RAPE, INCEST, AND HARPER LEE'S *TO KILL A MOCKINGBIRD:* ON ALABAMA'S LEGAL CONSTRUCTION OF GENDER AND SEXUALITY IN THE CONTEXT OF RACIAL SUBORDINATION

IRIS HALPERN*

In 1960, *To Kill a Mockingbird*[1] was published to significant popular acclaim: a reception that has proved enduring. *Mockingbird* remains one of the most widely circulated works in United States history.[2] Curiously enough, however, the nonpareil American novel known for its condemnation of racism has proven itself a more venerable object in the heart of the legal establishment than in that of the literary—a peculiarity which has given rise to frequent comment. Despite its Pulitzer Prize, few literary scholars have engaged critically with the work.[3] Comparatively, Harper Lee's novel and the characters she constructs therein have received an unexpected and atypical amount of attention from a field—law[4]—that is defined by objective, rational perspectivalism and which is notorious for its

---

* J.D., University of California, Berkeley, School of Law (Boalt Hall), 2008.

I would especially like to thank Kathryn Abrams for all of her suggestions while I authored this Article in my third year at Berkeley. Thanks as well to the editors and members of the *Columbia Journal of Gender and Law* for their painstaking and excellent editing efforts.

[1] HARPER LEE, TO KILL A MOCKINGBIRD (Perennial 2002) (1961) [hereinafter MOCKINGBIRD].

[2] *See* CLAUDIA DURST JOHNSON, TO KILL A MOCKINGBIRD: THREATENING BOUNDARIES 13–14 (1994).

[3] The few in-depth literary analyses that do exist note this irony. Johnson observes, for example, that the book has never been the subject of a dissertation and has been the subject of only six literary studies. *See* JOHNSON, *supra* note 2, at 20, 25–26.

[4] For purposes of this Article, the phrase "the field of law" consists only of a narrow set of legal actors—primarily judges and lawyers (or those trained in the law but serving in other forms of regulatory capacity, such as legislatures). For other purposes outside of the purview of this essay, legal actors would certainly include a broader range of players (e.g., the police, scholars). However, because the focus of this Article is a discrete one, I have restricted the definition.

ostensible disdain of the fictional and activist. Indeed, entire symposia and law review volumes have been dedicated to the work.[5]

The book, however, steadfastly maintains its position as a masterpiece in the canons of American literature. Popular response to *Mockingbird* has been remarkable: it has enjoyed ninety-four separate printings and appeared on secondary school reading lists as often as any other book in the English language.[6] By the close of the 1980s, Lee's story was mandatory reading in seventy percent of all public schools.[7] A 1991 survey found *To Kill a Mockingbird* listed second only to the Bible as the book that has had the most meaningful impact on the respondents' lives.[8]

The popular and nascent critical treatment of *Mockingbird* has emphasized the story's racial themes. Perceptions of race—particularly white notions of black inferiority—are clearly a central object of critique in Lee's novel. *To Kill a Mockingbird*, after all, was a work penned in response to the agitated and volatile scenery of 1950s and 60s America—a period renowned as much for its omnipresent reactionary violence as for its peaceful protest and civil disobedience. All around Lee, the intransigence of the South following the Supreme Court's 1954 desegregation ruling in *Brown v. Board of Education*[9] was on stark display.[10] In scripting *Mockingbird*, Lee sought to document the region's historic problem with racism and expose the anatomy of segregation at the moment of its legal dismantling. In doing so, she perspicaciously commented on the

---

[5] The greatest volume of critical reading about the text has been generated by two legal scholars who use Atticus Finch as a source of material for legal ethics analysis. *See* Alice Hall Petry, *Introduction* to ON HARPER LEE xv–xvi, xxii (Alice Hall Petry ed., 2007) (discussing the scant coverage of the book in literary analysis and the surprisingly in-depth work done by several law scholars). Whole symposia and journal volumes have analyzed the novel and its characters. *See generally* Symposium, *To Kill a Mockingbird*, 45 ALA. L. REV. 389 (1994); Symposium, *Classics Revisited*, 97 MICH. L. REV. 1339 (1999). A brief search in July 2009 of the LexisNexis legal database by title generated some 662 Law Review, Journal, and Magazine hits.

[6] JOHNSON, *supra* note 2, at 13–14.

[7] *Id.*; *See also* Petry, *supra* note 5, at xv–xvi.

[8] Petry, *supra* note 5, at xv–xvi (sample of five thousand participants).

[9] 347 U.S. 483, 495 (1954) (*Brown I*).

[10] JOHNSON, *supra* note 2, at 11–12; Patrick Chura, *Prolepsis and Anachronism: Emmett Till and the Historicity of* To Kill a Mockingbird, *in* BLOOM'S MODERN CRITICAL INTERPRETATIONS: TO KILL A MOCKINGBIRD 115, 115–16 (Harold Bloom ed., 2007).

institutional mechanisms of racial hierarchy,[11] and ultimately turned to fiction to facilitate cultural change in the face of law's failure to end the injustices visited upon black citizens of southern towns.[12]

While *Mockingbird* remarks on race openly, the book also invokes the theoretical framework of "intersectionality" developed by critical race theorists in the legal academy. These theorists argue that race does not occur independently of the histories of gender or sexuality.[13] Rather, gender and sexuality heavily influence and shape our conceptions of race. It is this additional layer to Lee's writing, her condemnation of southern mores regarding femininity and sexuality, which helps further expose the variety of institutional strategies operating to construct and police race both in past and present.

The theory of intersectionality is explicated by Professor Kimberlé Crenshaw in her landmark essay *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*.[14] Professor Crenshaw postulates that a black woman is more than just the separate layerings of gender plus race; she is a distinct personality who confronts distinctive forms of harassment and bias.[15] Because courts fail to grasp the mutually constitutive ways in which race and gender interact, black women's subjectivity and injuries go unrecognized.[16]

Warning us, Crenshaw extends the following cautionary advice: It is incumbent on feminism to interrogate and take account of the ways in

---

[11] *See* Eric J. Sundquist, *Blues for Atticus Finch: Scottsboro, Brown, and Harper Lee*, *in* BLOOM'S MODERN CRITICAL INTERPRETATIONS, *supra* note 10, at 75, 77–78.

[12] *See* Calvin Woodard, *On Racism and the Law*, *in* BLOOM'S GUIDES: TO KILL A MOCKINGBIRD 69, 69–70 (Harold Bloom ed., 2004).

[13] *See, e.g.*, *infra* notes 14–17 and accompanying text.

[14] Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140. Professor Crenshaw notes that failing to adopt this framework erases many groups, for example black women, in the "conceptualization, identification, and remediation" of experience. *Id.*

[15] *See id.* at 159.

[16] *Id.* at 150. Professor Crenshaw argues that contemporary antidiscrimination frameworks are inadequate by demonstrating how poorly they operate in the employment law setting. Focusing on Title VII of the Civil Rights Act of 1964, Crenshaw describes how black women are disenfranchised because their particular experiences and identity fall outside of judicial consciousness. *Id.*

which dominant conceptions of gender are situated in, and operate in tandem with, histories of racial subordination. As she explains, "[a]n effort to develop an ideological explanation of gender domination in the Black community should proceed from an understanding of how crosscutting forces establish gender norms and how the conditions of Black subordination wholly frustrate access to these norms."[17]

Through examination of Lee's *Mockingbird*, this Article will take up Crenshaw's admonition and ask from where our contemporary epistemologies of gender come and what potential ideological struggles have informed them. How have prevailing constructs of femaleness and sexuality been manufactured, internalized, enacted, and policed in response to America's history of racial subordination? In what ways do they interconnect? Lee explored these very questions as she forayed into the heart of American racism.

Conventions of gender and sexuality ceaselessly respond to society's agenda for race, as is true of the converse. The inaccessible interpretations of womanhood that Crenshaw contests have been systematically naturalized in American culture for the same reasons underpinning the development of racial taxonomies: desire to maintain geo and socio political hierarchies.[18] Lee situates Jim Crow era gender and sexuality within the region's overarching "rape complex"—the discourse produced to validate segregation and black subordination.[19] By doing so, she elucidates the convergence of gendered, sexual, and racial ideologies and comments on how cultural and legal institutions promulgate these conditions.

Part I of this Article briefly surveys the legal and cultural environment before and during desegregation in the South and dissects the mechanics of white supremacy by analyzing how gender and sexuality were oriented under its discourse. Part II explores the narratives of gender and sexuality interwoven into *Mockingbird* with the intention of showing how Lee's characters and plot criticized temporal constructions of gender and heteronormativity as facilitating racial signification and hierarchy. As this Part explains, normative models of femininity and masculinity served to

---

[17] *Id.* at 155–56.

[18] *See generally* Michael Omi & Howard Winant, *Racial Formations*, *in* RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY (Paula S. Rothenberg ed., 1998); Ian Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.–C.L. L. REV. 1, 27–40 (1994).

[19] Chura, *supra* note 10, at 117–18.

justify racial stratification and sanction the forms of particularized violence visited upon blacks throughout the era. Further, these personifications were reached in part by restricting the sexual agency of both white and black women (although sexual dominion over each occurred for different reasons and was achieved through different means).

Part III uses Lee's insights to decipher the legal system's function in creating and policing certain forms of sexuality and explores law's potential investments in doing so. This Part juxtaposes Lee's criticisms with Alabama's[20] jurisprudence and legislation on rape, incest, and evidence, and theorizes the ways that the sexuality of both black and white women was manipulated to effectuate gender norms and maintain a racial caste system. Though obscured when viewed through more traditional modes of legal analysis, this Part highlights the ways that Lee's multiple narratives of sexuality illuminate the otherwise veiled motivations behind Alabama's evolving treatment of these crimes before and during the years of desegregation. It concludes that Lee depicts a period where sexuality became a crucial site of contention in white supremacy's struggle to reinforce and legitimize its stronghold over the South.[21]

I. CONTEXT

To Kill a Mockingbird's value as a resource for thinking about transformations in the country's regulation of race may be extrapolated from its iconic status. The text's popularity, familiarity, and subject matter provide insights into law's operation during an epoch when the authority of the law functioned to entrench segregation through pervasive activity on a number of seemingly unrelated fronts. It is this subplot that ultimately provides the roots of the legal profession's romance with Lee's novel.

From where does the faithful relationship between law and *Mockingbird* arise? One possible explanation for the attraction is intimated by Charles Lamb's introductory quote that concedes: "Lawyers, I suppose, were children once."[22] *Mockingbird* depicts legal actors warmly and decently, in contrast to their stereotypical renderings as avarice-motivated, argumentative, and even heartless creatures obsessed with the technical.[23]

---

[20] *Mockingbird* is set in Alabama. *See* MOCKINGBIRD, *supra* note 1.

[21] Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 676 (2002).

[22] Charles Lamb, *Introduction* to MOCKINGBIRD, *supra* note 1.

[23] This presumably correlates with Lee's personal history. Her father, Amasa Coleman Lee, and her sister were lawyers—the former being credited as the character study

Intuitively then, the legal community retains its fascination with *Mockingbird* at least in part because it strongly identifies with the novel's positive characters—especially with the affirming "hero-lawyer" persona of Atticus Finch. The profusion of legal scholarship lauding Atticus's ethics and comport in the face of tumult supports this hypothesis.[24]

The captivating father figure of the novel, Atticus, has indeed evolved into such a revered symbol in the legal community that Professor Monroe Freeman, upon censuring the character for complacency in certain structures of racism in his *Legal Times* column, was forced to reevaluate his criticisms following an outpouring of disquieted responses from fellow academics, attorneys, and even the then-president of the American Bar Association, Talbot D'Alemberte.[25] Other legal characters have also emerged from the text with a slightly romanticized flavor. Judge Taylor, for example, has procured a minor role in legal pedagogy for his attempt to maintain rule of law in his courtroom.[26]

---

for the much-revered patriarch of the book, Atticus Finch. See Timothy Hoff, *Influences on Harper Lee: An Introduction to the Symposium*, 45 ALA. L. REV. 389, 392–94 (1994); Petry, *supra* note 5, at xiv. Lee herself studied law at the University of Alabama. Hoff, *supra*, at 396–97.

[24] The heroic lawyerly behavior of Atticus Finch is discussed extensively in legal, as well as literary, scholarship. *See, e.g.*, JOHNSON, *supra* note 2, at 17 (quoting Claudia Carter's description of Atticus's influence as a lawyer–hero); Petry, *supra* note 5, at xxiv–xxv (providing examples of lawyers characterizing Atticus Finch in a heroizing fashion); Cynthia L. Fountaine, *In the Shadow of Atticus Finch: Constructing a Heroic Lawyer*, 13 WIDENER L.J. 123 (2003); Michael Asimow, *When Lawyers Were Heroes*, 30 U.S.F. L. REV. 1131, 1136–38 (1996).

[25] Claudia Johnson, *Without Tradition and Within Reason: Judge Horton and Atticus Finch in Court*, 45 ALA. L. REV. 483, 483–86 (1994) (recounting the response to Freeman's column and noting the attention Atticus Finch has received in the law); JOHNSON, *supra* note 2, at 17–19; Petry, *supra* note 5, at xxii–xxiv. Almost a canonical figure, Atticus Finch has been cited by acclaimed public interest attorneys such as Morris Dees, the founder of the Southern Poverty Law Center, as an inspiration for their specific careers. Petry, *supra* note 5, at xxiv. Professor Freeman revived some of his criticisms of Atticus Finch in subsequent years, critiquing his complicity in the racist structures of the South. *See* Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994); Monroe H. Freeman, *Monroe Freeman on the Difficulty of Atticus Finch as a Role Model*, *in* BLOOM'S GUIDES, *supra* note 12, at 65, 65–69.

[26] Judge Taylor obtained minor role model status because he assigned Atticus to Tom Robinson's defense and attempted to administer law equitably in his courtroom—activities explained as inherently dangerous and for which he was eventually targeted by Bob Ewell. *See, e.g.*, JOHNSON, *supra* note 2, at 19. Talbot D'Alemberte, in his exonerating editorial in favor of Atticus Finch, also praised Judge Taylor as a legal role model. Thomas L. Shaffer, *Growing Up Good in Maycomb*, 45 ALA. L. REV. 531, 535 (1994) ("Scout . . .

While the legal community emphasizes the characters of *Mockingbird* when articulating the book's appeal, the subject of the law's own racist past also ineluctably emerges. The characters in Lee's novel are admirable *only* because they duel against the nation's malefic history of pervasive structural violence against African Americans. It is Lee's condemnation of femininity and dominant sexual norms, however, that most exposes the socially constructed and historically contingent nature of race. Performances of gender and sexuality in the novel undermine the assumptions fundamental to the maintenance of white supremacy—specifically, that race, gender, and sexual orientation derive from genotypes. Rather, race, gender and sexuality are revealed to be the products of diverse institutional pressures and histories, as well as personal agency in different contexts.

Lee's novel demonstrates this reality by dissecting the South's "race problem." In 1954, the Supreme Court mandated the desegregation of public schools in *Brown v. Board of Education*.[27] Ultimately, that holding served as the basis for rendering unconstitutional all state-administered de jure "separate but equal" segregation, a tenet which had been consecrated in the late nineteenth century in *Plessy v. Ferguson*,[28] but which had risen to prominence much earlier following the dismantling of the Black Codes.[29]

The following year, the Court heard the remedial phase of the litigation and concluded that desegregation should proceed with "good faith compliance at the earliest practicable date . . . to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to

---

learns about truth and courage from her father and from Mr. Underwood and Judge Taylor."); Rob Atkinson, *Liberating Lawyers: Divergent Parallels in* Intruder in the Dust *and* To Kill a Mockingbird, 49 DUKE L.J. 601, 638, 672 (1999) (discussing Judge Taylor's intentional act of assigning Tom Robinson's case to Atticus and Judge Taylor's role as one of Atticus's few white supporters).

[27] 347 U.S. 483 (1954) (*Brown I*).

[28] 163 U.S. 537 (1896). Private actors' discriminatory behavior absent state action was statutorily banned in various sectors by the two Civil Rights Acts (those of 1866 and 1964). The Civil Rights Act of 1964 is the legislation which prohibited private discrimination in terms of housing, employment, participation in services, etc. Civil Rights Act of 1964, 42 U.S.C. § 2000 (2009).

[29] The Black Codes arose after the Civil War and were invalidated by the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment. *See* Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 680–92 (2003).

these cases."[30] The standard—foreshadowing the South's resistance to desegregation—enabled regional de facto segregation to persist for years as federal authorities, the impetus behind legal desegregation, were largely deprived of enforcement power. By 1964, three years after *Mockingbird* was published, less than two percent of black school children in the South were attending integrated schools and several states, including South Carolina, Alabama, and Mississippi, had yet to facilitate a single black child's introduction into the white public education system.[31]

Lee integrates these and other experiential occurrences of race relations into her writing. The characters and plot of her story reference such tragedies as the murder of Emmett Till, a fourteen-year-old African American boy who was viciously mutilated in 1955 for allegedly insulting a white woman.[32] Also alluded to are the horrific Scottsboro trials, where nine illiterate black youths charged with raping two white women received such inadequate legal protections that the Supreme Court reversed and remanded their convictions and death sentences for due process violations, likening the prior proceedings to mob justice.[33]

But less frequently commented upon is Lee's success in revealing the relationship between conceptions of race, gender, and heteronormative sexuality.[34] As Gary Richards notes, *Mockingbird* "is a destabilization of heterosexuality and normative gender that seems . . . radical . . . . Lee

---

[30] Brown v. Bd. of Educ., 349 U.S. 294, 300–01 (1955) (*Brown II*).

[31] Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9–10 (1994).

[32] Chura, *supra* note 10, at 115–28 (noting similarities between the Emmett Till tragedy and *Mockingbird*).

[33] Powell v. Alabama, 287 U.S. 45, 59 (1932) (reversing and remanding defendants' convictions for rape and death sentences because defendants were denied the right to counsel in any real sense until the morning of their trial); JOHNSON, *supra* note 2, at 4–11 (discussing similarities between the Scottsboro trials and *Mockingbird*); Sundquist, *supra* note 11, at 88–94 (discussing similarities between *Mockingbird* and the Scottsboro trials and also the Emmett Till tragedy); *see also* Norris v. Alabama, 294 U.S. 587 (1935) (reversing and remanding rape conviction and death sentence because of unconstitutional exclusion of qualified African Americans from the jury).

[34] Although race and racism are the most often discussed aspects of the novel, gender and sexuality are also beginning to garner much attention. For example, The Publishing Triangle, an association of lesbians and gay men in publishing, listed *To Kill a Mockingbird* in their top one hundred gay and lesbian novels at position sixty-seven. The Publishing Triangle, The 100 Best Lesbian and Gay Novels, http://publishingtriangle.org/100best.asp (last visited Nov. 1, 2009).

presents [Maycomb] to be, without it ever being fully conscious of the fact, already distinctively queer."[35] These transgressions are not unintentional. Lee explicitly marks those persons in the story who most strenuously demand gender and sexual conformity as those who also most vehemently perpetuate the antebellum South's racism.[36] Such linkages underscore the interconnectedness of the three forces in an era when the specter of the black rapist and the personification of the vulnerable and sacred southern white woman were antithetically constructed and culturally internalized, and where racial archetypes were enforced through the legal and tacit policing of sexual intimacy to justify segregation and black subordination.[37] As Lee's narrative implies, none of these embodiments are natural or inevitable.

Lee's suggestion that gender and normative sexuality are abstractions resonates with a branch of feminist thought long suspicious of appeals to innateness as explanations for governing social and political orders. As Simone De Beauvoir counsels in *The Second Sex*, marginalized constituencies should be particularly wary of the rhetoric of biologism, for it has historically been levered against them only as justification for their own subjugation.[38] For just as gender—masculine as well as feminine—is constructed by patriarchy for purposes of valuation and power distribution,[39] so too have white supremacist philosophies invoked heredity in their efforts to validate racial hierarchies and unjust conditions.

> In proving woman's inferiority the antifeminists then began to draw not only upon religion . . . but also upon science—biology,

---

[35] Gary Richards, *Harper Lee and the Destabilization of Heterosexuality*, *in* BLOOM'S MODERN CRITICAL INTERPRETATIONS, *supra* note 10, at 149, 151.

[36] *Id.* at 160.

[37] *See* Chura, *supra* note 10, at 118–19.

[38] SIMONE DE BEAUVOIR, THE SECOND SEX xxiii–xxiv (1952).

[39] De Beauvoir elaborates on the construction of femininity by the male enterprise in her well-known quote:

> One is not born, but rather becomes, woman. No biological, psychological, or economic fate determines the figure that the human female presents in society; it is civilization as a whole that produces this creature. . . . Only the intervention of someone else can establish an individual as an *Other*.

Id. at 267.

> experimental psychology, etc. At most they were willing to grant "equality in difference" to the *other* sex. That profitable formula is most significant; it is precisely like the "equal but separate" formula of the Jim Crow laws aimed at the North American Negroes. . . . The similarity just noted is in no way due to chance, for whether it is a race, a caste, a class, or a sex that is reduced to a position of inferiority, the methods of justification are the same. "The eternal feminine" corresponds to "the black soul" and "the Jewish character." . . . In [all] cases the dominant class bases its argument on the state of affairs that it has itself created. As George Bernard Shaw puts it, in substance, "The American white relegates the black to the rank of shoeshine boy; and he concludes from this that the black is good for nothing but shining shoes."[40]

Lee effectuates her criticisms by exposing the theatrics of the southern "rape complex"—a phantasm first discerned by Wilbur Cash in *The Mind of the South*,[41] a book which captures the hysteria of post-bellum southern society at the specter of newly emancipated slaves sexually polluting white femininity. By organizing the plot around a false rape claim made by a white woman against a black man, Lee exposes the ideological labor undertaken by sexual norms to frame cultural (and legal) understandings of both gender and race. In his essay *Blues for Atticus Finch, Scottsboro, Brown, and Harper Lee*, Eric Sundquist fleshes out the anti-miscegenation mechanics of Jim Crow implicated in Lee's writing.[42] Theorizing the South's rape complex, Sundquist explains the methods employed by segregationists intent on forestalling integration[43] by "ultimately referring every racial question to the mystical body of the white woman."[44] The logic of this maneuver is to translate all sexual interactions that traverse color lines, even consensual relations, into forms of violence and abnormality and thus create grounds for prohibiting them.[45] In describing the relationship between the cult of southern womanhood and anti-miscegenation philosophy, Cash notes:

---

[40] *Id.* at xxiii–xxiv.

[41] W.J. CASH, THE MIND OF THE SOUTH 115–16 (1941).

[42] *See* Sundquist, *supra* note 11.

[43] *Id.* at 78–79, 90, 92–93.

[44] *Id.* at 90.

[45] *See* Chura, *supra* note 10, at 117–19.

> The upshot, in this land of spreading notions of chivalry, was downright gyneolatry. She was the South's Palladium, this Southern woman—the shield-bearing Athena gleaming whitely in the clouds, the standard for its rallying, the mystic symbol of its nationality in face of the foe. She was the lily-pure maid of Astolate and the hunting goddess of the Bœtician hill. And—she was the pitiful Mother of God. Merely to mention her was to send strong men into tears—or shouts . . . the ranks of the Confederacy went rolling into battle in the misty conviction that it was wholly for her they fought.[46]

White supremacy demarcated the boundaries of womanhood, constituting the female as virginal, chaste, passive, and above all white. Conversely, black masculinity was posited as animalistic, overtly sexualized, and inherently threatening to the (white) female's personhood.[47] Intimacy between them was cast as violating the precepts of natural law. Using the rhetoric of legal rationality, science, and god, the Alabama Supreme Court vehemently elaborated on this state of affairs often, for example, in the 1912 interracial rape trial *Story v. State*.[48] In *Story*, the court reversed a lower decision that forbade the black defendant from introducing general character evidence of a white woman's reputation for unchastity in his attempt to negate the element of non-consent,[49] even though the woman herself had admitted to engaging in prostitution.[50] But, as the court declaimed in Catholic detail, even where a white woman admits to employment in prostitution, the court required particularized information or evidence that the woman engaged in commercial intercourse with black men, not merely a willingness to have sex in exchange for money with other whites.[51] The presumption that even a fallen white woman, depraved as she was, would still not voluntarily engage in intercourse with African Americans was nearly irrefutable, for if she were to engage in sex with black men it would violate an elemental pecking order derived from the

---

[46] CASH, *supra* note 41, at 86.

[47] *See* Chura, *supra* note 10, at 117–19.

[48] 178 Ala. 98 (1912).

[49] *Id.* at 102–03.

[50] *Id.* at 101.

[51] *Id.* at 103–05.

"immutable rules of social conduct."[52] Based on these perceived rules of the natural social arrangement, Alabama law codified prohibitions against miscegenation.[53] "Since the fundamental, initial suggestion of the social separation of the races is conceived in nature . . . only ignorance or unholy purpose ignorance or unholy purpose [could] question or assail . . . the natural result that laws should be enacted promotive of the social purpose of the dominant race."[54] Those few, if any, white women who both engaged in prostitution and practiced their trade with black men were doubly degraded: first for unchastity and secondly for transgressing against racial norms. It was the sexually active female herself that was posited as anomalously diseased. In so reasoning, the court demarcated the use of sexual activity as a source of threat not only to dominant framings of race relations, but as a medium of assault on the female's sexual identity. Sex, for white women, was both a debased and debasing act when divorced from procreation, monogamy, and the husband's control: a fatal flaw inhering within the promiscuous female that was, when deployed across color lines, an even greater sickness and defect. It was "conclusive[] among both the races" that a white woman, "will not yield—has not yielded—even in her confirmed depravity, to commerce with a negro. . . . The consensus of public opinion, unrestricted to either race, is that a white woman prostitute is yet, though lost of virtue, above the even greater sacrifice of the voluntary submission of her person to the embraces of the other race."[55]

The fact that performances of gender and sexuality were responding to racist ideology, both preceding and following the decision in *Brown I*, was evidenced not only by their manifestations in daily life and routines, but also in the political rhetoric espoused by segregationist leaders. In the language of Mississippi Circuit Judge Tom Brady following the *Brown I* decision: "a new black threat [has arisen] to the loveliest and purest of God's creatures . . . the well-bred, cultured Southern white woman or her blue-eyed, golden-haired little girl."[56] This construction of womanhood and sexuality vindicated adherence to race-based hierarchization.

---

[52] *Id.* at 103.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 104.

[56] Sundquist, *supra* note 11, at 78–79.

II. WITH RACE IN MIND: NARRATIVES OF GENDER AND SEXUALITY IN *TO KILL A MOCKINGBIRD*

Harper Lee denotes the ways in which racial stratification relies on the perpetuation of specific embodiments of femininity and sexuality by divorcing the positive qualities often associated with womanhood—compassion, love, tenderness, caring—from those characters in the novel who most adamantly insist on the traditional trappings of femininity. Instead, these individuals are frequently associated with the negative aspect of racist discourse.[57] Recall, for example, the figures of Aunt Alexandra and the ladies of the Missionary Circle, the characters in the story whom most efficaciously personify the feminine, and who serve as the foils Miss Jean Louise Finch—Scout—is contrasted against. Scout contemplates with awe their perfect execution of the feminine role as she struggles to assimilate and gain societal approbation.[58] Yet, in the moments when these women anthropomorphize presumptively biological gender most acutely, Lee stresses the performative aspects of their practices and interpolated racism into the dialogue.

Following the trial of Tom Robinson, Scout is privy to a gathering where the women of the Circle, sheathed in pastel prints, have "put on their hats to go across the street."[59] They smell heavenly and achieve femaleness through artificial means which they nonetheless pass off as unstaged.[60] Their faces are "heavily powdered but unrouged," and wear masks of "Tangee Natural" lipstick accompanied by "Cutex Natural" nail polish.[61] This elaborate paradox between "natural" essence but fastidiously contrived aesthetics and mannerisms[62] also occurs in the same scene where the

---

[57] Karen Getman likewise illuminates the necessity of policing sex in the antebellum South. Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984).

[58] *See generally* MOCKINGBIRD, *supra* note 1, at 132, 262. Indeed, a central theme in *Mockingbird* is Scout's coming of age—the pressures forced upon her as she enters a gendered world where she can no longer continue to wear overalls, fight, and generally act like a tomboy.

[59] *Id.* at 262.

[60] *Id.*

[61] *Id.*

[62] *See* Richards, *supra* note 35, at 156–57.

women express opprobrium for "a sulky darky" and discuss those "poor Mrunas."[63] They condemn Helen (Tom Robinson's wife), and congratulate themselves by commenting that "[a]t least we don't have the deceit to say to 'em yes you're as good as we are but stay away from us."[64] Manifesting the internalization of the South's rape complex and the ways it precipitated sexual self-monitoring, Mrs. Farrow, with her "fresh permanent wave," complains, "there's no lady safe in her bed these nights."[65]

It is informative to compare this stream of commentary with Lee's depiction of these women as visually pleasing, as the only (white) mothers in the story, as religious moralists, and as, also importantly, the wealthy women of Maycomb County. The characteristics ubiquitously associated with femininity are vested solely in women of the Circle. Conversely, Scout has no mother, nor do the impoverished Ewells, who are denigrated by their racial peers as responsible for their own economic demise.[66] Miss Maudie Atkinson is both a bachelorette and childless.[67] With these comparisons, Lee illustrates how porous the boundaries of femininity can be. The women's strict adherence to the performance of "femaleness," dominated by ideologies of innateness, decorum, and asexuality, is one of Lee's most prominent examples of the constructed nature of gender. Femaleness is not a natural occurrence—it is a complex, ongoing process that evolves along with, and takes account of, revolutions in counterpart social norms.

The women of the Missionary Circle are not the only representatives in *Mockingbird* whom Lee reprimands for rigidly adhering to gender norms under the guise of authenticity. Lee further links gender conventionality with racism in the character of Mrs. Henry Lafayette Dubose. Mrs. Dubose warns Scout that wearing overalls is unladylike behavior that dishonors the Finch lineage and augurs future sexual degradation: "a Finch waiting on tables at the O.K. Café—hah!" Mrs. Dubose threatens.[68] Scout reacts appropriately: "I was *terrified.* The O.K. Café was a *dim organization* on the north side of the square."[69]

---

[63] MOCKINGBIRD, *supra* note 1, at 263.

[64] *Id.* at 263–64, 267; *see also* Dean Shakelford, *On Gender Issues*, *in* BLOOM'S GUIDES, *supra* note 12, at 71, 75–76.

[65] MOCKINGBIRD, *supra* note 1, at 265.

[66] *See infra* text accompanying notes 120–25.

[67] *Infra* note 143 and accompanying text.

[68] *Id.* at 117.

[69] *Id.* (emphasis added).

Simultaneously, Mrs. Dubose attacks Atticus for associating with African Americans and representing them in court. "Not only a Finch waiting on tables but one in the courthouse lawing for niggers . . . Your father's no better than the niggers and trash he works for."[70]

Lee's insights into gender tropes are subtler than her observations on race; she pens her characters in such a fashion that their gendered characteristics are less instantaneously obvious. Representations of Tom Robinson and his wife Helen, Calpurnia and her son Zeebo, the Reverend Sykes, and even the African American community of Maycomb at large are positive with only a few minor exceptions[71]—effectively combating caricatures of the black community that were prevalent at the time the book was released. Explicitly linking her critique of gender (or sexuality) with the racial politics of the era would have radicalized the novel to the point of alienating her mainstream target audience, so Lee obnubilated these subtexts, expositing their prominence in the politics of the time period discretely while making primarily legible her protests against dominant white imaginaries of African Americans. Lee's choice explains why *Mockingbird* was initially celebrated for its overt commentaries on race, and it is only now that critical assessors have begun to focus on the role gender and sexuality played within her book and critiques of racism.

Professor Claudia Durst Johnson notes in her comprehensive examination, *To Kill a Mockingbird: Threatening Boundaries*,[72] that the importance of the novel, at least in part, "arises from its challenge of the southerner's stereotype of African-Americans."[73] In defending the family's continuing relationship with Calpurnia, Atticus tells Alexandra that, in his wife's absence, Calpurnia is more than just a cook—she is the closest approximation to a maternal force that exists in Jem's and Scout's lives; although not a substitute for their mother, she is pivotal to their successful upbringing.[74] The Reverend Sykes, another positive image, preaches nonviolence and exudes an ethos of compassion towards both his congregation and the white citizens of Maycomb. Without apprehension, he

---

[70] *Id.*

[71] Lula is the one minor character Lee represents as angry, to the point of causing conflict within her own community, when she openly critiques Calpurnia for bringing Jem and Scout to the African American church where the two women are members.

[72] JOHNSON, *supra* note 2, at 16.

[73] *Id.*

[74] MOCKINGBIRD, *supra* note 1, at 155.

welcomes Jem and Scout into his church, and later into the area of the courtroom to which the African American community is restricted.[75] The black citizens of Maycomb rise as one, silently, in respect for Atticus as he completes the trial, exiting the courtroom. The next morning, Atticus awakes to find such a multitude of gifts of appreciation from the poverty-stricken community that it brings tears to his eyes.[76] Though on trial for allegedly raping a woman, Tom, ultimately, is the most beneficent character of the novel. Without claim to the youthful innocence granted to child protagonists in most literature, he yet still shows more kindness to Mayella Ewell than she receives from the state, or from her own family and white neighbors. He volunteers to assist with her regular household chores, expecting nothing in return.[77] All the while, he maintains an impeccable work record, despite his physical disability, and earns praise for his work ethic even from sectors of the white citizenry.[78]

Lee juxtaposes these images with several depictions of degenerate white characters who exhibit blatant bigotry and violence. Bob Ewell, for example, is not only exceedingly racist, but is also indolent, proudly uneducated, an abusive father, and a scofflaw. In due course he reveals himself as a coward as well; he hunts deer off-season, pulls his sons from school, lives unabashedly off the government dole, and targets children as the objects of his fatal violence.[79]

But the axis of segregation is not race as a self-contained category. Rather, it is the prohibition of miscegenation. Without this restriction, the racial classification system risked being rendered meaningless. Miscegenation threatened to destabilize and ultimately render illegible what society understood as race.[80] Lee comprehends this foundational rule of racism and uses her writing to target the structures that police racial borders through gender and sexual norms. The apprehension surrounding interracial

---

[75] *Id.* at 137, 139, 186.

[76] *Id.* at 244.

[77] *Id.* at 223–24.

[78] *Id.* at 222 (describing Link Deas voluminous proclamation to the courtroom audience, in the midst of the trial, that Tom was never a "speck o'trouble" in his eight years' tenure).

[79] JOHNSON, *supra* note 2, at 102.

[80] *See generally* Bennet Capres, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 38–43 (2006) (analyzing Richard Wright's novel *Native Son* and the trial of the main character, Bigger, to demonstrate racial trespass).

intercourse that is evidenced by Maycomb's white society[81] girds the statutory circumscription of cross-race sexual relationships for centuries.

Collette Guillaumin unmasks these operations in her work *Race and Nature: The System of Marks* by provocatively asking the question: What "natural group" did the children of slaves and masters fall into during the eighteenth century?[82] In answering the question, Guillaumin exposes the fallacy of presuming that the morphological "markings" of a body, the ostensible basis for race, arise from immutable inheritances or natural law.[83] Instead, she exposits that the mark of race, and therefore slavery, is relational: it did not pre-exist the social condition of enslavement.[84] Biracial children exposed the artificiality of the racialized body by falling into more than one column of the rubric at once. Thus, their destabilizing potential, rather than their physiognomy, explains their treatment.[85] Such a premise better explains the motivation behind placing children in a variant of servitude—either indentured service or slavery—regardless of their biological forbears' status. Typically, a child born to an enslaved black mother was bound because it was argued the baby's identity could not be severed from that of the maternal biology.[86] In Virginia, biracial children's legal status was derived from their mother as a matter of law.[87] If the child was born to an enslaved woman it would likewise be deemed a slave.[88] However—still invoking the rationale of maternal lineage—if the biracial child was born to a white woman, despite her independence, the offspring would be forced into indentured servitude until the age of thirty.[89] Likewise,

---

[81] MOCKINGBIRD, *supra* note 1, at 231–32 (describing Atticus's closing statement in which he discusses social taboos against interracial intimacy).

[82] Colette Guillaumin, *Race and Nature: The System of Marks*, *in* FRENCH FEMINISM READER 77, 84 (Kelly Oliver ed., 2000).

[83] *Id.* at 88–89.

[84] *Id.* at 89.

[85] *See id.* at 88–89.

[86] *See id.* at 88.

[87] Karen Woods Weierman, *"For the Better Government of Servants and Slaves": The Law of Slavery and Miscegenation*, 24 LEGAL STUD. F. 133, 134–36 (2000) (tracing the history of the "condition of the mother" laws in Virginia).

[88] *Id.*

[89] *Id. See generally* Guillaumin, *supra* note 82, at 84–85.

Maryland law, although purporting to align with paternal blood, evolved to render all mixed race children slaves, even those born to white women.[90] South Carolina forced all biracial children to work as indentured servants until adulthood, even after adopting the maternal lineage rule in 1740.[91]

The precept that morphological markings of the body precede an individual's social relationships was essential for the viability of slavery as an institution and for continued subordination of African Americans under Jim Crow regimes. Aunt Alexandra's preoccupation with, and insistence on, models of heredity captures this ideology.[92] White supremacy relied heavily upon theories of hermetic reproduction and replication, physiologically closed borders between races, and distinguishing physical characteristics.[93] As Guillaumin states:

> The social idea of a natural group rests on the ideological postulation that there is a closed unit, endo-determined [determined from within], hereditary and dissimilar to other social units. This unit, always empirically social, is supposed to reproduce itself and within itself. All this rests on the clever finding that whites bear whites and blacks bear blacks, that the former are the masters and the latter the slaves, etc. and nothing can happen, and that nothing does happen, to trouble this impeccable logic. The children of slaves are slaves, as we know, while the children of slaves can also be—and often are—the children of the master. What 'natural' group do they belong to?[94]

Gender was therefore cardinal in maintaining the South's racial caste system. Anti-miscegenation was enforced by scripting "woman"—always white—as sexually passive and virginal in order to support the cultural mythology underlying segregation and black inferiority. As Lillian Smith unpacks:

> [C]onventional white southern fears of black sexuality, which drove the South . . . superimpose[d] the semiotics of Jim Crow

---

[90] Weierman, *supra* note 87, at 141–42.

[91] *Id.* (discussing the process of indenturing and, finally, the decision to make all children born of enslaved persons likewise slaves under Maryland law).

[92] MOCKINGBIRD, *supra* note 1, at 147.

[93] Guillaumin, *supra* note 82, at 83–85.

[94] *Id.* at 84.

> upon the white female body[;] . . . part[s] of [her] body are segregated areas which [she] must stay away from and keep others away from. These areas [she] touch[es] only when necessary. In other words, [she] cannot associate freely with them any more than [she] can associate freely with colored children.[95]

Reinforcing her critique, Lee conversely narrates those white characters in the novel who contest dominant conceptions of gender and sexuality as the most enlightened individuals in terms of the South's overarching race problem. A host of positive white characters reinforce Lee's argument that gender and its behaviors are socially constructed. Unlike the members of the Missionary Circle, however, these figures do not participate in the model blindly, but by appraising the process of gender assimilation and either consciously attempting to emulate it or by repudiating parts of the performance entirely. Scout, in particular, interrogates the process of achieving femaleness. Attempting to reconstitute herself as feminine, a role she finds exceedingly difficult to fulfill,[96] she watches Calpurnia cooking and "beg[ins] to think there [i]s some skill involved in being a girl."[97] Being female, Scout intuitively comprehends, is an acquired proficiency. The essentialized woman does not inevitably exist. Rather, she is an ideal—one that female children aspire to become; a stage "where on its surface fragrant ladies rocked slowly, fanned gently, and drank cool water;"[98] and "a polite fiction at the expense of human life."[99]

Likewise, the inspiration for Charles Baker Harris—better known as Dill—is known to be Harper Lee's childhood friend Truman Capote, the openly gay author of the classic *In Cold Blood*.[100] In the scenes when Dill's effeminacy and queerness are most pronounced, Lee reflects on the procedures of racism most explicitly. During Tom's trial, for example, Dill's protracted sobs reverberate so audibly and that Scout must escort him

---

[95] LILLIAN SMITH, KILLERS OF THE DREAM 87 (1961).

[96] *Id.* at 90, 117, 131, 263. Scout does not want to be, and does not succeed in being, a "lady." *See also* JOHNSON, *supra* note 2, at 53–56; Richards, *supra* note 35, at 154–55 (noting how tomboyish ways were monitored and disciplined in line with codes of the South).

[97] MOCKINGBIRD, *supra* note 1, at 132.

[98] *Id.* at 266.

[99] *Id.* at 167.

[100] Richards, *supra* note 35, at 153–54.

from the courthouse. She is tearless, despite belonging to the sex considered too "frail" to serve on Alabama juries.[101] But Dill, in a visceral response to the racism of the trial, falls physically ill.[102] His epicene behavior is a response to the degrading cross-examination that Tom had been subjected to moments earlier. Dill's nonconformity testifies to the utter wrongness of the South's behavior. Dolphus Raymond, who escapes punishment for trespassing color barriers only by feigning alcoholism,[103] remarks as Dill vomits, "[t]hings haven't caught up with that one's instinct yet. Let him get a little older . . . he won't cry. . . not when he gets a few years on him."[104] Mr. Raymond's insights into masculinity echo Scout's earlier musings on becoming female. It is a learned behavior. Mr. Raymond's words also serve as a warning to Dill about what assimilating into masculinity means within the contours of southern social codes: losing part of his humanity.

Almost immediately, the costs of his increasing acculturation become evident as Dill moves to erase his effeminacy by expunging his race consciousness. "'Cry about what, Mr. Raymond?' Dill's maleness was beginning to assert itself."[105] Scout's observation speaks on two levels. In one sense, the essence of masculinity is exposed. Maleness, like femaleness, is not a natural state but is rather an institution into which children are recruited. At the same time, Scout's prognostications elucidate the ways in which race is marginalized upon entry into the sphere of the quintessential male who, like the female, is always white in the southern imagination. To acquire admission, boys must revisit their relationship with inequality, become inured to the violence of racism, and make whiteness the universal experience—the same way in which whiteness serves as the focal point of femininity.

Representations of Atticus—his age, eyesight, profession, mannerisms and hobbies[106]— function to undermine assumptions about straight maleness by associating his self-aware aberrance from masculine norms with more noble racial aspirations, against the backdrop of a hostile racial climate. Lee writes:

---

[101] MOCKINGBIRD, *supra* note 1, at 252.

[102] *Id.* at 225.

[103] *Id.* at 227–28.

[104] *Id.* at 228–29.

[105] *Id.* at 229.

[106] *Id.* at 102–03.

> Atticus was feeble: he was nearly fifty. . . . Our father didn't do anything. He worked in an office, not a drugstore. Atticus did not drive a dump-truck for the county, he was not the sheriff, he did not farm, work in a garage, or do anything that could possibly arouse admiration of anyone. Besides that, he wore glasses . . . he never went hunting, he did not play poker or fish or drink or smoke. He sat in the livingroom and read.[107]

As with Dill, it is in the scenes where Atticus loses or rejects his claims to heteronormative maleness that masculinity is most lucidly stripped down to structural violence by whites and systemic subordination of blacks. When Atticus's eyes "fill[] with tears" it is in response to the generosity of Maycomb's African American community,[108] despite contrary perceptions of them among the white citizens of Maycomb as "dissatisfied," "sulky," unintelligent, and living in "sin and squalor."[109] Later, when the citizens of Maycomb attempt to lynch Tom, Atticus suffers an almost maternal "flash of plain fear" and "trembling" for his imperiled children.[110] In bare contrast, at the same moment, the white residents of Old Suram who comprise the lynch mob are represented, at least initially, as homicidal, dishonest, threatening to youth, "cold-natured," and "sullen-looking."[111]

Through the repeated collocation of hyper-masculinity with problematic racial politics, Lee succeeds in demonstrating the mutual influence these phenomena have on each other. She uses an analogous technique in associating femininity with racism through the women of the Missionary Circle. But, it is also important to note that Lee's gender narratives are not always as monolithic as they might seem at first glance. By presenting inconsistencies, she illustrates the malleability of identity and thus allows for the possibility of a changed future—an impossible trajectory without recognition of the potential for human agency, consciousness, and capacity for transformation. Thus, there are instances when her characters transgress the tropes originally assigned to them. Atticus, for example, clearly harbors certain skills classically associated with masculine identity. This is demonstrated by his single-shot confrontation with the rabid dog,

---

[107] *Id.* at 102–03.

[108] *Id.* at 244.

[109] *Id.* at 264–67.

[110] *Id.* at 172.

[111] *Id. See also* JOHNSON, *supra* note 2, at 99.

Tim Johnson—a feat so impressive that even the county sheriff defers to Atticus's skill.[112] As Miss Maudie tells it, "Atticus Finch was the deadest shot in Maycomb County in his time. . . . His nickname was Ol' One-Shot. . . . If he shot fifteen times and hit fourteen doves he'd complain about wasting ammunition."[113] Similarly, Mrs. Dubose functions as another such exemplar, frustrating her own gender normative and sexuality normative rhetoric with her markedly unladylike qualities. Before her death, Mrs. Dubose is vindictive, vicious, uncharacteristically loud, dishonest, and belligerent.[114] Unlike the women of the Missionary Circle, she is not graceful or beautiful. After rebuking Scout for her undesirable trajectory in life, she "put her hand to her mouth. When she drew it away, it trailed a long silver thread of saliva."[115] Descriptions of Mrs. Dubose are often grotesque, itemizing her monstrosity; Mrs. Dubose had a face

> the color of a dirty pillowcase[;] . . . her mouth glistened wet. . . . Old-age liver spots dotted her cheeks and her pale eyes had black pinpoint pupils[;] . . . cuticles were grown up over her fingernails. Her bottom plate was not in, and her upper lip protruded[;] . . . she would draw her nether lip to her upper plate. . . . This made the wet move faster.[116]

The incongruities between these characters and the idealized norms of the time delineate the lapses between personal experience and institutional agendas. In so doing, Lee's imagery outlines a space for reconstituting gender through the very act of making visible its performative disposition. Further, by illustrating the traumatic psychological, economic, and emotional toll exacted from the characters, who despite their best efforts fail to satisfy institutional dictates, Lee illuminates the assiduous efforts undertaken by society in maintaining the legitimacy of governing gender norms. Atticus compliments Mrs. Dubose, "Good Evening, Mrs. Dubose! You look like a picture this evening."[117] The praise observes that femaleness is always about visage—it is about being a

---

[112] MOCKINGBIRD, *supra* note 1, at 109–10.

[113] *Id.* at 112.

[114] *Id.* at 114–16.

[115] *Id.* at 117.

[116] *Id.* at 122.

[117] *Id.* at 115.

picture, an image which is widely propagated, internalized, and believed. Between the elaborate artifice of the women of the Circle, Atticus, and Mrs. Dubose's inconsistent performances, Lee illuminates the disjuncture between individual and ideology. Yet simultaneously, Mrs. Dubose's victory over drug addiction just prior to her death fulfills Lee's second ambition—to prove the existence of free will and the potential for positive change within even the most entrenched players.

Due to Lee's understanding of gender as a schooling normative force in the structures of racism, it is unsurprising that few of her characters fulfill the criteria of successful gender performance. Mrs. Dubose's alienation, drug addiction, and ninety-eight pound frame prove unequivocally that when characters involuntarily fail to conform, the price exacted is a heavy one.[118] Through punitive cultural censure, the strict hierarchies and power arrangements are achieved and maintained. But there is no better representative of the dangers of failure than Mayella Ewell who, in Kathryn Lee Seidel's words, embodies the "destructiveness of the belle gone wild."[119]

Mayella Ewell serves as the focal point of the southern rape complex in the novel both because of her gender and, crucially, because of the control exercised over her sexuality by law, culture—even her own father—in part for racist purposes. White society has utterly abandoned the Ewells in all other aspects, especially Mayella, who despite her attempts to assimilate into it—her red geraniums, efforts at cleanliness, literacy, and desire for intimacy—is not permitted entrance.[120] The Ewell men ostensibly fail even to try: the truancy police require but a single day of schooling for the children, none of whom are functionally literate (with the exception of Mayella).[121] The family lives surrounded by dirt and trash near the community dump, closer in physical location to the black citizens of Maycomb than to the white ones—living, even, in a house once occupied by a black owner.[122] Lee depicts the Ewells as choosing this state with the

---

[118] *Id.* at 127–28.

[119] Kathryn Lee Seidel, *Growing Up Southern: Resisting the Code for Southerners in* To Kill a Mockingbird, *in* ON HARPER LEE 79, 87 (Alice Hall Petry ed., 2007).

[120] MOCKINGBIRD, *supra* note 1, at 33–34, 218. Scout recalls the clean corner of the Ewell home and realizes how lonely Mayella is. During the trial it is revealed that Mayella is the only child who can write at a rudimentary level as well, and throughout the book we are reminded that the rest of the family cannot and does not particularly care to learn how.

[121] MOCKINGBIRD, *supra* note 1, at 29–30.

[122] *Id.* at 33–34, 192–193.

ambiguous exception of Mayella. She portrays them as indolent, black hearted, and dishonest[123]—wards of the state who revel in their circumstances and who harbor no intent or desire to change it.[124] They are blamed for their own inhumane conditions, a refrain common in today's contemporary discourse on poverty;[125] the family is forgotten, reviled, and distanced until the white community requires a temporarily alliance in the face of racial integration.

Mayella is, for this reason, partially identified with Boo Radley, the mysterious secondary protagonist of the novel. Both characters exist on the fringes of society. Mayella is marginalized both because she desires—but fails—to realize southern standards of femininity and because of her family's poverty, the latter being a status that her racial peer group deems deserved and thus a sufficient excuse and justification for ostracizing her. In contrast, Boo is a voluntary outcast, understanding the brutality of assimilation and wishing not to conform to the predominant social directives, and choosing instead to remain secluded at the closing of the novel. Boo aspires only to reclusiveness. "Will you take me home?" he asks Scout, "in the voice of a child afraid of the dark."[126] He enters his house, closing the door behind him, and Scout "never [sees] him again."[127] In his brief, violent exchange with the outside world, Boo fatally stabs Bob Ewell in order to defend the Finch children. He then self-consciously touches Jem's head as the boy lies injured and unconscious, a gesture that appreciates the innocence of youth and its inevitable violent loss.[128] Immediately thereafter he returns to his own psychological (and physical) ambit, never to emerge again. By linking Boo and Mayella in their relationship to society, Lee questions the role of violence and sexuality in the maintenance of racial subordination, positioning sex as integral to gender and racial personality. Both characters share a similar past: they enter the story as hyper-sexualized, aggressive incarnations of their

---

[123] *Id.* at 29–34, 192–193.

[124] *Id.* at 192–193.

[125] *Id.*; *see* Teresa Godwin Phelps, *The Margins of Maycomb: A Rereading of To Kill a Mockingbird*, 45 ALA. L. REV. 511 (1994). For analysis in contemporary discourse see, for example, Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991).

[126] MOCKINGBIRD, *supra* note 1, at 319–20.

[127] *Id.* at 320.

[128] *Id.* at 317–20.

respective genders. Maycomb speculates that Boo, falling in with a "bad" crowd, stabbed his father in rebellion against the discipline the patriarch represented and in the youth's attempt to gain independence and ascendancy.[129] Mayella, despite clutching to racism, still proves willing to miscegenate in order to satisfy her desire for sexual intimacy. Moreover, she is the character in the book depicted as most overtly sexual and least benignly domestic. Both Boo and Mayella are consequently punished through the mechanism of exclusion from the community; Boo is physically confined to his home, while Mayella is socially ostracized.

Because of his maleness, Boo's hermitic existence functions differently. He cannot be dominated by his father male sentry as completely as Mayella can by hers. His confinement emasculates and asexualizes him, penalizing him for his youthful offenses, but it also facilitates his redemption by distancing him from the degrading racial politics of the era. The threat of his masculinity now eviscerated, it is Boo who ultimately kills Bob Ewell, even though both are white, because Boo retains a degree of autonomy and self-control by divorcing himself from the requirements of his gender—and consequently of his race. Conversely, Mayella is trapped because she does not want to estrange herself from her gender. Lee reveals how Mayella's gender facilitates her sexual exploitation as she is abandoned to incestuous sexual violence while trapped, like Boo, in the private, familial sphere—the traditional realm of male authority. Her acculturation thus takes a very different path from Boo's and eventually culminates in the false rape claim she levies against Tom.

The constructions of gender—both masculine and feminine—which Lee critiques are reflective not only of race but also of the enforcement of compulsory heterosexuality and female sexual subordination. As the theory of intersectionality predicts, sexual behavior plays a prominent role in molding other social classifications and is itself a manifestation of ideological forces, completely divorced from any claims to natural inclination. Lee's narratives of heterosexual intimacy are either violent and repulsive or are completely absent where they might otherwise be represented positively. This sexual landscape not only implicates configurations of gender and race, but also insinuates that law, a central force in *To Kill a Mockingbird*,[130] participates in reifying problematic and often destructive embodiments of sexuality. The legal framework in which

---

[129] *Id.* at 11–12.

[130] *See generally* Woodard, *supra* note 12, at 69–70; JOHNSON, *supra* note 2, at 95 ("Laws and the legal system, both official and unofficial, form the skeleton of the narrative.").

Tom Robinson is punished and murdered[131] is one in which "the kinds of justice administered by southern mobs and southern courts were often indistinguishable"[132] and "mobs and juries [were] indistinguishable."[133] Yet Lee was writing during a period in United States history when federal courts had attempted to dismantle legal segregation, and clashes between the technical rule of law and lawless tacit social codes were common as the two regulatory systems converged.[134] Southern recalcitrance took the form of mob justice as federal political will receded.[135]

In the end, law in *Mockingbird* not only fails to solve the South's race problem while "the secret courts of men's hearts"[136] predetermine the verdict against Tom, but it also fails to take cognizance of or account for the actual sexual violence which transpires in the text—incest and rape between a (white) father and his daughter.[137] Mayella and Bob Ewell's relationship is the only actual performance of heterosexuality in *Mockingbird*, and it is suffused with perverse brutality. Mayella's compelled accessibility to her father assumes the form imposed by a race-based caste system responding to fears of miscegenation. Societal organizing principles arise that focus the cultural and legal gaze on one set of contacts—in this case interracial relationships—while other combinations, often violent, are obfuscated. Mayella is thus driven to fabricate rape charges against a black man instead of making the same accusations against the true perpetrator, a white one. But when Bob Ewell shouts at Mayella, "[Y]ou goddamn whore, I'll kill ya,"[138] after he finds her with Tom, it is clear her chastity or health are not his concern; he never calls a doctor, and Mayella is distinctly not virginal.[139]

---

[131] MOCKINGBIRD, *supra* note 1, at 268.

[132] Sundquist, *supra* note 11, at 79.

[133] *Id.* at 87.

[134] *See* JOHNSON, *supra* note 2, at 96–103, 105–06.

[135] *See* Sundquist, *supra* note 11, at 79 (describing a revival of "Judge Lynch").

[136] MOCKINGBIRD, *supra* note 1, at 276.

[137] *See* Seidel, *supra* note 119, at 87. (stating "According to Atticus's definition of it ('carnal knowledge of a female by force and without consent'), Mayella was indeed raped by her father, as he beats her if she does not comply.").

[138] MOCKINGBIRD, *supra* note 1, at 221.

[139] *See* Seidel, *supra* note 119, at 87 (noting that the codes of southern womanhood produce the fiction of Mayella's virginity for the purposes of fortifying the South's rape complex, but Mayella is not in fact a virgin; she is regularly raped by her father).

Instead, his anger is motivated both by racism and his own dominion over Mayella's sexuality, which her intimacy with Tom threatens—an expression of jealousy that is common in domestic abuse to this day.[140]

Lee's novel is devoid of the prototypical narratives of heterosexual romantic relationships common to much literature of this genre. Romance is absent. Paralleling her strategies for gender, the white characters of the novel that are favorably portrayed are either widowed, such as Atticus,[141] or adamantly single like his brother Jack.[142] Miss Maudie Atkinson, the white woman who most challenges both normative femininity and racism, remains disinterested in her marital prospects, as she annually declares with relish her intention to remain single: "Call a little louder, Jack Finch, and they'll hear you at the post office, I haven't heard you yet!"[143] Atticus notes of Judge Taylor, the straight, married minor hero of the book, that he "didn't kiss [his wife] much."[144]

The southern rape complex is one of only two prominently figured heterosexual facets of the plot; the second is the extremely violent relationship between Bob and Mayella Ewell.[145] Lee reminds us that Mayella, in her own subtle, complicated fashion, inverts the familiar archetype of the southern woman. She is fundamentally pitiful—a failed and destitute belle abandoned by both nation and neighbor, except when she can be used to perpetuate racism. She is both produced and victimized by the South's social and legal codes. Despite her utmost efforts to satisfy her role, she is ignored by a community that shares nothing with her and supports her only so far as she functions to maintain racial hierarchy.[146] Her

---

[140] *See generally* Donna Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71 (1992) (surveying historical use of voluntary manslaughter in cases where husbands kill unfaithful wives).

[141] MOCKINGBIRD, *supra* note 1, at 6.

[142] *Id.* at 89, 99.

[143] *Id.* at 49.

[144] *Id.* at 188.

[145] *See* Richards, *supra* note 35, at 175.

[146] MOCKINGBIRD, *supra* note 1. Poverty is often correlated with this consideration as discussed *supra*, notes 120–25 and accompanying text. The Ewells are clearly poor, and the Old Sarum residents hardest hit by the depression are those who generally comprise the mobs as well as the juries. However, wealth does not go uncensored by Lee. Dolphus Raymond, a wealthy character, and the Finch family might be of a higher socioeconomic class, but Aunt Alexandra's tirade against white "trash," MOCKINGBIRD, *supra* note 1, at 256, the Missionary circle's mores, Miss Gates's racism despite her proclaimed dislike of Hitler,

father neglects, rapes, and beats her. Though Bob Ewell is the person who compels Mayella to come forward with rape charges,[147] her own intense racism fuels the process. Mayella subscribes to her whiteness a source of power and wields it readily, having gained little else of value to show for championing the dominant segregationist political and social milieu. She has no friends—she does not even recognize the term— she is regularly physically assaulted, and her father drinks away his relief checks, leaving her to raise her six younger brothers.[148] Scout understands that Mayella Ewell "must have been the loneliest person in the world. She was even lonelier than Boo Radley, who had not been out of the house in twenty-five years."[149]

Mayella's sexuality functions in several ways in *Mockingbird*: she implicates miscegenation; she is physically controlled by and sexually available to her father; and she fails at sexual propriety, for she cannot control her own bodily desires and does not wish to do so. These three themes reveal the many ways sexuality was produced in relation to the midcentury South's obsession with race. Heterosexuality in *Mockingbird* is portrayed as forced; the prominent heterosexual acts figuring in the novel are those of incest, not of romance. For Tom Robinson testifies that Mayella claimed, "she never kissed a grown man before an' she might as well kiss a nigger. *She says what her papa do to her don't count.*"[150] The allusion to incest and rape is drawn from the dialogue where Bob Ewell's abuse is made evident, and Mayella's silence in response to questioning at trial is suspiciously telling. By inverting the rape complex dominating southern discourse during desegregation, Lee locates sexuality within the region's historic social and political orders. Heterosexual intercourse is thereby revealed not solely as a natural occurrence, but also as a project that, although presumptively innate, is in fact a product of systemic institutional construction.

---

id. at 282–83, and Atticus's explanation on why the wealthier don't participate in juries, *id.* at 252–53, offer insights that contradict the façade that only the poor participated in racism and facilitated ongoing inequality.

[147] *See id.* at 199, 208–09, 212–14 (Bob Ewell was unconcerned with Mayella's injuries because he instigated them. Lee also insinuates that Mayella was looking to her father as the source of violence and for answers while testifying, and she indicates that he—and not Tom—beat Mayella).

[148] *Id.* at 199–201, 207–09, 213, 224.

[149] *Id.* at 218.

[150] *Id.* at 221 (emphasis added).

Mayella's sexuality contrasts distinctly with that of other female characters. Miss Maudie, for example, is distinctly asexual, exhibiting no heterosexual impulses despite the pressure of constant societal expectation. In his discussion of queerness among Maycomb's citizens, Richards queries how we are to read her and other fixedly single characters.[151] The characters whose performances of gender and sexuality contrast most to Mayella's are, not surprisingly, the women in the Missionary Circle. Their sexuality is marked by gender hierarchy, maternity, propriety, whiteness, and disavowal of personal agency and transgressive desires. By juxtaposing Mayella's sexuality with that of the Missionary Circle, Lee disambiguates heterosexual behavior from its oft-ascribed positive qualities, as she does likewise with gender identity. She thereby shows that sexuality, like gender, is not a natural state of being but instead is socially constructed. Lee does not, however, condemn all heterosexuality. Rather, by separating the fact of heterosexuality from common positive assumptions about it, or tinting those ostensibly positive attributes with racism, Lee makes her critical point: there is nothing inherent about sexual normalcy, just as there is nothing inherent about gendered performances. Norms surrounding sexuality are malleable, evolutive, and are mutually constituted by considerations of race and gender. Thus, women's sublimation of desires to the superior call of chaste domesticity cannot necessarily be equated with compassion, caring, and morality; heterosexual sexual intimacy does not necessarily yield stability and peace. Where cultural mythologies alone fail, sexual violence works in tandem to maintain existing gender and race power relations. Consequently, there are two violent plot devices in Lee's novel: Mayella's abuse and her contrived rape charges. These two acts problematize dominant conceptions of sexuality that reinforce demarcated boundaries of racial purity, as well as the allegedly innate nature of sexuality. Lee's allusion to Bob Ewell's incestuous violence, though subtle, is an invaluable part of her analysis because it brings to the forefront the role of sexuality in upholding racial segregation.

III. INCEST AND RAPE: ALABAMA LAW FROM 1930 TO 1960

In *To Kill a Mockingbird*, Harper Lee exposes the ways in which gender and sexuality contribute to the construction of racial personalities. Through her fiction, she acknowledges and addresses obliquely the forces operating in the South's struggle over desegregation. *Mockingbird*'s

[151] *See* Richards, *supra* note 35, at 151.

characters echo, but also subvert, the iconic southern belle, the menacing black male rapist, and the constitutive relationship between gender and sexual norms in an era defined by white obsession with creating and maintaining racial signification. Lee discloses the continuous legal and cultural labor white patriarchy exerts in order to frame the feminine archetype as pure, virginal, white, threatened by black masculinity, and subservient to white patriarchy.

The long relationship between law and the novel arises from the shift in paradigm Lee employs—switching from Scout's daily life and tribulations to the detailed scenes of a court trial—and from the use of her characters as mechanisms of critique throughout. Mimicking dominant cultural fables, Tom's trial draws upon themes from Lee's surroundings, employing the adjudication trope as a plot device not only to explore legal codes but the tacit social codes of the South as well. These interpolations, amongst other achievements, reveal how women's sexuality was shaped by the ideologies of white supremacy permeating both the courts and the community at that time. Visions of black-on-white "rape" dominated southern white psychology, mandating the prohibition of interracial intimacy and justifying imprisonment, capital punishment, and even extrajudicial lynching.[152] The merest insinuation of rape unleashed a frenzy of violence, even in situations where the accusations were almost completely unsupported by evidence.[153] Conversely, black women were rarely "raped" according to the legal and societal understandings of the crime.[154] Though black women experienced sexual violence and assault frequently, often systematically as part of broader processes of racial subordination, their injuries were legally invisible, if not openly sanctioned by the legal establishment itself.[155]

White women were themselves rarely "raped" when the assailant was also white, though for considerably different reasons than those pertaining to black women. Lee touches upon just this facet through the sexual abuse that Mayella faces at the hands of Bob Ewell, and by the town's noticeable indifference to her plight. While violations of white women's innocence pervaded the regional imagination, the impetus for the

---

[152] Sundquist, *supra* note 11, at 78–79, 90, 92–93.

[153] Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990).

[154] *Id.*

[155] *Id.* at 598–99.

obsession was racial antagonism, rather than a concern for female sexual agency. In the words of one Maycomb citizen, "[t]hey c'n go loose and rape up the countryside for all 'em who run this country care."[156] The emphasis is on blacks "going loose," gaining mobility, not on the ill effects of sexual invasion: hardly a disparagement evidencing the critical dissection of the gendered nature of rape. As a consequence, recourse for sexual violence was minimal when the assailant was white.[157] This was particularly true in cases pertaining to white women who had reached the legal age of consent. Courts often viewed sexual access in these instances as the prerogative of husbands,[158] shied away from scrutinizing fathers, and located blame with the victim herself.[159] Such state-sanctioned sexual prerogative, both legal and cultural in nature, assumed many faces encapsulating marital rape and incest. These intimate relationships were central in educating white women about their proper roles within racial and gendered hierarchies.

Lee's explicit and implicit critiques of the law in *Mockingbird* suggest some of the ways in which the legal institution inculcated Jim Crow practices in the South. For example, legislators banned miscegenation and recognized sexual access as the husband's proprietary interest in marriage, courts adjudicated rape so as to exclude marital rape and incest, and, less overtly, law conceptualized familial and sexual relationships among whites. The ways in which legal regulation of the family contributed to shape dominant perceptions of normative sexuality during slavery and Jim Crow are only now beginning to be explored. However, the roles and responsibilities assigned to each member of the family factored significantly into creating the distinctly racially segregated and heteronormative ideal critiqued in *Mockingbird*. Thus, it is not accidental that the modes of sexual violence inflicted upon Mayella in *Mockingbird* went overlooked by both the community and courts, while Tom was victimized by cultural prohibitions of miscegenation. These narratives track

---

[156] MOCKINGBIRD, *supra* note 1, at 153.

[157] As discussed throughout the pages that follow, rape occurring within relationships that tend less frequently to cross the color line was not recognized as rape under law. The most prominent example of this is of course marital rape, but it also includes such sexual violence as incest, which I canvass in detail, and acquaintance rape, which I also show was not prosecuted.

[158] *See* Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 353–64 (1995) (detailing history and justifications of the marital rape exclusion).

[159] *See infra* notes 259–71 and accompanying text.

law's failings during the decades implicated by the novel: the 1930s, in which *Mockingbird* is set, through the late 1950s, when it was written. In the South's legal and societal efforts to construct the "bestial black man"[160] and passive, white, heteronormative woman,[161] sex—particularly women's sexuality, whether black or white—became a critical battleground for ideological race wars. How the female could experience her sexuality and which intimate relationships she could enter became, therefore, subjects of significant legal and societal attention.

The sexual experiences of both black and white women were of central import to the legal establishment, though in dissimilar ways. Violence was meted out disproportionately upon the black community, although white women who transgressed their assigned gender roles also suffered severe consequences. White men were almost never punished for these crimes, either legally or in society's heart.[162] In one graphic example, a white woman's labia were slit on both sides, and a padlock strung through and locked as the Ku Klux Klan's punishment for her cohabitation with a black man.[163] In another instance, the KKK fatally burned three black men and three white women for living with each other.[164]

At the same time, as Professors Angela Harris and Kimberlé Crenshaw note, the intense forms of violence black women experienced were never understood to be an injury before law.[165] In *Rape, Violence, and Women's Autonomy*, Professor Dorothy Roberts explores sexual violence visited upon black women as a mechanism for asserting racial control: for profit, for pleasure, or to instill fear. Whether to fragment the black family and community or to emasculate black men, the rape and sexual abuse of black women was prevalent and periodically legally sanctioned.[166]

---

[160] *See generally* N. Jeremi Duru, *The Central Part Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321–39 (2004); Cardyn, *supra* note 21, at 695–96.

[161] *See* Chura, *supra* note 10, at 119.

[162] Cardyn, *supra* note 21, at 766.

[163] *Id.* at 743–44.

[164] *Id.* at 769.

[165] Harris, *supra* note 153, at 599–601; Crenshaw, *supra* note 14.

[166] Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT. L. REV. 359, 366–67 (1993).

> White men exploited Black women sexually before and after slavery as a means of subjugating the entire Black community. During slavery, white slavemasters raped Black women both for pleasure and profit. They considered slave women to be purely sexual objects, to be raped, bred or abused. After Emancipation, white employers continued to subject Black women who worked as servants in their homes to sexual violation. The Ku Klux Klan's terror included the rape of Black women, as well as the more commonly cited lynching of Black men. White sexual violence attacked not only freed Black men's masculinity by challenging their ability to protect Black women, but also freed Black Women's devotion to their own families.
>
> The criminal law has enforced this racial construction of rape. The legal treatment of rape targets Black assaults of white women and devalues rape's injury to Black women. For much of American history, the rape of a white woman by a Black man was considered a capital offense; while the rape of a Black woman was hardly punished, if at all.[167]

Forms of sexual violence ranged from whipping and rape to other types of sexual torture; all were unique methods of violence employed by the white patriarchy long after the formal cessation of slavery[168] as means of reasserting racial, gender, and class dominance.[169] This interpretation of the violence perpetrated against black women is buttressed by the collective nature of the endeavor.[170] Going beyond private rape, violence against black women regularly became a white male communal act, and one that reinforced group psychologies of superiority and accomplishment.[171]

Professor Roberts juxtaposes the different experiences of white and black women with rape in order to illuminate the ways in which black male and female sexuality was configured to validate their subjugation.[172] Simultaneously, the construction of female sexuality as chaste, virtuous,

---

[167] *Id.*

[168] *See* Cardyn, *supra* note 21, at 699, 704, 716, 736, 719 (discussing Klan violence in the Reconstruction era).

[169] *Id.* at 721.

[170] *Id.* at 727.

[171] *See id.* at 730.

[172] Roberts, *supra* note 166, at 365.

passive, and white served as an instrument of racial domination.[173] Roberts hints, however, that the anxiety surrounding miscegenation and interracial rape was rendered invisible when the assailant and the victim were both white.[174] As reflected in contemporary debates, white brutality often remains under-regulated and unacknowledged by courts; in other words, the assault of a white woman by a strange black man receives disproportionate attention compared to other sexual crimes such as acquaintance and marital rape which are far more prevalent.[175]

This dynamic operated starkly in the South before and during desegregation. Southern courts and legislatures played no small part in creating these repressive conditions. By penalizing or privileging varying performances of sexuality in gendered relationships, the law indoctrinated society with heterosexual customs that advocated racial bias. Richards, commenting on the queer landscape of *Mockingbird*, notes that Lee's narratives function to bare the South's racial paradigm and the ways it depended not merely on gender, but also on the policing of sexual desires.[176] The novel's favored characters deviate from standards of heteronormativity, though their choices are not part of a politically legible debate. By representing characters such as Miss Maudie in ambiguous terms with regard to sexuality, Lee scrutinizes dominant sexual ideologies in the same way she questions prevalent gender discourses, seeking to mark out sexualities as both constructed and operating in tandem with other cultural agendas.

---

[173] *Id.*

[174] *See id.* at 363-64. While black men were convicted frequently of raping white women, a host of relationships that would apply tend to apply to white-on-white rape, such as marital rape, were not criminalized.

[175] *Id.* at 363–65; *see also* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986) (using a personal narrative—in the form of a story, although unfortunately not a fiction—to help concretize the claim that interracial and stranger rape are the two forms of coerced sex most commonly perceived as "rape," and that when the two converge the crime becomes especially legible). This is not to say that stranger rape is not important. I mean only that stranger rape makes up a small percentage of total rape in this country, yet the legal system, media, and cultural attention focus on it rather than working to form a more inclusive framework that would also address acquaintance and marital rape in proportion to their actual prevalence.

[176] *See generally* Richards, *supra* note 35.

Adrienne Rich deploys the lexicon of "force" in her milestone essay *Compulsory Heterosexuality and Lesbian Existence*.[177] While feminist theorists such as De Beauvoir focused their critiques on dissecting the artificiality of gender, Rich argues against assuming that heterosexuality is "natural"—paralleling Guillaumin's protestations regarding innate race and sex and De Beauvior's criticisms of gender.[178] Rather, society subjects women to intense physical and psychological propaganda and pressure regarding heterosexuality in its bid to maintain a particular distribution of power in society.

> [W]omen have been convinced that marriage and sexual orientation toward men are inevitable, even if unsatisfying or oppressive components of their lives. The chastity belt; child marriage; erasure of lesbian existence (except as exotic and perverse) in art, literature, film; idealization of heterosexual romance and marriage—these are some fairly obvious forms of compulsion, the first two exemplifying physical force, the second two control of consciousness.[179]

The responsibility of heteronormativity in maintaining race-based hierarchy is only now becoming manifest. Professor Darren Hutchinson critiques the essentialist examination of homophobic assaults and asks critical race theorists to grapple with the multidimensional aspects of violence against the gay community.[180] Histories of violence against gay, lesbian, bisexual, and transgender racial minorities have been particularly brutal, intimating the correlation between racial subordination and the policing of sexual norms.[181] Looking at breakthrough moments in the gay rights movement, such as the Stonewall Riots of 1969, Professor Hutchinson expounds the disproportionate violence visited upon sexually transgressive racial minorities.[182] This imbalance speaks to the fact that

---

[177] *See generally* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

[178] *See* Guillaumin, *supra* note 82; DE BEAUVOIR, *supra* note 38.

[179] Rich, *supra* note 177, at 640.

[180] Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, *in* FEMINIST LEGAL THEORY 371 (Nancy Dowd & Michelle Jacobs eds., 2003).

[181] *See id.*

[182] *Id.*

white hegemony found aberrant sexual behavior by people of color particularly threatening.[183] Minority rioters during Stonewall were thus responding to more than just homophobia; rather, they were reacting to "a multidimensional system of sexualized racial violence and harassment directed toward them by the 'protective' arm of the state."[184]

Elaborating on Kathleen Gough's *The Origins of the Family*, Rich argues that mandated heterosexuality is an institutional mechanism that reifies male power by denying women their own sexuality and forcing male sexuality upon them through rape, marital rape, domestic violence, and father-daughter incest.[185] She argues that training women to intrinsically desire the male sexual drive amounts to a misogynistic privilege to control women's potential through an elaborate system based on conceptions of sexuality.[186] Lee makes this same point, regarding both gender and racial oppression. She invokes the father-daughter incest milieu to illustrate how the imposition of sexuality and gender ideals fortify the myth of white supremacy. Without utilizing overt language of sexuality, Lee exposits a model where the investments of patriarchy and segregationists in controlling sexuality converge to erase white sexual violence, all while disempowering blacks in the battle over desegregation.

Homosexuality was not criminalized solely in the South, but the region suffers from a particular notoriety for instituting and enforcing harsh punitive measures against gay men and lesbians. To wit: the now-infamous case of *Bowers v. Hardwick*,[187] which putatively legitimized the criminalization of sodomy,[188] was a known euphuism for harassing and even incarcerating gay men throughout the latter part of the twentieth

---

[183] The imbalance also speaks to a process paralleling that above, but which is applied to the inculcation, adoption, and policing of sexual norms *within* a particular community, as racial identity is defined both within a group and in relation to outside forces. *See generally* Adele M. Morrison, *Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177, 205 (2007).

[184] *Id.* at 371–72.

[185] Rich, *supra* note 177, at 638–39.

[186] *Id.*

[187] 478 U.S. 186 (1986). The court denied standing to a heterosexual couple that attempted to join the plaintiffs in challenging the sodomy statute. The decision was explicitly about homosexual sodomy; the legality of heterosexual sodomy was not a question before the Court. Note, however, that in this instance, Hardwick himself was ultimately never imprisoned

[188] *Bowers* was later overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

century.[189] In upholding Georgia's penal sodomy laws as applied to consensual oral or anal sex between two male defendants,[190] the Supreme Court portrayed gay sex as repugnant to the natural order, illicit, immoral, and worthy of stronger legal censure than even rape.[191] It also detailed Georgia's long history of both legally and socially condemning gay sex.[192] Chief Justice Burger concurred:

> Homosexual sodomy was a capital crime under Roman law. During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. Blackstone described "the infamous crime against nature" as an offense of *"deeper malignity" than rape*, a heinous act "the very mention of which is a disgrace to human nature" and "a crime not fit to be named." The common law of England, including its prohibition of sodomy, *became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time.* To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.[193]

Alabama's history is no less punishing than Georgia's. Alabama's criminal code was specifically modified to make the consent of parties engaging in the behavior immaterial to the criminality of homosexual conduct.[194] In cases occurring as late as the 1970's, the state heavily penalized sodomy with prison sentences of between two and ten years.[195]

---

[189] *See* Mary Bernstein, *Liberalism and Social Movement Success: The Case of United States Sodomy Statutes*, *in* REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY 3 (2005).

[190] The Court refused to consider an as-applied challenge by a heterosexual couple attempting to claim a "chilling effect" injury. *Bowers*, 478 U.S. at 188 n.2.

[191] *Id.* at 197 (Burger, J. concurring).

[192] *Id.*

[193] *Id.* at 196–97 (Burger, J., concurring) (internal citations omitted) (emphasis added).

[194] ALA. CODE § 13A–6–65 (LexisNexis 2007).

[195] Boyington v. State, 45 Ala. App. 176, 177 (Ct. App. 1969) (sodomy prosecution).

The courts allowed the most skeletal of indictments to suffice because "the crime against nature . . . [is] too well known and too disgusting to require other definition or further details or description."[196] Living as an out lesbian also carried consequences, including criminal penalties and loss of right to custody of a child because, in the words of one court as recently as 1998, "[the lesbian mother] has chosen to expose the child continuously to a lifestyle that is neither legal in this state, nor moral in the eyes of most of its citizens."[197]

Between the South's criminalization of homosexuality and the region's history of prohibiting interracial marriage, Lee's narrative reflects what were then prevailing norms about sexual and familial roles and relationships. From the years of slavery[198] until 1967, when bans on marital miscegenation were finally held unconstitutional in *Loving v. Virginia*,[199] white women's bodies served as a conduit for both black subjugation and white patriarchal empowerment. Legendary civil rights advocate Ida B. Wells criticized this dynamic in her campaign against lynching throughout the late 1800s and early 1900s.

> Not fifty of these [lynchings] were for political causes; the rest were for all manner of accusations from that of rape of white women. . . .
>
> These statistics compiled by the *Chicago Tribune* were given the first of this year (1892). Since then, not less than one hundred and fifty have been known to have met violent death at the hands of cruel bloodthirsty mobs during the past nine months.
>
> To palliate this record (which grows worse as the Afro-American becomes intelligent) and excuse some of the most heinous crimes that ever stained the history of a country, the South is shielding itself behind the plausible screen of defending the honor of its women. This, too, in the face of the fact that only *one-third* of the 728 victims to mobs have been *charged* with rape, to say nothing of those of that one-third who were innocent of the charge. A

---

[196] *Id.*

[197] *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998). The section was finally declared dead by the state attorney general but only following *Lawrence*. For related proceedings, see Doe v. Pryor, 344 F.3d 1282 (11th Cir. 2003).

[198] *See generally* Getman, *supra* note 57.

[199] 388 U.S. 1 (1967).

> white correspondent of the *Baltimore Sun* declares that the Afro-American who was lynched in Chestertown, Md., in May for assault on a white girl was innocent; that the deed was done by a white man who had since disappeared. The girl herself maintained that her assailant was a white man. [200]

Wells quotes a newspaper article that explicated how lynch mobs exploited "the new alarm about raping white women. The same program[] of hanging, then shooting bullets into the lifeless bodies was carried out to the letter," but that "[n]obody in this section of the country believes the old thread-bare lie that Negro men rape white women."[201] Wells criticized this phenomenon: "white men used their ownership of the body of white females as a terrain on which to lynch the black male."[202]

Against this backdrop, it is unsurprising that Tom, symbolizing black men, was convicted and murdered for rape, and that Mayella, emblematic of the white woman, was sexually abused by her father but remained invisible to the law. Alabama's judicial treatment of rape and incest paralleled these characters' experiences. From slavery onwards, the terrain of sexuality played a pivotal role in maintaining the racial order.[203] America's history with African Americans thus heavily impacted notions of sexual normalcy in response to an enduring cultural anxiety surrounding miscegenation.[204]

Southern states were often explicit about the racist objectives of their rape laws. In some instances, grossly disproportionate enforcement occurred in states with facially neutral statutes.[205] In other states, the rape

---

[200] IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892), *available at* http://www.gutenberg.org/files/14975/14975-h/14975-h.htm#THE_NEW_CRY.

[201] *Id.*

[202] Roberts, *supra* note 166, at 366.

[203] *See* Chura, *supra* note 10, at 117.

[204] *See* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968, 1996–97 (1989).

[205] *See* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, And Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 22 (2006) (discussing neutral law enforcement following the restructuring of dual, race-based, criminal codes). Though this Article only discusses sexual violence in Alabama through the 1960s, statistical evidence presented in *Furman v. Georgia*, 408 U.S. 238 (1972), shows that nearly ninety percent of those executed for rape until that date were non-white. Pokorak, *supra*, at 31.

legislation expressly targeted black men.[206] Territories such as Virginia, for example, promulgated Black Codes that provided for the death penalty where a black man was convicted of raping a white woman, but that omitted similar penalization where the perpetrator was a white man.[207] Alabama, Mississippi, and Texas also eliminated the death penalty for white men convicted of rape prior to the Civil War.[208] Though scant, statistical evidence on the race of the victim also buttresses the racial tone permeating prosecution of rape in southern courts. Florida, for example, between 1940 and 1964, sentenced fifty-four men to death for rape convictions. Despite facially neutral laws, only six were white, while forty-eight were black. Ultimately, only one white man was executed, and he was gay.[209] Three others had their sentences commuted and the state supreme court reversed the sentences of the remaining two. All six of the victims were white, four of whom were children.[210] In contrast, eighty-four black men were convicted of raping white women, with forty-five ultimately executed—a frequency of fifty-three percent.[211] What is imperative to note is that the race of both the defendant and victimized female were thus delineating elements.[212]

Florida was not singular in its practices for the South. From 1937 to 1950, with the exception of three executions that took place in Missouri, all of the executions for rape in the nation took place in southern states.[213] Prior to the Civil War, Virginia provided for only five capital crimes for whites,

---

[206] *See* Higginbotham & Kopytoff, *supra* note 204, at 1968 ("Virginia applied the early law of rape more harshly to blacks than to whites: it punished only black men for interracial rape and, in the nineteenth century, the state formulated anti-rape statutes directed specifically at blacks.").

[207] *Id.* at 14–15.

[208] *See* Peter W. Bardaglio, *Rape and the Law in the Old South: "Calculated to Excite Indignation in Every Heart"*, 60 J.S. HIST. 749, 755 n.22 (1994).

[209] Pokorak , *supra* note 205, at 31–32.

[210] *Id.* at 32.

[211] *Id.*

[212] Of the 1,238 defendants convicted of rape from 1945 through 1965, 317 were black and were convicted of raping white women. Thirty-six percent of black perpetrators convicted of raping white women received the death penalty. Of the remaining cases, only two percent of the defendants were sentenced to death. *Id.* at 34.

[213] *Id.* at 32–33.

but seventy-two for blacks.[214] Between 1909 and 1949, Virginia executed fifty-two black men for rape; although roughly 800 white men were convicted of rape during the same period, none were executed.[215] Louisiana's dual code system, which was similar to Alabama's, differentiated between rape crimes by creating different classifications that carried disparate sentences and by applying them, typically, according to the defendant's race.[216] Rape, a substrate of sexual violence that was defined as an aggravated form, carried the death penalty;[217] carnal knowledge, or other such euphemistic variants, was subject to extremely light sentencing.[218] In Georgia, the rape of a white female by a black man was punishable by death; rape by anyone else of a white female was punishable by a sentence of only two to twenty years.[219] Meanwhile, rape of a black woman was penalized only through civil fines or, rarely, through imprisonment at discretion of the court.[220]

Term sentencing was likewise tainted by considerations of race. Black men convicted of raping white women were twice as likely to receive life sentences as were their white male counterparts.[221] Differential sentencing was often overtly encoded into statute. However, historically, southern courts, including those in Alabama, perpetuated such differential sentencing through evidentiary rules molded around race. Here too, the race of both the defendant and the victim mattered. As early as 1850, the Alabama Supreme Court was explicit about its hierarchal motives. *Thurman v. State* demonstrates the reality: in that case, insufficient evidence of the victim's race resulted in sympathetic treatment of the defendant, while, simultaneously, inconclusive data of his race was grounds for a new trial.[222]

---

[214] *Id.* at 11.

[215] *Id.* at 33.

[216] *Id.*

[217] *Id.* at 32–33.

[218] *Id.* at 33.

[219] *Id.* at 12–13, 12 n.57.

[220] Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403, 438–39 (1994).

[221] *See* Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693, 699 (1997) (book review).

[222] Thurman v. State, 18 Ala. 276, 279 (1850).

The court reversed a man's conviction for rape of a white woman because he produced proof that his maternal lineage was white.[223]

The few statistical studies of the era focus on disparate application of the death penalty, although they rarely systematically document the causal relationship between the courts' racial determinations regarding the defendant and rape victim and the resulting sentence, because of failures by southern courts to properly track this connection.[224] The identity of both the accused and the victim can be extrapolated from the case law by situating decision-making within the passing references, circumstantial evidence, and historical overtones of the court's jurisprudence. A survey of reported opinions from rape cases before the Alabama Supreme Court and Alabama Court of Appeals between 1930 and 1960[225] indicates that all but two involved white female victims, and that all but five involved black defendants. In addition, the death penalty was imposed exclusively—and almost uniformly—when the defendant was black and the victim white[226]: a

---

[223] *See* Bardaglio, *supra* note 208, at 764.

[224] Pokorak, *supra* note 205, at 26 n.131.

[225] My survey looked at Alabama court cases decided between Jan. 1, 1930 and Jan. 1, 1960 because this represents the time period between when *Mockingbird* was set and when it was written.

[226] The death penalty was imposed in a majority of the electronically-available Alabama rape or intent to rape cases I surveyed where the victim was white and the defendant was black. I assume both or one of the parties is white where the text of the decision is silent on racial identity because Alabama courts tended to explicitly state the defendant's or victim's color where black parties were involved. A similar pattern is found in the incest case law I survey *infra* notes 275–78 and accompanying text. *See, e.g.*, Walker v. State, 269 Ala. 555 (1959) (death penalty imposed); Luker v. State, 268 Ala. 346 (1958) (both assumed white because no race of either party given; fifteen year sentence); Thomas v. State, 267 Ala. 44 (1958) (burglary and intent to rape; fifty year sentence; race of victim not given); Huff v. State, 267 Ala. 282 (1957) (defendant's race inferred from characterization by counsel: "ignorant and possibly mentally deficient Negro"; victim's race not given; death penalty imposed); Relf v. State, 267 Ala. 3 (1957) (assumed both parties white because no race given; thirty-five year sentence); Taylor v. State, 266 Ala. 618 (1957) (death penalty); Jackson v. State, 264 Ala. 528 (1956) (victim's race not given; death penalty); Reeves v. State, 264 Ala. 476 (1956) (death penalty; further proceeds appear below); Mincy v. State, 262 Ala. 193 (1955) (race of victim not given; defendant's inferred from stenographer commentary; death penalty); Reeves v. State, 260 Ala. 66 (1953) (death penalty); Myhand v. State, 259 Ala. 415 (1953) (death penalty); Washington v. State, 259 Ala. 104 (1953) (presumption that both parties are white but could be mistaken; conviction for burglary in the nighttime with intent to commit rape; seventy-seven-year-old widowed victim; death penalty); Thomas v. State, 257 Ala. 124 (1952) (death penalty); Drake v. State, 257 Ala. 205 (1952) (death penalty; defendant also convicted of murder); Arrington v. State, 253 Ala. 178 (1949) (death penalty); Huntley v. State, 250 Ala. 303 (1948) (death penalty); *Ex parte*

Taylor, 249 Ala. 667 (1947) (death penalty); Scott v. State, 249 Ala. 304 (1947) (death penalty); Taylor v. State, 249 Ala. 130 (1947) (death penalty); Smith v. State, 248 Ala. 363 (1946) (death penalty); Smith v. State, 247 Ala. 354 (1946) (second of the two appeals; death penalty); Underwood v. State, 248 Ala. 308 (1946) (convicted of burglary and intent to rape; death penalty imposed; victim not identified as white though text strongly implies it); Daniels v. State, 243 Ala. 675 (1943) (death penalty); Ellis v. State, 244 Ala. 79 (1943) (neither race of defendant nor victim given although it can be inferred victim was white; twenty-five year sentence); Johnson v. Williams, 244 Ala. 391 (1943) (race of victim not stated; death penalty); Robinson v. State, 243 Ala. 684 (1943) (death penalty); Williams v. State, 245 Ala. 32 (1943) (death penalty); Johnson v. State, 242 Ala. 278 (1942) (death penalty); Clark v. State, 239 Ala. 380 (1940) (race of victim not given but can be heavily inferred as white—especially by hostility from jury; death penalty); White v. State, 237 Ala. 610 (1939) (death penalty); Cooper v. State, 235 Ala. 523 (1938) (death penalty); Norris v. State, 236 Ala. 281 (1938) (Scottsboro; death penalty); Weems v. State, 236 Ala. 261 (1938) (Scottsboro; death penalty); Collins v. State, 234 Ala. 197 (1937) (death penalty); Patterson v. State, 234 Ala. 342 (1937) (Scottsboro; death penalty); Brown v. State, 229 Ala. 58 (1934) (race of victim is not given but can be heavily inferred from text as being white; death penalty); Norris v. State, 229 Ala. 226 (1934) (Scottsboro; death penalty); Jordan v. State, 225 Ala. 350 (1932) (conviction for murder though a rape is mentioned; color of victims not given though heavily insinuated that they are white from the text; death penalty); Patterson v. State, 224 Ala. 531 (1932) (Scottsboro; death penalty); Powell v. State, 224 Ala. 540 (1932) (Scottsboro; death penalty); Weems v. State, 224 Ala. 524 (1932) (Scottsboro; death penalty); McQuirter v. State, 36 Ala. App. 707 (Ct. App. 1953) (assault with intent to rape; sentence not stated); Russell v. State, 36 Ala. App. 19 (Ct. App. 1951) (sentence not given; intent to burglar and rape; race of victims not given but probably were white); Autry v. State, 34 Ala. App. 225 (Ct. App. 1949) (assault with intent to rape; both races inferred from victim's story and evidentiary attack regarding how difficult it is for white women to properly identity black men; twenty year sentence); McCollum v. State, 34 Ala. App. 207 (Ct. App. 1949) (reversing and remanding intent to ravish conviction because defendant was improperly denied new trial, and holding that words alone not are enough—he had never attempted to touch victim. The race of the defendant is inferred from the story and evidence—the defendant was called a darn negro and the race of the victim and family can be inferred as white because the family had "always been good to" defendant's family; no sentence stated); Gordon v. State, 32 Ala. App. 398 (Ct. App. 1946) (potentially two white parties; vague reference to a negro causing a concussion to victim uncorroborated by police officer. This is not a "rape" case in the classic sense of term as the narrative indicates that the woman was having sex with a white (?) man "optionally" and even conversed with a police man who found them but then fabricated a story afterwards that she was unconscious at the time); Allford v. State, 31 Ala. App. 62 (Ct. App. 1943) (no racial identifications given; no sentence stated); Wilkins v. State, 29 Ala. App. 349 (Ct. App. 1940) (sentence eighteen to twenty years; assault with intent to rape); Roberts v. State, 28 Ala. App. 553 (Ct. App. 1939) (both parties potentially white; no race given; phrases such as "working girl" and "marriage talk" also insinuate both were white; reversed and remanded because trial judge had not allowed evidence that man was married to another woman and had three children to enter the trial; seven to eight years in prison); Stewart v. State, 27 Ala. App. 315 (Ct. App. 1936) (black defendant and black victim case; sentence not mentioned); Thompson v. State, 27 Ala. App. 104 (Ct. App. 1936) (second case which is between two black parties; sentence not mentioned); Stewart v. State, 26 Ala. App. 392 (Ct. App. 1935) (second of two claims; sentence not mentioned). None of the cases before the state supreme court or court of

trend which persisted until 1977 when the imposition of the death penalty in cases of rape was held to be cruel and unusual punishment.[227]

Infamous among the Alabama rape cases are the prosecutions of the Scottsboro Boys,[228] nine black youths charged with raping two white women, one of whom later recanted her story; the second, Victoria Price, was suspected of prostitution and is widely believed to have fabricated the charges to avoid her own prosecution.[229] The Scottsboro trials elucidated the ways in which black men's guilt was predetermined and how criminal charges could function as a pretext for terrorizing black communities. This pattern became so apparent that the United States Supreme Court reversed the convictions for violations of the defendants' due process rights. In *Powell v. Alabama*,[230] the Court found that the state had violated the defendants' Fourteenth Amendment rights by denying the illiterate, isolated, and violently harassed youth meaningful counsel.[231] They were given no opportunity to prepare for the trial until opening day;[232] the hearing was expedited so cursorily that the Court analogized its operations to that of a "mob";[233] and the defendants faced such overwhelming violence

---

appeals involved a black victim and white perpetrator and all of the cases before the supreme court involved a white victim. In my estimation, only four rape cases, excluding statutory rape cases, involved two white parties—and in two of these, the defendant's sentence was overturned on appeal. Other states in the South paralleled Alabama in legislative and prosecutorial history by systematically providing for, or at the very least applying, extremely disparate sentencing criteria based on the race of both the defendant and victim. For example, Louisiana prosecuted charges of sexual assault as either rape or the lesser offense of carnal knowledge depending on the race of the perpetrator and victim. *See* Pokorak, *supra* note 205, at 33.

[227] Coker v. Georgia, 433 U.S. 584 (1977) (holding that imposition of the death penalty for rape cases is cruel and unusual in violation of the Eighth Amendment).

[228] *See, e.g.*, Patterson v. State, 234 Ala. 342 (1937); Norris v. State, 229 Ala. 226 (1934); Powell v. State, 224 Ala. 540 (1932); Weems v. State, 224 Ala. 524 (1932). Each of the boys, when convicted, was assigned the death penalty.

[229] JOHNSON, *supra* note 2, at 7–8; Sundquist, *supra* note 11, at 91–93.

[230] 287 U.S. 45 (1932).

[231] *Id.* at 71.

[232] *Id.* at 56–57.

[233] *Id.* at 59.

and hostility from the community that a militia was necessary to protect them at all times.[234]

> [T]he ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . the fact that their friends and families were all in other states . . . that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.[235]

Rape then, in one sense, was legible for bigoted reasons. The state's and the public's primary concern was hardly the well-being or sexual agency of the ostensible victim. While rape of black women by white men served to entrench black subordination,[236] claims of rape levied by white women against black men were also a tactic for doing so.[237] Both served specific functions in reinforcing a hierarchical society organized around race and gender signification.

In the antebellum South, the rape of black women was perpetrated more often by white slave holders than by strange black men.[238] Sexual violence was prevalent, both during slavery and following its official demise. As Professor Harris notes, in a majority of instances, black women's experiences with rape throughout history were illegible as legal harms; the rape of a black woman by any man was not understood as a criminal act.[239] As Alabama's case law reflects, rape laws were infrequently invoked to protect black women in the era following the Civil War, in

---

[234] *Id.* at 51.

[235] *Id.* at 71.

[236] Cardyn, *supra* note 21, at 677.

[237] By 1925, the death penalty was available for rape of adults in eighteen states and under federal law. *See* Elizabeth Gray, *Death Penalty and Child Rape: An Eighth Amendment Analysis*, 42 ST. LOUIS U. L.J. 1443, 1447 (1998). States that applied the death penalty for rape were concentrated in the South: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. *Id.* Excluding Nevada and Delaware, they were all in the Southeast United States. One prevailing explanation is that such laws existed to punish black men who raped white women. *Id.* at 1448–49.

[238] Harris, *supra* note 153, at 598.

[239] *Id.* at 599.

contrast to the partial or at least nominal protection white women enjoyed under these statutes.[240] Instead, evolving rape laws were employed by the white community to terrorize the newly emancipated black community. As Lee makes visible through Mayella's charges, white women played a central role in this regime of subordination.

This last aspect of rape is not restricted to the distant past. Between 1930 and 1967, eighty-nine percent of men executed for rape in the United States were black. Along a similar vein, a 1968 study in Maryland unearthed that in all of the state's history, of the fifty-five cases resulting in the death penalty, all occurred where the victim had been white.[241] Conversely, between 1960 and 1967 in that state, forty-seven percent of black men convicted of assaults on black women were immediately released on probation.[242] These conviction patterns reflect power delineations drawn along race and gender lines that influenced the perception of rape. At stake in defining the crime, legal actors determined what modes of sexual access men were entitled to based on their racial classification, as well as what levels of protection women deserved, again by taxonomical race.[243] As Professor Roberts notes, "[i]n America, the hierarchies that determine rape's meaning are based on race and class, as well as gender."[244] Within this intricate web of power relationships, white society used the physical act of rape as an enforcement mechanism for retaining a position of dominance. The legal establishment's historic preoccupation with the rape of white women by black men, in combination with its discounting of black victims' worth, excluded black women from legal protections while legitimizing far more frequent occurrences of intra-racial acquaintance rape of both white and black women. Legal and cultural interpretations of rape served to police both black and white bodies and their sexual agency,[245] and today, heightened punishment for black-on-white crime lingers on—at least partially the result of society's devaluation of black victims' human worth and its racial stereotypes of black defendants.[246]

---

[240] *Id.* at 599–600.

[241] *Id.* at 600.

[242] *Id.*

[243] Roberts, *supra* note 166, at 364.

[244] *Id.*

[245] *Id.* at 366.

[246] Capital punishment remains embedded with norms of race, victimhood and value. In *McKlesky v. Kemp*, 481 U.S. 279 (1987), a black defendant introduced statistical

As previously noted, the struggle over female sexuality permitted certain forms of sexual abuse against white women to go overlooked when the perpetrator was a white man.[247] These forms of violence largely transpired within the inscrutable realms of marriage and family. Peter Bardaglio details the complicated legal and cultural characteristics prescribed to each white family member and the operation of relations in the family unit as part of the overall racialized atmosphere of the South. In *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South*, Bardaglio notes that domestic relations codes enumerating legal rights and responsibilities of citizens were broken down into chapters pertaining not only to husband and wife, parent and child, and guardian and ward, but also to master and slave.[248] Specifically, "Southern lawmakers had organized statutes in this fashion because they did not consider these sets of social relations as isolated categories but as intrinsically connected."[249]

Bardaglio demonstrates how the domestic sphere was carved and severed from public life so as to facilitate white patriarchy's dominance in society by giving white men absolute control within the domestic sphere. This privatization injured many white women under legal regimes,

---

evidence that illustrated the extent to which racial considerations bias juries in application of the death penalty. The statistical data, known as the "Baldus Study," analyzed 2000 murder cases decided in Georgia in a ten year window, demonstrated that defendants received the death penalty in eleven percent of cases when charged with killing white victims, but only in one percent of cases when the victim was black. The study thus facilitated a new racial bias argument that is the partial inverse of the more common prejudice-against-the-black-defendant argument. Instead, defense counsel argued that the death penalty was impermissibly imposed because bias against the victim, in addition to bias against the defendant, affected the sentencing result. *Id.* at 286. The study indicated that in homicide cases, the death penalty was imposed twenty-two percent of the time when the defendant was black and the victim white, but only eight percent of the time when the defendant and victim were both white. Similarly, the death penalty was imposed in only one percent of cases when the defendant and victim were both black, but in three percent of cases when the defendant was white and the victim black. Further, the study reported that the state sought capital punishment in: seventy percent of cases involving a black defendant and a white victim; thirty-two percent of cases involving a white defendant and a white victim; fifteen percent of cases where both defendant and victim were black; and nineteen percent of cases when the defendant was white and the victim black. *Id.* at 286–87.

[247] *Supra* notes 158–160, 175–76, 186 and accompanying text.

[248] *See* PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH CENTURY SOUTH xi (1998).

[249] *Id.*

especially those who had reached the age of maturity and were construed by law to therefore have the powers of consent and complicity. Sexual injury caused by family members was rarely recognized under normal conditions. Additional criteria were often necessary in order for penal censure to be imposed—the analogue of modern day statutory rape.[250] Subdivided into two offenses at that time, statutory rape laws were configured to minimize punishment for sexual attacks of white women by white men, especially if

---

[250] The results of my electronic LexisNexis search include two versions of the crime: 1) for "carnal knowledge of a girl over 12 and under 16 years" and 2) for "carnal knowledge of a girl under twelve years of age." Like with rape jurisprudence, the courts stated the race of either the victim or perpetrator when one or both were black. As periodically discussed in this Article, intimate, marital and familial rape was treated differently both legislatively and as prosecuted, and it is these forms of sexual violence that more frequently implicated white-on-white sexual abuse. *See, e.g.*, *supra* notes 158–160, 175–76, 186 and accompanying text. Only one case involved a black victim and defendant, and it was prosecuted as regular rape and thus I list it in that discussion. Thompson v. State, 27 Ala. App. 104 (Ct. App. 1936). The electronically available statutory rape cases from the Alabama Supreme Court and Court of Appeals between 1930 and 1960 were: Hamm v. State, 264 Ala. 366 (1956); Lawley v. State, 264 Ala. 283 (1956) (life in prison); Smith v. State, 256 Ala. 444 (1951); Denham v. State, 255 Ala. 125 (1951); Noble v. State, 253 Ala. 519 (1950); James v. State, 246 Ala. 617 (1945) (death sentence); Pugh v. State, 243 Ala. 507 (1942); Gregory v. State, 235 Ala. 547 (1938) (ninety-nine years); Harrison v. State, 235 Ala. 1 (1937); Shanes v. State, 233 Ala. 418 (1937) (only potentially black victim with white defendant but court assumes the child is white and affirms); Hull v. State, 232 Ala. 281 (1936) (death sentence); Petty v. State, 224 Ala. 451 (1932); Stewart v. State, 226 Ala. 15 (1932); Stewart v. State, 38 Ala. App. 365 (Ct. App. 1955); Houston v. State, 37 Ala. App. 359 (Ct. App. 1953); Malone v. State, 37 Ala. App. 432 (Ct. App. 1953); Ferguson v. State, 36 Ala. App. 358 (Ct. App. 1952); Gaut v. State, 36 Ala. App. 365 (Ct. App. 1952); Smith v. State, 36 Ala. App. 209 (Ct. App. 1951); Kornegay v. State, 34 Ala. App. 274 (Ct. App. 1949); Eller v. State, 34 Ala. App. 157 (Ct. App. 1948); Free v. State, 33 Ala. App. 620 (Ct. App. 1948); Walden v. State, 34 Ala. App. 29 (Ct. App. 1948); Brasher v. State, 33 Ala. App. 13 (Ct. App. 1946); Brown v. State, 32 Ala. App. 131 (Ct. App. 1945); Morris v. State, 32 Ala. App. 52 (Ct. App. 1945); Wilkerson v. State, 32 Ala. App. 82 (Ct. App. 1945); Young v. State, 32 Ala. App. 233 (Ct. App. 1945); Lee v. State, 246 Ala. 69 (1944) (set punishment at fourteen years); Hacker v. State, 31 Ala. App. 249 (Ct. App. 1943); Lee v. State, 244 Ala. 401 (1943); Marecheau v. State, 30 Ala. App. 610 (Ct. App. 1943); Pugh v. State, 30 Ala. App. 572 (Ct. App. 1942), Van Hyde v. State, 30 Ala. App. 227 (Ct. App. 1941); Youngblood v. State, 30 Ala. App. 57 (Ct. App. 1941); Price v. State, 29 Ala. App. 263 (Ct. App. 1940); Blair v. State, 28 Ala. App. 430 (Ct. App. 1939); Tolbert v. State, 28 Ala. App. 209 (Ct. App. 1938); Bedsole v. State, 28 Ala. App. 27 (Ct. App. 1937); Harrison v. State, 28 Ala. App. 17 (Ct. App. 1937); Baldwin v. State, 233 Ala. 138 (1936) (sentence of ten years); Bradham v. State, 27 Ala. App. 225 (Ct. App. 1936); Thompson v. State, 27 Ala. App. 104 (Ct. App. 1936); Shores v. State, 25 Ala. App. 351 (Ct. App. 1933); Christian v. State, 25 Ala. App. 218 (Ct. App. 1932); Stewart v. State, 25 Ala. App. 266 (1932); Black v. State, 24 Ala. App. 433 (Ct. App. 1931); Alldredge v. State, 23 Ala. App. 577 (Ct. App. 1930); Brown v. State, 23 Ala. App. 424 (Ct. App. 1930); Love v. State, 23 Ala. App. 363 (Ct. App. 1930).Spencer v. State, 24 Ala. App. 140 (Ct. App. 1930).

the woman had reached the age of adulthood. One set of prohibitions applied to "carnal knowledge" of a girl under the age of twelve, and the death penalty was available for this substrate of claims.[251] It was rarely imposed on taxonomic white defendants, who were both close family members and the products of a broader ideological investment in racial purity which motivated false polarization between black and white.[252] Although a capital offense, this crime rarely led to execution, and sentences were more lenient than those levied against defendants in interracial rape claims[253]—death was imposed only twice by Alabama courts under this law.[254] The second subset of provisions prohibited "carnal knowledge" of a girl above the age of twelve but under the age of sixteen.[255] The penalty here was restricted to two to ten years of imprisonment.[256]

The latter category of statutory rape crimes is particularly illustrative. As far as a canvass of electronically published state court cases indicates, the alleged assault of a white woman by a black man was frequently prosecuted as rape regardless of her age[257]—a crime for which the death penalty was available and frequently imposed. However, the structure and substance of Alabama's penal code suggests that the state's objectives in legislating and prosecuting rape were not to protect the female

---

[251] Alabama permitted execution for both adult rape and statutory rape when the victim was under the age of twelve. ALA. CODE § 395 (1958) (repealed 1973). "Any person who is guilty of the crime of rape shall, on conviction, be punished, at the discretion of the jury, by death or imprisonment in the penitentiary for not less than ten years." *Id.* "Any person who has carnal knowledge of any girl under twelve years of age, or abuses such girl in the attempt to have carnal knowledge of her, shall, on conviction, be punished, at the discretion of the jury, either by death or imprisonment in the penitentiary for not less than ten years." *Id.*

[252] *See id.*

[253] The sentence is not mentioned in most of the cases, but several list sentences of seven years. The lesser sentences correlate with both the race of the defendants and the age of the victims. *See* Lawley v. State, 264 Ala. 283 (1956) (imposing life sentence when victim was under twelve; contrast with the death penalty applied in the Scottsboro cases); Flournoy v. State, 251 Ala. 285 (1948); Caldwell v. State, 36 Ala. App. 612, 612 (Ct. App. 1952).

[254] James v. State, 246 Ala. 617 (1945); Hull v. State, 232 Ala. 281 (1936).

[255] Harrison v. State, 235 Ala. 1, 2 (1937) (citing ALA. CODE § 5411 (1923)).

[256] *Id.*

[257] This information is taken from the surveys of, and comparisons between, the rape and incest cases electronically available for the time period which I have documented herein this Article.

from violence. Rather, the state aimed to delimit sexual privileges based on a racially organized patriarchal structure. That is, because the substantive crime and penalty attached to different types of rape changed according to the white woman's relationship to her alleged attacker—whether they were related through familial ties or not—race was the defining factor because of cultural and legal histories of separation. The value of the white woman's sexual agency changed according to the race of the person who sought sexual access to or control over her.

This tension manifests most starkly in the crime of incest, the form of sexual assault that Mayella Ewell experiences. Mayella's sexual subjectivity and relations are bounded by the ways law and society conceptualize both sexually intimate and familial relationships, as well as the different methods law employs for demarcating and regulating the public and private spheres of white citizens as well as those between races. Although it is clear that Tom did not rape Mayella, it is equally apparent that someone did: "Tom Robinson may not have inflicted the bruises on Mayella, but someone did. As they do with Burris's truancy, the citizens of Maycomb . . . choose to look the other way. Among the extralegal 'privileges' they afford Bob Ewell are the privileges of beating and raping his daughter."[258]

Incest, then, serves a special function in Lee's novel and in the book's contemporaneous setting, though its role is less initially obvious than that of interracial rape. *Mockingbird* introduces the ways in which law shaped sexuality both through techniques such as explicit prohibition of miscegenation or sham rape trials, and also by regulating relations between whites. Cultural behaviors are similarly implicated. Incest falls along a fault line at the very core of the private sphere: control of the family and home, the space that law staunchly carved out as the domain of the white patriarch.[259]

Throughout the century preceding desegregation, the Alabama judiciary oscillated between the sentiment that, on the one hand, incest conflicted with southern mores and, on the other hand, the rigidly patriarchal structure of the white family ought to be sacrosanct.[260] Courts

---

[258] Phelps, *supra* note 125.

[259] *See Ex parte* Boaz, 31 Ala. 425, 427 (1858) (denying a writ of mandamus for probate court to grant habeas petition for custody of a child in the father's control: "The law regards the father as the head of the family").

[260] *See* BARDAGLIO, *supra* note 248, at 39–40 (tracing how Southern states diverged from Northern notions of family and were steeped in certain forms of patriarchy).

evinced a marked desire to distance themselves from the problem of incest, following the tradition of centuries of judicial emphasis on the impenetrable boundaries of the domestic sphere. This reticence to disturb the private-public divide, combined with the construction of gender norms leading up to desegregation—the focus on a particular formulation of benign white femininity—cultivated a climate in which incest was increasingly prevalent.[261] As Bardaglio notes, the psychodynamics of the white southern family had a "distinctly incestuous character."[262] Emphasis on the sentimental and affectionate qualities of familial relations, combined with concern over controlling white female sexuality and purity, produced an emotional landscape that often resulted in incestuous feelings within the household.[263]

Southern courts grappling with incest exhibited anxiety and ambivalence as to how to confront this form of sexual violence. As the problem burgeoned, judges recognized the ways incest threatened the integrity of the family and, by extension, white patriarchy in society as a whole.[264] Incest destabilized the relationships and obligations attributed to family members and eroded the unit's stability, enervating its potency as an institution of power distribution. Electronically published state law suggests that, although incest was periodically occurring, the crime was rarely prosecuted and generally resulted in punishment disproportionately minimal to those for rape as courts sought to reinforce the importance of white male authority in the household.[265]

Treatment of incest illuminates a second theme that materializes in the investigation of Jim Crow era gender relations: while the essentialized female was formed within the rape complex as a direct response to blackness, the ontological construction of the female was also important for maintaining the social and political order by empowering white men. For white men, normative framings of white female sexuality adopted a presumptively heterosexual and patriarchal form that justified continuing male hegemony in the private sphere of the home. Alabama's disparate enforcement and penalization for incest and statutory rape laws, in tandem

---

[261] *Id.*

[262] *Id.* at 39.

[263] *Id.*

[264] *Id.* at 39–40.

[265] *See infra* note 278 listing all of the electronically available cases; BARDAGLIO, *supra* note 248, at 39–40.

with prohibitions on gay intimacy and interracial marriage, takes on added significance under this analysis. Female sexuality was constituted so as to render the white female both dependent upon and available to white men, with the "white" and the "male" being distinct but overlapping. At the same time, it served as a vehicle for reviving prohibitions on interracial intimacy that were no longer permitted facially by law; while bans in several states against marriage continued, no limitations effectively remained on sex or procreation at the time desegregation was ordered.

In policing the sexuality of both white and black women, the law facilitated intense sexual violence by white men in order to maintain race and gender stratification. The white patriarch required control of the private sphere in order to retain his social and political authority in the broader visible public arena; he controlled white female sexuality on the one hand and defined black women's and men's sexuality on the other in order to retain his elevated racial and gendered status.[266]

After desegregation, incest was the least scrutinized form of sexual violence against white women, because of the other interests the behavior implicated. Father-daughter incest, in particular, elicited the most volatile response from southern communities because calling attention to it undermined white moral superiority.[267] Courts therefore took great pains to depict incest between white fathers and daughters as an anomalous act that destroyed the father's otherwise superior social position as a white male. The act was

> so shocking to the moral sense of every civilized being, so degrading and humiliating to human nature, reducing man from his boastful superiority of a moral, rational being to a level with the brutal creation, that our pride and respect for our species would not allow us to believe it possible to have been committed in this age and country, unless constrained to yield conviction on the most indisputable proof.[268]

---

[266] *See* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 282 (1999) (citing Marcy Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 78 J. AM. HIST. 835, 854 (1991) (noting that everyone in the antebellum South had a role to play, including the authoritarian role of white men)).

[267] BARDAGLIO, *supra* note 248, at 39.

[268] Tuberville v. State, 4 Tex. 128, 130 (1849); *see* BARDAGLIO, *supra* note 248, at 40.

Any paternal propensity for incest posed a danger to the legitimacy of white patriarchal dominance in the family, and of white preeminence generally. Thus, although courts comprehended the abuse of male power inherent in the act of incest, the insight did little to weaken their overarching investment in preserving patriarchal organization of the home. In the few instances when incest was prosecuted and penalized, courts declined to locate incest within the broader landscape of gendered relationships governing the model southern white family, shielding the domicile from scrutiny. Consequently, the narrative of white male superiority could be maintained.[269]

Legislative histories of incest statutes likewise evince ulterior motives. Although by the mid-1800s most southern states had laws criminalizing incest,[270] the interventions were primarily aimed not at protecting women from sexual violence, but rather at preventing matrimony between close relatives and inbreeding. Laws thus punished only sexual intercourse and left unregulated other forms of sexual assault.[271] At the same time, southern courts, although noticeably hesitant to punish incest, zealously enforced measures penalizing interracial sex and marriage,[272] out of fear that sexual relations between blacks and whites would undermine existing legal, and later cultural, race-based caste systems.[273]

The politics of segregation mandated that white men command the many aspects of sexual identity formation—political, moral, and practical.[274] Therefore, courts reinforced the notion that white male behavior was beyond reprobation while cultural treatment of incest, in tandem with legal practices, effectively erased the act from public discourse. Incest was just one of several crimes through which legal actors attempted to sustain racial and gender frameworks. Other techniques were also implemented. For example, the common law and statutory marital

---

[269] BARDAGLIO, *supra* note 248, at 40.

[270] *Id.* at 44.

[271] *Id.* at 45.

[272] *Id.* at 48.

[273] *See id.* at 49.

[274] This pattern traces back to slavery when slavemasters policed racial purity by controlling the sexual behavior of white women rather than their own. This also partially explains the (de)segregation era rape complex and invisibility of sexual violence against black women. *See* A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 40–47 (1978).

exemptions to rape were instrumental in maintaining a cloak around intra-familial relationships. Lee illustrates this process of erasure and obfuscation through the impunity Bob Ewell enjoys in both Maycomb's social circles and before the courts for his incestuous attacks on Mayella. Lee's narrative elucidates the hidden reasoning behind Alabama's incest jurisprudence and the underwhelming societal response to incest in the white family.

Between 1930 and 1960 the Alabama Supreme Court and Court of Appeals heard seventeen incest cases—all white-on-white. Four of these addressed marriage to close relatives,[275] the proscription of which was the primary objective behind the adoption of many of the early versions of incest statutes. Of the remaining thirteen, three separate cases arose from an incident between two parties,[276] leaving only ten sexual assault-based cases before the two courts.[277] Perhaps more illustrative even than the rarity of incest prosecution is Alabama's decision to presumptively deem the daughter an accomplice to incest upon passage of her sixteenth year, the age of consent[278]—several years younger than Mayella's nineteen years.[279]

---

[275] *See* Brand v. State, 242 Ala. 15 (1941); Osoinach v. Watkins, 235 Ala. 564 (1938); Smith v. Goldsmith, 223 Ala. 155 (1931); Henderson v. State, 26 Ala. App. 263 (Ct. App. 1934).

[276] *See* Flournoy v. State, 251 Ala. 285 (1948); Caldwell v. State, 36 Ala. App. 612 (Ct. App. 1952); Caldwell v. State, 36 Ala. App. 229 (Ct. App. 1951); Flournoy v. State, 34 Ala. App. 23 (Ct. App. 1948); Newton v. State, 33 Ala. App. 621 (Ct. App. 1948); Newton v. State, 32 Ala. App. 640 (Ct. App. 1947).

[277] The remaining cases are: Noble v. State, 253 Ala. 519 (1950); Brasher v. State, 249 Ala. 96 (1947); Skinner v. State, 36 Ala. App. 434 (Ct. App. 1952); Anderson v. State, 35 Ala. App. 557 (Ct. App. 1951); Allen v. State, 35 Ala. App. 170 (Ct. App. 1950); Wyatt v. State, 35 Ala. App. 147 (Ct. App. 1950); Kelley v. State, 32 Ala. App. 408 (Ct. App. 1946).

[278] *Newton*, 32 Ala. App. at 641 (finding that the lower court erred in refusing defendant's instruction that "his daughter [is] what is known in law as an accomplice and you cannot convict the defendant solely on her testimony that he did have such intercourse." The charge: "that the defendant in this case is charged with having an illegal sexual intercourse with his daughter. This makes his daughter what is known in law as an accomplice and you cannot convict the defendant solely on her testimony that he did have such intercourse."); *see Skinner*, 36 Ala. App. at 435 (age of consent is sixteen; corroborating testimony is necessary if over the age of consent, although the four month lapse in this case did not create the necessity); *see also* Duncan v. State, 20 Ala. App. 209, 211 (Ct. App. 1920) (age of consent is sixteen); *Noble*, 253 Ala. at 520 (accomplice defense only applies to daughters above the age of consent).

[279] MOCKINGBIRD, *supra* note 1, at 206.

Alabama courts made young women complicit in incest by accepting the "accomplice defense" argument to charges of incest made by adult daughters. In doing so, courts shielded familial sexual violence from censure and made the harms visited upon women like Mayella virtually invisible. The accomplice defense arises from the tenet in criminal law that a felony conviction cannot be sustained solely on the testimony of an accomplice, but instead requires corroborating evidence.[280] Judges imposed the evidentiary rule on incest prosecutions by conceptualizing the daughter as consenting to the illegal sexual act upon reaching the age of consent.[281] Her "acquiescence" to the sexual conduct rendered her a co-conspirator to the crime, thus limiting the use of her testimony against her father.[282] The requirement of independent corroborating evidence for such a prototypically private crime made proving incest in such cases nearly impossible.[283] The contorted application of the principle consequently minimized incest prosecution and functionally denied the existence of this particular method of sexual violence.[284]

As such, the state's legal apparatus, under the influence of patriarchal forces, operated the accomplice and corroborating testimony rules in a manner that disparately impacted violence transpiring in the domestic sphere while continuously invoking the rhetoric of an abstract and neutral process, a source of interpretive authority, and a just, impartial enforcer.

The Alabama Supreme Court first voiced the determination that the accomplice rule applied to incest in *Denton v. State*.[285] There, the court reversed the defendant's conviction for incest because it could not find corroborating evidence; there was no proof other than the daughter's complaint and detailing of the incidents. The court stated: "After carefully considering the evidence in this record, we fail to find facts sufficient to

---

[280] *See* Denton v. State, 17 Ala. App. 309 (Ct. App. 1920).

[281] *Id.*

[282] *See* Leigh B. Bienen, *Defining Incest*, 92 NW. U.L. REV. 1501, 1539 (1998).

[283] *Id.*

[284] *Id.* at 1538–45 (noting that Texas law appears to have been similarly structured to Alabama's, including the way in which accomplice theories played out and their evidentiary repercussions, although Texas defined the age of consent at seventeen rather than the sixteen years Alabama adopted. Bienen also notes that underage women were considered accomplices as well).

[285] *Denton*, 17 Ala. App. at 309.

corroborate the testimony of the woman, who alone testified to the facts constituting the crime with which defendant is charged."[286]

The progeny of *Denton* clarified the rule's applicability and hinted at the explicit and implicit ramifications of applying the rule to incest. Carving out an exemption to the evidentiary requirement for daughters "under the age of consent," the Alabama Court of Appeals ossified the notion that daughters over the selected age were both capable of consenting and in fact did consent to incestuous relationships with their fathers. This, in turn, further entrenched the perception that incest victims over the age of consent were "accomplices" and not victims. In *Duncan v. State*,[287] the court of appeals upheld a father's conviction of incest with his thirteen-year-old daughter. The original conviction had relied solely upon his minor daughter's testimony, with no independent corroboration of the offense.[288] The court rejected the appellant's attempt to invoke *Denton*,[289] stating, "[t]he important question therefore is: Was the girl in question an accomplice?"[290] *Denton*, it explained, was distinguishable because of the victims' relative ages. The daughter in *Duncan*, being but thirteen, was too young to bestow legal consent and thus could not be complicit in the crime:

> [T]his case must be differentiated from the *Denton* Case. . . . It is true [that under Code 1907 § 7127] it is provided if any man and woman, being within the degrees of consanguinity or relationship . . . have sexual intercourse together . . . each of them would be guilty. But certainly this statute implies that each of the parties must be capable of committing the offense and under the law able to give legal assent thereto.[291]

The seemingly non-substantive evidentiary maneuvers adopted by the Alabama court not only penalized older daughters who clearly fell outside of the temporal marker, but also set the stage for reasoning across the judiciary that punished daughters subject to sexual abuse over time. Ultimately, courts often viewed the longevity of sexual abuse as indicative

---

[286] *Id.*

[287] 20 Ala. App. 209 (Ct. App. 1924).

[288] *Id.*

[289] *Id.* at 211–13.

[290] *Id.* at 211.

[291] *Id.*

of the daughter's consent. Rather than situating the relationship in sustained familial power dynamics, the court of appeals purported to recognize where the daughter was incapable of legal consent and by implication, when she was. In the dicta of the *Denton* case, the court stated:

> It is true, the woman testified that at each recurrent act the defendant used threats and intimidations, and that she yielded to him through fear, *but the rape was too often repeated and continued too long without outcry for full credence to be given to the statement.*[292]

In *Brown v. State*, for example, the daughter's testimony required independent corroboration because the young woman had been one month over the age of seventeen when trial commenced.[293] Violations had occurred before she reached sixteen and continued thereafter, but according to the Alabama Supreme Court, the state could not rely on her evidence alone in proving incest for the entire period.[294] Because the girl had become an accomplice at sixteen, additional proof was required for all incest that occurred after that date.[295]

The court's legal reimagining of familial rape as an act where the daughter "willfully or willingly joined in the incestuous act,"[296] and "became *particeps criminis*,"[297] influenced white female sexuality and strengthened white male dominance. The unwillingness to confront this substrate of incest materialized in case law even where the female was a minor. Protracted sexual activity was viewed skeptically by the courts regardless of the daughter's age; it was often utilized, not as evidence of a crime, but as proof of complicity and consent.[298]

---

[292] Denton v. State, 17 Ala. App. 309 (Ct. App. 1920) (emphasis added).

[293] Brown v. State, 21 Ala. App. 371 (Ct. App. 1926). *But see* Newton v. State, 33 Ala. App. 621, 622–23 (Ct. App. 1948) (noting daughter's age as immaterial because even if she was over sixteen at the time of incest, father's threats of violence rendered her unable to legally consent).

[294] *Brown*, 21 Ala. App. at 371.

[295] *Id.* The court ultimately did find that enough corroborating evidence was given to establish the fact and uphold the jury's verdict.

[296] *Duncan*, 20 Ala. App. at 211.

[297] *Brown*, 21 Ala. App. at 371.

[298] Bienen, *supra* note 282, at 1543–44; Smith v. State, 108 Ala. 1 (1895) (citing Freeman v. State, 11 Tex. Ct. App. 92 (Ct. App. 1881)).

The statutory definition of incest, and the prescribed punishments and evidentiary treatment associated with it, illustrate the ways white female sexuality was molded by courts, largely as a response to racial considerations. Courts' decisions to enforce laws governing gendered and sexual relationships were permeated by ideas of race, and vice versa. The rhetoric courts employed also evinces overt and subtle—as well as unconscious—attempts to influence sexual norms. As compared to interracial rape claims, the violence faced by white female victims of incest received very little judicial language.

In incest cases between 1930 and 1960, defendants were often concisely or minimally described. Appellants were, quite tersely, "convicted of incest, the offense denounced by § 325, Title 14, Code of 1940;"[299] "convicted of incest;"[300] or "tried and convicted under an indictment charging incest."[301] More condemnatory linguistic diatribe included: "This appellant has been convicted of the crime of incest growing out of his alleged sexual relations with his young daughter,"[302] and "[t]his appellant was indicted for incest or adultery with his daughter. His jury trial resulted in a verdict of guilty."[303]

Descriptions of the circumstances and crime were generally kept skeletal as well, barring a few exceptions.[304] For example: "[m]edical

---

[299] Flournoy v. State, 251 Ala. 285, 285 (1948).

[300] Caldwell v. State, 36 Ala. App. 229, 229 (Ct. App. 1951).

[301] Newton v. State, 32 Ala. App. 640, 641 (Ct. App. 1947).

[302] Skinner v. State, 36 Ala. App. 434, 435 (Ct. App. 1952).

[303] Allen v. State, 35 Ala. App. 170, 171 (Ct. App. 1950).

[304] The one instance where the court included a more detailed accounting of the crime was in *Newton v. State*, 33 Ala. App. 621, 622–23 (Ct. App. 1948):

> The stepmother and her son left home to visit another member of the stepmother's family in a nearby community; that the appellant, father of the prosecutrix, directed all the other children to do certain chores on the farm and sent them from the house; that when only the prosecutrix and her father remained in the house, her father called to her to come upstairs; that she refused to do so and that her father threatened to beat her with a lead rein; that upon his insistence and threats, she went upstairs in the home where her father proposed to have illicit relations with her; that upon her refusal, after certain promises, he further threatened her and that she then submitted to his desires and engaged in sexual intercourse with him; that twice more upon this same day, while all other members of the family were away from the house, the defendant forced her to submit to him . . . .

testimony established that at the time of the trial this unfortunate girl was about six months pregnant. . . . No necessity arises for any detailed discussion of much of the sordid testimony presented during this trial. We therefore refrain from such detailing."[305] Similarly:

> The testimony by the girl tends abundantly to establish that her father carnally knew her on repeated occasions from the time she was thirteen years of age. These offenses were well within the statutory limit as to time, and also during the period when she was under the age of consent, and when no corroboration of her testimony is required.[306]

On the more descriptive end of the spectrum:

> we copy the following: And on several occasions that he had played with her and fondled her, and on several occasions while he would go to the pasture that she and the other children would go with him and they would play hiding and that he and Janie Frances would get off and that he would play with her then, and he said on two or three occasions that he penetrated her just a little bit but either she resisted or his conscience would get to hurting him and he never did complete it.[307]

> The controverted question as to the age of the daughter appears to be wholly immaterial, and as the State's evidence tends to show that the crime was committed under duress and refutes conclusively that the unfortunate daughter was an accomplice; to the contrary, it tends to show she was but the victim of her father's lust.

Id.

In one other case, *Wyatt v. State*, 35 Ala. App. 147 (Ct. App. 1950), much detail is given, *id.* at 6–10, but equal time is devoted to the defendant's interpretation of the events, *id.* at 11–14, because the debate centered around not the incest so much as a violent fight which arose between the defendant and his father (the victim's grandfather). The former said the fight arose out of his desire to instill discipline in his lazy wife and daughter (the victim) because they would not cook dinner and he was going to beat them, to which the grandfather protested; the latter argued that the two women fled to his house because of violence and incest and from there the fight arose.

[305] Flournoy v. State, 34 Ala. App. 23, 26 (Ct. App. 1948).

[306] Skinner v. State, 36 Ala. App. 434, 436 (Ct. App. 1952).

[307] Anderson v. State, 35 Ala. App. 557, 559 (Ct. App. 1951).

In contrast to these more descriptive accountings, many incest cases simply noted that the act had transpired and focused on the appeals of the defendant, which were commonly based on the grounds that the daughter was an accomplice or that the crime had not taken place at all. For example: "Three witnesses for the State testified that they had, on the same occasion, seen appellant and his daughter engaged in sexual intercourse. We omit the sordid details";[308] or "[t]he prosecutrix was fourteen years of age at the time of the alleged offense. She testified that her father, the appellant, had sexual intercourse with her on several occasions. The defendant denied the accusation."[309]

In contrast, electronically published opinions from interracial rape cases during those years were elaborate in recounting the events, emphasizing the victim's positive virtues and eradicating any potential incongruities in her story or motivations. A representative example:

> Before reaching the bed, [the victim, a single widow,] turned out the light. . . . The evidence is to the effect that these street lights furnish sufficient light by means of which Mrs. Rice could identify some one. . . . After getting in the bed she started to turn off the radio . . . and discovered a Negro man, whom she judged to be some two or three inches taller than herself, between 25 and 30 years of age, and weighing some 170 or 175 pounds. He was dressed only in one undergarment, known as a BVD type. Mrs. Rice . . . evidently was a woman of poise and courage. Defendant is 29 years of age . . . 179 pounds.
>
> The Negro told her he came there for the purpose of raping her. He put his right hand on her throat, with a knife in his left hand threatening to kill her if she made any outcry. She put up what might be well described as a game fight—trying to scratch his face, succeeding one time in pushing him away from her, and all the while insisting that he let her alone. He repeated that he intended to rape her. She was struggling as best she could with his arms around her, and at one time he bit her on the cheek. He also struck her in the eye, and her hand was slightly cut. Finally, however, he overpowered her and threw her back on the bed with her gown up and his body in contact with her person. In a manner not proper to be detailed in an opinion (though clearly set out in the record) this contact evidently gratified his passion, and after throwing the bedspread over her body and pillow over her head,

---

[308] Allen v. State, 35 Ala. App. 170 (Ct. App. 1950).

[309] Kelley v. State, 32 Ala. App. 408, 410 (Ct. App. 1946).

> with the admonition that she make no outcry, he left her without a full accomplishment of his original purpose.[310]

Though employing graphic depictions of the crime in their written decisions, courts simultaneously discounted the alibis of defendants, often cursorily. Their rhetorical strategies drew attention to the ways that the alleged behavior of the black defendant reflected prevailing racist stereotypes, fueling the discourse of their innate animalism and brutality and simultaneously reinforcing conceptions of the endangered southern belle. The trivialization of defendants' alibis impress that their fates were predetermined; once the cry of rape was proffered, guilt and punishment at the hands of white judges and juries was inevitable:

> There is no occasion to here set out the details of the crime. . . . [The victim] was a girl fourteen years of age and in the fifth grade at school. The alleged attack occurred between 8 and 9 o'clock at night when the victim went with a girl friend to the schoolhouse to attend a dance. She went out alone to the back of the building in the schoolyard. . . . While there she discovered the defendant approaching. She immediately began to make her way, running, to the schoolhouse and was intercepted. . . . [The] defendant caught her as she was between the two buildings, that she screamed for help twice; that he had a knife with which her hand was slightly cut, and drew it on her and threatened if she screamed again he would kill her. After that she made no further outcry, though she begged him to let her alone. Her testimony is further to the effect that he then pushed her out into the weeds, which was some distance from the building; placed her on the ground and though she tried to push him back was unable to do so and defendant accomplished his purpose. She also testified that he still had the knife with him. It is her recollection that when he 'took her down' on the ground that she kicked off her shoes, and he either removed or made her remove some of her undergarments. She had never seen the defendant before and, from this record, the jury could reasonably infer her fearful reaction to having thus been so suddenly caught unawares. . . .
>
> It appears that after this crime was committed another colored man by the name of Brooks was arrested and given a preliminary hearing. . . . Much stress is laid upon the fact that the prosecutrix had identified Brooks as her assailant. The evidence is now to the effect that this was a mistake and that this defendant was the man.

---

[310] *See* Underwood v. State, 248 Ala. 308 (1946).

> One of the differences between the two that prosecutrix now discovers was that Brooks' teeth were rather wide apart and a difference in their height. . . . The fact that the prosecutrix had mistakenly identified another man (Brooks) previously, would perhaps be of some consequence if there were proof offered by the defendant which would tend to establish his innocence.[311]

Perhaps the most instructive exemplar of the divergent rhetorical treatment interracial rape and incest claims received comes from the Scottsboro trials. Throughout the trials, evidence of Price's potential ulterior motives, prostitution, and untruths were uniformly denied admittance. The graphic details of the case were repeatedly enumerated. The young men meanwhile were described as physically virile adults, armed with knives and guns, doing battle.

> The evidence of the state's witness Victoria Price, to state its substance, goes to show that on the 25th day of March, 1931, she was riding on a freight train through Jackson county with her girl companion, Ruby Bates; that they were riding in a "gondola car" loaded with chert or gravel; that just after the train passed Stevenson in Jackson county, Ala., the appellants, Charlie Weems and Clarence Norris, with the aid of other negroes, forcibly stripped off her outer garment, a pair of overalls, tore off her under garments, and forcibly ravished her; that there were twelve in the party of negroes who came upon the car and forced six of seven white boys to leave the train while it was in fast motion, by assaulting said white boys; that, after said white boys were forced to leave the train, some of the negroes raped her companion, Ruby Bates, and the others raped her—six in number—and that some of them held the girls while the others accomplished their purpose; that Weems held a knife against the throat of [the] witness, while some of the others, including Norris, forcibly had sexual intercourse with her.[312]

The Alabama Supreme Court denied introduction of statements elicited on cross-examination regarding Price's turbulent relationship with her husband, whom she arguably had just left, and her potential prison

---

[311] Taylor v. State, 249 Ala. 130, 135 (1947).

[312] Weems v. State, 224 Ala. 524, 527 (1932). The description in *Weems* is actually quite restrained in comparison to several of the other descriptions found in concurrent trials. However, it demonstrates the ways in which cross-examination of Price was systematically stymied. *See, e.g.*, Powell v. State, 224 Ala. 540, 543–44 (1932).

record. It permitted the testifying medical examiner to report, and consequently emphasized, that the two women sported mild bruising and several small scratches, and that the presence of semen in their vaginas proved penetration. But the court omitted the examiner's doubt that a violent gang-rape by six men on a gravelly surface would produce such minor injuries. There were "no lacerations or tears of the sexual organs . . . six men, one right after the other, could have had intercourse with her (Victoria Price) without lacerations. That is possible."[313] When the defense counsel sought to explore the examiner's suspicions and introduce alternative explanations for the presence of semen in the two women on cross-examination, they were again stymied. Statements made to the medical examiner by the two women that they had participated in consensual sexual intercourse just before the alleged rapes were excluded because there was, "no evidence showing or tending to show that the defendants had sexual intercourse by and with the consent of the state's witnesses. The evidence sought was not material."[314]

How these familial and sexual relationships operated in both legal and cultural media was not incidental to the overarching history of racism in the South. From incest to rape, control and authority over the sexual relationships and experiences of women both white and black supported a system of patriarchy that molded both race and gender relations. Although race, gender, and sexuality incessantly influenced each other, how law produced southern sexual norms in response to the racial politics of the era has largely been overlooked. Normative sexuality's role in creating and maintaining racial hierarchy is inseparable from analysis of the roles gender and race played in systems of racial subordination.[315]

IV. CONCLUSION

As Professor Crenshaw warns, United States history, fraught with racial violence, heavily influences our prevailing understandings of gender and sexual identity. Harper Lee's *To Kill a Mockingbird* is important for two reasons in thinking about the workings of law and its relationship to the structuring of society and identity within the context of our troubling racist past and continuing problems with racism. First, Lee's turn towards fiction as a means for inspiring change where law had previously failed allows her

---

[313] *Weems*, 224 Ala. 524 at 527-528.

[314] *Id.*

[315] BARDAGLIO, *supra* note 248, at xii.

to link cultural behaviors to the technicalities of law, demonstrating how law operates within larger social currents rather than hermetically in a vacuum. Secondly, through literature, Lee is able to explore the numerous distinct layers comprising racism and comment upon the complex legal and cultural forces required to maintain a structure of black subordination. Within the model, she captures the functions of gender and sexuality in facilitating, responding to, and incorporating perceptions of race. Both community and courts respond to these phenomena: legal actors create regulations and enforce them within this cultural landscape while society, consciously and, more often, unconsciously, promulgates a framework of gender, race, and sexuality that has historically perpetuated white, heterosexual male hierarchy.

Mockingbird has long elicited a poignant and strong emotional response from the legal community for its stirring portrayals of an era of racial inequality. The injustices visited upon blacks included disenfranchisement, regular legal and extrajudicial lynching, and imposition of other forms of extreme violence as tools for prolonging black subordination. The law was implicated in facilitating systemic and pervasive dehumanization. Lee evokes this response by emphasizing the agency of her protagonists. She highlights a hope in the individual capacity of the human condition to overcome institutional injustice. Thus, in providing her interpretation, Lee vests her characters with a choice, providing a vision where racism in its then-current incarnation is only sustainable through the manipulation of other communal organizing principles such as gender and sexuality. Understanding their interconnectedness, Lee depicts race, gender and sexuality as responding to each other, evolving over time according to the agendas and geography of the era, and demonstrates how the three mutually constitute each other and interact with cultural norms and legal regulation.