proper rules of evidence regarding sex crimes. What resulted was a system that did not seek the perspective of women, but made rulings, laws and treatise that strongly impacted women’s lives.

Through analysis of the law, we are presented with one side of the story, the side that deals with male lawmakers and their predisposed concepts regarding rape, and the reasoning underlying the myriad of additions and changes made to sex crime legislation. Viewing sex crimes from this vantage point illuminates our understanding of the bias lawmakers had about such crimes. It also provides insight into the difficulty women faced in charging and prosecuting their assailants.

But what of that other side of the story—the woman’s side? As was the case with Mary Hunter, conceptions of sexual assault by women differed from those of the men who drafted these laws. From Hunter’s perspective, she had in fact been raped. Risking both public scrutiny and scorn, she nonetheless entered the male dominated legal system. Her insistence that she had indeed been raped provides insight into the ways women sought to
define the crimes committed upon their bodies. Although muted by the strength of patriarchy, women's voices can be heard in the reports of such crimes. Those voices provide evidence that women in the nineteenth-century used what means they could to impact the legal requirements for rape. And at times, women successfully pushed the legal fraternity to accept their definitions.

More frequently, however, male conceptions prevailed. From the beginning of the state's legal history, treaties and statutes from other states served as the basis for rules of evidence for Ohio's sexual assault legislation. Local courts found themselves reliant upon rules of evidence books originating from out-of-state until 1832, at which time the Ohio State Supreme Court initiated argument and subsequent documentation of its decisions. Throughout the state's early period, the most commonly-held definition for rape was "the unlawful carnal knowledge of a woman, by force, and against her will." Force, along with the absence of prior consent, were required proof through any "competent evidence" that demonstrated that the woman had been violated because her resistance had been overcome by physical force, the threat of death, or by duress. Lawmakers insisted that proof of force was demonstrated. Otherwise, they stated, any woman could willingly submitted to sex and later called it rape. Evidence that might likely ensure conviction included torn and soiled clothing, bruising or scratching on the woman's face and/or body, and any evidence taken from the victim's vagina that demonstrated forced penetration. The latter required substantiation by a medical doctor. Additionally, evidence of weapons used during the commission of the act would strengthen the prosecutor's case. Thus, cases in which dramatic and visible evidence were submitted were the cases where

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3 Ibid., 207-208.
convictions were the most likely. It appears from the record, however, that such sexual assault cases occurred less frequently than those where no clear evidence prevailed, or other necessary evidence, like the emissions requirement, negated the strongest proof. In addition, notions of proper female behavior could outweigh even the most brutal of assaults. The Cleveland Leader reported in 1854 that, “A Negro was arrested a few days ago on the charge of raping a thirteen year old girl.” A doctor concluded that extreme violence had occurred as evident from several lacerations, bruises and “tearing of the vaginal area.” Strong proof of force did not matter, however, because “he was discharged because it was proved that the girl did not sustain good character.” Race may also have been a factor in that ethnological writers regularly described blacks as sexually savage. Josiah Priest, one of Ohio’s leading advocates of forcibly removing blacks from the nation generally and Ohio particularly stated in a collection of essays that blacks were unchaste by blood, disregarded marriage to engage in promiscuous intercourse, and that every black family was a brothel where formidable sins were committed at an alarming degree. Priest also contended that women were supposed to be the moral authorities within the family but that black women behaved like the promiscuous Jezebel in the bible thus negating any chance for sexual morality in the race. Such prevailing attitudes about race and gender could at times result in a dismissal of sexual assault claims.

Law-makers also considered that force might be established through what was called “preemptive” evidence. Preemptive force occurred in cases in which sexual intercourse had been performed on a female who, at the time of the action, was in a “state of stupefaction, or unconsciousness.” The notion of preemptive sexual intercourse

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[5] Josiah Priest, Moral, Mental and Physical Characteristics to Other Races (1859), 183-188. For other ethnological writings on blacks in the early to mid 1800s written by white theorists in Ohio see; David Goodman Croly, Miscegenation PA Box 94, and Buckner Payne, The Ethnological Status of the Negro PA Box 50-7 at the Ohio Historical Society in Columbus Ohio.

[6] Josiah Priest, Moral, Mental and Physical Characteristics to Other Races (1859), 188.
addressed the many cases in which alcohol and/or drugs had been used to subdue victims, or in which sexual intercourse had been committed upon a female who was either “insane or an imbecile” or asleep. In cases such as these, courts were to presume that force occurred. As progressive and protective as this legal assumption seemed, more often then not, judges and juries rarely honored this aspect of the rules of evidence.

Consider, for example, the case of Winnie Gilhooey, a ten year-old girl who had repeatedly been the victim of sexual assaults by a man named Dennis Ragan. Ragan kept a saloon near Broadway crossing in Cleveland, Ohio and had been giving Gilhooey alcohol and sexually molesting her. According to the newspaper:

The action taken in this case grew out of complains (sic) made to the police that liberties were being taken with the child, some of the neighbors even alleging that the child’s own mother was a party thereto. It was claimed that it was a usual occurrence to get the child into Ragan’s saloon and give her liquor to drink. Then her mother, who was also in a maudlin condition, would send her into the bedroom with the man, where the child was subjected to indignities which, if true, would almost warrant the lynching of the parties implicated therein.

When a Patrolman named O’Malley questioned Gilhooey at the police station, she admitted that Ragan had attempted to violate her person several times. Although rules of evidence treaties clearly stated that force was to be presumed if the female was intoxicated, other factors were introduced by defense attorneys as a means of placing blame on the victim. Ragan admitted that he had indeed given the child alcohol but insisted that she willing submitted to him sexually. He said that the alcohol tended to make her have “a desire for him which she enjoyed.” As to Gilhooey’s youthfulness, Ragan asserted that although she was ten in years, her understanding of sexual matters

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8 Cleveland Newspaper Digest (Jan 1 to Dec 31, 1876): 1276.
was far more mature because of the low moral character of the mother who raised her.®

Ragan's argument was enough to convince the authorities to release him. Thus, principles of law designed to protect women and young girls could be easily thwarted by notions of proper female behavior. Although the newspaper reporter felt that a "lynching" should occur, neither Ragan nor Gilhooey's mother were ever charged with a crime.

Along with force, another crucial element of nineteenth-century rape law involved the absence of consent. According to a leading book of evidence at the time, "to warrant conviction for rape, the evidence must show the fact of non-consent, and the exercise of all the means of resistance which . . . were within her power to make."® Traditionally, the most common evidence used for substantiating a claim of non-consent included a woman's cries for assistance or an eyewitness to the crime itself. To bolster the case of defendants, defense lawyers made inquiries regarding the location of the alleged offense, and to the reputation of any witnesses. The belief commonly held was that "if the act were done in a place where other persons might have heard her cries, but she uttered none, credit to her testimony would be diminished."®

On a Tuesday evening in 1876, Mrs. Augusta Fischer experienced the ramifications of this requirement when Joseph Sheef assaulted and attempted to rape her. Newspapers reported that:

The affair occurred on Ackley Avenue, where the assailant, who is a Bohemian, seized the woman, threw her to the ground, placed one hand over her mouth and then attempted to outrage her. Mrs. Fisher screamed loudly and repeatedly and Officers Burns and Matzourek soon arrived and took charge of the criminal. He did

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® Ibid., 1276.


not accomplish his purpose with Mrs. Fischer, who is a German living on Fifth ave. in the eighteenth ward.\textsuperscript{12}

Because Fischer had screamed "loudly and repeatedly" and because police officers were eyewitnesses, Fisher had a solid case. She was eventually convicted of an assault with the intent to commit rape and sentenced to the penitentiary for four years of which he spent one and a half years in prison.

Although Fisher's experience adhered to the rigidly defined rules of evidence, the record indicates that most women were not as fortunate. In August of 1875, Katie Klopp attended a local dance in Cleveland. While at the affair, she met and danced with two different men, James Handy and John Switzer. Reportedly she had a joyful time dancing late into the night. Klopp left the dance alone to walk home and while in an isolated area was attacked and raped by Handy while Switzer held her down. Although she cried out for help repeatedly, her cries disappeared into the night. Klopp filed a complaint of rape in the Court of Common Pleas, both men were arraigned, bail was set, and a trial commenced. Neither Handy nor Switzer were found guilty, however, because no one heard Klopp's cries for help and the only witnesses reported that she happily danced with two different men "until the hour became to late for a respectable ladie (sic)."\textsuperscript{13}

Along with the elements of force and non-consent as essential aspects of rape, other required and or acceptable evidence included sexual emission, the reputation of the woman, the age of the both parties, and the declarations verbalized by the woman following the alleged crime. These factors and legal requirements for defining rape worked in combination to thwart the conviction of offenders, making it extremely difficult for women to receive legal satisfaction through judicial processes. As in the case of Mary Hunter, sexual emission did not always occur. In addition, every aspect of a woman's character could be introduced in court to soil her reputation, thus making her claims less

\textsuperscript{12} Cleveland Newspaper Digest (Jan. 1 to Dec. 31, 1876), 1276-1277.
\textsuperscript{13} Cleveland Newspaper Digest (Jan. 1 to Dec. 31, 1875), 655.
believable. A girl of thirteen could be considered old enough to have given consent for sex whereas a boy could have been considered to be too young to be responsible for his sexual aggression. And if a woman did not report the crime immediately after a rape occurred she ran the risk of not being believed. Thus, by the time the Ohio General Assembly began writing its own sex crime statutes, the general understanding of what constituted rape had long been established, as had the assumption of blaming women for these crimes.

The process for defining what constituted sexual assault in Ohio proved to be quite complex. Throughout the nineteenth century the definitions and punishments were changed by the legislature many times. This was especially true in light of the myriad of factors brought to bear on this issue throughout the century that influenced both definitions and sentencing. Similarly to other emergent states in the Old Northwest, one of the initial tasks set before the Ohio General Assembly and its members was the establishment of both civil and criminal law statutes and procedures. Based upon a combination of English Common Law, laws already established in the older Eastern seaboard states, and the idiosyncratic personalities of charter members of the Assembly, the origins of a large majority of these laws were many and complicated. As in other states, the sex crime laws of Ohio were unique reflections of both the political and cultural climate of that particular region during a given period of time in history.

During the 3rd General Assembly, from 1804 to 1805, the Legislature added the first statute for rape to Ohio’s law books:

That if any man shall carnally know any woman, with force and against her consent, or shall carnally know any woman child, under the age of ten years, with or without her consent, such persons shall be deemed guilty of a rape, and on conviction thereof, shall suffer death.\(^\text{14}\)

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As critical factors that distinguished the elements of consensual intercourse from that of rape, force and consent both were of primary importance to the above statute. Although not explicitly stated, the definition of rape during the early nineteenth century also required inclusion of both penetration and fluid emission.¹⁵ There was no need to state this requirement because it was one that originated from English Common Law and was thus longstanding. The statute does, however, clearly distinguish between consent regarding a woman as opposed to a "woman child," wherein sexual intercourse with a girl under the age of ten, whether via consent or not, was considered to be rape. The assumption was that a female child was incapable of consent due to lack of maturity and judgmental ability regarding the physical and social ramifications of sexual relations. Age then immediately became a significant factor in rape legislation and would continue to be so throughout the century.

The initial sexual assault statutes also defined attempted rape, or as it was called, "assault with intent to commit a rape," as follows:

That if any person shall, with force and arms, and actual violence, an assault make on the body of any female, with an intent to commit a rape, he shall, on conviction thereof, be whipped not exceeding thirty-nine stripes, on his naked back, and be imprisoned for a term not exceeding two years, and be fined in a sum not exceeding one thousand dollars, at the discretion of the court.¹⁶

Similar to the rape statutes, issues of force and consent were of paramount concern in attempted rape cases. The punishments for both crimes reflected a colonial law heritage.

¹⁵ Used early on in the nineteenth century in the majority of legal systems throughout the nation, this aspect of sex crimes was entered into Ohio's law books in 1836.

Lawrence Friedman, the noted legal historian, states that during the colonial period crime was considered an act against the laws of God—acts of immorality. However, lawmakers were of the belief that individuals could change and criminals, if publicly shamed and instructed to adopt appropriate behaviors, could aid in the deterrence of criminal actions. And, in this manner, lawmakers and clergy alike held firm to the belief that a Godly society without sin could exist. Extrapolating from that premise, punishments set forth for crimes emphasized both harshness and visibility, as demonstrated by public whippings, the wearing of a letter to demarcate a particular crime on one's outer clothing, and/or serving time in public stockades.  

During its 1808-1809 session, the General Assembly again revisited the sex crime laws. While the rape laws themselves experienced no change, the attempted rape statute was revised—lighter punishments to be meted out for this crime. Although the thirty nine stripes remained as punishment for this crime, prison terms and fines were decreased by fifty percent, to one year imprisonment and $500 fines issued, respectively. This radical change initiated a legislative trend on rape statutes that continued throughout the remainder of the century—punishments would continually decrease. Initially, the decrease was due to a cultural shift in the way lawmakers thought about appropriate punishments, but as the century unfolded overloaded court dockets, overcrowded prisons, and an increased emphasis on punishing economically based crimes over moral and sexual ones resulted in a decreased concern over the occurrence of sexual assault. These evolving dynamics became apparent in the 1814-1815 Session and continued for many decades.

During the 1814-1815 legislative session, the punishment for rape decreased significantly, and two new sex crimes were added to the statutes. The punishment faced

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by rapists fell from a possibility of a death sentence to a sentence that ranged from seven to twenty one years in the state penitentiary.\footnote{Thirteenth General Assembly of Ohio 1814-15, \textit{Punishment of Crimes}; 857. For a discussion of the ways in which the death penalty acted as a deterrence in criminal acts see; Ruth A. Olsen, "Rape, An 'UnVictorian' Aspect of Life in Upper Canada." \textit{Ontario Historical Society}, 68 (1967): 75-79.} The reduction in punishments for rape was a significant change in Ohio law, a change that followed the developments in national legislation based on the effects that both the American Revolution and Jeffersonian Republican perspectives on legal issues. The American Revolution unleashed powerful forces of market capitalism and individualism. Republican values, shortly thereafter, began to reshape American citizens’ understanding of criminal law. The economic forces of the Revolution, for example, placed great value on holding and using private property for individual gain. Criminal law and the apparatus of criminal justice adapted to this change. Statutes dealing with economic crimes such as theft and burglary began to appear in greater numbers. Conversely, prosecutors devoted less time to traditional moral offenses like adultery, fornication, and rape. Although morally based crimes remained on the law books, the predominant use of criminal law during the early Republic was “as defender of an economic and political order, and much less as guardian of a code of sexual and social behavior.”\footnote{Lawrence Friedman, \textit{Crime and Punishment in American History} (Basic Books, 1993), 62; Kermit Hall, \textit{The Magic Mirror: Law in American History} (NY: Oxford UP, 1989), 169.}

The transition made by legislative amendments and changes to statutory precedence dramatically influenced the experience of women within the legal system by decreasing both their accessibility to the courts and, if fortunate enough to receive a hearing,
thwarting the potential for success in the prosecution of sex crimes. The legislative changes that emphasized economic-based criminal acts occurred shortly after the Revolution, predominantly amongst Eastern states. The emergent states, such as Ohio, took longer to adopt these changes to their statute books, but nonetheless followed the national trends.

Republican philosophies also motivated the trend toward early nineteenth-century punishment reform, in an attempt to distance itself from the Colonially-based focus on “visible” punishments, such as stocks, whippings, and capitol punishment. In states where Quakers played dominant roles, such as Pennsylvania, directives were issued to legislators to compose a new and more humane criminal code in which punishments were more proportionately commensurate with degrees of criminal actions. As example, in 1786 the Pennsylvania Legislature abolished the death penalty that had existed for crimes of theft, burglary, and sodomy. Notable Republican thinkers, such as Benjamin Rush, influenced this new trend as well by focusing writings on the need to eliminate capital punishment altogether. He stated that capital punishment “was the natural offspring of monarchical governments.” Rush believed that death sentences, or the gallows, eroded rather than a strengthened Republican values and behaviors, and promoted the concept that mild and benevolent punishment should characterize Republics. These patterns and

21 Cornelia Hughes Dayton, Women Before the Bar: Gender, Law, and Society in Connecticut, 1639-1789 (University Of North Carolina Press, 1995), 232-234. In this study, Dayton traces the crimes in which women are most often involved in by illustrating this transformation in American law. Her findings conclude that this shift resulted in a decrease in the number of women appearing in legal courts as a method for redressing violations against them.


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shifts in criminal legislation continued throughout the country up until the middle of the century, with Ohio following suit by building its first large-scale penitentiary in 1825.

Thus, the 1814-1815 Ohio Legislature, dominated by Jeffersonian Republicans modified the penalties for various crimes, including rape, and authorized the construction of a penitentiary, completed in 1825. Now long terms of isolated confinement replaced whipping and stocks as punishment for crimes.

Moreover, two crimes were added to the statutes in 1814: “carnal knowledge with an insane woman,” and incest. The law defined the former as:

That if any person sixteen years of age or upwards, shall have carnal knowledge of any woman other than his wife, such woman being insane, every person so offending, his aiders and abettors, counselors and procurers, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary at hard labor, for any space of time not more than twenty-one years nor less than two years.24

In contrast to the definition of rape, the above statute did not mention either consent or use of force; neither of these elements were necessary because the courts considered the insane woman of having insufficient mental capacity to allow for knowledgeable consent.

In addition, the age of sixteen as set by the legislature to indicate the maturity of any given male offender also shined light on the belief that a male needed to be sixteen to have the capacity for understanding the consequences of such criminal actions although the “age of consent” for a female remained ten. In addition the age of sixteen indicated the age in which the offender would have the physical maturity and capacity to emit sexual fluids.

The crime of incest, added during the same legislative session, had a rather long and complex definition and read as follows:

That if any step-father shall have sexual intercourse with his step-daughter, knowing her to be such, or if any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship; or, if any father shall have sexual intercourse with his daughter, knowing her to be such; or if any brother and sister, being of the age of sixteen years or upwards, shall have sexual intercourse together, having knowledge of their consanguinity; every such step-father, father, step-mother, step-son, brother or sister, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall be imprisoned in the penitentiary, at hard labor, not more than ten years not less than three years.25

According to the above definition, incest encompassed not only sexual relationships confined to blood ties but those based in socially structured connections, such as "step" parents, and that these types of relationships involving non-blood related adults and children could also be considered acts of a criminal nature. The element of force as it related to incest was not a requirement in Ohio’s laws at this time but, rather, was based on the concept that family members, whether blood related or not, should not engage in mutual sexual activity.

During the following General Assembly, from 1820 to 1821, further alterations to sexually-based crimes were initiated. While the definition of incest remained the same, the crime of rape was placed into degrees of severity, and the age requirements for sexual intercourse between a mature male and an insane woman changed, along with the punishment it accrued. The maximum punishment for the rape of an insane woman decreased substantially from twenty-one years in the penitentiary to ten years.26 The emphasis placed on the age of maturity of the perpetrator remained a trend throughout the century. The new requirement mandated that those charged were eighteen years of age or older. Significantly, the age at which females were considered to be mature enough to

25 Ibid., 183.

26 The Nineteenth General Assembly of Ohio, 1820-1821, 1200-1203.
knowingly give consent was considerably younger than that of males. Lawmakers believed girls to be knowledgeable of sex acts by the age of ten; yet the age where young men were responsible for their behavior climbed from sixteen to seventeen to eighteen in this early period. The extreme difference is due to commonly held beliefs about male and female sexuality and sexual development. Sexual maturity for boys was viewed in physical terms while for girls it was viewed from a psychosocial perspective. Since the prevailing attitude was that "boys will be boys" there was little emphasis placed on the social ramifications of premarital intercourse. The male age set by Assemblymen reflected the medical literature's understanding of male physical sexual maturity. The belief was that young men were not able to emit sexual fluids until they reached sixteen to eighteen years old and since the rape required emission, that age became the defining factor for the law. For girls, physical maturity was not the issue. No part of the legal definition of rape required a particular physical capacity for females. Instead, the popular, or at least legal conception was that at ten years old a girl would understand the social consequences of consenting to sex. The belief was that she would understand the importance of preserving her moral reputation and chances for marriage that could be at risk if she consented.

Before the age of ten, Assemblymen believed that a girl's maturity on such issues would not be fully developed, thus the need for a law that would protect them.

The other major legal change of the 1820-21 legislative session involved the legal definition of rape. The legislature made a distinction between first and second-degree

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28 The Ohio State Supreme Court spent considerable time discussing male and female age of consent issues. For example see O'Meara v. the State of Ohio (1867), Williams v. The State of Ohio (1846). In these and other cases, the emphasis on males is physical maturity where, for example, a young man's testicles and underarm hair were examined to determine his physical maturity (see, Hiltabiddle v. The State of Ohio, 1878), whereas for girls, the discussion was on whether or not a girl had enough of an "enlightened will" to understand the nature of the sexual act and its consequences (see, O'Meara v. The State of Ohio, 1867).
acts, reflecting a national trend in distinguishing between degrees of many crimes. The principles behind defining distinct degrees in criminal actions resulted from republican ideals of fairness. Initiated by Pennsylvania in 1794, the idea was to elucidate “different degrees of atrociousness” for some crimes and to proportionately fit these crimes to varying degrees of punishment. The Ohio legislature followed suit and considered the most atrocious sex crime, first-degree rape:

That if any person shall have carnal knowledge of his daughter or sister forcibly, and against her will, or if any person shall aid, counsel or procure, any other person to commit said offense, every person so offending shall be deemed guilty of a rape, and upon conviction thereof, shall be imprisoned in the penitentiary and kept at hard labor during life.

The distinguishing factor between the new definition and the older definition lay in the requirements that first-degree rape need to included perpetration with force against one’s daughter or sister. Second-degree rape remained essentially the same as the original definition. The new definition was as follows: “that if any person shall have carnal knowledge of any woman other than his daughter or sister forcibly and against her will or shall carnally know any woman child, under the age of ten years, with or without her consent, such person shall be deemed guilty of a rape.”

First-degree rape focused on blood relationships because of a commonly shared repugnance by the general public towards sexual relations within one’s family. The repugnance was so strong that a separate distinction was necessitated to distinguish it from other forms of rape, as well as demarcate its difference from prior definitions of incest. Included within this definition of first-degree rape is the compound crimes of both

29 Act of Pennsylvania 3 (April 22, 1784), 186.

rape and incest. It is both with force and committed upon a relative, and a blood relative at that. Thus, a more offensive attribution was elicited than either one of the crimes viewed individually. The emphasis placed on the reprehensible nature of first-degree rape by lawmakers was reflected in the sentence for the crime. A conviction for first-degree rape resulted in a prison sentence for life, while the punishment for second-degree rape was seven to twenty years at hard labor in the penitentiary. It should be noted that neither the definitions of incest, first-degree, nor second-degree rape included a husband raping a wife. Lawmakers’ emphasis on blood relations, step relatives, daughters, and sisters legally excluded the possibility of marital rape as did the prevailing legal and social notion that once married a woman became the husband’s “property.” Laws of this nature occurred neither in Ohio nor any other state until well into the following century. Nonetheless, at least one case originating in Ohio acknowledged the legal possibility of a husband sexually abusing his wife.

In 1884, the Ohio Superior Court of Summit County ruled in the divorce suit, initiated by Jennie E. Fulmer against Daniel Fulmer. At the time of her marriage in 1881, Jennie Fulmer was “seventeen years old, plump and in good health, a farmer’s daughter.” But three years later at the time of the divorce hearing she looked sickly. In court, Jennie Fulmer described the harsh treatment she endured from her husband. He forced her to have sexual intercourse with him, “not less than three times every night straight through the night,” to the point where her health failed her. Jennie temporarily left her husband and returned home to her father. But after she recovered, Jennie Fulmer’s father sent her back to her husband’s house, where the sexual abuse resumed its former course. When her health began to deteriorate again, Jennie filed for divorce on the grounds of extreme cruelty. Two important legal issues were raised by this case. The first involved whether Daniel’s sexual behavior constituted extreme cruelty and served as grounds for divorce. And the second, whether a wife could testify against her husband regarding threats and
sexual brutality. The court found in favor of Jennie on both questions, awarded her a
divorce and $1,000 alimony. Daniel was not charged with any criminal action, but the fact
that the court upheld Jennie’s belief that she had been sexually assaulted within her
marriage gave credibility to the idea that wives could be sexually abused by husbands. 31

During the General Assembly sessions of 1823-1824 and 1830-1831, definitions for
both rape and incest were widely discussed, but no changes were made to either statute.
The next modification in the existing law took place during the General Assembly of 1835,
with an alteration in the punishment for second-degree rape. The former punishment of
seven years minimum and twenty years maximum, was decreased to a minimum of three
years and maximum of twenty. Given that the majority of convicted sex crime offenders
fell into the second-degree rape category, and that most offenders served only minimum
sentences, this alteration reflected the increased lack of severity in punishments for
sexually-based criminal actions. The reason for this continued decrease in punishment was
because of the ever increasing role that economics played within the entire legal system.
As the state’s economic structure developed so too did the importance Ohio played in the
increasingly complex national marketplace. New economically based crimes were added
to the statutes, and the legal culture’s evolving shift to prosecuting economically-based
crimes already in existence resulted in an saturated legal system at every level. 32 In
addition, a legal system that emphasized the protection of goods and promotion of
commerce needed to ensure that such criminals were punished for long sentences. With
an overcrowded prison system, the result was that the legislature had to enact every

31 See Fulmer v. Fulmer, 24 O. 795. Also see legal commentary on this case in, The Weekly Law

32 Because of the westward location of the state, Ohio played an important role in the expansion of
the nations railroad system. As a result, the state had to comprise a series of tort laws designed to address
personal injury issues. This was only one of the new areas of law the state had to address. Others
included legal issues surrounding the state’s canal system important to transporting goods, and protecting
public lands to name a few. For further discussion see; Lawrence Friedman, Crime and Punishment in
American History (Basic Books 1993) and, Kermit Hall, The Magic Mirror: Law in American History
remedy possible that might diffuse some of the strain on the system. The one remedy easily within their authority was to decrease the time sex offenders (and those who committed other morally based crimes) spent in prison. Thus, with in the first three decades of the state’s existence, the punishment for the majority of rapes committed decreased from death, to seven to twenty years, to three to twenty years and would remain so through the end of the century. It is worthy of noting however, that the punishment for first-degree rape would remain life in prison. However, it was of little consequence upon the issue of a saturated system in need of relief. From 1829 to 1850, for example, only three men were convicted of “Rape upon one’s daughter or sister” (first-degree rape) and received a life sentence. Marcus Frost, a thirty seven year old man originally from Massachusetts but living in Athens County, was convicted for this crime in August, 1831. Johnathon Thompson, a repeat offender, was convicted in May, 1850 for raping his sister. He was later transferred to a “lunatic asylum.” And Eli Williams was sentenced to life in prison in June of 1850 for raping his daughter. Out of the 100 sex crime convictions during this period, these were the only three that were convicted of first-degree rape. Despite discussions by the General Assembly in 1853, 1860, and 1875, no new sex crime categories were proposed, and only one significant alteration to the established definitions of sex crimes occurred. During the 1875 legislative session, the age in which a girl would be considered raped whether she consented to sex or not was raised from ten to twelve years old. However, it would remain so for only five years at which time the

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33 For record of prison crimes and sentences see, The Ohio Penitentiary: Registrar of Prisoners, 1829-1855 GR3627.
legislature changed the age back to ten.\textsuperscript{34} Other aspects of the definitions of sex-based crimes remained intact until 1880, when Ohio formulated a more structured legal system, through documenting and publishing major cases that appeared before the Ohio Supreme Court. This forty five year inattention to altering sex crime laws reflected a nationwide trend of decreasing legislative powers. In the 1840s and 1850s, legal changes were enacted to restrict the power of state legislatures. The desire to curb legislative authority was evidenced on a national scale, but occurred predominantly in such public enterprise states as Ohio. At the state constitutional convention in 1851 existing laws were rewritten to truncate legislative power. Simultaneously, constitution makers' granted higher degrees of authority to the judicial and executive branches.\textsuperscript{35}

With Republican confidence in legislative bodies fading, two new themes surfaced in its place. First, state level statutes became more formulaic and code-oriented documents, with the express intent of limiting governmental actions. The second new theme was in the roles of state officials. Such changes included increased authority given to governors through veto power, the power to pardon, and the ability to make appointments. Although concerned primarily with economic matters, this radical movement affected Ohio's sex crime laws in the 1880s.

One major outcome of these constitutional changes was that definitions of sex crimes were increasingly modified by the judicial rather then legislative branch of government. As discussed above, the constraints placed on legislative powers worked to increase judicial influence. This was evident in Ohio's legal record. From 1832 through 1880, Ohio witnessed an increase of Supreme Court activity. During this heated period, the state Supreme Court decided twenty-six sex-related crime cases. Prior to 1832, the

\textsuperscript{34} There is a need to research more extensively why the age changed and then changed again so quickly. As already stated, the age reflected beliefs of female social maturity on sexual issues, but this does not account for the discussion of these issues during the two legislative sessions.

State Supreme Court had not ruled on any case, and after 1880 the court ruled on only ten. Thus, the power to change existing sex crime statutes gravitated from the legislature to the state Supreme Court.

The second effect of the changes to constitutional law was that of the national “codification” movement, the goal of which was to represent law as objective, neutral, and apolitical. Legal reformers believed that common law, based on the past, was entirely inappropriate for an Age of Reason. According to historian Lawrence Friedman lawmakers reasoned as follows:

It (state law) was huge and shapeless. Common-law principles had to be painfully extracted from a jungle of words. “The law” was an amorphous entity, a ghost, scattered in little bits and pieces among hundreds of case-reports, in hundreds of different books. Nobody knew what was and was not law. Why not gather together the real principle of law, put them together, and build a simple, complete and sensible code?^a

Ohio, following the national trend, labored to make civil and criminal law more accessible, more simplistically written, and easier to comprehend through the 1880 “Ohio Revised Code.” In creating the code, the legislature simplified the existing definitions for rape and incest, and placed them in categories. Rape was listed in the state’s statute books under Crimes Against the Person, which also included such crimes as robbery, administering secret medicine, and maiming another individual. Returning to the definitions used earlier in the century, lawmakers established one standard for rape,


melding both first- and second-degree rape into one definition as follows: “Whoever has carnal knowledge of a female person forcibly and against her will, or, being seventeen years of age, carnally knows and abuses a female child under ten years of age, with her consent, is guilty of rape.” The distinctions between the various forms of rape crimes were relegated through the punishment phase of the legal procedure, rather than in the definition itself, with life imprisonment the price meted out to a man convicted of raping his daughter, sister, or any given female child under the age of twelve. In counterpoint, a person convicted of raping any non-family related female received a sentence to the state penitentiary for a period from three to twenty years.

Two other areas of the definition of rape changed towards the end of the century. Each would have a crucial effect upon the ability to prosecute offenders and protect young girls. Addressed more explicitly later in this study, social purity reformers who increasingly became active in the 1880s and 90s would push for the eradication of the emissions requirement and an increase in the female age of consent. Women, who had repeatedly declared that they had been raped even though emission had not occurred, ultimately succeeded in changing the law in a manner that increased the likelihood of conviction. Mary Donnelly, who was raped by William Blackburn in 1871, served as the catalyst for this critical legal change. Like Mary Hunter, the rape was interrupted by a third party before emission occurred. Supreme Court Justices in this case influenced by reformers documented their disapproval of the emissions requirement and encouraged the legislature to institute the change. The process took several years, but by 1877, the legal fraternity was forced to accept at least this aspect of a woman’s definition of rape. In addition, the

39 Ibid., 1619.

40 Ibid., Revised States of Ohio (1890): 2038.

efforts of reformers who wanted more legal protection for young girls resulted in the age of consent for a female child increasing from ten (in 1880) to fourteen years old in 1890.

By the end of the century, the state legislature existent in Ohio had made considerable changes and additions to the established sex crime statutes. In order to enact these revisions, the legislature found it necessary to grapple with existing law within the context of contemporary economic, theoretical, and social forces that weighed heavily upon their decision-making processes. Republican philosophy, economic shifts that placed more value on things than women’s bodies, and transformations in the way society regarded punishment all impacted these legislative changes. Throughout the century the decreasing importance placed on the crime of rape was evidenced in the declining sentences attributed to such crimes. However, some aspects of the law appear to have not changed at all, but remained fixed. In particular, issues of force and consent, strict rules of evidence that made it difficult for women to prove rape, and the ability to rule out even the most conclusive evidence by presenting evidence of a woman’s tainted reputation were consistently at play when women filed charges even through the end of the century. Still, there were advancements in the law, the most significant being the eradication of the emissions requirement and the increase in the age of consent.

Importantly, most revisions of the law were initiated and carried forth without the direct advisement of women. However, women did impact the law. The fact that women possessed their own definitions of what constituted rape, and forthrightly brought such charges forward ultimately forced a change in the law that showed women’s ability to influence a system in which they were to have no part. Jennie Fulmer, who successfully argued that rape constituted extreme cruelty in a marriage, Mary Hunter and Mary Donnelly who insisted that a rape had occurred in spite of the absence of emission, Katie Klopp who filed charges of rape even though her behavior at a dance was considered
"unlady like," and ten year old Gilhooey who bravely told authorities that sex had been forced upon her, all voiced their own conceptions of sexually related crimes and thereby confronted nineteenth-century, patriarchal notions of rape.
CHAPTER 4
“CHIVALROUS WORDS, NEGLECTFUL DECISIONS”: SEXUAL ASSAULT AND THE OHIO STATE SUPREME COURT

During the September term, 1900, John F. Patterson filed as plaintiff in error to the Ohio Supreme Court. Although Patterson had been convicted of an assault with intent to commit rape upon a “little girl,” Eva Pike, he, with the assistance of his attorney Charles D. Saviers, sought to overturn the decision. In their opinion, the essential basis for the error by the Court of Common Pleas of Ross County was that its verdict was manifestly against the weight of evidence presented in the trial. According to Ohio statutes at the end of the century, “an assault with intent to commit rape required that the accused intended to ravish the assailed, against her will, and in his attempt, to use whatever force that might be necessary to overcome any resistance she might make to accomplish his purpose.”¹ The elements of force and resistance were the crucial ingredients for conviction, but Pike’s testimony had not established that either had occurred.

Pike testified that during the afternoon of the day in question she was sitting on the front door step of the house where she lived, when Patterson came and took her back into a shed just off of the alley by her house. He did not say what he wanted her to do, but offered her five cents to follow him into the nearby shed. After entering the shed, he took down her panties, took something out of his pocket and told her to kneel down, which she did not do. During her testimony, Pike did not say that she resisted Patterson,

¹ Patterson v. The State of Ohio, 11 C.C. 602.
nor that he laid his hands upon her other than when he took down her underwear. Before
the incident could go any further, two men entered the shed, having seen Patterson and
Pike going in and being suspicious of their actions. Both witnesses, William Woodard and
Mr. Boerer, testified that the girl looked very frightened and that she had been crying.
However weak the evidence appeared to Patterson and his lawyer, the jury in the lower
court was outraged by the offense, found him guilty, and sentenced him to five years hard
labor at the state penitentiary in Columbus, Ohio.

The Supreme Court Justice who wrote the decision for the case was equally
outraged by the attempted rape and was even a bit critical of the law. Judge Sullivan
wrote that:

However harsh the rule may seem in a case so repulsive in its
features as this one is, yet the intent to use the degree of force to
constitute the offense cannot be presumed against the accused, it
being one of the elements constituting the crime charged against
him. There are several adjudicated cases in which the evidence was
of much greater weight than the evidence of the girl in this, when
the courts of last resort, recognized as the highest authority, held
the evidence to be insufficient to sustain the charge... However
reluctant we are to disturb the verdict in this case, yet personal
disinclination cannot be indulged at the sacrifice of duty.²

However repulsed and outraged Sullivan and other members of the Supreme Court were,
their personal beliefs could not outweigh their duty to uphold the law as specifically stated
in the statutes. And the statutes were specific in that the girl or woman must display a
considerable amount of physical and verbal resistance during an assault. The court did not
question this aspect of the law or expand the possibilities of resistance as they had the
power to do, instead they overturned the verdict of the lower court and freed Patterson
from the penitentiary.

The decision rendered by the Supreme Court informs us about many aspects of the

² Ibid., 604.
relationship between sex crime laws and society. The Supreme Court was clearly inflamed by the assault made upon Eva Pike. Even those who had the ability to alter the letter of the law were outraged, yet the case did not have an impact upon changing the definitions of attempted rape. As Justice Sullivan noted, earlier cases with greater evidence could not bring about convictions, therefore the court could not uphold a verdict of guilty in this one. Like numerous cases that reached the Supreme Court of Ohio in the nineteenth century, the high court’s decisions neglected crucial aspects of rape as experienced by its female victims. Case after case reveals the contradictory nature of rulings that on the one hand morally bemoaned the existence of rape, but on the other hand refused to use their authority to influence the law in a manner that would extend protection to women and young girls. Moreover, although the Court claimed it had no power to alter long established law on one hand, at crucial times, they actually did depart from legal traditions. As will be demonstrated, at these times, race and gender ideologies played decisively in the rulings of Supreme Court Justices.

An analysis of these rulings illuminates the paradox of these dynamic, and reveals the extreme difficulty women faced when addressing their claims to the highest court in the state. Ohio’s Supreme Court stands as the final and most respected word in the legal fraternity. At this level of the system, there was little concern about the woman’s perspective on crimes of a sexual nature, and more concern on defining Ohio’s rules of evidence guidelines on particular areas including -- a woman’s reputation, a woman’s word, her mental capacity and her age at the time of the charged assault. In essence, every aspect of the woman testimony was under intense scrutiny. Each of these factors was utilized by the state Supreme Court to overturn the convictions of sex offenders.3

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Moreover, analysis of the Court’s opinions on such matters reflects the era in which state supreme courts were given more power over defining the law and exercising judicial review. As noted, in the 1840 to 1850s legislative powers were truncated and the Supreme Court exercised increased power over the General Assembly’s definitions of crimes. Thus, beginning in the 1830’s the Ohio Supreme Court set out to make rape law even more distinctive of the state’s perspective on legal treaties and rules of evidence. Through an examination of the Court’s decisions in this period one is able to see not only the topics Ohio’s Court debated over the particularities of rape, but the way the ideologies of the different branches of the legal fraternity agreed and disagreed on these particularities. Often, Supreme Court justices agreed with medical authorities on rape and utilized their ideas to back important aspects of sexual assault. And at crucial times, the State’s highest court decisions differed markedly from the General Assembly’s previously established rape statutes. During such times, the Court would use its newly established more powerful voice to document its disagreement with the legislature. In these decisions and disagreements, then, we are able to see how the legal fraternity is not simply a body of powerful men who decided the fate of female rape victims, but a body of men who quarreled over who was the ultimate authority in the legal system in general and over sexual assault definitions specifically.

A Woman’s Word:

Numerous court documents reveal that when a woman filed a charge of rape, her declarations immediately became suspect. Indeed, it appears as if every sentence she uttered came under intense scrutiny by members of the legal fraternity, forcing one to wonder who was really on trial. An analysis of such cases informs us of many crucial aspects of a woman’s experiences in Ohio’s nineteenth century court system. First, they

inform us of the types of challenges women faced once they entered the legal system. Second, they reveal male perceptions of the proper and “natural” verbal response by women. And third, they reveal how male corroboration of a woman’s word (usually by a male relative, doctor, or community member) strengthened the woman’s statements making her more believable.¹

The 1848 case of *Harrison Johnson v. the State* also involved questions about a woman’s word. Johnson was a seventeen year old white farmer who was living in Knox County with his parents. In November 1848, local authorities brought him before the Knox County Court of Common Pleas for the rape of young Sarah M. Coal. Although the court found Johnson guilty, the defense appealed, claiming the lower court erred in its treatment of Sarah Coal’s declarations after the assault had occurred. Immediately after the rape, Coal told her mother what had happened and she said that it occurred against her will. Coal’s mother testified to this, and lawyers on her behalf argued that this proved she had been raped. Johnson’s attorneys objected and stated that such testimony could not be submitted as conclusive proof. On these grounds they appealed to the Supreme Court.

Speaking for the Court, Judge Hitchcock stated:

There can be no doubt, that in a case of rape, the declarations of the injured female, made immediately or soon after the injury inflicted, are competent testimony, provided the female herself has first been examined; competent not for the purpose of proving the commission of the offense, but as corroborative of, or contradictory to, her statements made in court. If these declarations are in accordance with the testimony given in court, they tend to strengthen and give effect to that testimony; if against it, the testimony is destroyed...For, as a general rule, it would be dangerous to convict, unless immediate complaint was made by the female, to her friends or others.²

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¹ For an analysis of how important corroborative evidence was to a woman’s believability see; Terry Chapman, “Sex Crimes in the West: 1890-1920,” *Alberta History* 35, 4 (1987): 6-18.
The state Supreme Court’s ruling said much about the status and validity of women’s word. Her word in regards to sexual assault was only credible if made “immediately” after the rape and then only if she had been seen by a doctor who observed evidence of force and emission. Her word must be validated by male authority and if she delayed in reporting the rape for whatever reason--fear for example--the court would not accept her charge as credible. By immediately, the court meant the first available moment, the first person encountered by the victim must be told. Further, her statements could not prove a rape had occurred but could “corroborate” or “contradict” her testimony which would either “strengthen” or “destroy” it. This judgment reveals the tenuous position that women’s words held. They could not prove that a rape happened but they could easily disprove that it happened. The decision also reveals the impact the legal fraternity had upon making law. As a male dominated system, Justices believed that it would be natural for a woman to cry rape immediately. Women subject to the crime, however, were often reluctant to tell because of fear of retribution, shame, guilt or the reluctance to have their reputation tarnished.

The Supreme Court called for a new trial for Johnson based on the above judgment, and the fact that the lower court had allowed Coal’s mother’s testimony as proof that the assault had occurred. Johnson was later found not guilty by the same court that had originally declared him guilty. Thus after spending eight months in prison awaiting the new trial, he was released from the penitentiary.

In 1860, another case appeared before the Supreme Court of Ohio that defined the extent to which women’s claims would be believed. The case involved Dr. Davis Green, a physician, and Jane Gray who at the time of the rape was seventeen years old. Court officials described Gray as “a trustful, virtuous girl, robust and healthy, of limited education and intelligence, though of good natural sense.” Dr. Green had appealed his
conviction to the Supreme Court on the basis that substantial evidence had not proven the charge of guilty filed by the Court of Common Pleas of Mercer County. Indeed, the process required so much evidence to substantiate the woman's claims that it appears as if she was on trial instead of the accused.

The essential story of this case is as follows. On June 23, 1857 Gray shared a bed with Dr. Green's daughter in the north-east corner room of a village hotel in Mercer County. Other lodgers, a man and his wife, who would eventually serve as witnesses, stayed in an adjoining room to the south. In the adjoining room to the west, with an unfastened door between them, was Dr. Green and other persons in other beds. During the night, Gray remembered that the defendant grabbed her by the arms, pulled her out of bed, told her he was Dr. Green, and that he had come to have sexual intercourse with her. Green then placed her in a position with her feet touching the floor, and her weight partially resting on them and on the bed and pillows. He then held his hand over her mouth, and she felt a rag between his hand and her mouth so that when she tried to speak she felt so weak or so scared that she was unable, except for a few words—"Go away--Oh dear!" Because she had been drugged, Gray testified that, "during the act, she experienced, the pain of rupture of the hymen, but experienced, upon her clitoris a pleasurable sensation from the coition." She also stated that she tried to push Green away but could not because of his size and the dizziness she felt.

Gray reported that the act lasted only a few minutes but that upon leaving her, Green said "she must never tell it and that it would not hurt her. She then reported experiencing a ringing sensation in her head, a bloody nose, felt weak, drowsy and sleepy, but did not sleep any more that night. She made no more outcries during the rest of the night and did not feel well the next day. Others testified that Gray appeared sad and gloomy and for a week or two was nervous and easily alarmed, and that for three or four

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6 The State of Ohio v. Davis Green, 2 O. 255 (1860).
days she could not sit up for long periods of time. Although friends and family inquired, she did not tell anyone about the occurrence until December, 1857 when it was discovered that she was pregnant.

Many aspects of Gray's testimony became suspect, particularly when the judge reiterated to the jury what facts must be proven in order to warrant a verdict of guilty. To convict, according to Judge Lawrence, "Jane Gray could not be the daughter or sister of the defendant—Crimes Act, sec. 5; that he had carnal knowledge of her, which requires penetration and emission—Williams v. Ohio, 14 Ohio R., 222; that it was had forcibly; that it was against her will; that it was thus had in Mercer County, Ohio. These facts must be established by lawful evidence." At this level in the court system, the only aspect of the charge that was in question was that the sexual intercourse occurred with force and against Gray's will, particularly because of the proximity to other people during the rape, and how little she fought or cried out.

According to court documents, the birth of the child proved that Green did indeed have intercourse with Gray. The prosecutor also proved that the rag held over her face had been diluted with chloroform. The central concern of this jury, then, was to determine the effects of chloroform on the will or mental capacity of Gray. Medical journals from the mid-nineteenth century debated the powers of the drug. If it rendered a woman unconscious or inhibited her ability to defend herself, then rape could occur, but if chloroform influenced sexual desire and acquiescence was given, even if the judgment and conscience did not approve, then rape could not occur due to what experts called "passive submission." This latter aspect applied to Gray's testimony in that she reported experiencing some sexual pleasure. Further, proof had to be submitted that Gray could be able to remember what happened and was not delusional from the dosage of the drug.

Along with Gray's testimony, prosecution lawyers had to submit additional evidence to prove that Green had assaulted Gray. In particular, evidence was required to
prove that she could have been impregnated at the time of the assault. Evidence from medical doctors submitted to the judge and all male jury was limited by the medical knowledge of the day. The testimony reads as such:

The medical authorities show that the human female is very susceptible to impregnation, for a day at least, preceding the menstrual discharge; that she is less so during the discharge which usually continues about four days, because the male semen is liable to be carried off by it; that she is again, after it, very liable to conception, until the ovum is expelled from the uterus and vagina. The termination of every menstrual period is followed by the discharge of an ovum; generally in five or six days; which may be detected in the form of a greenish or grayish tough mucous globule, about the size of a pea, either on water or by wearing a bandage. This is generally preceded by a slight watery mucous discharge, and parturient pains barely perceptible...

The defense lawyers presented such testimony to educate the jury about how they believed impregnation occurred and to substantiate Gray's claim that her menstrual discharge was supposed to have occurred on the 23rd of June, the very day she was raped. With the declarations made by a male physician that indeed Gray could have been impregnated, the court accepted her pregnancy as the key factor in proving that a rape had occurred.

Every aspect of Gray's testimony came under scrutiny; the amount that she resisted the rape, the enjoyment she initially felt, and medical descriptions of common reactions to chloroform, menstruation and pregnancy. After hearing all of the substantiating evidence of Gray's testimony, the Supreme Court believed that she was unable to resist the rape because she had been sedated. They therefore agreed with the lower courts ruling and confirmed the guilt of Dr. Green. One is left to wonder, however, if the same sentence would have been rendered if chloroform had not been used and Gray

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had not become pregnant from the rape. Both courts spent considerable time questioning Gray’s word, and put her testimony to the utmost scrutiny. The child that resulted from the rape served to be the irrefutable proof that her word and physical condition after the rape occurred could not provide.⁸

Early in March, 1872, Mrs. Susan Hale made a formal charge of rape against Orlando Burt, a twenty eight year old farmer who lived with his wife in Norwalk, Ohio. Hale charged that Burt had raped her along side a public highway which she was walking along on her way home. After an abundance of testimony and dramatic physical evidence of force tending to prove Hale’s charges, the Court of Common Pleas of Huron County found Burt guilty of rape and sentenced him to the state penitentiary.

He appealed, however, to the Supreme Court of Ohio based on two alleged errors that occurred at the lower court; one regarded Hale’s statements about the assault to a friend, Mrs. Elon Parker, and the other surrounded the testimony of Charles L. Hurlburt, the town constable. During the trial in the Court of Common Pleas, counsel for Hale had called several witnesses to affirm the statement Hale made immediately after the rape had occurred. Mrs. Parker was one of those witnesses. She stated that when Hale came to her house her clothes were ripped and soiled, and Hale told her that she was raped by Orlando Burt.

In their appeal, Burt’s lawyers contended that Mrs. Parker’s testimony was incompetent because “the declarations of the injured female, that are admissible in corroboration do not extend to proof of what she said as to who did it.”⁹ Their reasoning behind this aspect of their appeal was that the only evidence that was admissible was that which was “natural” to the female sex. They stated:

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⁸ The court documents for this case state that the child was Dr. Greens but does not explain how this was concluded.
⁹ *Orlando Burt vs. the State of Ohio*, 23 O.S. 394 (1872).
... A crime or outrage of this nature is specially abhorrent and shocking to the feelings of a female, and that her statement, made immediately after the offense was committed, in connection with her condition in person and apparel at the time, is admissible to corroborate her statement that the act was committed against her will. That the natural modesty of the sex, and their utter dislike to make any statement or admission against their own purity, is a sufficient guaranty(sic) for the truth of what they may say in regard to the act immediately after its commission...Her statement to others, as to who did it, how he was dressed, his complexion, height, and other means of identification are not matters in any degree peculiar to her sex, and are not, therefore, any more admissible to corroborate her upon the point of identity...10

The reasoning used by Burt’s layers and later substantiated by the Supreme Court justices reveals societal assumptions about female sexuality and virtue, and their connection to the spoken word. It was believed that if a woman was “outraged” she would tell others about it at the first opportunity, and if she did she would be believed because no woman would lie and want her purity tarnished. Although it was considered “natural” for Hale to report the crime immediately, it was not “natural” for her to able to identify the assailant as proof of who the rapist had been, even if, as with Susan Hale’s case, the assailant was someone familiar to her. The lower court was eventually found in error for admitting the testimony of Mrs. Parker who had stated the identity of the offender as declared by Hale. Although the lower court agreed that a rape had occurred, Hale’s statements about who committed it were inadmissible.

By 1872, the court had at last come to clarify and substantiate that women’s declarations were strong evidence to be brought before the court. In the Burt case the Court even allowed all of Mrs. Parker’s testimony about Hale’s declaration regarding the rapist. Although her words were allowed apparently a woman’s word alone was not

10 Ibid, 397.
enough for conviction. The second aspect of Burt’s appeal reveals that the corroborated and substantiated testimony of a man was needed in order for the state Supreme Court to support the ruling of the lower court.

The second aspect of Burt’s appeal revolved around the testimony of the town constable, Hurlburt, who arrested the defendant upon warrant. After his arrest, Hurlburt took Burt to Susan Hale’s home so that she could identify him as the guilty party. Hale did identify him and declared in his presence that he was the man. Such testimony would have supported Hale’s claims except that Burt told his attorneys that at Hale’s house, Hurlburt said, “Mrs. Hale, as you can not identify him and swear to him positively, there is no use in my holding him and taking him to Norwalk.” Burt also claimed that Hale could not positively identify him. Thus, constable Hurlburt’s testimony was suspect and by being so, so was Hale’s testimony that she had identified Burt as the attacker. Her word was refuted even though Hale had many witnesses testify both to her character and to her declarations and appearance after the rape occurred. And even though the Supreme Court stated that a woman’s “natural” response to a rape was enough evidence to convict when the physical evidence of force was evident, the reported flaws in Hurlburt’s testimony made the Supreme Court rule in favor of the appeal and grant Burt a new trial. By allowing Burt a new trial, which eventually set him free, the Supreme Court further devalued the creditability of women’s word. To the court, a woman’s declarations were simultaneously of grave importance and easily discredited. But, a woman’s words were not the only issue the state Supreme Court deliberated over. Her moral reputation would be a crucial factor in the believability of her allegations.

**Woman’s Reputation:**

Upon hearing about the sexual assault upon his wife, Samuel Gertsch went to the home of Alexander McCombs, the alleged assailant, to settle the matter. Instead of
defending his wife's honor verbally or physically, as one might expect from nineteenth century notions of manhood, Gertsch asked McCombs for five dollars to settle the matter. McCombs refused to pay thus Mr. Gertsch resorted to the legal system to defend his wife's honor. At the court of common pleas, McCombs was found guilty. McCombs appealed the decision for what he considered unfair legal judgments that occurred in the Court of Common Pleas of Tuscarawas County. In 1858, McCombs vs. the State became the first case to come before the Supreme Court that would decide what aspects of a woman's reputation would be admissible in court.

Deciding on what impact the sexual reputation of a woman should have on sexual assault cases was a new issue for Ohio's upper court, one that would be a central issue several times during the rest of the century. Ohio's Justices were not alone in their concern about a woman's reputation, for nineteenth-century judges and juries seem to have been almost pathologically driven in their quest to assess the reputation of raped women. Women known to drink alcoholic beverages, frequent taverns, or indulge in extramarital sex were virtually guaranteed legal rebuff when they complained of violent rape. Maria Gertsch was one of these women.

During the trial, defense attorneys asked Gertsch a series of questions, the goal of which was to make her appear as a promiscuous and immoral woman whose reputation was highly questionable. Lawyers for McCombs asked Gertsch, "How many bastard children have you had?" and, "Have you ever had two bastard children?" The questions were objected to and the Judge sustained them. The defense continued, however, and asked her "Did you ever prostitute yourself for money?" Finally, after it had been proven

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11 McCombs vs. the State of Ohio, 8 O.S. 643 (1858).
12 See Karen Dubinsky, "Sex and Shame: Some Thoughts on the Social and Historical Meaning of Rape" in RFR/DRF 19, ¾ ((1990): 83, where she argues that the single most important factor in sexual assault trials was a woman's character. Because of this, Dubinsky argues, women were always at a disadvantage, since the prevailing sexual climate determined that moral scrutiny was applied more often and more harshly to women.
that Maria Gertsch had been married to Samuel Gertsch for four years prior to the trial, counsel for McCombs asked, “How long were you and your present husband Samuel Gertsch, living together as man and wife before you were married?” The judge again did not allow the question.

Such questioning says a great deal about the motivations of the defense lawyers in this case. Essentially, they aimed to place into question Maria Gertsch’s reputation before the jury. By stating the questions as they did they effectively sought to tell the jury that she had two children prior to marriage, implied that she had lived in sin with a man, and perhaps worse than that she may have prostituted herself, certainly considered a most degrading act by the sexual standards of the day. Whether or not such actions were true was not at issue. Instead, the implication was that a woman of such loose sexual morals was of questionable believability and certainly could not have been forcibly raped. Since the judge did not allow responses to these questions, McCombs appealed to the Supreme Court on the grounds that his attorneys were not allowed to get answers to questions they believed pertinent to their defense. In this important decision the Supreme Court ruled that specific details of a woman’s sexual history would not be allowed in court nor could she be interrogated about previous “criminal intercourse.” But, the Court stated, testimony about her general reputation for chastity was admissible.¹⁴ McCombs lost his appeal and was remanded to the state penitentiary to complete his three year sentence. The McCombs decision was a critical one in that at least a woman’s entire sexual history and the details of her “criminally” immoral behavior could not be presented in Ohio’s courts.

The following year 1859, McDermott vs. the State came before the Supreme Court of Ohio, and again the issue that served as the basis for appeal was a woman’s reputation. The disputed issue in this case revolved around an alleged conversation that occurred on a train heading to Warren, Ohio between McDermott and the victim Sarah Helme.

¹⁴ McCombs v. The State of Ohio, 8 O.S. 643 (1858).
McDermott at the time was a twenty two year old white man who worked as a hotel keeper in Youngstown, Ohio. He was also married and had a child. Little is known about Helme except that allegedly she agreed with an unnamed male passenger on the train to meet him on a future day and have sexual intercourse with him. Records also report that Helme said if her husband was not in Warren to meet her, she would have sex with this man there. McDermott overheard the conversation and later attacked and raped Helme on the train. McDermott admitted to having sexual intercourse with Helme but denied that it was rape. Part of McDermott's defense argument was that as a result of Helme's conversation with the unnamed man, she must have “experienced awakened desires and lascivious propensities...thereby lessening the probabilities that it was consummated forcibly and against her will.”

Other evidence admitted also tended to place into question Helme's reputation. McDermott’s lawyers brought “several witnesses” to the stand to testify to the general character of Helme. Unanimously, they reported that her reputation for chastity was “bad.” Such testimony was allowed according to the McCombs ruling, however it did not allow for specific acts of “immoral and lewd” behavior to be reported to the court. Nonetheless witnesses for McDermott spoke “of certain specific reports in circulation of her improper intimacy with two men, Andrew Pritchard and also with Levin Arnold.” Although Helmes' lawyer could have objected to such testimony he did not. Instead during cross-examination and when he later called the witnesses back to the stand, Helmes' attorney tried to prove that the reports of sexual intimacy were not true.

McDermott filed a writ of error to the Supreme Court on two counts: First, that Helme was sexually aroused prior to the reported rape and that such testimony should be held credible in court. And second, that Helme's lawyers should not have been allowed to disprove the testimony of the witnesses that spoke of specific sexual acts that Helme


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allegedly had engaged in.

The Supreme Court ruled without much discussion on the first matter. "It by no means follows" the Court decreed, "that a desire to have sexual intercourse with one person, tends, legitimately, to prove a willingness to have like intercourse with another and different person. Indeed, the reverse is much the most probable; but, however this may be, the introduction of such proof is opposed to the well-settled rules of evidence."[16]

On the second matter, the court went to extensive lengths to clarify the issue of reporting on the prosecuting woman's chastity. As in the McCombs case, the judges stated that particular acts of lewdness with persons other than the accused were not allowed for the following reasons: "First, because she is presumed to be unprepared to disprove such specific accusations, without previous notice; and secondly, because it would create collateral issues, indecisive of the guilt or innocence of the accused, but well calculated to embarrass and mislead the jury." Further, they stated that the nature of the testimony concerned her "bad" reputation for chastity was not that such reputation was deserved, but that it was "generally accredited." The court therefore ruled that cross examination of such witnesses was allowed in order to show the jury that no such reputation existed, or to establish the extent of the reputation and be able to determine how far it affected her credibility. In general, the decision offered a bit more protection for women who brought forth sexual assault charges. However, allowing testimony of even the general reputation of the victim opened up the possibility that women would not be believed, added to the humiliation women experienced in court, contributed to the notion that a woman's past sexual history related to her believability about rape claims and contributed to the paradox that it was more the woman/victim on trial than the alleged rapist.

Interestingly, although the Supreme Court judges ruled against both errors filed by

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[16] Ibid., 334.
McDermott's lawyers, he was granted a new trial on the basis that the lower court erred in admitting testimony about alleged sexual intercourse between Sarah Helme and another man Andrew Pritchard. The new trial found McDermott not guilty and he was released from the state penitentiary after serving thirteen months of the original sentence. Apparently, Helme's sexual past was controversial enough to cause the lower court that had previously convicted McDermott to clear him during the re-trial.

The Emission of Sexual Fluids:

The legislatures that defined nineteenth-century crimes established that one of the necessary ingredients constituting rape was the “emission” of sexual fluids by the male perpetrator. Forced penetration alone was not legally considered rape until late in the century. This aspect of the law was not peculiar to Ohio but was an element of English Common Law that most other states also adopted. Therefore the emission requirement can be found in the earliest legal evidence books. It was not, however, formally discussed by the legislature in the early years of statehood but was addressed in the third rape case on record to be appealed to Ohio's Supreme Court in 1846.

Although an established aspect of rape law, requirements for sexual emission were swayed by sexualized notions of race. The case Williams v. The State of Ohio had profound influence upon the written law, especially as it related to free black men.\(^\text{17}\) Joseph Williams was a thirteen year old black adolescent who worked as a waiter in Columbus, his native town. Williams was charged with rape and assault with the intent to commit rape upon an unnamed white woman. Williams was found guilty of the later charge, attempted rape, by the Court of Common Pleas of Franklin County. Although William's defense lawyers had successfully argued that he could not be convicted of rape because he had not reached the legal age of sexual maturity where he could have the

\(^{17}\) Joseph Williams v. The State of Ohio, 14 O. 222 (1846).
ability to eject sexual fluids, they had not succeeded in clearing him of all charges. Lawyers for Williams believed that legally, he had not committed any crime. Thus, they appealed to the state Supreme Court.

A writ of error on Williams’ behalf was filed on the grounds that the verdict contradicted “the laws of the land.” According to the English Common law on emission that influenced Ohio’s rape law, “a boy under the age of fourteen, could neither be convicted of the offense of committing a rape, nor of an assault with an attempt to commit a rape, no matter what might be his physical capacity.” The reasoning was that since legally rape had to involve both penetration and emission, a boy under the age of fourteen could not emit sexual fluids because physically he had not reached manhood. Therefore he could neither rape nor attempt to rape. For this reason they argued, the conviction on the intent to rape against Williams should be dropped.

State lawyers on behalf of the unnamed white woman, however, submitted that the law mentioned above applied in England but not in a nation such as the United States where there are people of every nation, “and especially (those) of the descendants of the natives of the tropical climate of Africa, it was a fact that an infant under fourteen years, was often capable of committing the offense of rape, and hence the safety of community requires that here the presumption of law should give way to proof.” As proof, the lawyers submitted to the high court criminal evidence treatise, transcripts from other cases, and references to several medical journals that discussed physiology and race.

After review of the evidence submitted, the state Supreme Court stated that it hesitated to change long standing laws but that it was necessary when society changed. The Court therefore declared:

18 Ibid., 223-224. Defense attorneys cited the following English Common Law treaties; 14 Eng. Com. Law, 367; 38 Eng. Com. Law, 63; 8 Carr. and Payne, 736 regarding emission laws where “strictness of the rule had not been departed from.”
19 Ibid., 224.
But if, in a vast majority of cases, infants under the age of fourteen years, are incapable of emitting seed, then it is a reasonable and necessary presumption of law that any named infant under that age, is incapable of committing the crime; and the presumption is strong or weak just in proportion to the rareness or frequency of the exceptions. Now, in the moist and cold climate of England and most of the countries of Northern Europe, it is so seldom that an infant under the age of fourteen is capable of emission, that it is assumed as a fact that, prior to that age, he is never capable; and hence, under that age, no one can be convicted of rape. But, in tropical climates, where the male usually arrives at puberty before the age of fourteen, the rule, instead of being founded in reason, would contradict both reason and fact. It is an admitted law of physiology, that climate, habit, and condition of life, have much influence in hastening or retarding the age of puberty. Different races of men differ as to the age of puberty.

Based on this argument supported by medical authority, the court upheld William’s original conviction and sentence of three years at hard labor in the Ohio State Penitentiary, of which he spent the entire three years. Racial ideologies had the ability to actually change long-standing legal traditions. In the aftermath of this case, the General Assembly attached an addendum to the rape statutes that read as such. “An infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it, but that presumption may be rebutted by proof that he has arrived at the age of puberty and is capable of emission and consummation of the crime.” Therefore, the sexual assault conviction age range for young black males became much broader than for whites. Ideas of race worked powerfully in Ohio’s legal system.

Although primarily an issue of race, the Williams case confirmed the necessity of emission for a conviction of rape in Ohio. Ohio lawmakers adhered to this requirement

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20 Ibid., 226-227.
21 Ohio Laws (1835): 185. The record indicates that acceptable “proof” included medical treatise on race and physiology, or the examination of a young male’s physical development including body hair growth etc. See, Hiltabiddle v. The State of Ohio, 35 O.S. 52 (1878).
until late in the century. By 1871, however, questions began to arise about the need to have such a requirement. The case to come before the Supreme Court to do so was an appeal submitted by William Blackburn. In the Court of Common Pleas of Montgomery County, Blackburn was convicted of committing a rape upon Mary Donnelly. Blackburn and his counsel appealed on the basis that although penetration had occurred, there was evidence tending to prove the absence of emission, because Blackburn and Donnelly were separated during the act by a third person coming to Donnelly’s aid. Further, they charged that the lower court judge erred when he told the jury that emission was not necessary in order to constitute the crime of rape.

Justice Welsch of the Supreme Court expressed the Court’s disapproval of the emission requirement of rape law but nonetheless took no action to change it, leaving it to the state legislature to do so. He stated that:

In England, in New York, and perhaps in other states statutes have been passed eliminating this element from the crime....Were it a new question, we would strongly incline to contrary decision, we do not feel at liberty to depart from the doctrine laid down in that case (Williams v. The State of Ohio). The remedy, if any is needed, we think should be left with the legislature.²³

As a result of following the Williams decision, the Court, however reluctantly, ordered a new trial for Blackburn during which he was cleared of all charges. Thus, with this decision, the Supreme Court validated the necessity of emission in rape. The emission question proved to be an area of controversy between these two branches of Ohio’s legal fraternity. The Supreme Court felt that the legal trend was moving in the direction of eradicating the emission requirement and made their opinions known to the legislature. Three years later, during the 1874 legislative session, Ohio’s General Assembly would be

²³ Ibid., 111.
forced to debate the issue and by 1877 it was removed from the statutes.\textsuperscript{24}

Whether due to the general inefficiency of Ohio's court system, or to a Common Court judge in Richland County who did not keep up on legal decisions, the state Supreme Court would have to rule on the emission issue one more time. In 1878, John Hiltabiddle was convicted of raping an unnamed eight year old girl. A great deal of controversy occurred during the trial in the lower court because Hiltabiddle was thirteen years and nine months old, thus close to the legal age of male maturity which was fourteen at the time.\textsuperscript{25} Two medical doctors with "long experience" testified that Hiltabiddle had reached the point of physical maturity where he was able to emit "sexual fluids." They concluded this after extensive examinations of his body in which they examined "the size of his testicles, underarm hair growth etc."\textsuperscript{26} Another doctor, however, determined that Hiltabiddle was too young which served as the basis of the appeal filed to the Supreme Court. The high Court utilized this case to establish that "carnal knowledge...was complete upon proof of penetration only" and cited changes to rape law made by the legislature. Hiltabiddle was given a new trial based on the error made in the lower court of allowing emission to be an issue.\textsuperscript{27}

\textit{Mental Capacity:}

Ohio statutes previously recognized the need to protect insane women from sex crimes. It was a crime to have "carnal knowledge with an insane woman" if the male was sixteen years or older, whether she consented or not. The question about the ability of an insane woman to be raped came before the Court of Common Please of Athens County in

\textsuperscript{24} 74 Ohio Law 349, 31.
\textsuperscript{25} Hiltabiddle v. The State of Ohio, 35 O.S. 52 (1878).
\textsuperscript{26} Ibid.
\textsuperscript{27} It is unclear whether or not Hiltabiddle was found guilty in the second trial. It appears as if he was because it was proven during the first trial that an assault, penetration, and rupturing of the hymen were committed upon the girl, and that Hiltabiddle caused it. Because he was young, Hiltabiddle was sent to a youth reform farm after the first trial. Records from that farm are unavailable for research.
1853. The woman in this case was seventeen year old Louisa Dowler who lived on a farm valued at $1,000 with her mother, three brothers and a male border. Dowler was listed as "idiotic" by county officials. The alleged assailant in this case was John Crow a twenty four year old unemployed white male who was living with his uncle in the same county. Crow was familiar enough with Dowler to know that she was "idiotic" and had been so from birth.

Council for the defense argued that by definition, Dowler, an insane woman could not be raped because she, "being an idiot, had no will, and, therefore, that a rape could not be committed on her person against her will." Supreme Court Justice Nash was alarmed by such a "startling" position and argued against it. According to Nash, if an insane woman "has no will to be overcome, she has none to consent; and then the law implied that the act, being accomplished by force, is done against her will." Therefore, the consent would need to have occurred, and since an insane woman could not give consent the act would have had to occur by force. In the end Crow was found guilty of the less weighty crime of an assault with the intent to rape, and sentenced to serve three years in the penitentiary. He was pardoned by Governor Meddle after serving one year and eight months in prison.

In 1879, another case involving an "insane" woman named Ada Wyatt came before Ohio's Supreme Court. During the trial The State vs. Hornbeck in Marion county, it was decided that even though Wyatt was twenty-three years old, she was incapable of testifying because she was an "imbecile." Her mother, Mrs. Mary Wyatt testified that on the day of the assault, she was absent from the house for a short time, having left Ada in the care of her grandmother. As she returned home, Ada met her and told her that a peddler of rat medicine (Hornbeck) had been at the house and had sexually violated her in

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29 Ohio Penitentiary, Registrar of Prisoners (1850-1855).
the wood-house. Ada’s statements “tended strongly to prove the commission of the alleged offense.” These declarations were objected to by Hornbeck’s attorney, but the judge overruled the objection and admitted the testimony. The jury of the lower court ruled that Hornbeck was guilty and sentenced him to the penitentiary.

Hornbeck utilized this aspect of the trial for his appeal to the Supreme Court. Defense attorneys argued that an error occurred in allowing Mrs. Wyatt to state what Ada said to her because Ada had not been sworn before the court nor could she testify because she was mentally incompetent to do so. Further, they argued that the testimony Mrs. Wyatt gave swayed the jury when other evidence could not prove the assault had occurred. The Supreme Court again expressed their chivalrous notions by stating that although it appeared as if some “wrongdoing had occurred between the two” (i.e. Hornbeck and Ada Wyatt) it had to agree with the appeal and ruled that, “the fact that the declarant is incapable of taking an oath, by reason of imbecility, insanity, or infancy, will not justify a departure from the long and firmly-established rule of evidence on the subject.” As a result, Hornbeck was allowed a new trial in the court of common pleas and was cleared of all charges.

Although only two cases involving the rape of women with mental incapacities made it to the state Supreme Court, both of these cases inform us about how credible women’s declarations were in Ohio’s court system. In the first case the court upheld part of Dowler’s charge, most likely because the assailant, Crow, admitted to the crime. Had he not, patterns show that Dowler’s case may have resulted like Ada Wyatt’s did. The only testimony prosecutors could submit in the Wyatt case were either the words of the mother, or the words of the young woman who was considered unfit to testify. Thus, the sworn testimony of two women could not substantiate the crime. The state Supreme Court’s empty declarations towards the desire to protect women must have sounded hollow to Ohio’s women who were repeatedly denied convictions.
Cases involving the sexual abuse of female children appeared frequently on the Ohio court dockets. Such cases brought forth the loudest exclamations of abhorrence from state justices and resulted in the toughest punishments from the state legislature. By 1820, the legislature separated the crime of rape into two categories; first and second degree. First degree rape was considered the most heinous and defined as having been committed against one’s daughter or sister with a punishment of life in prison. The punishment for second degree rape was seven to twenty years in the state penitentiary. Thus, very early on, the legislature made the sexual abuse of one’s family member, especially a child, morally and legally reprehensible. The state Supreme Court regularly echoed similar disgust, but their decisions did not follow their sentiment.

During the December term in 1867, William Moore appealed to Ohio’s Supreme Court. The alleged victim in this case was Fanny Moore, William Moore’s daughter. William Moore was originally charged with “incest, assault with intent to commit rape, and rape upon his daughter” in the Pickaway County Court of Common Pleas. The lower court found him guilty of rape upon his daughter and sentenced him to life in the state penitentiary. Moore never served any of the prison term, however, because he was released for a new trial by the state Supreme Court. Attorneys on his behalf filed a writ of error to the Supreme Court based on what they believed to be inadmissible testimony from a state’s witness.

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30 For Supreme Court cases not discussed here see; Smarr v. the State of Ohio, 4 C.C. 614 (1890). For a comprehensive analysis of statutory rape see; Kathleen Parker, “‘To Protect the Chastity of Children Under Sixteen’: Statutory Rape Prosecutions in a Midwest County Circuit Court, 1850-1950,” Michigan Historical Review, 20, 1 (1994): 49-79. In this study, Parker finds that Michigan courts reveal an extraordinary focus at the pre-trial level on complaints of sexual intercourse with girls below the age of consent, and only minimal concern with complaints made by women of consensual age.
During the trial in the lower court, the state acting on behalf of Fanny Moore, called as a witness a physician. The physician testified that he had made an examination of William’s daughter four days after the time when the crime was to have been committed. He testified that, "he found on her evidence of violence, and also of disease, but that there was no means of determining with certainty whether the disease was gonorrhea or vaginitis, the pus and other evidences of disease being indistinguishable in the two cases.” The witness also testified that he “made an examination of the person of the prisoner William Moore at the same time, and found that he had gonorrhea.”

After making this testimony, the prosecuting attorney asked the witness what, in his opinion, was the disease of Fanny Moore at the time he examined her. To this question the witness replied, “Judging from the examination of said Fanny alone, his mind was in suspense, but that taking into consideration the facts aforesaid in regard to the pus upon her drawers, and the fact that said William Moore had gonorrhea, he was of opinion that said Fanny had gonorrhea.” The counsel for William Moore objected to this testimony, and asked the court to rule it out. But the court overruled the motion, and held the testimony to be competent. Whether or not Fanny Moore had been sexually abused and that a disease resulted from the abuse was not under dispute. But, the evidence of disease must have been the crucial evidence to link the sexual abuse that Fanny Moore experienced from her father.

Although convicted in the lower court, William Moore appealed. To the Supreme Court, William Moore's lawyers argued that the physician's testimony was inadmissible because he had no basis to presume that Fanny received gonorrhea from her father. The Supreme Court ruled in favor of the appeal noting:

Whether the father had so been in contact with her, was not a subject matter of professional opinion (by the physician). It was a

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31 Moore vs. the State, 17 O.S. 479 (1867).
32 Ibid., 480.
question of fact for the jury, determinable by ordinary evidence, and requiring no peculiar science or skill. The physician might properly have been permitted to say, as a matter of professional science, that the disease was in his opinion contagious; or that, if the father had been in contact with her, he would give it as his opinion that her disease was also gonorrhea.\textsuperscript{33}

This somewhat small difference in language was enough for the Supreme Court to reverse the original judgment of guilty and award a new trial for Mr. Moore. William Moore was eventually cleared of all charges because it was not proven with satisfaction that Fanny received gonorrhea from her father, even if it was finally decided that she did have the same disease. As the Court noted, the physician needed only to have reworded his hypothesis in order for it to be allowed in court. The Moore case serves as example of how easy it was for the Supreme Court to dismiss sexual assault cases involving children.

Several cases that show the neglect of the Supreme Court centered around the issue of age and the ability to consent.\textsuperscript{34} The first of such cases involved a child named Desire Franks who was under ten years old at the time of the assault. Although records do not indicate the specific age, they do indicate that the accused, Ebenezer Smith, was a mature adult when he was charged with the crime in 1861. Prevailing statutes declared that carnal knowledge with or without the consent of a female child under ten years old was rape. The legislature was clear in this aspect of the law because they believed that a female child was not considered psychologically mature enough to give consent to sexual relations. The law was unclear in Smith’s case, however, because although Franks gave consent, actual intercourse did not occur. There was an attempt by Smith to have sexual intercourse, but Franks’ mother interrupted Smith’s attack. Franks’ mother was so upset when her daughter told her about Smith’s persuasion for sex that she sought the help of

\textsuperscript{33} Ibid., 481.

\textsuperscript{34} For a discussion on the age of consent see, David Pivar, \textit{Purity Crusade: Sexual Morality and Social Control}, 1868-1900 (Greenwood Press, 1973). In pages 104-105 and 140-143, Pivar discusses how purity reformers push state legislatures to increase the age of consent as a means of protecting young girls from rape, seduction and other sexually related crimes.

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the justice system. Eventually, Smith was charged with felonious assault with the intent to ravish. After reviewing the evidence and hearing the testimony presented, the Court of Common Pleas of Sandusky County found Smith guilty and sentenced him to three years in the Ohio State Penitentiary.

Smith, however, never set foot in the penitentiary. He and his council avoided the punishment by appealing to the Ohio Supreme Court on the grounds that rape statutes did not contain the crime for what he was convicted. Judge Peck of the Supreme Court stated, "The question, therefore, arises whether the mere attempt by a male person of the age of seventeen years and upward, to have carnal connection with a female child under the age of ten years, she consenting to the connection and voluntarily submitting her person to his operations, is a crime in Ohio..." (emphasis his). At issue to the Supreme Court was not only that "an attempt" was not a crime, but that there was also a contradiction between the ability to assault or force a consenting person. Justices called it a "legal absurdity." In essence, although the legislature declared that a girl ten years or younger was not mature enough to give informed consent, the Supreme Court believed that young girls like Franks could knowingly consent and that if they did, no force could have been involved.

To decide on these questions, the court reviewed previous cases and decisions which included similar dynamics. The majority of the cases came from English Common Law records. Upon review, Ohio's Supreme Court noted that the "weight of authority in England seems to be that such connection, if consummated, does not constitute a rape; and that where it is not consummated, the person can not be found guilty of an assault with intent to commit a rape, nor even of a common assault." Thus, under English Common Law young girls were considered knowledgeable enough to give consent to

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35 Smith vs. the State, 12 O.S. 466 (1861).
36 Ibid., 469.
sexual relations. So, under this precedent, neither the commission of a sexual act with a young consenting girl, nor the attempt was considered a crime. By 1867, one state in the union, New York, disagreed with English legal tradition and made both having sex with a consenting minor and an attempt to have sex with a female minor illegal.

The case of *Hays v. The People* occurred in New York in 1841. This case was an indictment for an assault with intent to commit a rape upon a child under ten years of age. Judge Cowen in this case held that “the assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender” (emphasis his). Judge Cowen reasoned that a child could not understand the ramifications of the sexual act enough to fully give consent, thus, a crime could occur even if it was “merely” (as Ohio’s magistrates stated) an attempted rape that was made.

Regardless of the New York decision, and the fact that the court had the ability to alter the law, the Ohio Supreme Court concluded that “an attempt” was not enough to convict. Prior to making its ruling, the Court commented that the “legal impossibility” of forcing a consenting person had already been a part of Ohio law. The legislature had previously established that “rape” by definition included consummated sexual intercourse with a consenting child under ten years and was punishable by imprisonment. Ohio’s Court noted that the legislature may have inadvertently included this aspect of the law, but that it nonetheless disagreed with what it saw as inherent contradictions.

The Supreme Court of Ohio did not attempt to influence the law to add additional legal protection for female children. This is particularly revealing in that they could have done so, as Judge Cowen had in New York. In fact, one of Ohio’s magistrates dissented to the decision on grounds similar to the *Hays vs. The People* of New York case. One dissent, however, did not sway the other members of the court for they decided that Smith should be cleared of all charges. Thus, another neglectful decision was made with empty

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38 1 Hill, 351.
regret when the court made the following seemingly sympathetic declaration:

It is much to be regretted that an attempt to have carnal knowledge of a child of such tender years, the child consenting thereto, and the attempt not having been consummated, is not punishable as a crime in Ohio. In this respect our little ones are not so well protected from demoralizing influences...}

As a result, Smith was released from prison. In essence, the Justices decided to ignore their personal or moral opinions, and the one case that changed this type of law in another state. Their adherence to English Common Law when it was not required, disagreeing with state law as defined by the legislature, and behaving as if they had no ability to impact the law directly impacted the ability to prosecute the actions of men like Smith. Ultimately, the Supreme Court ruled in ways that left young girls of, "such tender years" unprotected from "demoralizing influences."

Although the legislature believed in 1861 that a female child under the age of ten was incapable of knowingly giving consent, by 1867 justices began to erode this aspect of the law. In that year, the case of O'Meara v. The State of Ohio weakened this aspect of female protection against sexual assault, becoming the second case where the Supreme Court addressed the issue of age and consent. Originally, the case had been tried before the Hamilton County Court, after which an error had been filed about the limits of a female’s ability to consent. The case involved the attempted rape of Sarah Doren, who at the time was eight years old. The offender, O'Meara, was also young, being fifteen at the time of the alleged crime. As young as he was, however, O'Meara was no stranger to being accused of such a crime. In fact, at the time that his second indictment for sexual assault was going to trial, the first charge was still being investigated. The central concern of this case was whether or not Doren’s alleged consent to O’Meara’s sexual advances fell

under the state’s legal conception of consent. The Supreme Court found the lower court in error for giving the jury the following instructions:

1. That the law presumes a female less than ten years of age incapable of consenting to sexual intercourse.

2. That the consent which defeats a prosecution for rape, or for an assault with intent to commit rape, is that of a will so far under the enlightened guidance and control of the other faculties, that the mind can fairly comprehend the nature and judge of the consequences of the act.

3. That the evidence to rebut the presumption of inability to consent, must satisfy the mind ‘beyond a reasonable doubt’ that the female child had such enlightened will, and did in fact consent; otherwise the act must be held to be forcible, and against the will of the child. ⁴⁰

Thus, the jury was to decide if Doren had enough of an “enlightened will” at eight years old to understand the nature of the sexual act and its consequences. Although the first instruction to the jury echoed the necessary age requirements according to state law, the Supreme Court argued against the validity of the last two, and even questioned the first.

Regarding the legal age of ten the Supreme Court declared:

The strict rule will hardly ever be actually resorted to in practice, because in almost all cases there will be some evidence, pro or con, to show the actual degree of intelligence of the child; and in all cases it will be a question of fact for the jury, whether the child did in fact understand the nature of the act. Of course, the presumption grows weaker and weaker as the child approximates the age of ten, amounting to little more than a nominal presumption during the later part of the period.

Whereas earlier in the century the legislature and the court were clear that there was an

⁴⁰ O’Meara vs. The State of Ohio, 17 O.S. 516 (1867): 518.
age that a female child could not understand the sexual act and should therefore be protected legally, the Court was now limiting that protection even further. The decision gave leeway that could be used by defense lawyers to show that even at a young age, a girl could make an informed decision about whether or not she wanted to have sexual intercourse, and that she would clearly understand the physical nature of the act and the social and psychological consequences that might follow. As the decision notes, this was even more acceptable to the courts when the girl neared ten years of age. The Court created this gray area of the law to note its disagreement with the legislature that a fixed age of maturity was not relevant for all youth. As opposed to the legislature, the Court believed that outside influences such as the moral level of one’s parents, prior sexual experience, and early physical development were factors that could out weigh the legislatures “strict rule.”

Similar to other decisions, the letter of the law appeared to be protective to young girls but continually Ohio’s Supreme Court negated these protections thereby making the prosecution of sexual assault cases even more difficult, and increasing the likelihood that offenders were allowed free. In this particular case, the Supreme Court reversed O’Meara’s original judgment and ordered a new trial. In the new trial, his attorneys provided evidence that Doren was mature enough at eight years of age to give knowing consent. O’Meara was eventually cleared of all charges and did not receive punishment for either of the two charges of sexual assault to young girls.

A victim’s age and consent continued to be a serious issue throughout the century. This was particularly so when the age of the young girl was close to the legally

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41 Discussed in a later chapter, reformers of the social purity movement used medical literature to discuss age of consent issues, and cases where the “immoral” parents corrupted the moral since of a child came before the Ohio Supreme Court later in the century. Thus, it is likely that the Court in this case utilized similar information in this decision.

42 The legal age requirement for the female’s ability to give consent changed throughout the century. From 1804-1875 it was 10 years old, from 1875 to 1880 it was 12 years old, from 1880-1890 it changed back to 10 years old, from 1890 through 1900 it was 14 years old. See the Ohio Code.
defined age when consent could be given. Where the age of the girl was questionable, so were the charges of rape. The 1896 *Jones v. The State of Ohio* appeal to the Supreme Court serves as yet another example. In the Court of Common Pleas of Wayne County, Jones was tried, convicted and sentenced to three years hard labor for having carnal knowledge of a female child under fourteen years of age by the name of Mary Weafler. The substance of the appeal was based on the document that Mary’s father had submitted as proof of her age. According to the record, a few months before the trial Mr. Weafler wrote out a memorandum dating the births of his children based on his memory. Using this document, he testified during the trial that his daughter Mary was born January 3, 1881, making her thirteen years old at the time of the rape. Her exact age was the crucial factor in the trial because she was close to the legal age where consent could be given (fourteen years in 1896 the time of the trial). Upon appeal, the Supreme Court agreed that her father’s testimony was suspect and the other evidence submitted was not enough to sustain the guilty verdict. As a result of the question of age the original judgment of guilty was reversed and Jones was cleared of all charges.

The Supreme Court spent considerable time determining the question of age and the assault of young girls. The written law appeared to protect the innocence of female children by making a rape upon one’s daughter a more serious offense than a rape upon another woman and by legally defining an age that a child could give consent. Yet, the Supreme Court continually excused even repeat offenders of such crimes. Ultimately, the disagreement between the two branches of state government worked to the disadvantage of the female children who entered Ohio’s court system.

*Legal Technicalities:*

In several cases that came before the Supreme Court of Ohio, the accused sex offenders were released on legal technicalities. The first such case was *Edward Howard*
vs. the State of Ohio, a case involving the 1860 rape of a woman noted only as “U” by two men, Howard and “R”. The case impacted the law only slightly, and in a technical manner that reflects the general concerns about written law during the middle of the nineteenth century. Both defendants in this case were found guilty and sentenced to fifteen years in the penitentiary, but Howard, a married man, father and book agent, filed a writ of error based on incorrect wording used in his original indictment. The indictment read that “H” and “R” were jointly charged with having carnal knowledge of “U” forcibly and against her will. Attorneys argued in their appeal that the statement was insufficient in that it did not clearly specify that U was not the daughter or sister of H nor R. Since legally there were two forms of rape; upon one’s daughter or sister, and upon a woman other than one’s daughter or sister, the wording needed to be very specific as to which crime the defendant was being charged. Thus, the Supreme Court clarified the existing law by stating that “one,... these were distinct and separate crimes, and not merely different grades of the same crime. And two,...it is essential for the indictment to state that the woman or female child upon whom the crime is charged to have been committed is not the daughter or sister of the accused.” Records do not reveal what happened to R, but as a result of the technicality in the indictment, Edward Howard was released from prison.

The next case occurred in 1867 and was a gang rape involving two men and a woman. The case, The State of Ohio vs. Frederick S. Miller et. al. was the first of its type because one man actually raped the woman while the other was present. Details about the case are minimal but what records do reveal is that this “new and important” issue continued to clarify rape law and added a new law to the statutes as well. The central issue in this case was how to charge two men who together assaulted and raped a woman. The issue became complex for Ohio’s judges because one man actually committed the sexual assault while the other held the woman down. The lower court of Montgomery
County initially charged and convicted both men of rape. Thus, the appeal was filed on the grounds that two men could not be charged for one sexual act. The court noted that the rule in England was clear, two men could be charged with rape even if only one man committed the act. The state of Arkansas agreed with England as well when a case of the same nature came before its courts. Ohio's Supreme Court, however, made a different decision. Unlike in the McDermott case where they decided to follow English legal tradition, Ohio magistrates in this case, decided to influence the law in a manner that allowed men indirectly involved in a gang rape to be charged with a lesser crime and receive lighter sentencing.

In writing the decision, Justice Smith of the high court saw a distinction between rape and Ohio decisions on the issue of aiding and abetting crimes. In *Breese vs. the State*, for instance, two men were charged with burglary of a store even though one of the men was a mile away from the scene serving as a lookout and never actually took the merchandise. When the case came before the Supreme Court, the Judges ruled that the charge was sound and that Breese was properly cited and convicted as a principal offender. Now, Judge Smith contended that crimes such as burglary, larceny, and murder could be committed by more than one person at the same time, but the crime of rape was different. "...If A. give (sic) the fatal blow, or fire (sic) the fatal shot, and B. is present aiding and abetting A. in its commission. B. is a principal. But on the other hand, rape is a crime, which according to my theory, cannot be actually committed on the same woman, by more than one person, at one and the same time..." Judge Smith did not consider that during a rape committed by two men upon a woman, man B by either serving as a look out or holding the woman down, as in the Miller case, defined him as a principal participant in the crime. In fact, in such a scenario B seems even more involved in the crime than in the cited occurrence where B was one mile away from the scene of a burglary. Justice Smith and the others agreed, however, that a distinction should be made
and as a result classified those who assisted in a rape under the aider and abettor statute.

"If one commits the crime of rape," the court ruled, "and another does not, but is present
aiding or abetting the other in its commission, he should be indicted as an aider, abettor or
procurer under the crimes act."\(^43\) The punishment under this statute was a penitentiary
sentence of up to three years, considerably less than the maximum twenty year sentence
for the man who was charged with rape. Thus, in the crime of arson where one person lit
the fateful match, all the participants were sentenced under equal harshness of the law.
But in the crime of gang rape, only the man who had actual intercourse experienced the
severity of law. Violation of property appears to have been considered more volatile to
the courts senses then the violation of a woman's body.

Throughout the century, legal technicalities continued to allow men charged with
sexual crimes to receive lighter sentences, or to go unpunished.\(^44\) In 1878, Annie
Catherine Corsmier charged Bonham Fox with rape in the Warren County Court of
Common Pleas. Evidence was not sufficient enough for the jury to convict Fox of rape
but ruled; "we, the jury in this case, do find said defendant, Bonham Fox, not guilty of the
rape, as charged in the indictment; but we do find him guilty of an attempt to commit a
rape on the said Anna Catherine Corsmier."\(^45\) Fox was sentenced to three and a half years
in the penitentiary but would not serve any of the time because of the appeal he filed to the
Supreme Court. This appeal was based an a technicality in the language of the ruling
against him.

Fox's attorney, William Wilson, argued that, "The laws of Ohio do not define or
mention any such crime as 'an attempt to commit a rape.' They do provide against the
crime of 'assault with intent to commit a rape,' but they do not name or hint at such

\(^{43}\) *The State of Ohio v. Frederick S. Miller et. al.* 14 O. 378 (1867).

\(^{44}\) Also see *Blanett v. the State of Ohio*, 20 O. 33 (1894) where the court ruled that the offender,
James Blanett, did not use all of the force he could have in order to accomplish the purpose of attempting
to rape a Mrs. Patterson.

\(^{45}\) *Fox v. The State of Ohio*, 34 O.S. 377 (1878).
‘assault’ as an ‘attempt.’” The Attorney-General for the state argued that they were the same crime, but the Supreme Court ruled differently. The court did not deny that a crime had been committed but stated that there was a difference between an assault and an attempt and that, “finding the defendant not guilty of the crime charged, but guilty of an attempt to commit the same, is not sufficient, under section 5, chapter 7, title 2, of the penal code, to convict the defendant of an assault with intent to commit rape.” On the grounds of legal technicality, Fox was awarded a new trial of which he was eventually cleared of all charges.46

Although many differing crimes were no doubt discharged based on legal technicality, the point is that for women in nineteenth-century Ohio these technicalities were simply another legal twist that worked to the disadvantage of women. When entering the legal fraternity --a system where women played no part in defining, deciding, participating as attorney nor jury-- the use of legal technicalities to overturn hard fought cases adds to the myriad of ways that sexual offenders escaped the consequences of their crimes, ultimately leaving women little recourse with the law.

Conclusion:

Of the many sex crime cases that came before the Supreme Court of Ohio during the nineteenth-century a trend can be observed. The highest court continually ruled in a manner that neglected the perspective, concerns and prior convictions that women received in the lower courts. Repeatedly, Supreme Court justices commented on the immorality of such crimes, on the “outrage” that had been committed, and on the “regret” with which they made their decisions. But more often then not they made their decisions to the benefit of the offending man. Of the twenty nine rape cases before the high court in the nineteenth-century only five were found guilty of the original charge, four were

46 One Supreme court judge, Justice Boynton, dissented to the ruling stating that he thought the defendant Fox was “well convicted,” 381.
declared guilty of reduced charges, and twenty were eventually cleared of all charges and
allowed to go free.47

In addition, the high court claimed an inability to alter the traditions of English
Common Law when an alteration could have benefited prosecuting women, as in the case
of Desire Franks and Ebenezer Smith where the court agreed with England that it was a
“legal absurdity” to convict a man when a female child consented to sexual relations. But
alternately, when they did decide contrary to English Common Law and use their own
ability to redefine the law they did so in ways that benefited male offenders. For example,
in the Miller gang rape case, the court allowed a lighter sentence for all but the one who
sexually penetrated, whereas England considered every participant to be subject to the
most severe punishment. The court did make exceptions to these trends, particularly
when the factor of race entered the decision making process. In the 1846 Williams case,
for instance, the court swiftly altered long standing English legal tradition on the possible
age that emission could occur in order to allow the conviction of a young African
American boy. In this case the court clearly showed the amount of power it did have in
altering the law, for they continued to refer to the Williams case for many decades. The
power they expressed in the Williams case would be unique, most often, convictions for
women’s charges of sexual assault were difficult to attain in the lower courts, and even
more difficult to be adhered to in the Supreme Court.

Many named and unnamed women withstand every level of the legal fraternity
successfully; the justice of the peace who could have declared their case unprosecutable,
the male definitions of rape handed down by the legislature that made fitting those
definitions difficult, the rules of evidence statutes and reference books that insisted on very

47 Of the five found guilty of the original crime unique aspects of their cases were contributing factors
in the Supreme Courts rulings of guilty. Two were African American and were the only black men to
come before the Supreme Court for rape. One had murdered the woman after raping her and was
sentenced to death. One rape resulted in the birth of a child which was the conclusive evidence in the
assailant’s guilt, and the last although found guilty by both courts because of overwhelming evidence
received a Governor’s pardon after serving one month in the State Penitentiary.
visible forms of female resistance to the crime and immediate declarations, examinations by male physicians, and the all male attorneys, justices and juries who were not only misinformed about the female perspective of rape, but who were given decision making advice from male experts about how a woman should "naturally" behave when raped. After entering a legal system in the face of such adversity, women who were able to receive convictions in the lower court faced an even greater threat to their grasp at justice, for the highest court in the state would quickly and decisively overturn the conviction and release a sexual offender back into the community. Justice for a sexually abused woman in nineteenth-century Ohio would prove to be elusive. The reason the state Court overturned so many hard fought convictions is because of the political and economic climate in which they made these decisions. Although clarifying Ohio's rules of evidence was their duty given the increased legal authority placed upon them, justices nonetheless made decisions within an atmosphere of extreme pressure. Court dockets were overloaded at every level; the penitentiary was filled beyond capacity, and the economic emphasis of state and nation legal precedence dictated that protecting women from the crimes committed against them was not a top priority.

To women in Ohio, a conviction in the lower court must have meant very little when one considers the actions of the state Supreme Court. Consider that Sarah M. Coal, who did exactly as was expected of her according to Supreme Court officials, when she immediately told her mother about the rape committed upon her, would not find justice in the state Supreme Court. Jane Gray, who even with the birth of a child that resulted from a rape, would not find justice from Ohio's Supreme Court. Maria Gertsch, who after unfounded and repeated insults upon her sexual reputation would not receive justice from the state Supreme Court. Ada Wyatt who was considered too "insane" to have informed her mother about a sexual assault would not find justice from Ohio's Supreme Court. Fanny Moore, abused by her own father and given a devastating sexually transmitted
disease, would not receive justice from Ohio’s Supreme Court. Sarah Doren, who at the young age of eight was considered mature enough by the Supreme Court to have given her informed sexual consent to a grown man, would not find justice in Ohio’s Supreme Court. Nor would the “little girl” Eva Pike who was persuaded into the shed in the alley by a man many years her senior find justice by the state Supreme Court. Justices who heard Eva Pike’s case, like the many others they decided upon would declare their “repulsion” at the behavior of the man, then allow him to go free. Their words were chivalrous, their decisions neglectful.
CHAPTER 5

"PARDONED, PAROLED, AND RELEASED": SEX CRIMINALS AND THE OHIO STATE PENITENTIARY

On October 24, 1874, George Randall raped a young Emma Gillett at Chagrin Falls, Ohio. Born in New York, Randall had moved to Springfield, Ohio with his parents Noah and Abigail when he was a teenager. Although listed as a blacksmith by trade, at the time of the crime, Randall was described by newspaper reporters as being a "loafer type" who was twenty-one years of age. When the case came before Judge Cadwell of the Cuyahonga County Court, it appeared to be an open and shut case. Although Randall claimed to be under the influence of "strong drink," he confessed to the crime of rape from the time he was arrested and through the trial proceedings. As a result, Judge Cadwell sentenced Randall to fifteen years in the penitentiary in Columbus. Justice and retribution seemed to be on the side of Gillet, who had suffered a horrible crime.\(^1\) In this case, the legal fraternity appeared to do as it promised, to punish those who victimize young girls.

Appearance, however, does not always mirror reality. Ohio’s legal fraternity did not end when rulings of guilt were proclaimed by the magistrate. Another element of the legal system would still serve in the matter of The State v. Randall, the state prison system. Although Randall was sentenced to fifteen years, he would serve less than half of his sentence, only three years and ten months. This was not because he escaped, nor

\(^1\) Cleveland Newspaper Digest (January 1 to December 31), 1874. Ohio Penitentiary: Register of Prisoners, GR3630 vol 7, 172.
because he was released for good behavior. Rather, Randall, like over one thousand of Ohio’s other convicted sex criminals, would be released early by order of the governor’s system of pardon. Although, Gillett and her family may have initially been relieved by the harsh sentence her abuser had been given, she and her family would no doubt have been appalled when Governor Bishop extended him an early release.\textsuperscript{2} Randall would serve short of four years for a crime in which Gillett would be affected for a lifetime.

This chapter explores yet another level of the legal fraternity at work in Ohio’s sex crime litigation, the state prison system. Although many of the women who came before the courts were no doubt unaware, high level state politics and gender bias significantly influenced the actual amount of time convicted offenders spent in Ohio’s prison. Penitentiary records reveal a here-to-fore unexplored level of the legal fraternity at work against women’s experience with sex crimes. Records reveal that after a woman arduously achieved a conviction against a sex offender in a biased court system, the state penitentiary system repeatedly released those convicted years before the expiration of their sentence. Pardons occurred for a wide range of convicted sex offenders, including violent gang rapists, repeat rapists, and female child sexual molesters. For the most part, pardons occurred across race lines; black men convicted of committing sex crimes against white and black women were also pardoned. However, race proved to be a factor that extended one’s stay in the penitentiary. As this chapter will reveal, penitentiary records provide a vast array of information not only about the way that this system released convicted sex offenders, but also about the identity of the convicted offenders. Although the majority of those convicted of sex crimes were men, women committed sex crimes as well. Thus, ultimately we can take a glimps into many aspects of the lives of these man and women and the events that brought them into one of the nation’s earliest and largest penitentiary systems.

\textsuperscript{2} \textit{Ohio Penitentiary: Register of Prisoners}, GR3630 vol. 7, 172.

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Ohio's Prison System

The history of Ohio's system of criminal punishment began long before 1874 when Randall served his shortened sentence. The emergence of Ohio as a state coincided with national debates about the nature of crime and punishment. Increasingly, sanctions for crimes committed moved away from corporal punishment to extended stays in state run penitentiaries. Ohio's Constitution of 1802 declared that "the central idea of modern penology that reformation rather than punishment should be the objective point in dealing with criminals, and that indiscriminate severity instead of preventing, created crime."

Accordingly, Section 13 of the state's bill of rights prohibited excessive bail, excessive fines and the infliction of cruel and unusual punishments. The spirit of the law on the subject of penalties and punishments was set forth in Section 14, as follows:

All penalties shall be proportioned to the nature of the offense. No wise legislation will affix the same punishment to the crime of theft, forgery, and the like, which they do to murder and treason. When the same undistinguished severity is exerted against all offenses, the people are led to forget the real distinction in crime themselves, and to commit the most flagrant with as little compunction as they do the slightest offenses. For the same reasons a multitude of sanguinary laws are both impolitic, and unjust, the true design of all punishments being to reform, not to exterminate, mankind.

Notwithstanding such strong language against physical punishment, the third General Assembly, on January 15, 1805, adopted a criminal and penal code which provided for the whipping post and made many crimes punishable by stripes on the bare back. This was in large part because the state lacked any facility to house the convicted. In addition, The seventh General Assembly, on January 24, 1809, revised the code by materially increasing the severity of corporal punishments. Assault with the intent to commit rape carried thirty nine stripes, malicious maiming 150 stripes, forgery and larceny
thirty nine stripes each, and burglary fifty. Although the courts of common pleas did not hesitate to employ the whipping post in the early days, this form of punishment disappeared with the advent of the state prison in 1815. Prior to that time, Ohio’s settlers had to rely on their own resources when crimes took place, even sexually based crimes such as the rape and murder of nine year old Polly Maloney in 1803. The circumstances surrounding Maloney’s death reveal the serious need for a structured criminal justice system early in Ohio’s history.

On May 28, 1803 the Scioto Gazette of Clermont County, Ohio reported that “a most horrid murder was committed on the body of Polly Maloney.” Maloney was visiting her aunt and uncle in Pleasant Township. John Rowe who was the girls’ uncle by marriage had obtained permission to get Maloney from the house she lived in with William Thomas, her step-father, and her mother. Rowe was to walk her to his house to stay the night. Some time after leaving, Rowe returned to Thomas’ home and reportedly began to “shout and smite the trees with his axe, crying out ‘Polly is killed and I am undone; I never shall get over it.’” Maloney’s mother and step-father came running and Thomas asked Rowe how she got killed. The newspaper reported the following in response:

Rowe said she fell off the horse across a log. Thomas knowing they had no horse, asked what horse? Rowe said he did not know, he could not tell how she got killed; The out-cries of the mother drew a number of the neighbors together, about the same time that Thomas Rowe came to the body, the mother said oh John, you have killed my child! On which he drew his knife and swore he would cut his own throat if she accused him; he however, suffered her quietly to take the knife out of his hand. It was thought expedient to take Rowe into custody, and he was bound and kept beside the corpse in the woods during the night.  

Neighbors had to secure Rowe in this manner because of the lack of accessibility to law officials and the unstructured nature of the criminal justice system. This issue continued in

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3 Scioto Gazette, 7 May 1803. I am greatly appreciative of Professor Randy Roth, historian at The Ohio State University for reference to this case.
Maloney's case as the community struggled to handle the situation at hand. The Gazette continued:

Several circumstances concurred to prevent an inquest from being called. The coroner lives remote from the place where it was committed; it was also uncertain whether the old coroner or the new one was in commission. The magistrates were not furnished with the acts of assembly, defining the duties of coroners and others in such cases. No person was willing to take a journey of 60 to 80 miles voluntarily, and none knew how to compel them, in addition to these difficulties, the water had rendered the roads difficult, if not impassible, and the warm season would soon have rendered the body highly putrescent.

Apparently, several days passed before Justices of the Peace Alexander Martin and Amos Ellis from Williamsburgh, Ohio came to scene. During that time "respected community members both male and female examined the body, decided that a sexual assault had occurred and noted the evidence of blood on Rowe's clothing and axe handle." Upon arrival, Martin and Ellis arrested Rowe and took him to the jail eighty miles away. The state's earliest jails were of local or county origin, but not every county had one, and those that did exist were not securely built. Rowe was charged with rape and murder and confined in such a jail in Clermont County. After Rowe spent a month in jail, the newspapers announced: "100 Dollars Reward. John Rowe, who was committed in the jail of the county of Clermont, ... with the assistance of some person or persons unknown, broke open the doors of the jail, and the said Rowe did there from make his escape." Legal inefficiency such as exhibited in this case compelled elected officials to strengthen the legal system in general, and to specifically find ways to construct a state penitentiary.

On December 3, 1811, Governor Jonathan Meigs, in his annual message, stated that there was an, "expediency of establishing by law, a state prison." During the 1811-1812 session of the legislature, a small group of men offered two ten-acre plots, on one of

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4 The Scioto Gazette, 31 August 1803.
which would be built the state house, and on the other the state prison. Consequently, the first state prison in Ohio opened in Columbus, the new capitol of the state, in 1816. Originally, it was a poorly built edifice, calculated to hold only thirty prisoners. Although built in part to address issues such as those described in the Rowe case, the new prison was immediately plagued with difficulties. The poor construction of the prison and the continual increases in the state population quickly led to overcrowding. The rich and vast farmlands of Ohio made the state a popular place for easterners to settle. With so many U.S. and foreign born settlers moving to the state, the rate of crime increased. Thus, by 1832, there were 190 convicts in the state penitentiary, far exceeding the original capacity. Whenever the prisoners exceeded the number of 120, the governor was forced to grant pardons in order to create room in the prison for the newcomers. Thus a pattern was created early in the state’s history, pardons were used in reaction to overcrowding, and not as a means of releasing those convicts who were deemed reformed.

This misuse of the pardon system continued to be a source of criticism throughout the century. Prison reformers continually criticized the misuse of the pardon system along with a myriad of other issues. Overcrowding, frequent escapes, complaints by prison officials about the difficulties in running an inefficient prison, and concern over the “mutual contamination” of prisoners, led the state legislature to declare that “a more perfect system for the dissemination of vice could not be devised than is to be found within the walls of the Ohio penitentiary.”

Criticism from outside and inside the prison walls forced the state legislature to pass a bill for the construction of a new prison. With the help of prison labor the new state penitentiary was completed in 1837. The purpose of the new penitentiary was to house all felons with a sentence of two or more years regardless of their age, sex, race, or

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mental state. Although the original goal was to solve the many problems associated with overcrowding, the legislature and prison officials would soon find that an excessive number of convicts beyond prison capacity would plague the penitentiary for the entire century. The new prison was built to house 700 convicts, by 1859 there were already 853 inmates. The excessive number of convicts forced officials to convert the chapel into a dormitory. In 1867, Republican Governor Jacob D. Cox along with the General Assembly hoped to find new methods of coping with the alarming increase in prison population.

As a result of this pressing issue, the legislature created a State Board of Charities in 1867. The Board of Charities was composed of prison officials, reformers, ministers and politicians whose task it was to investigate the state’s prison and make recommendations for improving the inefficiency, overcrowding, and general treatment of prisoners. Thus, in 1868 the General Assembly passed a joint resolution authorizing the expansion of the penitentiary to 1,050 cells.

Overcrowding led to more than just issues of space, but also considerable debate amongst prison reformers, prison officials and the state legislature about the nature of the prison experience, particularly upon the younger inmates. In a series of reports, the Board of State Charities denounced the penitentiary and condemned the local jails as a “disgrace to the state and a sin against humanity. The jails’ filth and depressing influences were most perfectly adapted to destroy self-respect—the basis of all manly character—and to educate and perfect the younger and less hardened, to the full capacity of their teachers.” The jails they stated were, “little better than seminaries of crime.”

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8 Ohio, Executive Documents, “Governor’s Annual Message, 1859” (1860) XXIV, Part II, 49. Located in the Ohio Historical Society, Columbus, Ohio.
9 Ohio, Executive Documents, “Governor’s Annual Message, 1866” (1867) XXXI, Part I, 270. Located in the Ohio Historical Society, Columbus, Ohio.
10 Ohio Board of Charities, Annual Report for the Year 1867 (1868): 3, 10-11. Located in the Ohio Historical Society, Columbus, Ohio.
Neither debate, legislation, nor new construction solved the problems the prison faced. The prison population continued to grow at an alarming rate, far exceeding the new capacity. In 1875 there were 1,005 inmates, in 1880, 1,362. In 1890, there were 1,509 convicts and in 1900, 1,909 prisoners swelled the walls of the penitentiary. Ultimately, throughout the entire century overcrowding plagued the prison system and the only effective release valve was the governor’s use of pardons.

Until the 1850s, the governors’ powers were defined in article II, section 5, of the Ohio State Constitution of 1802, “He shall have all power to grant reprieves and pardons, after conviction, except in cases of impeachment.” Ohio’s early chief executives used this power to the extreme. Of the 150 convicted criminals admitted in the first five years to the state prison, eighty two were pardoned. During the period from 1815 to 1834, of 1,231 commitments to the penitentiary, 663 were listed as pardoned, an average of fifty four percent. Such high release rates continued until the period between 1850-1870, when roughly one out of every three inmates of the penitentiary were released by pardons.

The abuse of clemency by the governors generated both criticism and scandal. Critics said that the wholesale use of pardons was a political device employed by the party in power to further its own ends; that it tended to break down respect for law by permitting a criminal to escape punishment through the application of money or political influence; and, that it made the courts careless in imposing sentences and judges too free in the imposition of heavy penalties, since both could be corrected by a recommendation of clemency at a later date.

In addition, critics felt that one of the greatest faults of the early prison system was that the power to grant clemency was wholly in the hands of governors who had too many other things to attend to. Crawford, one of the pioneer students of penology, reported

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after a visit to the Ohio State Prison in the early 1830's, that "whenever the convicts exceeded the number of 120, the Governor of the state was forced to grant pardons in order to create room in the prison for the newcomers." In 1826, Governor Morrow pointed out that because of the insufficient size of the penitentiary he had to resort to a free use of the power of pardon. It was customary for governors who needed to leave the state capitol for some time to leave a large supply of signed blank pardons for use in an emergency. In 1849, Governor Ford had to return in haste to the capital because the supply he left had been exhausted; it is noteworthy that an average of one pardon a week was handed out that year.12

The General Assembly recognized the need to relieve the governor from the ever increasing burden of examining applications for pardons, and also the necessity of weakening the enormous power placed in the hands of a busy and sometimes weak chief executive. Thus, in 1852 the state adopted a new constitution in which article III, section 2 read:

He shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses except treason and cases of impeachment, upon such conditions as he may think proper: subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law...He shall communicate to the General Assembly, at every regular session each case of reprieve, commutation, or pardon, stating the name and crime of the convict, the sentence, its date, the date of commutation, pardon, or reprieve, with his reason therefor.

This change was an advance over the unlimited, unquestioned and unreported pardon powers granted to the governor in the first constitution. Even still, sentiment gradually increased for an even greater curbing of the gubernatorial privileges, or perhaps a desire to relieve the governor of the work, worry and responsibility of the examination of the many

applications for clemency which flooded his office. Similar sentiment was found in nearly every state in the union. In 1857, Minnesota was the first to provide for a board of pardons to investigate the applications for pardons and make recommendations upon which the governor might act, if he chose. Shortly thereafter, Ohio established a board of pardons, yet as in most states, the governor still retained the ultimate power to pardon because he could ignore recommendations of pardon, commutation, and reprieve made by the board.

Governors pardoned all sorts of criminals who had committed an array of crimes. However, when one compares the rate of pardons granted to those convicted of sexually based crimes against pardons for other offenses, bias is evident. Convicts of sex crimes were pardoned earlier and more frequently than offenders of other crimes. Although the all white, male judges, juries, prosecutors, and state Supreme Court justices bemoaned the sexual “outrage” committed on women and young girls, governors who played a powerful role in the legal fraternity released sixty six percent of convicted sexual offenders before their sentence was complete. This is a rate twelve percentage points higher than that of non-sex offending convicts. This phenomenon can be attributed to the legal fraternity’s emphasis on punishing those convicted of the economically based crimes such as grand larceny, burglary, forgery and the like. Those who committed such crimes were not given early releases as often in a legal and economic culture that protected goods more readily then women. Pardons included the early release of sex criminals who had been given

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13 Ibid., 608.
14 These rates reflect Ohio Penitentiary records from 1827, the time in which they began keeping records in the new prison through December 1899.
15 Initial review of prison records indicates that this is the case, however, a more thorough and comparative study of prison records will provide a quantitative description of what occurred and illuminate the relationship between the litigation of economically based crimes and sex crimes. One of the major arguments in Cornelia Hughes Dayton’s *Women Before the Bar* is that in Connecticut a similar process occurred and that by the end of the 1800s the shift in prosecuting economic issues resulted in a decrease in the number of women appearing in court for issues pertinent to their experiences.
relatively long sentences (ten to fifteen years, and life) because of the severity of the crime they committed, repeat felons, and those who had raped female children.

Numerous examples reveal the dynamics involved in the pardoning of convicted sex offenders. For instance, a Cleveland newspaper reported:

A young man living in Bedford, named Joseph Sheeff, assaulted and attempted to commit rape on the person of Mrs. Augusta Fischer. The affair occurred on Ackley Avenue, where the assailant, who is a Bohemian, seized the woman, threw her to the ground, placed one hand over her mouth and then attempted to outrage her. Mrs. Fischer screamed loudly and repeatedly and Officers Burns and Matzourek soon arrived and took charge of the criminal. He did not accomplish his purpose with Mrs. Fischer, who is German living on Fifth ave. in the eighteenth ward.  

Sheeff was convicted of committing an assault with the intent to rape and sentenced to four years in the Ohio penitentiary. He was pardoned after spending one and a half years there.Likewise, a white, thirty seven year old farmer, Marcus Frost, was sentenced to life in the state penitentiary after having committed what the courts, in rhetoric, considered the most heinous of crimes, “rape on one’s daughter.” Frost however, spent only a total of four years and eight months in prison before he was pardoned by Governor Lucas. James Stead was convicted and sentenced to life in prison for the rape of his daughter. Stead’s first day in the penitentiary was on June 28, 1886 and he was released by pardon just one and a half years later on December 29, 1887. Another native born white male, Joseph Williams was sentenced to six years in the state prison after losing an appeal to the state Supreme Court. Convicted of assault and battery with the intent to commit rape, Williams spent only two years and four months for this crime, even though it was the second of such convictions. Borrus Apple Mofs, a forty three year-old peddler who was

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16 Cleveland Newspaper Digest (Jan 1 to Dec 31, 1876) 1276-1277.
17 All sentencing lengths, release dates, and reasons for the prisoner’s releases are from the following records: Ohio Penitentiary: Registrar of Prisoners, GR3627-3640.
born in Poland, was sentenced to seven years in the state prison for an assault with the intent to commit rape. He was released by Governor Shannon in 1840, after a mere one year and ten months in prison. Allen T. Miller, a seventy nine year old laborer was convicted for “carnally knowing and abusing a female child under the age of twelve years with her consent” and given life in prison. Miller was sentenced in January of 1891, went to the state penitentiary the following month, and was pardoned by Governor Campbell a mere ten months later. James Ritter received a life sentence for “rape on a female child under the age of twelve years” in Portage County in May, 1891. Governor McKinley pardoned Ritter on March 17, 1894, less than three years later. This was Ritter’s second conviction. Mulife Burnell, a black man from Cleveland was convicted of incest and sentenced to ten years in prison. He spent less than half of his sentence, four years, before being released by Governor Ford. John Soltz, sentenced to life in prison for the rape of his daughter, spent short of four years in the penitentiary before being pardoned by Governor Foster. Governor Foster also pardoned Samuel Brown who was convicted of rape and sentenced to fourteen years in prison. Foster released Brown after eight and a half months in the penitentiary. James Rockwell, who was sentenced to life in prison for rape, was pardoned by Governor Campbell after serving only nine months of his prison term.

In a fifteen-year period from 1834-1849, there were a total of eighty nine convicted sex criminals in Ohio’s penitentiary. These included men convicted for rape, assault with the intent to rape, rape upon one’s daughter, carnal knowledge of an insane woman, burglary with the intent to rape, and incest. Of these, forty nine (fifty five percent) were pardoned or released early, twenty five (twenty eight percent) completed their sentences, one escaped, and fourteen died while in prison. Of the twenty five who completed their sentences most were convicted of the least harsh sex crimes, and given significantly shorter sentences than those who were pardoned. Eight were convicted of
rape, while the remaining seventeen were convicted of the lesser crimes of attempted rape and incest. Fourteen of the twenty five were sentenced to three years, two were given four years, seven were given five to seven years, and only two were given harsh sentences of ten to fifteen years. Ultimately, those convicted sex criminals who were given long sentences in the penitentiary, ten years to life, were the same ones who were released early. The harsher the sentence, the more likely one was to be pardoned by the governor.

Pardons cut across race and ethnic lines. “Native born whites,” European immigrants, and African American men were released via pardon, although black men were given longer sentences by an average of one year, and black men spent a longer time in prison by about one year. In addition, native born white men were pardoned sixty five percent of the time, while black men were pardoned fifty five percent of the time. A twenty year-old black man Stephan Johnson, for example, was sentenced to twenty years in the state penitentiary for rape, a relatively harsh sentence. He spent over ten years in prison until being pardoned by Governor Ford. Ten years was a considerable stay for most sex crime convicts, and race was probably a factor but, nonetheless, his sentence was reduced by a considerable amount.

Although race was a strong factor in the pardon process, patriarchal collusion appears to have taken precedence over racial subjugation when it came to the legal fraternity’s handling of sex crimes committed upon women. A black man, John Veny was arrested on a charge of attempting to rape a young “colored woman.” Convicted and sentenced to four years in prison, Veny would serve just short of three months before being pardoned. David Watson, a black man from Cleveland was arrested and charged with attempting to rape the mother of his white wife. Convicted and sentenced to six years, he served nine months. The fact that convicted black men were released illuminates our understanding of what little importance was placed upon punishing rapists.

18 Cleveland Newspaper Digest (Jan. 1 to Dec. 31, 1875) 655.
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Governors faced with numerous pardons on their desk were forced to pardon those whose crimes were considered less destructive to society. Although a rape may have harmed an individual woman, a counterfeiter, bank robber or larcenist was probably seen as having committed a crime more devastating by a legal system whose central aim was the protection of material goods, profit, and commerce.

Ultimately, prison overcrowding and governors’ power to pardon continually served as the last step in the legal fraternity that worked against the hard fought efforts of the black, white, and European immigrant women who won convictions in lower courts. The misuse of the pardon system, along with other issues facing the state’s penitentiary, contributed to a national movement that would ultimately reform many aspect of the legal system. These reforms included instituting new laws surrounding the treatment of prisoners, and a shift in the ultimate purpose of imprisonment. Interest in devising better methods of punishing felons intensified about 1870, partly because the end of the Civil War enabled northern and midwestern reformers to turn their attention to new causes. In the late 1860’s two reformers, Enoch Wines and Theodore Dwight, inspected all the penal institutions in the United States and Canada on behalf of a private group called the Prison Association of New York. What they found distressed them. In their Report on the Prisons and Reformatory of the United States and Canada (1867), Wines and Dwight wrote that, “There is not a prison system in the United States... which seeks the reformation of its subjects as a primary object.” Indeed, most prisons seemed to be schools for crime. Wines and Dwight found no institution making systematic efforts to educate convicts, train them for a trade, or instill religious principles. The most important message of the report was that convict reformation should be the key purpose of prisons. As a result of the report, the nation’s major penitentiaries, including the one in Ohio, began focusing more on reforming criminals.

19Nicole Rafter and Debra Stanley, Prisons in America (Santa Barbara: ABC-CLIO), 7-9. 123
The next major step toward overhaul of the prison system occurred in 1870, when reformers from throughout the country met in Cincinnati, Ohio for a conference on improving the nation’s prisons. The formal title of the conference was the National Congress on Penitentiary and Reformatory Discipline. Wines, an organizer of the conference, opened the meeting with a speech summarizing his and Dwight’s report on the state of prisons. Another report, written by Sir Walter Crofton, formerly director of Irish prisons, described the “Irish System” of prison discipline, at the time considered innovative, of encouraging good behavior with the promise of early release. Zebulon R. Brockway, the superintendent of the Detroit House of Correction, delivered a speech arguing for more scientific methods of prison administration, methods that would, he explained, de-emphasize the traditional goal of punishment and work toward the goal of reformation.

At the end of the Cincinnati conference, the delegates unanimously approved the “Declaration of Principles” which became the philosophical foundation of American prison management for the next century. The Declaration of Principles began by asserting that the fundamental purpose of punishment was to reform the criminal:

> The treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal rather than the crime, its great object should be his moral regeneration. Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering.\(^\text{20}\)

At the time, this was a truly radical statement. Previously, retribution or revenge had been the primary purpose behind the punishment of offenders, but now Cincinnati delegates were giving first priority to reformation. Next, the Declaration called for a “mark” system of rewards, similar to Crofton’s Irish system that would give convicts incentives to reform.

Delegates of the Cincinnati conference stated in principles IV and XV of the Declaration that:

Since hope is a more potent agent than fear, it should be made an ever-present force in the minds of prisoners, by a well-devised and skillfully applied system of rewards for good conduct, industry and attention to learning. Rewards, more than punishments, are essential to every good prison system.... In prison administration, moral forces should be relied upon, with as little admixture of physical force as possible, and organized persuasion be made to take the place of coercive restraint, the object being to make upright and industrious freemen, rather than orderly and obedient prisoners. Brute force may make good prisoners; moral training alone will make good citizens.

A third proposal called for sentences that would keep convicts in prison until they had truly reformed. Those who never changed for the better, the delegates maintained, should stay in prison until death. The delegates referred to the proposed new type of sentence as an “indeterminate” sentence. They stated that; “peremptory (definite) sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.” In the 1870’s, indeterminate meant that the convict’s sentences would be open-ended or indefinite, ranging from one day to life in prison. For convicts released on good behavior, delegates envisioned a system in which state officials would keep former convicts under surveillance as they readjusted to the community. Those who returned to crime would be sent back to prison.

The Ohio legislature adopted much of the conferences suggestions and enacted new laws about criminal punishment. Prison officials too began efforts to reform and encourage good behavior while in prison. Thus, from 1870 through the end of the century, the number of pardons steadily decreased. Prison records reflect this change, but it does not mean that prisoners remained in the penitentiary for the length of their sentence. Instead, prisoners were increasing released due to the state’s creation of “good
time" laws which provided early releases for criminals who had behaved well while in
prison. Thus, the use of pardons may have declined in this period, but Ohio's good
time laws served in a similar manner in that convicted sex offenders were released well before
their sentences expired. Ohio's good time laws included a system of parole (1856),
where convicted offenders were released from a penal institution prior to the termination
of a sentence on the condition of remaining under supervision of correctional or other
authorities until a final discharge was given. During the 1884-1885 session, the General
Assembly defined the indeterminate sentence law as follows:

Every sentence to the penitentiary of a person hereafter committed for
felony, except murder in the second degree, who has not previously been
convicted of a felony and served a term in a penal institution, may be given,
if the court having said case thinks it right and proper, a general sentence in
the penitentiary. The term of such imprisonment of any person so
convicted and sentenced may be terminated by the board of managers, so
authorized by this act, but such imprisonment shall not exceed the
maximum term provided by law for the crime for which the prisoner was
convicted and sentenced; and no such prisoner shall be released until he
shall have served at least the minimum term provided by law for the crime
for which the prisoner was convicted and sentenced.

George Jewel, for example, was convicted of assault with the intent to rape in
1883 and sentenced to twelve years. With application of the good time laws he was
paroled after spending seven years. August Simon was convicted in January of 1884 for
assault with the intent to rape and sentenced to seven years. Simon was released by parole
after spending two years in prison. James Harris was convicted of the same crime and
sentenced to six years but was paroled after serving just over two and a half years.

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21 For pardons see, Ohio Penitentiary: Registrar of Prisoners, GR3627-3640. For a discussion of
Ohio's parole system see Marshall, A History of the Courts and Lawyers of Ohio.
22 Ohio Law, vol. LXXXI, 74 and 168.
23 Ohio Penitentiary: Registrar of Prisoners, GR 3634 vol. 12, 170.
24 Ibid., 350.
25 Ibid., 488.
important to note that although the law just cited stated that the convicted offender was to serve at least the minimum time of his sentence, sex offenders like Simon and Harris were released after spending two, and two and a half years respectively even though the minimum sentence for their crimes was three years.

Good time laws did not decrease the early release of sex criminals. In fact, the early release rate increased. From 1880-1985, roughly seventy percent of those convicted of sex crimes were released early by either pardon or as a result of good behavior. Compared to the sixty six percent release rate earlier in the century, sex offenders were actually getting out of prison earlier with these new laws. Of those convicted of sex crimes (assault with the attempt, rape, and incest), rapists were pardoned and released most often. Their sentences were reduced by roughly fifty two percent. Thus, the most serious of the crimes was treated with the most lenient aspects of the new legislation. Good time laws did affect the overall pardon rate for crimes other than sexually based ones and ultimately reduced the burden and power of pardoning from governors, but they did so at the expense of women. Thus, by the end of the century, Ohio's legal fraternity continued to show its gender biased insensitivity on crimes which most affected women. Continually, those who raped, molested and sexually attacked women and young girls were released from prison and given their freedom. Members of the state legislature who enacted new laws, governors who continued to pardon, and prison officials who determined whether or not sex criminals deserved early release worked together in a manner that belittled sexually based crimes and condoned the abuse of women.

**Sex Crime Offenders**

Prison officials began keeping record of all inmates in 1831. From 1831 through 1899, roughly 1,015 persons spent time in the penitentiary for various sex crimes. Prison officials kept record of the following aspects of the prisoners and their prison experience:
name (including all alias' known), criminal conviction (including whether it was the second, third or fourth conviction), years sentenced, county the crime was prosecuted in, birth place, race, ethnicity if born outside the United States, age, height, hair color and description, identifiable body marks such as tattoos or physical deformities, eye color, whether the prisoner drank alcohol, number of members in family, general amount of property owned, general amount of literacy the prisoner possessed, and how the prisoner was released from the penitentiary (either by pardon, parole, expiration of sentence, transfer to a reform farm, escape, or death). The depth of these records reveal significant information about the type of men and women convicted of sex crimes, and even more about the role that the social construction of race, class, gender, and sexuality played in this level of Ohio’s legal fraternity.

From 1831 to 1899, those convicted of sex crimes committed a variety of offenses. For most of the century (until 1881) rape, incest, and assault with the intent to rape were the crimes for which sex offenders were convicted. Of these, men convicted of assault with the intent to rape were consistently the most numerous. Between 1831 and 1841, there were 15 men in the penitentiary for rape, 6 men for incest, and 23 for assault with the intent to rape. From 1850 to 1860, there were 46 convicted for rape, 5 for incest, and 58 for assault with the intent to rape. Later in the century the pattern continued. From 1870-1880, there were 68 rape convicts, 20 for incest, and 121 for assault with the intent to rape. From 1885-1895 there were 120 men in the penitentiary for rape, 72 for incest, and 181 for assault with the intent to rape. The consistent disparity between those convicted of rape and those convicted of assault with the intent to rape occurred for two reasons. First, these numbers reflect the difficulty women had securing convictions for rape. The strict rules of evidence that required visible proof of force, the necessity for evidence of the emission of sexual fluids by the male perpetrator, the requirement that the woman report the crime immediately, the need for male collaboration of the woman’s
testimony, and the legal system composed solely of men who ruled on crimes primarily suffered by women all served as factors that made rape charges difficult to uphold. Since rape convictions were difficult to prove, many men who were originally charged with rape, would eventually be convicted for the lesser crime of assault with the intent to rape. As a result, a higher number of men were convicted for an attempted rape, a crime whose punishment was significantly lower than that of rape. The case of Bohnham Fox typifies this phenomenon. In 1887 in the Warren County Court of Common Pleas, Fox went on trial for the rape of Annie Catherine Corsmier. Because Corsmier did not get a medical examination until two weeks after the crime and her bruises were healed by then, her attorneys could not prove force. Consequently, Fox was eventually found guilty of an attempt to commit a rape and sentenced to three and one half years in the state penitentiary. Fox spent only eight months of his sentenced before he was released on a technicality. As noted in the previous chapter, the Ohio Supreme Court ruled that the original charge was worded incorrectly. Instead of an attempt to commit a rape, Fox should have been charged with an assault with the intent to rape.

Although the vast majority of sex offenders in the prison were men, there were a few women sentenced to the penitentiary as well. As the only prison in the state for felony convictions, the Ohio Penitentiary housed female offenders too. Female convicts were housed separately from the men until a women’s facility was constructed in 1903. The women convicted and sentenced to the penitentiary committed a variety of crimes from grand larceny, poisoning with the intent to kill, murder, attempting to produce an abortion, pick pocketing, manslaughter, bigamy, arson, forgery, receiving stolen goods, giving obscene pictures away, enticing a young girl to a house of ill fame, and about every

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27 *Fox vs. The State of Ohio*, 34 O.S. 377 (1878).
other crime imaginable. The race and ethnicity of these women varied as well. Black, native born white, European immigrant, and Native American women transported from the plains territories all served time in the prison.

The first woman to serve time for a sex crime was Anna Johnson. In November, 1861, the Court of Common Pleas of Cuyahoga County convicted Johnson of “rape and assault with the intent to rape.” Johnson was sentenced to seven years in prison and was not released by pardon, parole, or any other means until her sentence expired. Details of the case remain unknown, but the relative severity of her charge and sentence were no doubt linked to the race of her husband. Anna Johnson was a twenty eight year old housekeeper, originally born in Ireland. She was described by prison officials as having, “hazel eyes, a light brown complexion... stout build, impudent looking and has two thumbs on her right thumb.” Although Johnson was white of European ancestry, her husband Thomas Leabody a thirty four year old Black man originally from the slave state of Missouri. Prison officials described Leabody as having black eyes, black and “woolly” hair and a dark copper complexion. Leabody and Johnson were both convicted for the same crime, a crime they committed together, and were both released on December of 1868.

Throughout most of the century, rape statues made it a legal impossibility for a woman to commit rape. Penetration by male genitalia was legally essential, as was the emission of male sexual fluids until 1877. This aspect alone would have served as grounds for an appeal to the state Supreme Court by Johnson but no such appeal is on record. This may have been due to lack of funds necessary to secure a lawyer, or perhaps both were aware of the role race played in their trial and they decided against further action. What is clear is that according to Ohio law, Johnson could not have raped any one. Most likely, she was present during the crime, and participated in the rape by some means. If

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28 Ohio Penitentiary: Registrar of Prisoners, GR3628-3640.
so, the charge she should have received is “aiding and abetting in the crime of rape” which would have resulted in a lesser charge. When men were involved in a rape other than by penetration, that is the charge that they received, and their sentence was generally less than the individual who actually penetrated the female victim.

For example, in 1843, four men were brought on trial for the rape of Elizabeth Higgins in Washington County, Ohio. A man whose last name was Hughes, and three others, Aaron, George, and Joseph Carle were all charged with rape. At the time of the rape, Aaron Carle was forty one years old, and the father of Joseph (age sixteen) and George (age twenty). During the course of the trial it became clear that the father Aaron Carle had raped Higgins, and Hughes had also raped her while Aaron Carle held her down with force. It was also revealed that George and Joseph Carle never penetrated nor touched Higgins in any way. Instead, both admitted to “shouting and hollering” to encourage the other men. Although the brother’s attorney argued for a mistrial stating that shouting was not the same as abetting a crime, the court changed the original charge from rape to “aiding and abetting a crime.” As a result, their punishment differed significantly from the other two men. Hughes received twelve years in the penitentiary, Aaron Carle received fifteen for two counts, rape and aiding and abetting a rape, but Joseph and George were both sentenced to three years in the state prison. During her trial proceedings, Anna Johnson was not given the option of a lesser charge.

Johnson’s case is unique in that she was the only woman throughout the century to be convicted of rape. She was not, however, the only woman convicted of aiding and abetting a rape. A black woman, Isabella Parish who was a thirty one year old washer woman was convicted of this crime and sentenced to three years in the penitentiary. The remaining women in the prison for sex crimes were there upon convictions of incest, nine

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30 Ohio Penitentiary: Register of Prisoners, GR3627, 1829-1855.
31 Washington County Court Records, GR3353, 1840-1845.
women in total from 1831 to 1899. Of those nine, four had committed incest with an older brother, one with her father, one with another male family member, and three women were in the prison for incest while the men they committed incest with were not.

Of the women who were siblings to their co-offender, each of them was well above the age of adulthood. Thus, they were not young nor seen as innocent victims in these sexual relations. The very definition of incest meant that both parties were willingly engaged in sexual relation, and no force was committed. The courts did, however, imply that the brothers were in some way more responsible for the act than the sisters. This is apparent in the disparity of the sentences given between the women and the men. Nancy Ray was the first woman to be convicted of incest in Ohio. Nancy Ray was a twenty-three year old white woman, who was a housekeeper at the time of her conviction. She was sentenced to three years in the penitentiary. Her brother, Lewis Ray, whom she kept house for, was thirty-three years-old and was given a sentence of four years. Hattie Martin, who was married at the time of her conviction, was a twenty-year-old housekeeper who had apparently committed incest with her brother Charles Tucker who was twenty-five-year-old laborer in a saw mill. Tucker was sentenced to three years, while Martin was sentenced to one. Ada and Joseph Baker had even more disparity in their sentencing. Ada Baker was twenty-two years old when she was convicted of committing incest with her older brother Joseph Baker, who was forty-nine years old. Ada Baker was sentenced to two years, while Joseph Baker was sentenced to ten. In each case, the brothers were older than the sisters which may have been a factor at sentencing time. Although defined as consensual, the courts appeared to believe that the men were more responsible for the sexual acts than the women.

Consensual relations were also assumed in the incest case of Henry and Sarah Ann.

33 Ohio Penitentiary: Registrar of Prisoners, GR3628-3640.
34 Ohio Penitentiary: Registrar of Prisoners, GR3628 vol. 4, 1859-1865:524.
36 Ohio Penitentiary: Registrar of Prisoners, GR3640 vol. 21, April 1898 through March 1900:116.
Lennox, who were father and daughter. Had Sarah been under age, the charge would have been rape upon one's daughter and the sentence could have been a maximum of twenty years in the state prison. Sarah Lennox, however, was a thirty five year-old widow, keeping house for her father. Henry Lennox was a sixty six year-old miner in Belmont county whose wife was living in Pennsylvania at the time the crime was committed. As in the other incest cases, the male offender was given a harsher sentence. Henry served seven years while his daughter served five. Although the details of their relationship are unknown, the difference in sentencing may be the result of gender bias in reverse, or may reflect a belief that although both would be punished, the male perpetrator is to some extent more responsible for the crime. Perhaps Sarah Lennox, like the other women in prison for incest, were victims who did not entirely consent.

The three women convicted of incest who were imprisoned while the men they committed incest with were not were all very young in age and were given minimal sentences. What is note worthy, however, is that Ohio's definition of the crime of incest necessitates that both parties be punished because both are assumed to be willing. Sarah Martin was an eighteen year old housekeeper who was sentenced to one year in prison, but was released by pardon two and a half months later. Annie Melvin was an eighteen year old domestic who was sentenced to one year and served the entire year. Lozitta Van Ausdale was a nineteen year-old house worker who was also sentenced to one year and served the complete year. Although their sentences were minimal, gender bias may have been at play in that they as women were punished when the males involved in the relations were not.\(^{37}\)

The women of Ohio who came before the lower courts faced many challenges in their efforts to punish those who abused them. Those rare women who saw their assailants

\(^{37}\) Additional research is needed on these cases. Although the males are absent in the state's only penitentiary they may have been younger then the women and sent to one of the state's reform farms.
convicted must have felt a sense of relief that at least their honor and dignity were upheld by the lower courts that believed them to have been unwilling recipients of sexual advances. As this chapter has demonstrated, however, their victories were short lived, and their dignity upheld only momentarily by the legal fraternity. The intensity and depth of which patriarchy functioned worked was beyond the reach of most women. Governors, the state legislature, prison reformers, and prison officials played a significant role in deciding the seriousness of sexually related crimes. Repeatedly, throughout the century, these components of the legal fraternity belittled the experiences of women and young girls ultimately considering the crimes committed against them as less serious than other crimes. Whether in the case of George Randall who admitted to raping a young girl, or John Veney, a black man convicted of a sexual assault upon a black woman, or Sheeff, European born, who was caught in the act of committing a sexual assault by police officers—all were eventually pardoned, paroled or released long before their sentences mandated. Across racial and ethnic lines, the legal fraternity acted in a manner that reflected their collusion as men in powerful positions with the authority to collectively deny women a viable chance at receiving justice. Prison reform movements, new legislation and increased efforts to stop the abuse of pardons did not help in this matter. So called “reforms,” such as those related to prison functioning, occurred at the disadvantage of women seeking retribution for sexually based crimes. As to the women who were convicted of sex crimes, they too had their lives impacted by a gender biased system. In cases of incest, the courts implied that women were victims yet they still punished them, while at times did not punish the men involved although it was legally required. The woman convicted of aiding and abetting in a sexually based crime, was not paroled, pardoned, nor released, but was forced to complete her sentence. The prison system then, was indeed powerful in the dynamics of sexual assault in the state of Ohio. Whether male or female, black, white, or immigrant, the prison served as a final assault on
the bodies of Ohio's women.
CHAPTER 6

“PROTECTING THE CHASTE”: SOCIAL PURITY AND SEX CRIME
LEGISLATION IN OHIO

At the end of the nineteenth century, American society entered a crisis about issues of sexual morality. Working-class youth were eager patrons of a nighttime world of commercialized amusements that mocked middle-class sexual ideals. Middle-class, white couples had dramatically reduced their family size, calling into question the primacy of motherhood in women’s lives and smoothing the way for them to venture beyond the home. Prostitution was running rampant in American cities, while the wages of sin seemed to be an epidemic of venereal disease. Since the 1870’s, purity advocates of various stripes had addressed these and other issues of sexual morality. Although a variety of issues were addressed, issues of morality, sexuality, family, and gender roles played a primary role in the debates, literature and legislation of this era. In Ohio, social purity reformers representing various causes were as active as in any other, and at times initiated the formation of influential organizations. On Sunday, December 23, 1873 for

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example, Boston based itinerant lecturer Dio Lewis visited the community of Hillsboro, Ohio. His topic for the evening was temperance reform. Lewis urged the women of the community to band together and pray in the local saloons in an attempt to close them. The next day, a group of Hillsboro women enacted Lewis’ plan. In the next four months over 32,000 women in more than 300 Ohio communities participated in the Crusade and in many towns they succeeded in closing, at least temporarily, all the local retail liquor outlets.2 The Woman’s Crusade severely disrupted the liquor trade and forced out of business manufactures and wholesalers as well as retailers. Within the year the Crusade had evolved into the Women’s Christian Temperance Union (WCTU) an organization that would eventually comprise over a million reformers and play a crucial role in achieving national prohibition. Several historians have noted that although the primary focus of the temperance movement was on decreasing and ultimately eradicating the manufacturing and sale of alcohol, issues of sexual morality, and the need for increased legal protection for women and young girls from the harm of abuse at the hands of men was a central underlying theme.3

In addition to protecting women from drunken husbands, both controlling and protecting female sexuality became another important theme in the social purity movement. Explicit restrictions on the dissemination of birth control information first appeared in the 1870s as the moral purity movement took hold. Its leaders succeeded in linking birth control to obscenity in the atmosphere surrounding the family in the Victorian United States. They also received strong national support. Anthony Comstock, a failed

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2 Jed Dannenbaum, “The Origins of Temperance Activism and Militancy Among American Women,” *Journal of Social History* 15, no. 2 (1981): 235. Dannenbaum presents a compelling thesis about the connection between early temperance movements and the thrust of activism that occurred as a result of the Hillsboro incident. His discussion also documents the central role that women played in this movement.

New York City businessman, mobilized the reform effort. He denounced the few state laws dealing with obscenity as too weak and turned to the federal government. Along with Vice-President Henry Wilson and Supreme Court Justice William Strong, Comstock drafted the first national obscenity statute that, after little debate, became law on March 1, 1873. The Comstock Act banned the circulation and importation of obscene materials through the mail. Federal judges shared Comstock’s enthusiasm for state regulation of morality. The U.S. Supreme Court in *Ex Parte Jackson* (1877) endorsed the Comstock Act and added to it the broad definition of obscenity. Justice Stephen J. Field’s opinion in the Jackson decision stated that “the object of Congress had not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals.” Several states, including Ohio, promptly passed “little” Comstock acts as issues of sexual morality reemerged as the focus of state legislatures.

Reformers used many tactics and ideologies to forward their aims, but unlike earlier sexual reform efforts that had relied largely on moral suasion and individual self-control, reformers who entered the Progressive era sought state regulation to achieve their goals. Purity reformers considered female virtue and chastity pearls of inestimable value. And, in an age of double standards, they argued, women suffered far more than men from loss of innocence. As a result, society through its legal system, had taken on the duty of protecting women’s honor and sensibilities.

Ohio purity reformers proved to be some of the earliest and most zealous campaigners for increased sexual morality. They pushed the state’s legislature to pass a number of laws that ultimately broadened the scope of what constituted sexual crimes. As early as 1873, Ohio’s citizens were calling for protective legislation for women. Newspaper articles commented on the “tragedy” of seduction and the “crime” of adultery.

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One unnamed woman wrote to her local newspaper that, "In the state of New York seduction and adultery have been made into criminal offenses. Ohio should do the same." Thus, by the efforts of male and female reformers, Ohio's social purity reform movement resulted in new legislation. This new legislation and those aspects of existing sex crime laws that were changed as a result of the social purity movement are the focus of this chapter. Between 1877 and 1890, Ohio's assemblymen increased the female age of consent, eradicated the emissions requirement, and added five new sex crime laws to state statutes. Each of these factors was the result of purity reformers who forced the legislature to reprioritize issues of morality in the age of commerce, growing city populations, and economic expansion.

In part, the new legislation benefited the experiences of women and young girls, as most of the legislation was designed to punish men for a variety of sexual and moral assaults that were not previously legally defined. But there were limitations. Even female reformers were imbued with the belief that only some women deserved protection. By focusing their efforts on protecting the "chaste" and "moral," they upheld ideologies that worked for over a century against the convictions of sexual offenders. Their insistence in upholding the ideals of proper female morality limited the broad impact that new laws could have brought. In addition, as we have seen, having written law did not always ensure conviction, nor the punishment of men who victimized women. Although purity reformers pushed the General Assembly for increased protective legislation, by the end of the century, they still had no official authority in Ohio's legal fraternity that could ensure offenders were properly punished. Moreover, they appear to have had little knowledge of how the authority and priorities of the Attorney General, governors, and prison officials would ultimately decide the extent of this new legislation. And when these members of Ohio's legal fraternity did so they still faced the age old problems of saturated

5 The Annals of Cleveland, (1873), 729.
court dockets and a penitentiary that was not built to house the many convicts sent its way. Thus, even the efforts of purity reformers fell short of the priorities established by the legal fraternity. There were however, important advancements as a result of this movement. By the end of the century, women and young girls would find that important shifts had occurred in the way society thought about male sexual responsibility and the necessary ingredients of the crime of rape.

As noted, the Ohio state legislature and State Supreme Court addressed the issue of female age of consent several times throughout the century. Prior to the 1880s the prevailing belief was that the set female age of consent was an issue of social maturity. By the time purity reformers predominated on the social and political scene that idea would be challenged and the age of female consent still at ten years old in 1880 would be increased by the legislature. This legislative change represented a significant shift in public thinking. The motivation to change the age of consent was part of the social purity reformers' desire to discourage young males from engaging adolescent females in premature sexual intercourse, which, they believed, led to prostitution. Moreover, changing notions of adolescent sexuality in the late nineteenth century helped to focus reformers' concerns on women's sexual vulnerability rather than promiscuity. This is because by the end of the century a new belief about female physiological development emerged. Physicians advised young women to postpone marriage until the age of twenty, when pelvic development would more likely be complete. Thus, by the latter part of the nineteenth century, medical and social authorities agreed that the age of sexual viability occurred later in a girl's life than previously had been thought. The focus shifted from social development to physical development as it had been for adolescent males the entire century.

These factors influenced the decision to raise the age of consent and reflected a

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changed social definition of female adolescent sexuality. Historian Kathleen Parker argues that another very powerful factor in the public support for prosecuting men who engaged in sexual activity with adolescent girls may have been the scientific discovery in the early 1890s of the long term, lethal effects of venereal disease. Although syphilis generally had been accepted as a serious disease, early Victorians thought gonorrhea was no more dangerous than a common cold. Persons suffering from either disease received little sympathy, since both were perceived as God’s punishment for sin. With the discoveries that syphilis caused internal organ malfunction and mental illness, and that gonorrhea was a deadly infection leading to diseases “the nature of which medical authorities had heretofore not guessed,” physicians began to spread the alarm. Moreover, when it became clear that wives could acquire a venereal disease from husbands that could result in female sterility, and/or could pass it on to children in childbirth, this “public health problem” took on new proportions—it became a menace to society.

The efforts of social purity workers and those concerned about public health made it possible to prosecute men for leading unwilling girls into social and physical ruin and potentially setting them on the road to prostitution. Both prostitutes and wayward females, formerly disregarded as hopelessly immoral, were now depicted as victims rather than criminals. Parker aptly contends that increasing the age of consent was a pragmatic move that aimed to mitigate a social health problem, but it was also an ideologically significant move that challenged male sexual freedom. Raising the age of consent to protect adolescent girls from male sexual impropriety, Parker states, was essentially a conservative measure rooted in a radical concept—that men should be held legally responsible for their sexual incontinence with any woman. Reflected in the 1890

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statutes, the Ohio legislature responded to ideology of reform workers and raised the age of female consent to fourteen years old.\textsuperscript{11}

Perhaps it was this shift in responsibility and the concern over the health risks involved with intercourse that finally pushed the state legislature to eradicate the emission requirement for rape.\textsuperscript{12} For decades women who filed charges of rape found that their claims could not satisfy definitions established by the legislature and rules of evidence treaties. As noted, the state Supreme Court suggested that the legislature make this important change in 1871 but it would not occur until 1877 after reformers organized around the issue.\textsuperscript{13}

Purity advocates both nationally and locally addressed issues of rape. Historian David Pivar notes that moral reformers willingly came forward to assist rape victims. Fearful that rapists might be freed either because the victims were reluctant to prosecute or because the testimony of women in courts of law might be disregarded, moral educationists gave moral and material assistance to them. In this instance reformers realistically assessed the unhappy situation and did what they could to end a legal disability of women.\textsuperscript{14} The major target of social purity reformers who addressed women’s issues was the sexual double standard, and rape was the most extreme result of the hypocrisy. Their attack on it had, in turn, two aspects: seeking greater safety for women and more penalties for men. Social purity feminists railed against male sexual privileges, against the vileness of male drunkenness and lust, and they sought with every means at their disposal to increase the costs attached to such indulgences. Social purity thought emphasized the importance of consensual sex for women, and insisted that even married women should

\textsuperscript{11} The Ohio Code (1890).
\textsuperscript{12} It is the intent of the author to research the ideological motivations behind eradicating the emissions requirement. A review of the medical literature on this topic may provide a more in depth understanding since medical authorities discussed emission and rape earlier in the century as noted in the Ohio Supreme Court’s decision in \textit{Williams v. The State of Ohio}, 14 O. 222 (1846).
\textsuperscript{13} \textit{William Blackburn v. The State of Ohio}, 18 O.99(1871).
not be coerced into any sexual activities they did not choose freely. In many ways, purity reformers of the late 1800s utilized tactics similar to those of the modern feminist era.

Feminist social purity reformers in Ohio did so as well by demanding that the state legislature remove the emissions requirement for rape. Members of Cleveland’s Female Protective Association wrote commentaries in newspapers and circulated petitions that would ultimately impact the legal fraternity’s previously male defined conception of rape. One such commentary read as follows:

The number of criminal outrages committed upon females in the United States in the past year was 2,300. If the wrongs that are born and suffered in silence were brought to light we should find they foot up an aggregate with which the above figures would scarcely bear a comparison.

The author was certainly correct about the frequency of rape being higher than reported and understood that the low numbers were influenced by the “silence” of those who did not press charges. The article continued with a resolve to complete a petition to remove the emissions requirement for rape:

We feel at this time that to require emission when the harm has already been done with the outrage itself is absurd, and urge the gentlemen of the legislature to remove it.

16 Elizabeth Pleck, “Feminist Responses to ‘Crimes Against Women,’ 1868-1896” Signs: Journal of Women in Culture and Society 8, no. 3 (1983): 451-470. In this article Pleck documents a wide range of services for female victims of violence including domestic violence shelters and rape crisis services. In addition, she includes a discussion of nationally known feminists’ speeches on topics of violence against women. Ohio’s women’s rights activists appear to have engaged in the same sort of activism. As early as 1854 a Mrs. C. M. Severance of Cleveland gave a speech before the Ohio Legislature on the “wrongs of Ohio’s laws against women”, called for a “Domestic Relations” law, and gave a treatise on how bad wife abuse was. See, Cleveland Newspaper Diges (Jan. 1-Dec. 31, 1854).
17 The Troy Times (Cleveland) 26 June 1873.
18 Ibid. Additional research is intended regarding the efforts of this reform group. Initial investigation indicates that this organization was the only one in Ohio (and probably one of a few in the nation) during this time period that specifically addressed rape as a primary political, social and legal issue.
Reportedly, the petition contained the signatures of over two thousand men and women. In 1874, the legislature discussed the emission requirement and by 1877 it was removed. The removal of the emissions requirement was an aspect of new legislation that clearly assisted women in prosecuting rape charges.19

Although eradicating the emission requirement and raising the age of consent had a direct impact on rape prosecution and the increased protection of young girls, the new laws passed as a result of the purity reform movement had more mixed results. In this area of law, the age of consent was raised to eighteen, and a variety of sexual offenses that would have been difficult to prosecute prior to this time period were instituted. The major limitation of this legislation was that it was specifically stated to protect the “chaste.” The new laws were placed in Ohio’s legal codes under the title “Offenses Against Chastity, Etc.” as opposed to “Crimes Against The Person” where rape law was listed.20

These laws generally fell under two categories. First, were laws that primarily targeted protecting females under the age of eighteen who were known to be chaste and of good reputation from men who could take advantage of them. Second, was morally based legislation that addressed a host of so called “immoral” behaviors including sodomy.

One of the laws designed to protect chaste women was entitled “Giving wine, etc., to a female with the intent to induce illicit intercourse.” Specifically, the law stated that:

Whoever, in a wine-room, saloon or restaurant, or elsewhere, gives, offers or furnishes to any female of good repute for chastity, over eighteen years of age, or to any female under eighteen years of age, any wine or other intoxicating liquors, with intent thereby to enable himself to have sexual intercourse, or to aid or assist any person in accomplishing or having sexual intercourse, with such female, shall be imprisoned in the penitentiary no more than three years nor less than one year.21

19 The eradication of the emission requirement was also applied to incest and sodomy. See, The Ohio Revised Code (1883).
20 Ohio Revised Code (1880).
21 The Ohio Penal Code, (1890): 1731.
Although the intent of the law was to recognize the role that alcohol could play in sexual abuse cases, and to punish those who use such malice against young girls, lawmakers fell short of protecting all underage females. According to lawmakers the only women who deserved legal redress were those who were of “good repute for chastity.” If the girl had a questionable reputation then the law would not protect her. Moral reformers worked in conjunction with the legal fraternity to place more value on a woman who was perceived chaste or a girl who was a virgin. In addition, the punishment for this crime was significantly less than for the crime of rape. In 1890, when this crime became law, the punishment for rape ranged from life for first-degree rape to three to twenty years for second degree rape. Thus, a man who forcibly had sex with a woman whom he had intoxicated could be charged with the lighter crime as outlined in this statute and given a shorter prison sentence.

The 1894 conviction of Fred Killman serves as example. Killman was a forty one year old white man who was originally from the state of New York. After moving to Allen county, Ohio with his wife Katie he opened a saloon. In November, 1894 he and his wife were asked to watch a sixteen year old girl for a few hours while her mother attended to some business in town. Killman’s apartment was next door to the saloon and easy to access. At mid-day, Fred Killman asked his wife to watch the saloon, then went to the apartment where the girl was, and gave her a strong alcoholic drink mixed with milk. The girl quickly became dizzy and disoriented and complained of a headache. Killman pushed her upon the floor, tore at her clothes and raped her.

At his trial, Killman argued that the girl showed no resistance and seemed to be “willing and content.” In defense, the state’s attorneys argued that the alcohol had made

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22 For a discussion on the role of age and the desire to protect virginity see; Marybeth Arnold, “‘The Life of a Citizen in the Hands of a Woman’: Sexual Assault in New York City, 1790 to 1820,” in Passion and Power ed., Peiss and Simmons, 35-56.

23 Fred Killman v. The State of Ohio, 16 O.S. 235 (1894).
the girl unable to resist or cry out. Killman, who was initially charged with second-degree rape was later convicted of the crime in mention and given the minimal sentence of one year.24 Had he been convicted of second-degree rape, his minimal sentence would have been three years.

In 1882, the Ohio Supreme Court decided upon an appeal filed by William Floyd Brown of Ashtabula County.25 Prior to 1882, Brown had enjoyed a respected position in his local community. By all accounts the reputation was deserved. He was married to a woman named Emma and had been one of the area's finest teachers. In 1881, however, that reputation would quickly become soiled by allegations of rape. The father of a young female student of Browns claimed that Brown had taken sexual liberties upon his daughter who was not mature enough to have consented to sexual intercourse. The father filed charges of second-degree rape with local authorities. Newspapers reported shock and dismay that Brown could be accused of such a thing, but as the story unfolded so too did Brown's admission that sexual intercourse had taken place.26 Brown argued, however, that a rape had not occurred but that the unnamed girl had expressed a romantic interest in him and invited the sexual encounter.

The justice in the Court of Common Pleas of Ashtabula County was convinced that a rape had not occurred. The judge declared that the fourteen year old girl was beyond the age where her consent could protect her, which was ten years old at the time. He concluded, however, that a crime had indeed occurred because new legislation declared that it was illegal for a teacher to have sexual intercourse with a female pupil under eighteen years of age. Teachers, who were to be morally upright because of the influence they had on students, would now be punished for moral infractions. The state legislature passed such a law in 1880 which defined the crime of "sexual intercourse with a

25 Brown vs. the State of Ohio, 16 O.S. 187 (1882).
26 The Ohio State Journal 23 November 1881.
female pupil" as follows:

A male person over twenty-one years of age, who is superintendent, tutor or teacher in a private, parochial or public school, or a seminary or other public institution, or instructor of any female in music, dancing, roller skating; athletic exercise, or any branch of learning, who has sexual intercourse, at any time or place, with any female, with her consent, while under his instruction during the term of his engagement as superintendent, tutor or instructor, shall be imprisoned in the penitentiary not more than ten years nor less than two years.

Although Brown had committed a crime according to the stated definition and was convicted, he nonetheless filed an appeal to the Supreme Court of Ohio in 1882. The basis of his appeal was that the sexual relation had occurred after the school hours of one day and before the school hours of another. Thus, he and his attorneys argued that he was not officially the girl's teacher at the time of the act.

The Justices ruled unanimously against Brown's appeal, for the statute written to protect the young and chaste was clear that "at any time or place" in which a teacher had sex with a female pupil was illegal. Brown was remanded back to prison to complete his five-year term. The new law in this case was of service to the unnamed girl in question. Had reformers not pushed for this legislation there would have been no crime that could legally have been prosecuted.

"Seduction under the promise of marriage" was yet another new sex crime listed under the offenses against chastity. Section 7022 of the Ohio Code defined seduction as:

A male person over eighteen years of age who, under promise of marriage, has sexual intercourse with any female person under eighteen years of age, and of good repute for chastity, shall be imprisoned in the penitentiary not more than three years, or in the county jail not more than six months.

Like the previous statutes, the emphasis of the crime was on protecting those females who were chaste. In the Supreme Court decision that tested seduction law, Justice C. J. Welch
declared that the, “language (of the law) could hardly be plainer. It is the reputation and the age of the female, and not her previous conduct, that bring her within the protection of the statute.”

The first seduction case was initiated by the charge of an unknown girl of sixteen years old against a Jacob Bowers. Bowers, who was twenty three years old and already married at the time, had promised to marry the young girl if she would have sex with him first. When the girl found out later that Bowers was already married and had lied to her, she confessed to her mother that she had engaged in premarital sex and charges were filed.

In the court of Common Pleas of Sandusky County, Bowers had tried to prove that the prosecuting female, “had had illicit carnal intercourse with men other than himself.” However, the evidence was rejected by the court since it had been long established that specific acts of immorality could not be introduced. Bowers appealed to the Supreme Court, but his motion was denied. Justice Welsch noted in the Court’s decision:

The law wisely and justly accords to the erring female a locus poenitentioe. If she has repented of her past error, and by her upright walk acquired an unimpeachable reputation for chastity, the law protects her against the man who overcomes her good resolves by a promise of marriage. It is purity and integrity of her mind, and not merely those of her person, that the law designs to guard against the attacks of the seducer.

The statute and courts were clear. If a girl under the age of eighteen had an “unimpeachable reputation for chastity” then the legal fraternity would protect her. The protection was even extended to those who had previously engaged in “immoral” sexual behavior but were now redeemed. Bowers was sentenced to the penitentiary for three years, the harshest term that the law mitigated for such a crime.

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27 29 Ohio St. 542: 1876 Ohio LESIX 440, Jacob Bowers v the State of Ohio, 2.
28 Ibid. 3.
29 Ibid.
30 Although sentenced to serve three years, Bowers was released via pardon from Governor Young after five months in the penitentiary. See, The Ohio State Penitentiary: Registrar of Prisoners.
In writing this new legislation, Ohio's legal fraternity made expressed commitment to increasing protection afforded women in sexual matters. But writing the laws was only part of the process, for the State Attorney's office rarely prosecuted those who were charged with these crimes, and governors and prison officials ultimately disproved their resolve to punish men who took advantage of the chaste. From 1880 to 1890 there were six convictions for seduction, two for having carnal knowledge with a pupil, and two for giving liquor to a minor with the intent of having carnal knowledge. This was out of the 136 charges that were filed. From 1890 to 1900 there were seven seduction convictions, two male teachers were convicted, and two convictions for giving liquor to a minor with the intent of sexually molesting. During this period there were 158 charges filed under the new legislation. Thus, ultimately the strongly written words, that were limited in their protection of only the chaste, fell short of truly offering increased protection.

The second area of new legislation that resulted from Ohio's social purity movement are those that were concerned about proper moral behavior around issues of sexuality. Although some of these crimes already existed on the city level, there were a number of new crimes added to the state crimes against chastity including: inducing illicit intercourse, keeping a house of ill-fame, indecent exposure, using obscene language, selling obscene literature or pictures, giving immoral exhibitions (including art), sending obscene literature by mail, advertising, selling secret drugs for use of females to procure abortion, profane swearing against God, sporting or working common labor on Sunday, sodomy, and cohabitation. Local reformers were quite concerned about what they perceived as a need for moral order.

Historian Nicola Beisel argues that at the heart of moral reform politics was family

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31 *Ohio Penitentiary: Registrar of Prisoners, 1880-1900*, and *Reports of the Attorney General of the State of Ohio* for the same years located in the Ohio Historical Society archives in Columbus, Ohio.
32 Ibid.
reproduction, specifically, the reproduction of the next generation. Moral crusades, Beisel states, addressed a crucial issue for parents: whether their children would equal or better their parents' place in the social world. Crusades to protect children from vice addressed parents' fear that vice would render children unfit for desirable jobs and social positions. Related to this fear, Besiel argues, was the belief that children would actively embrace habits or lifestyles that parents see as inimical to acceptable work or social habits. Thus, many of the above laws were erected to protect children from the "evil" corruption pervasive in late nineteenth-century society, whether children were perceived to be directly or indirectly impacted. The punishment for each of these crimes included the paying of fines from $200 to $1,000 and imprisonment in a county jail. Only one of the crimes required imprisonment in the state penitentiary—sodomy. Sodomy was addressed not only as a moral issue but as deemed a crime against a person when force was involved.

Until 1880, sodomy was not a state crime in Ohio. The state Supreme Court had addressed sodomy but only in terms of slander. In 1859, 1875, and 1880 the Court discussed slanderous accusations of sodomy. In *Melvin v. Weiant* (1880) Ohio Supreme Court Justices unanimously stated their opinions of sodomy:

"We fully agree with counsel for the plaintiff, that the words spoken of his client were of the grossest and most scandalous character. It would be difficult to put into words, a charge, which, if believed, would more certainly exclude from society the one against whom the same was made, or more surely expose him to public odium and disgrace. Formerly, in England, the offense was deemed of a nature so heinous, that the delicacy of the common law would not permit it to be named in its indictments... It may be, and quite likely is, true, that this want of statutory regulation upon the subject, has resulted, in the one case, from a reluctance to believe that a human being could be found sufficiently depraved to perpetrate so foul an act... However this may be, the fact remains that no statutory regulation..."

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That statutory regulation would occur nine years later in 1889 and was initiated by moral reformers who wanted local complaints of sodomy prosecuted on the state level. In 1889, State representative and moral reformer Samuel Holmes, along with six community members initiated House Bill number 779 before the legislature due to an increase in sodomy cases filed on the local level. The increase was documented in the five years before Holmes’ bill was introduced. Local charges of sodomy increased from zero, to two to five in 1889. The legislature responded to Holmes’ appeal by writing the following statute:

That whoever shall have carnal copulation in any opening of the body, except sexual parts, with another human being, or with a beast, shall be deemed guilty of sodomy, and shall on conviction thereof be imprisoned in the penitentiary not more than twenty years.

The case that initiated the sodomy law occurred in 1885 in Butler County. On December 29th of that year, a Christian Ramsayer filed charges against three men, Michael O’Conner, Robert Foster and John Wilson. The three men had forced anal intercourse upon Ramsayer and were charged with “the most detestable and abominable act of having copulation against nature—sodomy.” The discussion of sodomy in this time period primarily involved men but is relevant to a discussion of sex crimes as they impacted women in two ways. First, it is important because the State Supreme Court case that tested the new legislation was forced sex, and even the Justices had to debate the parallels

35 Melvin v. Weiant, 34 O.S. 184 (1880).
36 Ohio State Journal (Columbus) 6 February 1889; Cincinnati Enquirer (Cincinnati) 24 February 1889.
37 Reports of the Attorney General to the State of Ohio, 1884-1889. Located at The Ohio Historical Society in Columbus, Ohio.
38 The Ohio Penal Code (1890): 2038.
39 Robert Foster et. al. vs. the State of Ohio, 10 C.C. 467 (1886). Since no sodomy law existed at the time, and by legal definition men could not rape other men, Foster, O’Conner and Wilson were convicted of simple assault.
between forced sodomy and female rape, including emissions, force and consent, and when Ramsayer told someone about the assault. And second, because of all of the new legislation worded to “protect the chastity” of young girls, the crime with the harshest punishment, and the crime that resulted in the most convictions was the very crime that women were not subject to according to the legal fraternity. Every case of sodomy found in this study included only male litigants and victims, and in many cases men were convicted when no force was involved. The maximum punishment for sodomy was twenty years in the penitentiary, a punishment harsher than any of the new laws and equal to that of second-degree rape.40

In defining the punishments for the new legislation, the state legislature established its opinion that sodomy was a crime deserving more punishment than the other new legislation. On paper the new laws were focused on protecting the chastity of young women, but in reality the prosecutorial emphasis of the legal fraternity resulted in the convictions of either men who had victimized men or men whose perceived sexuality was considered both immoral and criminal. The entire legal fraternity appears to have responded in kind. Between 1890 and 1900, there were twelve seduction convictions, four convictions of male teachers who had sexual intercourse with pupils, four convictions of men giving liquor to a female minor with the intent of having sexual intercourse, one conviction of a man having illicit intercourse with a girl under eighteen years old, and forty nine convictions for sodomy.41 And those who were convicted of sodomy were the least likely to be pardoned by governors or released early by prison officials. In the same time period roughly forty percent of those convicted under the state’s new sex crimes were released from the penitentiary early, while only fifteen percent of men convicted of sodomy were given the same benefit.42 Ultimately, prosecuting and punishing the crimes

40 The Ohio Code (1890).
41 The Ohio Penitentiary: Registrar of Prisoners, 1890-1900.
42 Ibid. Additional research is needed to determine why this phenomenon occurred.

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committed against women would not be the main priority of Ohio's legal fraternity. This is particularly revealing when considered within a social context where protecting the chaste and shifting sexual responsibility upon men was the prevailing emphasis of both moral reformers and medical authorities.

The results of the social purity movement upon sex crimes were important progressions over the years in which legislation designed to protect women and punish sex criminals was limited. By adding new laws, women's experiences that did not easily fit into prior definitions of rape or incest were given credibility. By doing so the understanding of the range that sexual abuse can occur was broadened, and Ohio's communities appear to have begun a discussion about sexually criminal matters in a public manner. The overall results however, were marred by reformer's emphasis on protecting those whose sexual and moral reputation fit into preconceived ideals of proper womanhood. Results were also marred by the fact that ultimately other levels of the legal fraternity would decide the overall impact of new laws. Nonetheless, that aspect of Ohio's social purity movement that focused their efforts on sex crime legislation demonstrates the way women collectively sought to influence the legal fraternity to accept their perspective on rape and other sex crimes. By doing so these reform efforts mark an important era in the history of the movement to end violence against women.
CHAPTER 7

CONCLUSION

The depth at which male dominance of the legal system in nineteenth century Ohio functioned was profound and extensive. Male power existed in every aspect of law, legal requirements, and court room officials. Even before a woman made accusations of rape, assumptions about what constituted sex crimes were at play. The all male legislature had already declared their definition of rape and other sex crimes, which was backed up by the State Supreme Court, and rules of evidence treatise again written by men. Before she was even allowed to file official charges, the legal fraternity decided if her claims were legitimate. If her claims satisfied rules of evidence requirements: if she made declarations about the rape immediately after it had occurred, if she had a good moral reputation, if semen was present, if non-consent could be established, and if evidence of violent force were visible then official charges would be accepted. Justices of the Peace and male physicians examined the woman with preconceived notions about the nature of rape and the tendency for women to lie about such matters.

If her claims were validated by male authority, and evidence was substantial, she entered the lower court room and faced an entirely white and male jury, judges, attorneys, and other court officials. There she defended her claims and was forced to discuss sexual issues that were considered improper for respectable women and at times were difficult to articulate. Attorneys for the defendant generally played upon social assumptions about women’s chastity. If they could demonstrate that the woman had a “bad” reputation for
chastity they would. Whether the claims were true or not was not the issue. The tactic was to bring forth as many witnesses as possible who would testify to her unchaste reputation. Tactics such as these, strict rules of evidence and testimony about the woman’s declarations worked against the efforts of female accusers. Charges were often reduced from rape to attempted rape, especially when the punishments were severe, and most men were cleared of all charges.

If a conviction had been won and the lower court found the sex criminal guilty, a woman’s fight to achieve justice was still not over. She may have felt a sense of relief initially, but the legal fraternity still had two important layers: The State Supreme Court and successive governors who grappled with an over crowded prison system. Those men who were convicted in the lower court and could afford additional attorney fees appealed to the Supreme Court. When they did, they found a high powered level of the legal fraternity whose scrutiny of the dynamics of rape showed their biases about reputation, women’s words, age of consent, emissions requirements, and the slightest legal technicality. Repeatedly, Justices chivalrously declared their disgust at the behavior of male sex offenders and repeatedly they sent the conviction back to the lower court where a dismissal of charges was likely. At times Justices threw up their hands and said that they had to follow the law strictly, but when it served their race and gender based prejudices they used their power to defy established legal definitions.

For those men convicted in the lower court that did not appeal to the Supreme Court, their chances of receiving a pardon or early release were likely. Those who had committed the most heinous acts with violence or upon female children or who were repeat offenders were ironically the ones who were most likely to be released early. Although race worked to the disadvantage of Black men in Ohio’s penitentiary, patriarchal collusion benefited even those who had assaulted white women. Although pardons were given to a variety of criminals who had committed a variety of crimes, sex offenders were
released more frequently than any other. As prison reformers sought to change the ways criminals were treated in prison, new laws continued to release convicted sex offenders at a higher rate than any other.

Social purity reformers too, would find that the results of their efforts were limited. Their own acceptance of nineteenth century standards of female sexual morality, and the overriding power of the legal fraternity that extended beyond newly written laws and female driven agendas thwarted the total impact that such legislation could have.

Considering the extensive manner in which patriarchy was institutionalized in Ohio’s legal fraternity, it is no wonder that Eliza Johnson shot the young man who raped her and tried to kill him. What is interesting about Ohio’s legal fraternity as related to sex crimes is that no one commented on the scope of the problem. Individuals and groups complained about various aspects of the legal fraternity. Individuals and groups resisted many of the assumptions about rape and worked to create new and more protective laws and were even successful at changing the emissions requirement, which had allowed so many men to escape charges of rape. But the dynamic way different aspects of the legal system worked in conjunction was never understood in its entirety. Eliza Johnson was one of the few documented that responded to the early release of the man who had raped her, but many more were no doubt unaware of the way the system worked collectively to the disadvantage of women who made allegations of rape.

I say this not as a critique of the women who confronted the fraternity but more as a statement about the way patriarchy worked on a subconscious level. That is, the way that both men and women exist with in a patriarchal society that few have an in-depth understanding of. The record indicates that even the male members of the legal fraternity whether as attorneys, supreme court justices, governors, or legislative members recognized the way areas with separate legal responsibilities worked subconsciously yet collectively to create a system in which rape was easily excusable. Their gender based
assumptions were so deeply engrained that they were spoken as universal truths and rarely questioned.

This historical understanding gives credit to feminist theories of the way sexism and patriarchy function in U.S. society. Their theories that male authority is institutionalized and sexual violence should be viewed as a political rather than personal act are true. Even in the modern era these aspects of our culture are at play. Rape has the lowest conviction rate of all violent crimes. The likelihood of a rape complaint ending in conviction is two to five percent. While the intent of rape reform legislation was to shift the emphasis from the victim's experiences to the perpetrator's acts, prosecutions are less likely to be pursued if the victim and perpetrator are acquainted, and juries are less likely to return a conviction in cases where the victim's alleged behavior departed from traditional sex-role expectations. In his study on child sexual abuse, Vincent De Francis found that plea bargaining and dismissal of cases were the norm. In Diana E. H. Russell's study of 930 female survivors of child sexual abuse, only seven resulted in conviction.

Gender and race based attitudes and the legal results of these attitudes are long standing traditions in U.S. society. This examination of Ohio's legal fraternity and the experiences of the women who entered it assists us in clarifying the way these dynamics functioned in history and the legacy these legal realities have on the present day.

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4 Ibid., 13.
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