Intimate invasions: rape, race, age, and the law in California, 1848-1900

Intimate Invasions

Rape, Race, Age, and the Law in California, 1848-1900

Caitlin A. Cunningham
History, Classics & Archaeology
Birkbeck, University of London

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Declaration

I confirm that all material presented in this thesis is my own, except where otherwise indicated.

Caitlin A. Cunningham

Abstract

In the middle of the nineteenth century, mobilising ideologies of personal liberty and collective nationalist conquest, white Anglo Americans moved onto the Western frontier with renewed energy. Their efforts inaugurated an invasion and conquest of California that was both sexual and violent. Spurred by news of the Gold Rush, consolidation of American rule in the territory was swift after 1848 and characterised by a pervasive martial manliness. Throughout the remainder of the century, white Anglo Americans established and justified a social and institutional dominance that built upon the foundations of initial conquest. In this context, judges, juries, reporters, doctors, social commentators, and a wider public grappled with the complexities of sexual violence. In the debates and conflicts that arose around "rape" as a crime in California, gender, class, race, and age were all key dynamics that shaped the visibility sexual violation to contemporaries. Building on these factors, this thesis seeks to explore and interrogate the structures of "knowing" or "understanding" sexual violence in California between 1848 and 1900, to unpack the development of specific meanings of rape and attempted rape both in law and in broader society. It does so by specifically narrowing in on the ways in which age and race interacted with gender and class to structure understandings of "rapable" and "unrapable" bodies.

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In writing this thesis I have held stories of great pain in my hands. To all of those people whose lives I have touched upon in this work, whose experiences I have made efforts to understand, and whose violations were often roughly handled, I also give my deep and sincere thanks. I only hope I do their stories justice.

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I. Introduction: A Lady's Influence

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
>
> - The Declaration of Independence (U.S.), 1776.

> "We are very much in want of the Lady's influence, and if there is any place where a man will [rest] a fair value upon a woman's character it is in a new country."
>
> -John Holmes Magruder, 1849.[1]

Introduction

In the middle of the nineteenth century, mobilising ideologies of personal liberty and collective nationalist conquest, white Anglo Americans moved onto the Western frontier with renewed energy. Their efforts inaugurated an invasion and conquest of California that was both sexual and violent. Spurred by news of the Gold Rush, consolidation of American rule in the territory was swift after 1848 and indelibly infused with a sense of martial manly fervour. Throughout the remainder of the century, they established and justified a social and institutional dominance that built upon the foundations of their initial conquest. In this context, judges, juries, reporters, doctors, social commentators, and a wider public grappled with the complexities of sexual violence. In the debates and conflicts that arose around the crime of rape in California, gender, class, race, and age were all key factors that shaped how legible

[1] J.H. (John Holmes) Magruder letters to his family, 1849-1851, HM 16723-16728. The Huntington Library, San Marino, California.

occasions of sexual violation were to contemporaries. Thus, this thesis seeks to explore and interrogate the structures of "knowing" or "understanding" sexual violence in California between 1848 and 1900, to unpack the development of specific and narrow meanings of rape and attempted rape both in law and in broader society.

The ideologies that encouraged American expansionism in the mid nineteenth century had roots in the very foundations of the American republic. In 1776, the first lines of the American Declaration of Independence asserted that men shared the unalienable rights of life, liberty and the pursuit of happiness. As historians have long explored, these now iconic words were penned with extraordinary irony; one of their principal authors, Thomas Jefferson, wrote them with the freedoms of a wealth – from which those who share his "legitimate" bloodlines continue to benefit from – gained through the mass enslavement, death, and transgressive abuse of other human beings. Three quarters of a century later, when rumours of gold on the American western frontier began circulating in the eastern states, those formative words of an independent United States would be again operationalised by a new generation of men, eager to exercise their liberty to strike a new course, cast off the degradations of wage labour, gain financial independence, and pursue the promise of happiness. On the eve of gold discovery, the American western frontier had already been imbued with a meaning that would be repeatedly asserted to legitimate the martial, violent, sexualised conquest of the "civilised" over the "savage," and – in turn – offer enterprising white men the possibility of extraordinary wealth and power.[2] This ideology found its expression in a sexualised and racialised cry of "Manifest Destiny."

[2] Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* (London: Routledge, 1995), 257.

Manifest Destiny, or the rationalisation of white, Anglo-American conquest of the western continental frontier as a God-ordained and destined outcome, offered a logic to the cementation of systemic inequity wherever white Anglo Americans ventured. Proponents of Manifest Destiny used it in service to their most atrocious abuses, wielding it as the weapon to make the contradictions in their behaviours and actions logical.[3] Anglo-American invasion of western territories also entailed what many viewed as the inevitable conquest of its peoples; thus, after the discovery of gold in the foothills of the Sierra Nevada Mountains in 1848, white men rushed into Alta California armed with the assurance of their God-given superiority. The social, political, legal, and economic systems that they introduced in the region codified their status according to a standing tradition of racialised and gendered exclusions, institutional authority, and the shaping of a rhetoric that reified their right to do so. In many respects, along the logical thread that began with the Declaration of Independence and was perpetuated in the promulgation of Manifest Destiny, the white American conquest of California was fashioned as simultaneously inevitable and natural.

Even after individual placer mining had given way to large-scale, industrialised and corporate mining, the image of California was still imbued with romanticised notions of a restless white manliness. This ideal masculine type reached back to ideals of the intrepid spirit of America itself, and found new expression in the absorption of the western frontier. As W. S. Walker described in his memoir of his time in California,

[3] Alain Corbin, *The Village of Cannibals: Rage and Murder in France, 1870,* trans. Arthur Goldhammer (Cambridge: Harvard University Press, 1993); Eric Foner, "The Meaning of Freedom in the Age of Emancipation," *Journal of American History*, 81, no. 2 (September 1994): 435–460, 436. https://doi.org/10.2307/2081167; Amy S. Greenberg, *Manifest Manhood and the Antebellum American Empire* (Cambridge: Cambridge University Press, 2005).

Glimpses of Hungryland (1880), "Hungryland is the home of that roving, discontented and restless class of individuals who are found in every portion of the civilized world." It was the natural destination for "the man, who is never contented, but always restless— always pulling up stakes, and moving around in the search for something better, is always hungry, his pockets are hungry—his body, heart and mind are hungry."[4] This hunger also shaped the nature of white men's claims on California. It created the ideological frame within which Anglo Americans consumed the western frontier in pursuit of "happiness," often practically understood as the pursuit of wealth. Indeed, men like Walker – who were predominantly of European origins – would begin to imbue the conquest of the Western Frontier with a mythology of its formation while it was still being made by white colonial settlers.

The dominance of conquest-laden, martial manliness that shaped the first two decades of Anglo-American consolidation of California shifted somewhat as a result of a broader national change in gendered and racial discourse after the Civil War.[5] Women's rights campaigners began mobilising in the mid-nineteenth century. Their efforts to reprioritise the sanctity of the Christian family in American social life led to important social purity campaigns that shifted gendered discourses and expressly

[4] W. S. Walker, *Glimpses of Hungryland; or, California sketches. Comprising sentimental and humorous sketches, poems, etc., a journey to California and back again, by land and water* (Cloverdale: Reveille Publishing House, 1880). https://www.loc.gov/item/rc01000896/.

[5] Varied ideals of manhood competed for primacy in the nineteenth century, although Amy Greenberg has argued that the two most vital of these were "restrained" and "martial" masculinity. See: Amy S. Greenberg, *Manifest Manhood and the Antebellum American Empire*; see also: Susan Lee Johnson, *Roaring Camp: The Social World of the California Gold Rush* (New York: W.W. Norton & Company, 2000); Christopher Herbert, *Gold Rush Manliness: Race and Gender on the Pacific Slope* (Seattle: University of Washington Press, 2018); Gail Bederman, *Manliness and Civilisation: A Cultural History of Gender and Race in the United States, 1880-1917* (Chicago: University of Chicago Press, 1995).

promoted ideals of restrained manliness. Temperance unions, efforts to raise the age of consent, and anti-prostitution movements all brought male excesses to the forefront of national conversations. These growing discussions demonstrated the crucial roles of sex and sexuality to social organisation in California.[6] Although most of the conflicts of the Civil War occurred outside of California's borders, in its aftermath ideals of a more restrained ideal of manliness began to permeate the state, which was increasingly accessible to a wide array of eastern migration after the completion of the transcontinental railway in 1869.

While the Civil War reshaped broader American society, the western frontier continued to operate as a symbol of limitless freedom. This endured until it was formally declared "closed" following the results of the 1890 census.[7] Thus, despite changes in ideals of manliness and the organisation of gender following the Civil War, white American commentators persistently imagined California and the broader American West as a territory ripe for invasion and as an escape for those seeking alternatives to the urban density in the East. In 1893, the idealisation of the American frontier as something elemental to white Anglo-American identity was further perpetuated by Frederick Jackson Turner. First put forward in a lecture at the American Historical Association in Chicago in 1893, and later incorporated in the 1921 publication of his text *The Frontier in American History,* the "frontier thesis" argued

[6] Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920* (Chapel Hill: University of North Carolina Press, 1995), 2.

[7] The 1890 the Superintendent of the Census Bureau declared that there were no remaining unsettled lands in the American west, leading to the official closure of the western frontier. See: Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt and Company, 1921), 1; G. Nash, "The Census of 1890 and the Closing of the Frontier," *The Pacific Northwest Quarterly*, 71 no. 3 (1980): 98-100.

that western expansion was crucial to American identity. Through this thesis, Turner asserted that the "peculiarity of American institutions" was that they were adaptable in processes of "winning wilderness" and effected "progress out of the primitive economic and political conditions of the frontier into the complexity of city life."[8] Thus, California was part of a wider context of white male hunger. It offered opportunity to those who wished to expand into new territory in unprecedented ways. This expansion was rationalised through political and economic arguments, ideologies of white men's needs for geographic freedom, and the constructed righteousness of the subjugation of the "wilderness" and its "savages."

While U.S. scholars have often proved hesitant to understand continental western expansionism in the context of colonial studies, Ann Laura Stoler has argued that American history and postcolonial studies "share more points of comparative reflection than either field has recognized or allowed."[9] In the edited volume, *Haunted by Empire: Geographies of Intimacy in North American History,* Stoler and other authors demonstrated how the nation can be understood in broader contexts of settler colonialism. Through this lens, it also revealed the integral role of sexuality to the creation of structures of power in imperial spaces.[10] As Nayan Shah explained in his chapter "Adjudicating Intimacies on U.S. Frontiers," the relationships between "a

[8] Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt and Company, 1921), 2.
[9] Ann Laura Stoler, ed. *Haunted by Empire: Geographies of Intimacy in North American History* (Durham: Duke University Press, 2006), 1; This hesitancy is not universal, as groups and individuals ranging from the Black Panther Party to Indigenous scholars have long linked American continental expansionism to colonisation. See: Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005); Joe Street, "'Free Huey or the Sky's the Limit': The Black Panther Party and the Campaign to Free Huey P. Newton," *European Journal of American Studies* 14, no. 1 (2019): 1-20.
[10] Stoler, *Haunted by Empire.*

person's innermost nature, sexual relations and the material world" provide a perspective that "spotlights the relentless assessments of the human subject that undergird the state's scrutiny of intimate ties."[11] These explorations elucidate the necessity of understanding U.S. western expansionism and Manifest Destiny as inherently imperialist ideologies. More importantly, they reveal the elemental roles of sexual and intimate ties to the process of colonising the American continental frontier.

Stoler has elsewhere worked to demonstrate the integral nature of sexuality to colonial projects in various global contexts. She maintains that the

> management of sexuality, parenting, and morality was at the heart of the late imperial project. Cohabitation, prostitution, and legally recognized mixed marriages slotted women, men, and their progeny differently on the social and moral landscape of colonial society. These sexual contracts were buttressed by pedagogic, medical, and legal evaluation that shaped the boundaries of European membership and the interior frontiers of the colonial state.[12]

In the context of the American western frontier, both intimate and sexual ties took shape in a landscape of chaotic and changing hierarchies of power and were formed by social and legislative efforts to make white male authority tangible and concrete. Exploring the instances of sexual expression that were proscribed, tolerated, and publicly condemned, alongside those that were rendered invisible through legislation, legal precedent, and social presumption reveals how "sexual violence" was foundational to American frontier hierarchy. As a result, acknowledgement and

[11] Nayan Shah, "Adjudicating Intimacies on U.S. Frontiers," in *Haunted by Empire: Geographies of Intimacy in North American History*, ed. Ann Laura Stoler (Durham: Duke University Press, 2006), 116.
[12] Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002), 110.

response to claims of sexual harm were processes by which white men exerted their authority over the personal and sexual autonomy of others.[13]

While American frontier imperialism was gendered and sexual, it was also deeply racialised. The processes by which those in positions of legislative and social authority – predominantly white Anglo-men – scrutinised or ignored claims of sexualised violence, ran along distinct racial lines in a process that ranked the value of individuals. The perpetration of sexual violence against women, especially women of colour, the construction and vilification of the sexually violent and racialised man, together with the incapacities of legal procedure to respond adequately to sexual violence, were all primary to the development of a social code that made the excessive violence of white men socially rational and integral to the triumph of white American "civility." A violent, sexualised white Anglo-American manliness was thus the basis upon which the territory that now comprises California was consumed and rendered "American."[14] As Andrea Smith has argued with reference to colonial violence against Native Americans,

> Sexual violence is a tool by which certain peoples become marked as inherently "rapable." These peoples then are violated, not only through direct or sexual assault, but through a wide variety of state policies, ranging from environmental racism to sterilization abuse.[15]

[13] Kristie Dotson, "Tracking Epistemic Violence, Tracking Practices of Silencing," *Hypatia* 26, no. 2 (May 2011): 236–57.
[14] In the nineteenth and twentieth centuries, counter-culture movements and dissidents would also play key roles in the making of a Californian culture, and this is not to deny their importance in the state. See for example: Elaine Elinson and Stan Yogi, *Wherever There's a Fight: How Runaway Slaves, Suffragists, Immigrants, Strikers, and Poets Shaped Civil Liberties in California* (Berkeley: Heyday Books, 2009).
[15] Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005), 3.

In late nineteenth century California, this process was borne out through processes that criminalised and disenfranchised people of colour through law and social practice, while simultaneously working to make their experiences of harm invisible.

Even as ideals of manliness shifted in California after the Civil War, and the chaotic dynamics of mining gave way to more settled conquest, the rhetoric and response to sexual violence remained relatively stable. As reformers pushed age of consent debates into the public and political spheres during the last decades of the nineteenth century, rape continued to be recognised as a terrible crime. However, it was defined and understood in such narrow and specific terms such that white men could perpetrate varied forms of violence, not least sexual violence that were outside the scope of legal or social recourse. In this space, ideas of white manliness and conquest were the foundations upon which the logics of sexual violence took shape.

California in Imperial Context, 1848-1900

"We are very much in want of the Lady's influence," lamented John Holmes Magruder, an early mining migrant from the Eastern United States who was in Sacramento during 1849, "and if there is any place where a man will [rest] a fair value upon a woman's character it is in a new country."[16] Throughout the late nineteenth century, white Anglo-men, like Magruder, wrote prolifically of their experiences on western North America's imperial frontiers, and engaged in discourse that assumed their own gendered and racial superiority. White Anglo-American presumptions of

[16] "J.H. (John Holmes) Magruder letters to his family, 1849-1851," HM 16723-16728. The Huntington Library, San Marino, California.

their right to invade and control "new" territory to the west, were further reinforced by longstanding and developing legal, religious, and scientific frameworks, which were applied haphazardly in the transforming California context. Their voices dominate the historical records, and their articulations of appropriate and inappropriate sexual behaviours disproportionately shaped constructions of sexual violence and sexual conflict on the Californian frontier between 1848 and 1900.

In writing to his brother in Maryland in 1849, Magruder's complaints signal the key conflicts that would shape imperial expansion on the North American west coast over this period. Explicitly conjuring a classed assumption of the ideal woman by referring to "the Lady" and implicitly positioning her as superior to the many Indigenous women that populated the region during the period, he foreshadowed the enduring roles that both gender and sexual access would take on in these spaces. More than this, his invocation of the "new country," in a region long populated by large and diverse Indigenous populations, highlights a discursive tradition amongst Anglo settler colonials of imagining spaces and peoples as coming into existence through their contact with Europeans.[17] In the mid-nineteenth century, imperial expansion into the region we now know as California was greatly influenced by American and European interest in the promises and possibilities of gold wealth. Within a larger context of nineteenth-century imperial expansion, the racial, gendered, and classed contours of sexual power, particularly highlighted by instances of sexual

[17] Edward Said, *Culture and Imperialism* (London: Vintage Books, 1994); Winthrop Jordan, *The White Man's Burden: Historical Origins of Racism in the United States* (London: Oxford University Press, 1974); Ann Laura Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (Durham: Duke University Press, 1995).

conflict and violence, revealed the shape of imperial logics on the transforming realities of the "frontier."

Western North American imperial expansion, which gained momentum during the gold rushes of the mid-nineteenth century, was indelibly marked by longstanding and consistently shifting European systems of knowledge. British and American principles of law and order, Christianity, and a burgeoning medical and scientific discourse all played crucial roles in shaping the social and political landscapes on the frontier. Yet broad territorial absorption was not enacted entirely by the implementation of colonial institutions. Settler colonials, like Magruder, arrived in California in large numbers – burdened with their notions of social order and hierarchy – demanding comprehensive access to land and resources as well as the power to exert their dominance over the bodies and minds of others.[18] Through discourse they constructed the contours of acceptable and unacceptable sexual behaviours in contexts disparate from those they had come from, often imagining the resulting social hierarchies that positioned white Anglo men at the top as natural, inevitable, and ordained by God.[19] In turn, these discourses of hierarchy had a role in how colonial officials and civilians understood and applied institutional precedents and knowledge in California after 1848.

Across the globe, settler colonials embarked with renewed energies to distant lands for parallel purposes during the nineteenth century. While imperial drives were not necessarily motivated entirely by sexual opportunity, sexual conquest was an

[18] Stuart Hall, *Representation: Cultural Representations and Signifying Practices* (London: Sage in association with The Open University, 1997); Michel Foucault, *The History of Sexuality Volume 1: An Introduction* (New York: Vintage Books, 1990).
[19] McClintock, *Imperial Leather*; Foucault, *The History of Sexuality Volume 1*.

indelible feature of broader colonial mandates.[20] At the core of the collision between the violent hunger that fuelled the expansion of empires and the sexual impulses of the Victorian period, was the persistence of sexual violence. Contentious and recognised as a particularly terrible physical transgression in broad discourse, religious ideologies, and the common law that permeated the British colonies, sexual violence was representative of a barbarity that white Anglo Americans and other white imperial settlers imagined as other to themselves.

Those that did commit sexual crimes that were recognisable to contemporaries were condemned and cast aside.[21] For generations across the British colonial world, rape was a capital offence, and thus – at least hypothetically – its perpetrators were punished with the ultimate social exclusion in death.[22] In the 1840s, the death penalty for rape was changed to life imprisonment or transportation in England, a legislative shift sparked by the perception that juries were hesitant to declare accused parties guilty as they knew this possibly condemned them to death. While this change sparked shifts around the British imperial world during the late nineteenth century, myriad sexual violations continued to be ignored or denied. This led to a distinct dissonance between the rhetoric and reality of rape.[23]

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[20] Ronald Hyam, *Empire and Sexuality: The British Experience* (Manchester: Manchester University Press, 1990), 1.
[21] See for example: Kim Stevenson, "'Crimes of Moral Outrage': Victorian Encryptions of Sexual Violence," in *Criminal Conversations: Victorian Crimes, Social Panic, and Moral Outrage,* eds. Judith Rowbotham and Kim Stevenson (Columbus: Ohio State University Press, 2005).
[22] Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England 1770-1845* (London: Pandora Press, 1987); Shani D'Cruze, *Crimes of Outrage: Sex, Violence and Victorian Working Women* (DeKalb: Northern Illinois University Press. 1998).
[23] Kim Stevenson also discusses the desexualisation of reporting on sexual crimes in the press, see: Kim Stevenson, "'Crimes of Moral Outrage': Victorian Encryptions of Sexual Violence," 232.

Thus, the investigation of sexual power and coercion particularly reveals tensions between discourse and practice. Sexually violent behaviour was frequently condemned by colonial officials both on the frontier and in the imperial metropole. Yet responses to claims of such violence were often met with disregard, hesitation, denial, or the acceptance of alternative narratives that allowed judges, journalists, institutional officials, and the broader public to deny claims to experiences of coercion.[24] Likewise, not all behaviours, acts, relationships or interactions that involved disparities of power and coercion may have been understood at the time as sexual violence, by either perpetrators or victims. Despite minimizations in legal writings, diarists, letter-writers, journalists and other observers on the frontier used the frequency or infrequency of rape, alongside other violent crimes, as evidence of broader tendencies of either chaos or order. Responses to hypothetical or rumoured instances of sexual violence and specific accusations of sexual crime reveal that both institutions and individuals were ill-equipped to recognise and respond to sexually violent behaviour, even though such violence occurred with some regularity in California during this period.[25]

The mid-nineteenth century was neither the beginning of a history of what we now know as the North American West, nor the beginning of its intimate and violent collision with imperialism. California's Indigenous peoples had populated the region for

[24] Judith Butler, "Performativity, Precarity and Sexual Politics," *AIBR. Revista de Antropología Iberoamericana* 4, no. 3 (October 2009): i–xiii; Kristie Dotson, "Tracking Epistemic Violence, Tracking Practices of Silencing," *Hypatia* 26, no. 2 (May 2011): 236–57.

[25] Each chapter of this thesis outlines the discourses of sexual violence that were influenced by gender, race, age, and class, and compares these discourses to how complaints of sexual harm were responded to by individuals, public commentators, legal officials, and journalists.

thousands of years, and were diverse in their linguistic, economic, political, familial, sacred and socio-cultural lifeways.[26] Undisturbed by Europeans until the late fifteenth century, California Indians experienced sustained European invasion onto the west coast with the arrival of the Spanish in the sixteenth century. Between the sixteenth and early nineteenth centuries, Spain remained the primary colonising force on the North American western coast, until eastern American energies of Manifest Destiny began to draw white Anglo settlement westward. The composition of the region shifted dramatically in the mid-nineteenth century, first when Mexico won its independence in 1821 and next after the Mexican-American War (1846-1848) and resulting handover of northern regions of Mexico to the United States in the Treaty of Guadalupe Hidalgo.

During these shifts, James Marshall reported the presence of gold in the American River. The discovery sparked a massive wave of migration onto the imperial frontier after 1848. Prior to this, Alta California was primarily populated by Spanish immigrant colonials, people of mixed Indigenous, Spanish and African descent, and varied Indigenous groups. After the discovery of gold and the establishment of California as an American state, the region's non-indigenous population rose from one thousand to close to 20,000 in 1848 alone and was approaching 300,000 by the end of 1859. As historian Benjamin Madley has recently demonstrated, the explosion in the immigrant population numbers was also tied to a dramatic decline in Indigenous populations – from approximately 150,000 in 1846 to only 30,000 by 1873.[27] Madley

[26] Jesse D. Jennings, *Prehistory of North America,* 2nd edition (New York: McGraw-Hill Book Company, 1974); Dean Snow, *The American Indians: Their Archaeology and Prehistory* (London: Thames and Hudson, 1976).
[27] I will elaborate on this at length in the following chapter.

has argued that the best descriptor for Anglo American campaigns to kill, starve, and disenfranchise California Indians from the 1846 to 1873 is genocide.[28]

In following the logic of the available primary sources, I have narrowed my exploration of California to the period between 1848 and 1900. In many respects, this range can be considered as two main periods, although never distinctly removed from one another, and represents a formative period in the making of modern California. From 1848 until 1872, California's population swelled in size. While a legislature hurriedly assembled after 1848, it was not until 1872 that the California Penal Code came into effect, and the population had transitioned from transitory and temporary, to permanent and longstanding. After the 1870s, even industry had changed, as individual gold mining had given way to largescale industrial natural resource mining and agriculture. From the early 1870s until the close of the century, Californian legal records increase in number, detail, and appear increasingly official in their production. Changes mark the records again in the 1890s, as the frontier was officially declared "closed" and the main guiding expertise on matters of sexual conflict – the law – was increasingly challenged by new sources of knowledge in science and medicine.[29]

[28] Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe* (New Haven: Yale University Press, 2016); Benjamin Madley, "Understanding Genocide in California Under United States Rule, 1846-1873," *The Western Historical Quarterly* 47 (2016): 449-461. doi: 10.1093/whq/whw176.
[29] Victoria Bates, *Sexual Forensics in Victorian and Edwardian England: Age, Crime and Consent in the Courts* (London: Palgrave Macmillan, 2016); Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880-1960* (Chapel Hill: University of North Carolina Press, 2005); Richard Harrison Shryock, "Trends in American Medical Research during the Nineteenth Century," *Proceedings of the American Philosophical Society* 91, no. 1 (1947): 62; Miriam Rich, "The Curse of the Civilised Woman: Race, Gender and the Pain of Childbirth in Nineteenth-Century American Medicine," *Gender & History* 28, no. 1 (2016): 57-76.

Despite the notable shifts that occurred in the 1890s, I consider records up until 1900. What it meant to be a Californian had taken on greater national implications by the end of the 1890s, with growing economic, social, and cultural ties to metropoles in the eastern United States, especially through federal debates over Chinese immigration and "white slavery" (the trafficking of women between states for purposes of prostitution).[30] Throughout these decades, legal and other administrative records continued to take on new official forms and were increasingly typed rather than handwritten. Further, continually evolving discussions around science, sexual behaviour, and the body began to change understandings of sexuality and sexual crimes in broader ways.[31]

Even during the 1890s, more diverse forms of sexual violence began to be recognised in institutional records, signalling a change to longstanding narrow understandings of sexual crimes. Likewise, social purity campaigners effectively mobilised throughout the last decades of the century, catalysing an increase in the age of consent in 1889, again in 1897, and finally in 1911. While the 1890s demonstrate some of those transformations in administration and practical constructions of sexuality and sexual violence, they also reveal continuities in the relationships between systems of knowledge, understandings of identities, and responses to sexual violence. Thus, even though 1889, when the age of consent was first changed in California, marks a possibly more logical end date for this study, I nevertheless continue beyond this somewhat natural closure. This continuation marks an effort to trace the ways

[30] Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (Cambridge: Harvard University Press, 2014); Erika Lee and Judy Yung, *Angel Island: Immigrant Gateway to America* (Oxford: Oxford University Press, 2010).
[31] Bates, *Sexual Forensics in Victorian and Edwardian England*.

that that some constructions of sexual harms endured relatively intact through otherwise radical social, political and institutional shifts.

Sexual Violence, Empire, and California

In the landscape of shifting understandings of bodies and sexual behaviour, legal definitions of "rape" and "assault with intent to commit rape" remained remarkably stable in California until the 1890s. Social understandings of sexually violent crime did not always directly align with legal definitions, but they were certainly shaped by this vital institutional source of expertise. Following the work of Joanna Bourke, a large part of this exploration grapples with the complexity, both discursively and practically, of "rape."[32] With a central and somewhat stable definition of rape persisting throughout the broader Anglo imperial world, the manner in which people responded to, understood and considered how the crime should appear shifted as notions of racial, sexual, class, and gender identities also morphed. While imaginings of what rapists and rape victims would look like proved at once crucial and imprecise throughout this period, the language of sexual violence even outside of legal contexts was notably influenced by legal constructions of this form of harm.[33]

In attending to the distinctly legal origins of broader social understandings of rape, this project considers a wide array of sexually illicit or sexually coercive gendered behaviours. Sexual crime, socially proscribed sexual behaviour, sexually violent

[32] Joanna Bourke, *Rape: Sex, Violence, History* (Emeryville, CA: Shoemaker & Hoard, 2007).
[33] Ibid. Common law constructions of sexual victimisation were also tied to religious notions of appropriate and inappropriate sexual behaviours.

behaviour, and sexual coercion do not connote the same things, but all are linked to understandings of various elements of wrongdoing and harm. Each, in turn, also uncover those complex and interwoven relationships between sexuality and the functions of imperial nation-building, while tying individual sexual expression to the development of logics of power and hierarchy. Considering this, this project is oriented around sites of sexual, or sexualised, conflict rather than a narrower focus on "rape." This includes hetero and homosexual sexual crimes, including: violent sexualised assaults like rape, assault with intent to commit rape, child abuse, and common assault; transgressions of Victorian moral codes, namely seduction; and "crimes against nature," or the anal penetration with a penis of man, woman, or animal.[34] Further, in an effort to recognise systemic violence enacted through colonialism against women of colour, this study also seeks to contemplate occasions and systems of sexual coercion that would not have been either socially or legally recognised during the late-nineteenth century.[35]

As noted, scholars in the field of colonial studies have particularly attended to the systems that linked sexuality, gender, race and class to imperial nation-building. Stoler has demonstrated that domestic arrangements and sexual intimacies were some of the primary concerns of a colonial order of things. "Looking at sex – who had it with whom, where and when," she argues "takes us closer to the microphysics of rule as it pushes us to rethink what we think we know about the arenas of

[34] For the purposes of this study, I do not discuss bestiality. For a specific exploration of the phenomenon, see Joanna Bourke's forthcoming text. Joanna Bourke, *Loving Animals: Reflections on Bestiality, Zoophilia, and Posthuman Love* (London: Reaktion Books, in press, 2020).
[35] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999).

colonialism's macropolitics."[36] Examining instances of sexual conflict and the people or knowledge systems that served to define and reify the boundaries of sexual violence offers another vantage from which to understand the machinations of colonial rule. While not all colonial sexual relations and behaviours were necessarily characterised by pain or proscription, an essential element of the imperial state – the subjugation of many in the interests of a ruling class – created systems of unequal power relations across gender, class and racial lines.[37]

This discussion is thus predicated on a fundamental recognition of the intersectionality of, or the indelible relationships between, gender, race, and class. As Kimberlé Crenshaw demonstrated in the context of contemporary identity politics, "the violence that many women experience is often shaped by other dimensions of their identities, such as race and class."[38] In a historical context, Anne McClintock has argued that race, gender, and class "come into existence in and through relation to each other – if in contradictory and conflicted ways."[39] Following these works, throughout this project I have understood each of these categories as changing constructs constituted by particular social contexts, with meaningful and sometimes catastrophic implications for the lived experiences of individuals. Likewise, I recognise that these categories cannot be understood in isolation from one another, as they are intricately bound-up in complex relationships of meaning. Further, as Judith Butler has explored, gender is often produced and then reified through its performance, and performances of "male" and "female" identities shift over time and across cultural

[36] Stoler, *Carnal Knowledge and Imperial Power*, 16.
[37] Raymond Williams, *Marxism and Literature* (Oxford: Oxford University Press, 1977).
[38] Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour," *Stanford Law Review*, 43, no. 6 (July 1991): 1242.
[39] McClintock, *Imperial Leather*, 5.

contexts.[40] Considering performativity is particularly useful when attending to whose performances of sexual victimisation were "legible" in California, or became "readable" to contemporaries as sexual harm, especially as expressions of gendered sexual harm were influenced by understandings of race, class, and place.[41] In the "contact-zones" of the imperial frontier, these relational identity markers could have implications for how and under what circumstances sexual victimisation could or would be acknowledged.[42]

The structure of this thesis follows along the logic of these crucial identity markers. My investigations into dominant and hegemonic constructions of sexual violation, and their relations to processes of social, political, and economic invasions, revealed the pivotal roles of age and race to understandings of sexual violence in California. Understanding race in America has long figured as a prominent endeavour for American historians, especially those who study gender and violence as interrelated spheres.[43] More recently, historians including Kim Stevenson, Louise

[40] Butler, "Performativity, Precarity and Sexual Politics."
[41] Ibid., iii.
[42] Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (London: Routledge, 1992); Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871* (Toronto; Buffalo: University of Toronto Press, 2001).
[43] Winthrop Jordan, *The White Man's Burden: Historical Origins of Racism in the United States* (London: Oxford University Press, 1974); Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge: Harvard University Press, 2013); Nell Irvin Painter, *Southern History across the Colour Line* (Chapel Hill: University of North Carolina Press, 2002); Martha Elizabeth Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven: Yale University Press, 1997); Diane Miller Sommerville, *Rape and Race in the Nineteenth-Century South* (Chapel Hill: The University of North Carolina Press, 2004); Twentieth century historians have also focused on regions and culture and how these inflect race and class dynamics. For a focus on San Francisco see: Joe Street, *Dirty Harry's America: Clint Eastwood, Harry Callahan, and the Conservative Backlash* (Gainesville: University Press of Florida, 2016); or another approach, which narrows in on Miami, see: Julió Capo Jr., *Welcome to Fairyland: Queer Miami before 1940* (Chapel Hill: University of North Carolina Press, 2017).

Jackson, Victoria Bates, Stephen Robertson, and Mary Odem have explored the vital implications of age to further demarcations of bodies and their relationships to innocence and victimhood.[44] They have likewise demonstrated the ways that biological and legal understandings of age and "knowledge" were matters of debate and scrutiny. Controversies of age, intricately bound up with racialised notions of sexual purity, were heavily influenced by nineteenth-century social purity campaigns and pervasive ideals of respectable (white) middle-class femininity.[45] Narrowing in on California, the law persistently emerges as an enduring frame that guided and interacted with constructions of age and race, shaping broad understandings of sexual harms throughout the late nineteenth century.

The variable meanings of these identity categories on the North American west coast from 1848 until 1900 were thereby linked to the machinations of imperial nation-building. As a result, this study grapples with the complicated elements of power, its production, and its maintenance through institutions, discourse, and everyday lived experiences.[46] While the hierarchies that developed in California after 1848 were neither natural nor inevitable, they were iterations of existing Victorian

[44] Louise Jackson, *Child Sexual Abuse in Victorian England* (London: Routledge, 2000); Kim Stevenson, "'Children of a Very Tender Age Have Vicious Propensities': Child Witness Testimonies in Cases of Sexual Abuse," *Law, Crime and History,* 7 no. 1, (2017): 75-97; Kim Stevenson, "Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases," *Feminist Legal Studies* no. 8 (2000): 343-366; Bates, *Sexual Forensics in Victorian and Edwardian England;* Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920*; Robertson, *Crimes Against Children*; for more on the racialisation of "innocence" see also: Jackie Wang, "Against Innocence: Race, Gender, and the Politics of Safety," *LIES: A Journal of Materialist Feminism* 1 (2012): 1-27.
[45] Ibid.
[46] Foucault, *The History of Sexuality Volume 1*.

discourses on white, middle-class, masculine dominance.[47] These systems of knowledge were, in turn, applied in contexts far different than the sites of their development, and were shaped by assumptions, behaviours, actions, and reactions of everyday peoples within the imperial context.[48] Implicitly, examining the contours of imperial power – which was as much systemic and institutional as it was brought to life by the behaviours of peoples across colonised territories – highlights theories of the constituting power of discourse.[49] While these imperial systems of power could be called hegemonic – as lived systems of "meanings and values…constitutive and constituting" – they sustained both challenges and change throughout this period.[50]

It was at what Edward Said has called "the nexus of knowledge and power," that white Anglo Americans created racialised "others" and thereby understood themselves by contrast.[51] A feature of this knowledge-production was the refinement of "rapable" and "unrapable" bodies, categories that had real consequences throughout the British Imperial world through the dissemination of common law legal doctrine.[52] On the American western frontier, as elsewhere in territories that bore the marks of British Imperialism, English common law was reborn with added features of racialised exclusion. In this system, some were granted the privilege of recognition as victims, while others were barred from access to this label.[53] In many respects, the

[47] Catherine Hall, *White, Male, and Middle Class: Explorations in Feminism and History* (Cambridge: Polity Press, 1992).
[48] Foucault, *The History of Sexuality Volume 1*; Hall, *White, Male, and Middle Class*; Said, *Orientalism*, 5.
[49] Foucault, *The History of Sexuality Volume 1*.
[50] Williams, *Marxism and Literature*, 110.
[51] Edward Said, *Orientalism*, 27.
[52] Smith, *Conquest*, 3.
[53] Stevenson, "Unequivocal Victims."

central mission of this thesis is thus to trace the logics of exclusion in the Californian context, through a focus on sexualised violation and harm.

Many historiographies specifically make it possible to analyse sexual coercion and conflict in California. First, prolific interest in the history of the state opens opportunities to re-examine the economic, political, and social contexts during and after the transformations that marked the late nineteenth century through the lens of sexual conflict, power, and race. Second, important work in the field of colonial studies has demonstrated just how crucial it is to link processes of imperial nation-building to the intimate workings of sexuality and probe the regimes of race and gender that shaped the perspectives of settler colonials.[54] Finally, historical examinations of rape have revealed in numerous and varied contexts that systems of sexual power and instances of sexual coercion often reveal the logics of power hierarchies in discrete periods and locations.[55]

The publication of Susan Brownmiller's *Against Our Will: Men, Women, and Rape* in 1975 has often been credited with instigating a new wave of studies that focus on sexual violence.[56] In the realm of history this conversation has largely attended to the question that Brownmiller's work catalysed: is rape a consistent phenomenon of patriarchal control or a shifting, historically and contextually contingent phenomenon? Historians including Joanna Bourke, Estelle Freedman, Kim Stevenson, Louise Jackson, Angela Wanhalla, Erin Ford Cozens, Pamela Scully, Elizabeth Kolsky, and Elizabeth Thornberry, amongst others, have since taken up the task of examining the ways in

[54] Stoler, *Carnal Knowledge and Imperial Power*, 6; Anne McClintock, *Imperial Leather*.
[55] Bourke, *Rape: Sex, Violence, History*.
[56] Susan Brownmiller, *Against Our Will: Men, Women, and Rape*, 1st Ballantine Books ed. (New York: Fawcett Columbine, 1993).

which victims and perpetrators were understood in both legal and social contexts.[57] Some of this work has focused on rape in conflict and war and others have narrowed in on sexual violence and colonialism.[58] These have laid the groundwork for anthropologists and historians to study the complex and volatile relationships between colonial rule and intimate coercion.[59]

Collectively this work has also demonstrated that the study of sexual violence requires sensitivity to the intricacies of the topic. Most notably, studying historical sexual violence necessitates differentiating between shifting legal definitions of sexual crime, social concerns of sexual misconduct in discrete historical periods, a victimised individual's experience of such violence, and the implications of contemporary understandings of sexually coercive behaviour to archival research methodologies. As Estelle Freedman has recently explored, what is legally and socially understood as sexual violence is and has been historically and contextually contingent.[60] Her work

[57] Bourke, *Rape*; Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge: Harvard University Press, 2013); Stevenson, "Unequivocal Victims"; Jackson, *Child Sexual Abuse in Victorian England*; Angela Wanhalla, "Interracial Sexual Violence in 1860s New Zealand," *New Zealand Journal of History* 45, no. 1 (2011): 71–84; Erin Ford Cozens, '"Our Particular Abhorrence of These Particular Crimes': Sexual Violence and Colonial Legal Discourse in Aotearoa / New Zealand, 1840–1855," *Journal of the History of Sexuality* 24, no. 3 (September 2015): 378–401; Pamela Scully, "Rape, Race, and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-Century Cape Colony, South Africa," *The American Historical Review* 100, no. 2 (1995): 335–59; Elizabeth Kolsky, "The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57," *The Journal of Asian Studies* 69, no. 4 (2010): 1093–1117; Elizabeth Thornberry, "Defining Crime through Punishment: Sexual Assault in the Eastern Cape, C. 1835-1900," *Journal of Southern African Studies* 37, no. 3 (2011): 415–30.

[58] Catharine A. MacKinnon, *Are Women Human?: And Other International Dialogues* (Cambridge, Mass: Belknap Press of Harvard University Press, 2006); Bourke, *Rape*.

[59] Stoler, *Carnal Knowledge and Imperial Power;* Stoler, *Race and the Education of Desire*; Hyam, *Empire and Sexuality*; Elizabeth Kolsky, "The Rule of Colonial Indifference"; Pamela Scully, "Rape, Race, and Colonial Culture."

[60] Freedman, *Redefining Rape.*

offers insight into the ways that the definitions of what "rape" or sexual assault are has shifted in response to political aims, social tensions, racial assumptions, and changing ideals of appropriate gender and racial behaviour.[61] In this context, those deemed sexual offenders in a given period may not have committed non-consensual sexual act(s) against an individual or multiple individuals – as in cases of sodomy, homosexual activity, or adultery. Inversely, not all occasions of coerced or forced sexual contact on the bodies of others resulted in criminal charges. As a result, studying sexual violence requires recognition of given medical, legal, and social expectations of appropriate behaviours during distinct periods of time.

In studies of North America, historians have made efforts to situate sexual violence within processes of settler colonialism and the making of colonial authority, as well as the implications of slavery and American discourses of freedom.[62] Historians of the territories that now comprise the United States especially grapple with the intersections of race and gender to occasions and reports of sexual assault across racial lines.[63] As a result, these texts often pivot their focus on the southern states, both during and after the pervasive existence of slave-labour camps. As historians like Martha Hodes and Diane Miller Sommerville demonstrate, rape is a deeply contested research ground, particularly in the contexts of gendered and racial notions of power,

[61] Other works make this clear as well, see, for example: Diane Miller Sommerville, *Rape and Race in the Nineteenth-Century South* (Chapel Hill: The University of North Carolina Press, 2004); Lisa Lindquist Dorr, *White Women, Rape, and the Power of Race in Virginia, 1900-1960* (Chapel Hill: University of North Carolina Press, 2005).
[62] Karen Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929*, Chicago Series on Sexuality, History and Society (Chicago: University of Chicago Press, 1993); Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975* (Toronto: Osgoode Society for Canadian Legal History, 2008).
[63] Race in general figures prominently in the broader historiography of the United States.

changing definitions of sexual crimes, and shifting fears around sexual predation.[64] Nevertheless, as Sharon Block argued in *Rape and Sexual Power in Early America,* which spanned the period between 1700 and 1820, "despite quantum shifts in print culture, urbanisation, race, gender, and politics, the *enactment* of sexual coercion remained fundamentally intact" over the period.[65] Her work likewise made a methodological argument for separating a charge of rape, a crime difficult to prove successfully and usually narrowly defined in law, and sexual coercion, which takes shape in a variety of forms including physical violence as well as blackmail or unwanted contact following a consensual sexual encounter.[66]

Ultimately, the historical literature on sexual violence in North America since colonisation provides crucial insights into the relationships between power and gendered, racialised bodies. It offers methodological guidelines for the study of sexual violence while stressing the importance of attending to the space between political aims, legal definitions, public rhetoric, community responses, journalistic reports, and experiences of victimhood. Perhaps most importantly, these researchers of rape have long illuminated an important discrepancy between wide-scale rhetorical

[64] Martha Elizabeth Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven: Yale University Press, 1997); Laura F. Edwards, "Law, Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South," *The Journal of Southern History* 65, vol. 4 (November 1999): 733-770; Diane Miller Sommerville, *Rape and Race in the Nineteenth-Century South* (Chapel Hill: The University of North Carolina Press, 2004); Freedman, *Redefining Rape*; Nell Irvin Painter, *Southern History across the Colour Line* (Chapel Hill: University of North Carolina Press, 2002); Melissa N. Stein, *Measuring Manhood: Race and the Science of Masculinity, 1830–1934* (Minneapolis: University of Minnesota Press, 2015).
[65] Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill: University of North Carolina Press, 2006), 6. Emphasis in original.
[66] Ibid., 3.

condemnations of sexual violence and frequent evidence of social disbelief or widescale judicial emphasis on false accusations.

While much of this work has demonstrated the intricate relationships between gender, race, class, and colonialism in continental North America, little work has been done to examine the ways in which sexual violence was understood, discussed, policed and punished on the outskirts of the American and British empires in the late nineteenth century. Rather, a significant subset of North American gold rush history leans toward nostalgic explorations of the experiences of Anglo American and British men.[67] In California in particular, Frederick Jackson Turner's 1893 "frontier thesis" has influenced certain imaginings of the American western frontier as a slow, plodding progression of intrepid frontiersmen and farmers. This theory effectively obscured the imperialism of American continental expansion, providing insufficient tools to account for the rapid urbanisation of the west following the discovery of gold.[68] In the Californian historiography, historical focus on white, Anglo men has often served to laud processes of masculine imperial conquest, all but erasing women from the narratives, obscuring the roles of non-white actors in these spaces, and failing to acknowledge the western "frontier" as a part of the story of American imperialism.[69]

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[67] Sally Wilson and Ian Wilson, *Gold Rush: Reliving the Klondike Adventure in Canada's North* (Vancouver: Gordon Soules Book Publishers Ltd., 1996); Richard Thomas Wright, *Barkerville: A Gold Rush Experience*, 2nd ed. (Williams Lake: Winter Quarters Press, 1998).

[68] Frederick Jackson Turner, *The Significance of the Frontier in American History / by Frederick Jackson Turner*, Penguin Great Ideas (London: Penguin, 2008); Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York; London: W.W. Norton & Company, 1987); Christopher Herbert, "White Power, Yellow Gold: Colonialism and Identity in the California and British Columbia Gold Rushes, 1848-1871" (PhD Dissertation, University of Washington, 2012), 25.

[69] There are many examples, for a selection see: Gordon R. Elliott, *Barkerville, Quesnel and the Cariboo Gold Rush* (Vancouver: Douglas & McIntyre Ltd., 1978); Richard

In the trend of Patricia Nelson Limerick, who unpacked the limiting implications of the "frontier thesis" to California's historiography, many historians have since worked to reorient the focus of North American western frontier history.[70] From the shaping works of Sylvia Van Kirk, Jean Barman, and Albert Hurtado, to the more recent efforts of Adele Perry, Susan Lee Johnson, Christopher Herbert, and Benjamin Madley, scholars have made great strides in engaging diverse sources to account for the intimate, coercive, paternalist, and symbiotic relationships between settler colonials and Indigenous peoples on the imperial frontiers of North America's west coasts.[71]

Also in response to the broad tendency to overlook the women that participated in the gold rushes on the Pacific coast, some researchers have utilised biography to reconstitute their stories.[72] The works of Jan Mackell Collins, Deb Vanasse, Liz Sonneborn, and Jo Ann Levy, amongst others, have helped to dismantle

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Thomas Wright, *Barkerville: A Gold Rush Experience*, 2nd ed. (Williams Lake: Winter Quarters Press, 1998); John Walton Caughey, *The California Gold Rush* (Berkley: University of California Press, 1948); Dwight L. Clarke, *William Tecumseh Sherman: Gold Rush Banker* (San Francisco: California Historical Society, 1969); Richard Stott, *Jolly Fellows: Male Milieus in Nineteenth-Century America* (Baltimore: The John Hopkins University Press, 2009); Charles Ross Parke, *Dreams to Dust: A Diary of the California Gold Rush, 1849-1850*, ed. James E. Davis (Lincoln: University of Nebraska Press, 1989).

[70] Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton & Company, 1987).

[71] Sylvia Van Kirk, *Many Tender Ties: Women in Fur-trade Society, 1670-1870* (Norman: University of Oklahoma Press, 1983); Jean Barman, *The West beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1991); Albert L. Hurtado, *Intimate Frontiers: Sex, Gender, and Culture in Old California* (Albuquerque: University of New Mexico Press, 1999); Christopher Herbert, *Gold Rush Manliness: Race and Gender on the Pacific Slope* (Seattle: University of Washington Press, 2018); Madley, *An American Genocide*; Johnson, *Roaring Camp*; Perry, *On the Edge of Empire*.

[72] Jo Ann Levy, *They Saw the Elephant: Women in the California Gold Rush* (Hamden: Shoe String Press, 1990); Deb Vanasse, *Wealth Woman: Kate Carmack and the Klondike Race for Gold* (Fairbanks: University of Alaska Press, 2016); Melanie J. Mayer, *Klondike Women: True Tales of the 1897-98 Gold Rush* (Ohio: Ohio University Press, 1989); Claire Rudolf Murphy and Jane G. Haigh, *Gold Rush Women* (Anchorage: Alaska Northwest Books, 1997).

the presumption that because women made up such a small portion of settler colonial mining migrants, they did not help shape the colonial North American west. Yet while – primarily white – women have been effectively restored to this historiography through these works, they are also simultaneously integrated into the kind of hopeful, nostalgic narratives that characterise much of the literature in the field. By focusing on individual women, they often miss opportunities to delve into the intricacies of shifting notions of masculinity, femininity, race, and class during a period of enormous change.[73]

Susan Lee Johnson offers an important antidote to this kind of singularity. Johnson's *Roaring Camp: The Social World of the California Gold Rush* examines interrelationships between gender, race, and colonialism in California's rapidly shifting gold rush spaces.[74] Her effort to parse the tension between history and memory allows her to read race and gender into a literature heavily dominated by sources produced by Anglo-American men. Through her work, she frames the California gold rush as "a time and place of tremendous contest about maleness and femaleness, about colour and culture, and about wealth and power."[75] A variety of historians have additionally made efforts to reorient the focus of study on the North American west to more comprehensively account for the experiences of people of colour. The historical research of Albert Hurtado and Benjamin Madley, in addition to Susan Lee Johnson's,

[73] Vanasse, *Wealth Woman*; Liz Sonneborn, *The California Gold Rush: Transforming the American West* (New York: Chelsea House Publishers, 2009); Murphy and Haigh, *Gold Rush Women*; Levy, *They Saw the Elephant*; Mayer, *Klondike Women*; H.W. Brands, *The Age of Gold: The California Gold Rush and the New American Dream* (New York: Doubleday, 2002); Charles Ross Parke, *Dreams to Dust: A Diary of the California Gold Rush, 1849-1850*, ed. James E. Davis (Lincoln: University of Nebraska Press, 1989).
[74] Johnson, *Roaring Camp*; Herbert, "White Power, Yellow Gold".
[75] Johnson, *Roaring Camp*, 51.

consider the complex, often violent implications of American conquest for California's Indigenous populations and other racialised minorities.[76] North, the works of Adele Perry, Jean Barman, and Sylvia Van Kirk have similarly contemplated the domestic, gendered, and social implications of British imperialism into the Canadian west, focusing on issues of race and imaginings of Indigenaity in the "contact-zone."[77] These, amongst others, suggest new ways of decolonising the work of historical research and engaging with archives without perpetuating the erasure of those excluded from the nebulous category of "whiteness."[78]

A significant body of work demonstrates the shaping influences of race, gender, and class in the making of the Pacific Coast. This literature creates important opportunities for further exploration and encourages research into the contested spaces where these categories of identity and colonial mentalities collided. From Ronald Hyam to Ann Stoler, historians and historical anthropologists have demonstrated the deep ties between the nature of colonial conquest and sexuality.[79] Stoler, in particular, has made a case for attending to the "discrepancies between prescription and practice," which "turns attention to the changing criteria by which European colonials defined themselves and the uncertain racialised regimes of truth

[76] Hurtado, *Intimate Frontiers*; Johnson, *Roaring Camp*; Madley, *An American Genocide*; Barman, *The West beyond the West*; Jean Barman, "Taming Aboriginal Sexuality: Gender Power, and Race in British Columbia, 1850-1900," *BC Studies* no. 115/16 (Autumn/Winter 1997/1998): 237-266.
[77] Sylvia Van Kirk, *Many Tender Ties: Women in Fur-trade Society, 1670-1870* (Norman: University of Oklahoma Press, 1983); Pratt, *Imperial Eyes*.
[78] Smith, *Decolonizing Methodologies*.
[79] Hyam, *Empire and Sexuality*; Stoler, *Race and the Education of Desire*; Stoler, *Carnal Knowledge and Imperial Power*; Ann Laura Stoler, "Tense and Tender Ties: The Politics of Comparison in North American History and (Post) Colonial Studies," *The Journal of American History* 88, no. 3 (December 2001): 829–65.

that guided their actions."[80] Taking cues from work on settler colonialism, sexual coercion in colonial contexts, and the interests of cultural history, this thesis maps the ways sexual violence was employed, understood, punished, and tolerated to better understand a period of enormous social and colonial transformation in the American West.

Mining the Archives

Hegemonic discourses on sexual behaviour are traceable through diverse historical records – they appear in legal discussions and police files, press reports, the studies and theories of medical professionals, in the mandates of social organizations, and personal diaries and letters. The voices of women, particularly women of colour, are largely obscured in these records, and their voices are heavily mediated in the places where they do appear.[81] This is partly because those who made public claims did not always have opportunities to record their experiences or express themselves in terms that would be legible to broader colonial society.[82] Using the records produced by the dominant, this project seeks to read into and through the available resources to better understand the way that power and knowledge of sexual bodies worked in California during the late nineteenth century.[83]

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[80] Stoler, *Carnal Knowledge and Imperial Power*, 6.
[81] Letters and diaries written by women offer some insight into their experiences, but these rarely contained explicit references to sexual violence. For one example of frontier letters written by a woman, see: Polly Welts Kaufman, ed., *Apron Full of Gold: The Letters of Mary Jane Megquier from San Francisco 1849-1856*, 2nd edition (Albuquerque: University of New Mexico Press, 1994).
[82] Butler, "Performativity, Precarity and Sexual Politics."
[83] Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Beacon Press, 2012); Alain Corbin, *The Life of an Unknown: The Rediscovered World of*

In the context of frontier transformation, colonial men defined rape and sexual assault in narrow terms, frequently ignoring or actively obfuscating instances of sexual coercion that did not fit within their understandings of who could be victimised by such violence and who could perpetrate it. Likewise, the individuals who experienced sexual violence may have actively avoided the potential shame and stigma that could result from making public accusations. In large part, the identities of both accusers and accused played crucial roles in determining mutable definitions of rape and sexual assault. Nevertheless, on the male-dominated transitory California frontier, individuals did make claims of sexual violence. Even if these claims were rejected or ignored, they indicate the possible ways that individuals and communities understood sexual violence and how those who were victimised may have sought some version of justice, retribution or recognition. As a result, this research explores the relationship between sexuality and power differentials, exploring a wide definition of sexual conflict in relation to sexual violence and coercion. This flexibility reflects the variable boundaries that characterised discourses of sexual coercion in the period, and the complex ways that sexual violence related to various elements of identity and behaviour.

Taking a cue from Sharon Block's work on sexual power in early America, sexual coercion, violation, violence and harm are defined differently here than "rape" and "assault with intent to commit rape."[84] Terms like sexual coercion or violence reflect a broad focus on behaviours or occasions that may not have been defined as sexual harm by perpetrators, victims, or a wider audience, but reflect occasions of forced

a Clog Maker in Nineteenth-Century France, European Perspectives (New York: Columbia University Press, 2001), xiii; Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton: Princeton University Press, 2009).

[84] Sharon Block, *Rape and Sexual Power in Early America*, 3.

sexual relations according to the historian's more contemporary lens.[85] Terms including rape, assault with intent (to commit rape), carnal knowledge, seduction, buggery, and sodomy reflect social and legal vocabulary with specific definitions throughout this period.[86] This means that many instances that fall under the definition of sexual coercion in this study may have been recorded as another kind of crime, or not legally recorded at all. Further, the men and women who experienced sexual coercion may not have understood their experiences in these terms, let alone thought to mention them in letters to their families, reflect upon in their diaries, or report to law enforcement officials. Examining sites of sexual conflict and using a wide definition of "sexual violation" offers an opportunity to account for these instances, alongside those that were more broadly acknowledged in the social or legal terms of the period.

By relying on sources produced and preserved primarily by those in positions of class, race, and gender authority – namely middle-class white men – this research runs the risk of expressing the ideologies and notions of a primarily white and male, Anglo ruling class.[87] Examining the ways in which those in positions of power constructed, interpreted, and responded to sexual violence certainly privileges their voices over the ways that Indigenous peoples, for example, understood, experienced and resisted the sexual contours of the white Anglo-consumption of California. The legal and social experiences of other marginalised peoples in the region, including women and Chinese, Japanese, Hispanic, and African American populations of all genders, are likewise difficult to access. However, attending to the identities, behaviours, and

[85] Philip Dwyer, "Violence and its Histories: Meanings, Methods, Problems," *History and Theory* 56, no. 4 (2017): 7-22.
[86] This is not to equate "sodomy" with sexual violence. However, same-sex sexual activity may have involved violence and/or elements of coercion.
[87] Smith, *Decolonizing Methodologies*.

ideologies of perpetrators, while also considering those they victimised, pushes back on deeply ingrained institutional and social constructions of sexual assault victims as architects of their own downfall.

Details about the choices, understandings, and various responses of victimised individuals are certainly important to this narrative. Likewise, examining those with sexual power, and the discourses that supported their ability to exert this power over others, also offer perspectives on individual choice in this particular settler-colonial context.[88] The identities of the oppressed, attacked, molested, and raped were often mobilised by the press and legal officials to legitimate, excuse, deny, or even condemn certain forms of violence.[89] Attending to how judges, juries, journalists, witnesses, perpetrators, complainants, and community and religious organisations articulated their understandings of sexual violence and rejected certain claims to such violence reveals hidden narratives of how bodies – and their relative humanity - were categorised and understood.[90]

Accessing this history relies on a variety of sources. Official documents related to policing and justice set the context as they informed American discourse on sexual violence at the time, framing the ideologies of victims and perpetrators. If an accusation escalated to legal trial, depositions, trial records, indictments, subpoenas, and records for Supreme Court appeals processes help to inform understandings of

[88] Bourke, *Rape*.
[89] For more on crime and the press, see: Estelle B. Freedman, "'Crimes Which Startle and Horrify': Gender, Age, and the Racialization of Sexual Violence in White American Newspapers, 1870–1900," *Journal of the History of Sexuality* 20, no. 3 (2011): 465-497; and Judith Rowbotham, Kim Stevenson and Samantha Pegg, *Crime News in Modern Britain: Press Reporting and Responsibility, 1820-2010* (Basingstoke: Palgrave Macmillan, 2013).
[90] Smith, *Conquest.*

how accusers and accused may have been scrutinised and how the law was interpreted by those with the authority to do so. Such records additionally reveal how sexual violence operated in practical terms throughout this period. In the law, and thus for the broader commentating public, both race and age were key identifying features beyond gender and class that shaped the legibility of accusations of sexually violent crimes and dictated imaginings of what those crimes should look like.

Medical and medico-legal texts of the nineteenth century also offer significant insights for this research. Medical journals and psychological studies, including the burgeoning discipline of sexology that gained a serious foothold in shaping ideas of sexual degeneracy during the late Victorian period, offer some access to the ways institutional experts may have understood the behaviours of both accusers and perpetrators.[91] Constructions of sexual degeneracy collided with notions of Social Darwinism as well as race, class, and gender hierarchies in the period, while medicine increasingly engaged with scientific method to legitimate certain social orders.[92] Growing knowledge of diseases and greater acknowledgement of phenomena like incest in the medical world were offset by the limitations in scientific and psychological perspectives to explain the, often violent, behaviours of peoples, especially during the last decades of the nineteenth century.[93] For the purposes of this thesis, I have focused

[91] Bates, *Sexual Forensics in Victorian and Edwardian England*; Ivan Crozier and Gethin Rees, "Making a Space for Medical Expertise: Medical Knowledge of Sexual Assault Land the Construction of Boundaries between Forensic Medicine and the Law in Late Nineteenth-century England," *Law, Culture and the Humanities* 8, no. 2 (2012): 285-304; Roger Davidson, "'This Pernicious Delusion': Law, Medicine, and Child Sexual Abuse in Early- Twentieth-Century Scotland," *Journal of the History of Sexuality* 10, no. 1 (January 2001): 62-77; Robertson, *Crimes Against Children*.
[92] Stein, *Measuring Manhood*.
[93] Robertson, *Crimes Against Children*; In California climate and disease were related discussions, see: Linda Nash, "Finishing Nature: Harmonizing Bodies and Environments in Late-Nineteenth-Century California," *Environmental History* 8, no. 1 (2003): 25-52.

primarily on the relationships that developed between medicine and the law, and the related discourses of sexual bodies in legal conflict.

This research also relies heavily upon the sexual assault reporting and editorial opinions printed in the burgeoning press. These records reflect another consistently changing set of sources, as newspapers were quickly-moving, heavily biased and sensationalist tracts, which reflected the often middle-class notions of their editors and journalists.[94] Editors and reporters occasionally acknowledged errors in their reporting, and rumour and heresy were persistent features of their writing throughout the period.[95] Nevertheless, journalists expressed their interpretations of sexual violence that, at times, diverted from official legal positions, and reflected their understandings and ideologies of sexual violence. Their reports frequently mirror a concern that rumours of sexual violence represented a threat to general safety and social order. This especially manifested as a fear of non-white male sexuality and its potential dangers and vulnerabilities. Many of these reports were aimed at local English-speaking, white, male audiences, but regional reports were also reprinted far beyond California. Journalists expressed some of the most lasting and detailed opinions regarding sexual violence in the historical record, revealing their notions of whose claims were valid and whose were worthy of dismissal.[96] Although these sources contain many biases, as legal historians like Kim Stevenson have noted,

[94] Freedman, "'Crimes Which Startle and Horrify'"; Isabelle Lehuu, *Carnival on the Page: Popular Print Media in Antebellum America* (Chapel Hill: University of North Carolina Press, 2000), 52-53; Rowbotham, Stevenson and Pegg, *Crime News in Modern Britain*.
[95] More on this in Chapter Four.
[96] Freedman, "'Crimes Which Startle and Horrify.'"

newspapers provide an important resource due to often sparse and incomplete legal records.[97] As such, they form a significant portion of this research.

Official institutional documents, including statute books and legal trial records, also offer insight into how white Anglo Americans – from lawmakers to judges – introduced and then policed systemic inequity.[98] As I explore in the following chapters, the law was at once rigid and flexible. Common law constructions of sexual harms permeated throughout the British Empire, maintained particular and narrow constructions of what constituted rape and attempted rape that were heavily influenced by religious notions of sexuality, and persistently offered opportunities for those in positions of power to shift those definitions to suit the systems of power at work in varied settler-colonial contexts. The delegates that gathered at California's first constitutional convention (1849) absorbed common law legal structures as givens, while simultaneously institutionalising exclusions that would make them even more narrowly understood in this context. Thus, the language of the law is a valuable historical site of analysis, as it reveals the codification of certain social hierarchies. Likewise, legal records reveal how such laws were interpreted and applied by legal representatives in the realities of everyday life. Lawmakers and judges represented a system that worked to uphold class and gender hierarchy. In the American context, this was diversified to include race as an additional site of exemption. The sources that they each produced are thus vital avenues to accessing the structure and function of varied white male expressions of superiority, and the complexities of the rank and placement of those they sought to exclude from power.

[97] Stevenson, "'Children of a Very Tender Age Have Vicious Propensities,'" 78.
[98] Rowbotham and Stevenson, *Criminal Conversations*.

Other sources, namely the letters and diaries of Anglo Americans who rushed onto the frontier, political speeches, and historical narratives produced during the period, are also engaged in this thesis. The creators of these texts were predominantly men. Women's voices are present in some of these sources as well – in their testimonies of violence, in their denial of the experiences of others, in their remembrances of the frontier – but they are disproportionately the voices of "respectable" white women, who principally represented ideals of the pious, chaste middle class.[99] Children, racialised women and girls, women who sold sex, and boys or men who experienced sexual violence are rarely at the forefront of these records. While this work is about them, it is less about their understandings or intimate experiences of harm, and more about the social and institutional barriers that limited their visibility and circumscribed the legibility of their diverse experiences of sexual violation. More accurately, these sources offer us access to the systemic logic of white male power, and the ways in which violent sexual access was a key to establishing and maintaining the borders of this power. White men, imagining themselves as the bearers of enlightened social structures, strode onto the frontier and implemented their social, political, and legal systems. When their imagined superiority was directly threatened by their own barbaric expressions of violence, they rationalised these as forms of exceptional violence that only proved the rule of their divine mandate to dominate.

These sources provide access to various kinds of discourses on sexual coercion. Examining the contradictions between hypothetical discussion and the records of how

[99] Clark, *Women's Silence, Men's Violence*; Shani D'Cruze, "Approaching the History of Rape and Sexual Violence: Notes Towards Research," *Women's History Review* 1, no. 3 (February 2011): 377-397.

people and institutions responded illuminates the ways that sexual violence functioned, with purpose, in processes of colonial expansion. Individuals who commented on sexual violence or ignored and denied its existence often revealed covert narratives of their own ways of organising and categorising people. Contrary to broad denunciations of sexual violence by most, from institutional officials to judges and journalists, rape and its threat functioned in the maintenance of social organisation and hierarchy in the consumption of the western frontier.

Race, Age and the Law

In this way, white Anglo-American men arrived on the frontier bearing a set of institutional traditions, most notably a system of law and order that they modified to suit the demands of the evolving Californian context. These adjustments to common law, which mainly came in the form of racial exclusion, were then mobilised to justify white male power throughout frontier territory. It was in this institutional and social context that sexual violence was organised and delineated in California over the course of the nineteenth century. Identity markers like age, race, and class all interacted with gendered assumptions of sexual bodies to make only certain expressions of sexual violation legible and thus valid between 1848 and 1900.

In Chapter Two I build out the concept of frontier white manliness in the California context in detail. The race, class, and gender ideologies of selfhood and place pervasive amongst white men in the late 1840s and 1850s were crucial in how Californian institutions and society were ordered. Race and racism were especially vital features in the development of frontier white manliness in California, and white men's

imaginings of themselves against a backdrop of varied "others" had deep and enduring implications for the ways that sexual violence could or would be recognised in this space.[100] White Anglo men imagined themselves as superior to these "others" before they even arrived in California, and it was in their constructions of varied "races" of people that their understandings of themselves are particularly evident. While racist ideologies targeted all those that white men exempted from the category of "whiteness," it is perhaps in their treatment of California Indians that their violent conquest was especially notable.

Building upon this exploration of how race and gender were essential features of American colonisation of California, Chapter Three delves into a key tool of American colonial consolidation: the law. The imagined superiority of American systems of law and order were vital to white Anglo-American rationalisations of their right to conquer from Atlantic to Pacific, or Manifest Destiny. While the law was an intricate and evolving site of institutional expertise, it also framed the ways in which the public discussed and understood sexually violent crime. As a result, narrow understandings of sexual violence in law permeated into narrow understandings of sexual violence in broader social discourse. In the legal realm, sexual violence was an abhorred and condemned crime and considered with a great deal of consternation by judges and other legal officials. Likewise, it was understood as a difficult crime to prove as it was rife with numerous evidentiary challenges in the contexts of trials. Thus, legal dialogue proliferated during a period when the numbers of white women and girls

[100] The reverberations of white violence in the nineteenth century, both in California and in the broader American context, can also be read as an important precursor to resistance efforts in the following century. See for example: Joe Street, "The Historiography of the Black Panther Party," *Journal of American Studies* 44, no. 2 (2010): 351-375.

were rising in California, and the numbers of Indigenous women and girls were rapidly declining. As less than fifteen percent of the total white population counted in California's 1850 Census, white women and girls accounted for closer to forty per cent by 1870. By 1900, women represented nearly half the State's population.[101] Their growing total numbers, and the especial increase in numbers of white women and girls, had important implications in the development of law and order throughout this period.

These marked population changes took shape on a backdrop of parallel shifts in criminal procedures. In the first decade of California's statehood, Police Courts would occasionally hear less serious charges of sexual crimes, but most were prosecuted in the Court of Sessions. After 1863, when the Court of Sessions was dissolved, rape and attempted rape cases were most frequently heard in the County Court. In 1880, the system shifted again when the Superior Court replaced both the County and District Courts. The restructuring of the court system in 1880 was accompanied by a change in the law that allowed District Attorneys to initiate criminal procedure through the filing of "information," or the prosecution's charge. Prior to 1880, a criminal procedure was initiated by grand jury indictment. Grand juries heard charges and either ignored them

[101] See: U.S. Bureau of the Census, *Seventh Census of the United States: 1850* (Washington, D.C., 1853); U.S. Bureau of the Census, *Ninth Census of the United States: 1870* (Washington, D.C., 1872); U.S. Bureau of the Census, *Tenth Census of the United States: 1880* (Washington, D.C., 1883); U.S. Bureau of the Census, *Twelfth Census of the United States: 1900* (Washington, D.C., 1901); Jo Ann Levy points out that prostitutes were not consistently counted as "women" in the 1850 census, and Native American populations were poorly accounted for, so these numbers are likely low estimates. See: Levy, *They Saw the Elephant*, 176.

or offered a "true bill" if they believed charge to be warranted and worthy of prosecution.[102]

While the courts underwent significant changes, the law also shifted throughout this period. California's adoption of the Common Law of England in 1850 kept with a broader American consensus that common law was the most effective model for American law. However, in 1872, the California state legislature shifted to a system of codification when it enacted four codes: the Political Code, the Civil Code, the Code of Civil Procedure, and the Penal Code. The last two of these offer the most crucial details for this analysis. Nevertheless, and despite this codification, California legal officials continued to reference case law throughout the late nineteenth century, often relying on precedent set in other states and in England.[103] This means that despite important legal shifts in the State throughout this period, California's narrative of rape and sexual assault remained intricately tied to broader trends in the United States and abroad.

Chapter Four pivots in focus to consider age as an essential signifier to responses of sexual violence by focusing on child sexual abuse. The abuse of children was spoken about and understood as a less complex crime than the sexual assault of

[102] For more on the California court system and serious crimes, see: Robert H. Tillman, "The Prosecution of Homicide in Sacramento County, California, 1853-1900" *Southern California Quarterly* 68, no. 2 (1986): 167-182. doi:10.2307/41171428.
[103] Arthur Rolston, "An Uncommon Common Law: Codification and the Development of California Law, 1849-1874," *California Legal History* 2 (2007): 143-164; *History of the Bench and Bar of California: Being Biographies of Many Remarkable Men, a Store of Humorous and Pathetic Recollections, Accounts of Important Legislation and Extraordinary Cases*, 5 Cal. Legal Hist. 399 (2010). https://archive.org/details/benchandbarofcal00shuc/; Robert M. Ireland, "Privately Funded Prosecution of Crime in the Nineteenth-Century United States," *The American Journal of Legal History* 39, no. 1 (1995): 43-58. doi:10.2307/845749.

adult women. Children's bodies and minds were generally understood as uncorrupted, pure exemplars of chastity. Their pre-pubescent bodies were the sites of idealisation, and a near-universal agreement pervaded that they should be protected from knowledge of sexual matters. As a result, perpetrators of sexual abuse against children were especially vilified in public discourses, and extra-judicial revenge and retribution were more widely accepted as appropriate responses to such cases. Nevertheless, exploring how reports of child sexual abuse were received alongside the forms of abuse that were alleged reveals that the narrow and limited definitions pervasive to sexual violence perpetrated against adults were superimposed upon child sexual abuse cases. At least until the 1890s, the law perceived child sexual abuse in very narrow terms, and thus ignored varied forms of sexual violation that children could experience.

Finally, in Chapter Five, the implications of age to the otherwise persistent identity markers of gender, race, and class are once again explored, this time through the lens of seduction. Ideas of adolescence shifted throughout the late nineteenth century, changing the ways that the public, lawmakers, and legal representatives understood their roles as protectors of virtue and innocence. Seduction, which was specifically exempted from California law until 1872, as well as the broader public use of the term, each provide deeper insight into the ways that sexual violence was constructed as harmful and dangerous. As the age of consent changed throughout this period, broader concerns about chastity and the sexual purity of girls before marriage came to the forefront of public debate. These discussions demonstrate that sexual violation was more dominantly oriented around a desire to prevent the destruction of innocence, rather prevent harm to individuals.

Legal and social identifiers like "victim" or recognition as "white" were at once incredibly meaningful and extraordinarily nebulous throughout this period. Such categories were vital in the application of criminal law and had deep meanings for if and how a person's experience of sexual violence would be responded to or even "seen" by contemporaries. I engage those terms liberally throughout this text, insofar as they had practical social meanings to those that deployed them. Importantly, my use of the term victim throughout the following pages does not connote a value judgement or seek to impose an identity on those who experienced forms of sexual violation. Rather, identification as a "victim" in this context was often a privilege offered to very few, and as an exclusionary category it must be considered for its use during the period in question.[104] Likewise, when I identify individuals as "white" or "racialised," I am not making any particular claims regarding the ethnic heritage of those I refer to. Rather, I engage with the terminology of race as a lived experience of exclusion or inclusion experienced by individuals that shaped their experiences of sexual harm and institutional recourse. Finally, throughout this text I refer to California's Indigenous populations as Indigenous, Native American and California Indians. The last of these three is the term that Indigenous peoples of California apply to themselves, and in following their lead is the term I apply most persistently.[105]

Exploring sexual violation is also an enterprise that necessitates a consideration of ethics.[106] Throughout the following pages I generally name both perpetrators and

[104] For more on the politics of the word "victim" in relation to sexual violence, see: Carine M. Mardorossian, "Rape and Victimology in Feminist Theory," in *Framing the Rape Victim: Gender and Agency Reconsidered* (New Brunswick: Rutgers University Press, 2014).
[105] Madley, *An American Genocide*.
[106] D'Cruze, "Approaching the History of Rape and Sexual Violence."

accusers of sexual violence. Their names were prolifically reproduced in publicly available records, making the negotiation of naming practices somewhat beyond my own personal choice. Nevertheless, I continuously contemplated whether reproducing the names of those who were victimised by and those who enacted sexual violence risked replicating, through exposure, the very violence I have sought to explore. Likewise, the reproduction of names in historical records was uneven. For example, in press reports men were usually named, and often with both their given and surnames. Those who were victimised by sexual violence were not persistently named, but when they were their surnames were often omitted. I rarely know the names of the racialised women and girls who were victimised throughout this period. Thus, by reproducing names – as and when I know them as the researcher, where they are freely available in public records – I not only work to dispel the shame too often associated with sexual violence, to honour and acknowledge the subjectivity of those I can name, but I also signal how power imbalance also worked in the context of naming practices.[107] Names are and were powerful markers of human individuality. The fact that I usually have no way of knowing the names of women of colour, who were disproportionately targeted with sexual violence during this period, is a consideration that warrants persistent attention. I hope in telling their stories even without access to their names, I help to affirm their positions as subjects, rather than objects, in the historical record.[108]

[107] Kamala Visweswaran, "Resisting the Subject," in *Fictions of Feminist Ethnography* (Minneapolis: University of Minnesota Press, 1994).

[108] The relationships between ethics and sexual violence warrants more extensive discussions than I can devote here, but during early 2019 I organised a workshop for the Sexual Harms and Medical Encounters research-team based at Birkbeck, University of London. For some of the thinking that emerged around those discussions, see: Cora Salkovskis, "Anonymity, Ethics, the Dead, and the Psychiatric Historian," *Sexual Harms*

Conclusion

As Anglo-Americans, Europeans, South Americans, Australians, and other migrants from throughout global empires travelled to the American Western frontier in the last half of the nineteenth century to establish American institutional dominance, they expressed racialised notions of gender and place through their understandings and expressions of sexuality. Where tightly controlled, Victorian masculinity reigned throughout the Anglo world, American and British imperial justifications for male, Anglo-Saxon dominance on the racially diverse frontier relied heavily on notions of sexual propriety and controlled moral orderliness. However, the conventions of moral, patriarchal order that saturated Anglo notions of civilised society were both challenged in California's early years and actively ignored or reshaped by white Anglo Americans according to shifting ideologies of sexual hierarchies and martial manliness.[109] Especially in first years of imperial expansion to the coast, California rarely lived up to the ideals that colonial settlers or state representatives imagined for them. Racially diverse, notoriously violent, and rarely representative of chaste Victorian middle-class sexual norms, the realities of the western frontier challenged imperial notions, and upset easy differentiations between people of various classes, races, and genders.[110]

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and Medical Encounters (blog)*,* 29 May 2019. https://shame.bbk.ac.uk/blog/anonymity-ethics-the-dead-and-the-psychiatric-historian/; and for a response: Adeline Moussion, "Silence and Shame, Ethics and the Living," *Sexual Harms and Medical Encounters* (blog)*,* 17 June 2019. https://shame.bbk.ac.uk/blog/silence-and-shame-ethics-and-the-living/.

[109] Greenberg, *Manifest Manhood and the Antebellum American Empire*; R.W. Connell, *Masculinities,* 2nd edition (Cambridge: Polity Press, 1995).

[110] John Arnold and Sean Brady, *What Is Masculinity?: Historical Dynamics from Antiquity to the Contemporary World* (Basingstoke: Palgrave Macmillan, 2011).

An early numerical dominance of male migrants onto the mining frontier and the deep relationships between sexuality, reproduction and colonial nation-building put sexual politics at the heart of imperial expansion along the North American west coast. Early Anglo settlement in California featured a certain tolerance of racial mixing that rose largely because of the lack of marriageable white women in the region and diverse populations of Indigenous and Mexican women.[111] The initial demographic dominance of white men also made white women's sexual and domestic services highly coveted, leading to a demand for working-class women to work in food production, laundries, and brothels. Many of these women were also not white, as California's population was and remained racially diverse.[112] In these spaces, sexual access and morality formed the basis of many hetero-social interactions, and conflict frequently arose between the expectations of colonial migrants and state representatives. In the context of imperial expansion, mapping the contours of sexual power, and attending to those occasions where sexuality and sexual behaviour became points of contestation, reveals the logics of gendered, raced and classed social hierarchies.

The mining frontier that John Holmes Magruder observed in the California of 1849 represented a space where expectations around racialised and gendered society were reordered according to longstanding tropes of white, Anglo American, Republican ideals.[113] Until a few decades into mining settlement, white men rarely saw

[111] Madley, *An American Genocide*.
[112] California had joined the Union as a free state as a part of the Compromise of 1850, but this did not stop some slave owners from bringing slaves with them to California. Ibid.
[113] "J.H. (John Holmes) Magruder letters to his family, 1849-1851," HM 16723-16728. The Huntington Library, San Marino, California.

those that they would consider “ladies” in California. Instead they saw prostitutes of a variety of ethnic backgrounds, and demeaned Aboriginal women as squaws; while constructing their rights to access women, they perpetuated certain class and race assumptions that glorified chaste, white, middle-class womanhood. On the one hand, white Anglo Americans strategically imposed law and order and worked to fashion “civilised” society according to the ideals of life, liberty and pursuit of happiness, protecting women from sexual violence seemed to operate rhetorically as an institutional and social priority. On the other hand, constructions of sexually appropriate behaviour and the hierarchies of gender, race, and class led to a practical reality that rarely matched the imagined ideals promulgated by American social and political theorists. Considering the enduring paradoxes inherent to the origins of American civil discourse, the palpable dissonances in the formal adjudication of sexual violation in late-nineteenth century California undoubtedly aligned with American tradition.

II. "Nature's Noblemen": Race, Violence, and White Manliness

> "In our company were some real good fellows— gentlemen, in the true meaning of that word, a word frequently misapplied but never by one who has had such experience as mine on this trip to California."
>
> - William C.S. Smith, 1849

> "In addition to the squaws, the spoils consisted merely of a few bows and arrows."
>
> - Heinrich Lienhard, 1850

> "A greater refinement in civilization is apt to be accompanied by a greater refinement in cruelty and infamy."
>
> - *The Press and Tribune*, 1860[1]

Introduction

To understand the occasions of sexual violence that marked the historical record in post-1848 California, it is vital to first map the formation and expression of white frontier manliness. Racialised, interpersonal, and gendered violence were integral to discourses of conquest, and often outcomes of white men's understandings of themselves in relation to those they saw as "other."[2] Consequently, this chapter will explore the ideological and practical implications of Manifest Destiny and competitive, frontier manliness during the American consolidation of California. The formative years

[1] William C.S. Smith, "Narrative of a Forty-Niner, 1849-1851," HM 30493. The Huntington Library, San Marino, California; Heinrich Lienhard and Marguerite Eyer Wilbur, *A Pioneer at Sutter's Fort, -1850: The Adventures of Heinrich Lienhard* (Los Angeles: The Calafía Society, 1941). https://www.loc.gov/item/42011300/; *The Press and Tribune,* 29 March 1860, 2. *Chronicling America: Historic American Newspapers*. Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn82014511/1860-03-29/ed-1/seq-2/.

[2] Edward Said, *Culture and Imperialism* (London: Vintage Books, 1994).

of the 1850s were crucial to establishing a social and political system that shaped understandings and responses to violence. The gendered and racialised regimes of power that took shape in this period had deep implications for how sexual violence would be constructed, made visible, and responded to for the entirety of the late nineteenth century.

Between 1848, when gold was discovered near present-day Sacramento, and 1850, when the California Constitution was passed at the Pueblo de San Jose by a delegation of Californios and Anglo-Americans, the state's colonial population increased dramatically.[3] At the signing of the Treaty of Guadalupe Hidalgo (1848), which ended the Mexican-American war and moved one-third of Mexico into American control, the population of the territory consisted of approximately 150,000 California Indians, 6,500 Californios, or Mexican Californians (most of combinations of mixed Indigenous, Spanish, and African American descent), and under one thousand Anglo-Americans.[4] By 1872, California's non-native population had risen to close to 600,000, while state-funded and citizen-supported genocide had levelled the population of California Indians to an estimated 30,000 people.[5] By the end of the century, the state's total population was nearing 1.5 million.

[3] "Californios" describes Mexican Californians. Most were of varied Spanish, Indigenous, and African descent. Those present in the delegation represented the elites of Alta California.

[4] The Native American population of California was estimated to be approximately 300,000 when the Spanish colonised in 1769, but estimates suggest it had declined by about half by the time the United States colonised. The numerical estimates here are borrowed from Benjamin Madley's recent work: Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe* (New Haven: Yale University Press, 2017).

[5] Ibid.

Histories of California frequently highlight these population numbers – in various forms, with distinct emphases, for different historical purposes – to such a degree that numbers often become the symbolic starting points to explorations of the moulding of California into its modern form.[6] It was this unprecedented, en masse arrival of settler colonials into the West that has captivated observers and led to the supremacy of romanticised notions of the Anglo-American pioneering mentality.[7] Overlanders and Argonauts alike, steeped in racial prejudice, were likewise infused with what historians have often characterised as a "pioneering spirit."[8] This ideal of the intrepid adventuring (white) man, whose desire to subdue the "Wild West" made the America that stretches from Pacific to Atlantic, has become a symbol of the endurance of the concept of Manifest Destiny.[9] In the nineteenth century, it offered the ideological scaffolding that the tenets of frontier white manliness took shape on – principally oriented around the concept of righteous, God-ordained conquest – and allowed the rationalisation of various racist, nativist, and gendered abuses in the name

[6] For a range of examples where migration statistics are an opening topic of discussion, see: Jo Ann Levy, *They Saw the Elephant: Women in the California Gold Rush* (Norman: University of Oklahoma Press, 1992), xv; John Boessencker, *Gold Dust and Gunsmoke: Tales of Gold Rush Outlaws, Gunfighters, Lawmen, and Vigilantes* (New York: John Wiley & Sons, Inc., 1999), 3-5; Malcolm J. Rohrbough, *Days of Gold: The California Gold Rush and the American Nation* (Berkeley: University of California Press, 1998), 7-8; Richard Thomas Stillson, *Spreading the Word: A History of Information in the California Gold Rush* (Lincoln: University of Nebraska Press, 2006), 1; Brian Roberts, *American Alchemy: The California Gold Rush and Middle-Class Culture* (Chapel Hill: University of North Carolina Press, 2003), 3.

[7] Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft. Volume XXIII: History of California Vol VI 1848-1859* (San Francisco: The History Company, Publishers, 1888); Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt and Company, 1921).

[8] Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton & Company, 1987).

[9] Ibid.

of this aim.[10] Memorialisation of white, Anglo-American western consolidation began while the process was still in motion, through letters, memoirs, sketches, stories, and newspaper articles of life on the frontier.[11] The transformations of the 1850s were chronicled and described by historians like James Ayers and, famously, Herbert Howe Bancroft, demonstrating that the frontier was a site of keen interest even before Frederick Jackson Turner penned his influential "frontier thesis" in 1893.[12] As California moved from a gold rush society to a state with permanent colonial settlements and long-term colonial residents, social commentators continued to extoll the virtues of Anglo-American settlement on the frontier and the way it demonstrated that unique white American (male) identity.[13]

Although a violent colonial state, Spanish colonisation in the eighteenth century had been forged on the making of intimate and personal ties with Native American populations. This meant that many of the most influential Californios in 1848, particularly those in the southern regions of the territory, were connected to California Indians through marriage, lineage, friendship, and/or labour relations.[14] In the northern regions of California, which would see the bulk of 1840s and 1850s migration to the gold fields, thousands of Indigenous peoples still lived with relatively little interaction with Europeans and Anglo-Americans.[15] Sutter's Fort was a remote

[10] Sucheng Chan, "People of Exceptional Character: Ethnic Diversity, Nativism, and Racism in the California Gold Rush," *California History* 79 no. 2 (Summer, 2000): 44-85.
[11] See, for example: Kevin Starr, "Rooted in Barbarous Soil: An Introduction to Gold Rush Society and Culture," *California History* 79, no. 2 (Summer 2000): 2.
[12] Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt and Company, 1921); Stillson, *Spreading the Word.*
[13] Kevin Starr, "The Gold Rush and the California Dream," *California History* 77, no. 1 (1998): 56-67. doi:10.2307/25462462.
[14] Madley, *An American Genocide*.
[15] Ibid.

outpost to colonial settlers when James Wilson Marshall, a carpenter working for the German-born John Sutter, discovered gold in early 1848. Thus, the making of American California was forged on a varied landscape, where longstanding colonial efforts gave rise to a racially mixed and heterogeneous Mexican population. In the late 1840s, when Anglo Americans consolidated their rule, the hierarchies of race were not foregone conclusions, and a potential for greater latitude of acceptance in the racial hierarchy seemed possible for wealthy, land-holding Mexicans of mixed heritage.

The idea of extending a degree of racial privilege to California's Mexican population quickly evaporated at the Constitutional Convention. White Anglo-American delegates hardened the boundaries of the racial hierarchy to privilege their own control over political, economic, and social life in California. While European migrants were also periodically subjected to disparaging stereotypes, racialised migrant communities were especially deterred from settling through legal and social proscriptions.[16] Hispanics were targeted alongside other racial minorities, most notably Chinese and African Americans, through various social and institutional violence, subjugation, and attempts to discourage migration altogether.[17] Many white Anglo Americans thought California was under siege by these communities, especially as they perceived racialised minorities as temporary wealth-extractors.[18] Such nativist

[16] See: Bancroft, *The Works of Hubert Howe Bancroft. Volume XXIII*, 326-327.
[17] Elaine Elinson and Stan Yogi, "Staking Our Claim: The Law in Early California," in *Wherever There's a Fight: How Runaway Slaves, Suffragists, Immigrants, Strikers, and Poets Shaped Civil Liberties in California* (Berkeley: Heyday Books, 2009); Susan Lee Johnson, *Roaring Camp: The Social World of the California Gold Rush*; Shirley Ann Wilson Moore, "'We Feel the Want of Protection'": The Politics of Law and Race in California, 1848-1878," *California History* 81, no. 3/4 (2003): 96-125. doi:10.2307/25161701.
[18] Chan, "A People of Exceptional Character"; Moore, "'We Feel the Want of Protection.'"

principles fuelled animosity against many foreign-born migrants, but were particularly targeted at populations of people who were not perceived as "white."

Ultimately, the racialisation of the frontier was predicated on a hierarchy where white men resided at the pinnacle. Varied notions of "race" thus came into play as diverse ethnic, linguistic, religious, and regional "types" met in townships, mining camps, and burgeoning towns like San Francisco and Sacramento in the first decades of California's statehood. The array of individuals that precipitated themselves onto the frontier led groups of white men to engage in various forms of overt racialised discrimination and violence, including vigilante justice, lynching, foreigners' taxes, legal impunity, and mob efforts to eradicate entire ethnic communities from mining regions.[19] While racial prejudice was pervasive amongst white settler colonials on the frontier, violent conquest efforts by Anglo Americans particularly targeted California Indians. They deployed nativist and nationalist ideologies to legitimate regulation of all non-Americans in the mines – although these restrictions were more consistently enforced against racial minorities – but Native Americans as the original inhabitants of California territory could not be disenfranchised by the same logic. As a result, the conquest of frontier land was indelibly linked to the conquest and subjugation of its peoples, whereby discursive physical violence against Native Americans was especially insidious, harsh, and condoned in settler-colonial society.[20]

[19] See: Chan, "A People of Exceptional Character"; Johnson, *Roaring Camp*.
[20] Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005); Clifford E. Trafzer and Joel R. Hyer, eds., *Exterminate Them: Written Accounts of the Murder, Rape and Enslavement of Native American During the California Gold Rush* (East Lansing: Michigan State University Press, 1999).

Conquest of the American frontier under the banner of Manifest Destiny was indelibly racialised and often legitimated through the rhetoric of white American racial superiority. Imagining, constructing, and implementing white (male) power therefore involved understanding Anglo American victory as inevitable and righteous. The concept of Manifest Destiny legitimated a variety of abuses in the name of the perceived inevitable outcome of American consolidation of the West, and its relationships to white frontier manliness shaped the contexts in which violence was enacted and responded to or ignored. This white conquest manliness was not only violent, but also gendered and sexual. As Andrea Smith has argued, "gender violence is not simply a tool of patriarchal control, but also serves as a tool of racism and colonialism. That is, colonial relationships are themselves gendered and sexualized."[21] In many respects, the conquest of California and the intricacies of the racial and gendered hierarchy that formed its scaffolding can be read through an exploration of sexually-violent behaviour.

Race and gender were indelible components of California's settlement, and how each were conceived of had crucial implications for how sexual violence was defined and responded to, both institutionally and socially. Before turning to sexual violence, I will therefore first explore some key features of California's settlement. The reality and concept of the "frontier" held potent meaning for white Anglo Americans in the middle of the nineteenth century, and racial hierarchy as well as conceptualisations of "civilisation" and "savagery" were compounded by deep fears of the "Other" amongst many American whites. In turn, California's first state representatives inaugurated a system that wrote their ideas of racial hierarchy into

[21] Smith, *Conquest*, 1.

law, carving deep lines of exclusion into the broader state culture for the remainder of the century. In the resulting institutional and social milieu, sexual violence was ignored, denied, hidden, and responded to in ways that often directly contradicted the broad discourses that condemned it.

The Western Frontier

In the course of the massive, unprecedented migration to California, men left the communities and families that structured their social and domestic lives to undertake arduous journeys to the American west coast. As historian Christopher Herbert has argued, on their way to the Californian frontier, Anglo-American men began understanding themselves and the frontier they sought in both racial and gendered terms. The Hispanic populations they encountered via ship voyages and the Native American populations they encountered on overland journeys gave settler colonials distinct understandings of themselves as "white," and many wrote letters and recorded in diaries of their increasing sense of racial superiority before they even set foot in the gold fields of California.[22] While California's frontier period has often been characterised as a tumultuous, chaotic period of vulgar, immoral tendencies, many of the men who "struck out" west were in fact Victorian, middle-class men. Thus, the manliness that they assumed in California was one that came into being through certain imaginings of themselves and racialised others on the frontier.

In a lecture he gave in Los Angeles in 1878, James J. Ayers emphasised that the Anglo-American men who "precipitated themselves upon California" after 1848 "were

[22] Herbert, *Gold Rush Manliness,* 16.

the very flower of the American people. They were young men, or men in the very prime and vigour of manhood." Indeed, he claimed, "they were cultivated because they represented that class of the American family which is always more or less educated, whether it graduate [*sic*] from the College or the public school."[23] By 1893, Frederick Jackson Turner would describe California's white frontiersmen with a romanticism that rationalised their less-than desirable attributes. To him, they were men bearing

> that coarseness and strength combined with acuteness and inquisitiveness; that practical, inventive turn of mind, quick to find expedients; that masterful grasp of material things, lacking in the artistic but powerful to effect great ends; that restless, nervous energy; that dominant individualism, working for good and for evil, and withal that buoyancy and exuberance which comes with freedom.[24]

Writing from their respective vantage points, Turner and Ayers highlighted different elements of the white Anglo-Americans who travelled west to seek their fortunes and freedom. While Turner was more realistic about their shortcomings, both wrote histories that idealised the character of western expansionism and those that consolidated the west as distinctly "American."

Hubert Howe Bancroft's well-known and elaborate histories of the American West demonstrated similar tendencies to Turner and Ayers. Although more critical of the violence of the frontier, he made a distinct effort to encapsulate the "nature" of those who sought gold wealth. While the western frontiersmen – "self-reliant" and

[23] James J. Ayers, "Pioneer Times: The Argonauts of Two Remarkable Periods, compared," Item CO58748, 1878. Society of California Pioneers, San Francisco, California.
[24] Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt and Company, 1921), 37.

"stalwart, restless backwoodsmen" – were the first to arrive, he contended that the wave of immigrants from the eastern states were men of a different character.[25] For him, these were men who were "full of a latent vivacity; of strong intellect, here quickening under electric air and new environment; high-strung, attenuated, grave, shrewd, and practical, and with impressive positiveness [*sic*]." Alongside them were Englishmen, "burly of mind and body, full of animal energy, marked by aggressive stubbornness, tinctured with brusqueness and conceit."[26] Following the lead of these dominant characters, the "coldly calculating Scott," the "quick-witted Celt," and the "plodding German" arrived next on the frontier.[27] If a certain hierarchy was not already formed through these phrasings, Bancroft's implicit ordering became clearer when he introduced the "pure-blooded Spaniard" as the intermediate between the "native Californian" and his American and European examples.[28]

These kinds of characterisations reified hierarchies of ethnic "types," often justifying dominance over or violence against those considered racially inferior.[29] While the conventions of Victorian puritanical masculinity in the United States more broadly demanded a degree of self-control in mid-nineteenth century men, frontier conditions reformulated gendered demands of behaviour.[30] The manliness of settler-colonial conquest on California's frontier was one rooted in new racial and social

[25] Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft. Volume XXIII: History of California Vol VI 1848-1859* (San Francisco: The History Company, Publishers, 1888), 3.
[26] Ibid., 3.
[27] Ibid., 3.
[28] Ibid., 4.
[29] Amy S. Greenberg, *Manifest Manhood and the Antebellum American Empire* (Cambridge: Cambridge University Press, 2005); Wilson Moore, "'We Feel the Want of Protection.'"
[30] Christopher Herbert, *Gold Rush Manliness*, 18.

orders, and invariably tied to the extreme physical demands of mining life.[31] Further, the men attracted to frontier life were often those who rejected the ideal of self-restraint embedded in conventional Victorian masculinity and sought a more martial expression of their manliness through conquest.[32] This conquest was rife with ambivalences, with some commentators on the frontier decrying "outrages committed... on defenceless foreigners," but was also rooted in ideas of white supremacy and inevitable, unavoidable, God-ordained Anglo-American triumph.[33] The possibilities of wealth inherent to the gold rush made the rationalisations of white dominance all the more pressing, and led to systemic, state-sanctioned killing-campaigns designed to subdue or completely eradicate Native American populations in frontier territories.[34] In the 1850s, white masculinity was thus shaped, in part, by a contest for power characterised by acts of disproportionate large-scale violence against entire settlements and communities in response to small-scale disagreements or clashes with individual California Indians.[35] This masculinity was expressly predicated on dominance, claims of righteousness and the conquest of land, people, and institutions.

[31] This toil was also used to excuse immoral behaviour by contemporaries, see: James J. Ayers, "Pioneer Times: The Argonauts of Two Remarkable Periods, compared," Item CO58748, 1878. Society of California Pioneers, San Francisco, California.
[32] Herbert, *Gold Rush Manliness*, 18.
[33] "The Chilenes [*sic*] and other Foreigners in the city of San Francisco attacked by an Armed Party of Americans." *Weekly Alta California*, 2 August 1849, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[34] Madley, *An American Genocide*.
[35] See, for example, Huntley's descriptions of various executions of accused California Indians: Sir H.V. Huntley, *California: Its Gold and Its Inhabitants* (London, T. C. Newby, 1856). https://www.loc.gov/item/rc01000796/.

Beyond the day-to-day expressions of dominance, white colonial conquerors legislated and legalised the terms of their conquest. Through the California Constitution and various legislative acts, they shaped Native American access to systems of reprisal and Anglo-American systems of justice. Even though some of the original delegates who met in 1849 to draft California's constitution were connected by marriage or descent to California Indians, the legislators overall voted to exclude them from the franchise and made their testimonies in courtrooms against white perpetrators inadmissible.[36] This system of racial exclusion continued in California until the California Penal Code was passed in 1872, encouraging broad forms of violence against Native Americans and making prosecutions of white perpetrators who assaulted victims of colour near impossible.[37] Likewise, systems that limited the access of Native American and other racialised complainants to legal reprisal served to encourage white violence against them.[38] These processes were wrapped up in discourse and practice that dehumanised Native Americans, further legitimating violence against them.[39]

The dominant formulation of manliness that developed on the California frontier was predicated on the celebration of white male dominance, a dominance that was heavily enforced through systematised and state-sanctioned violence.[40] The making of California after 1848 was thus based on a social organisation oriented

[36] California, *The Statutes of California passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850). https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.
[37] Madley, *An American Genocide*.
[38] Ibid.
[39] Ibid.
[40] R.W. Connell, *Masculinities,* 2nd ed. (Cambridge: Polity Press, 1995).

around the rationalisation of "righteous" imperial violence of white men against others that was, in turn, built into the institutional rhetoric and practice after 1850. In the post-Civil War era, broader American politics began to challenge the rugged individualism that had shaped the populating of the American West. The ideology of Manifest Destiny that had fuelled westward expansion until the Civil War began to be reimagined in the post-war period in a manner that re-centred white womanhood as a symbol of stability, and American expansionism as "domesticated and retrained."[41] Nevertheless, the mythology of frontier manliness was a potent symbol that far outlived the existence of an actual "frontier," and continued to shape Californian culture until the end of the nineteenth century.

California's industries had shifted by the onset of the Civil War, turning toward large-scale commercial mining and agriculture, while concerted genocidal efforts had significantly reduced the population of California Indians.[42] Even the southern regions of the state, which had remained relatively Hispanic in the 1850s, were more firmly incorporating into the fabric of Anglo-Californian society.[43] The completion of the transcontinental railway in 1869 and new technologies, like the individual motor vehicle, also made accessing cities like San Francisco much easier for continental travellers and migrants after the 1860s. In the post-Civil War period, labour relations in the United States shifted dramatically with the federal abolition of slavery.

[41] Greenberg, *Manifest Manhood and the Antebellum American Empire,* 3.
[42] Madley, *An American Genocide*.
[43] Particularly in the early 1850s, Los Angeles County Court Records are often written in Spanish, but as the city grew it became increasingly anglicised. See: Paul R. Spitzzeri, "On a Case-by-Case Basis: Ethnicity and Los Angeles Courts, 1850-1875," *California History* 83, no. 2 (2005): 26-39. doi:10.2307/25161803.

In California, which had always held an ambivalent role in the North-South divisions that led to the Civil War, the outbreak of direct military conflict reenergised the martial masculinity behind its genocidal "killing machine," and heightened conflicts around its relationships with race and labour.[44] Although the formal institution of slavery was not legal in California after 1850, until the Civil War coercive labour was practised in the state, including tacit acceptance of some African American slavery.[45] Further, various laws passed in California during the 1850s incentivised slave raiding on Native American villages for the capture and indenture of children and adults for various domestic-service and manual-labour roles. The bail of incarcerated people could also be paid for by a highest bidder, without their consent, and their labour thus demanded as repayment of the debt. Helen Hunt Jackson, a Native American rights activist in California after 1875, bemoaned the realities of Los Angeles's streets, describing them as often "full of Indians lying about helpless in every stage of intoxication." The city's solution, she explained, was to incarcerate them with the ultimate intention of hiring them out for indenture: "they were picked up by scores, unconscious, carried to jail, locked up, and early Monday morning hired out to the highest bidders at the jail gates."[46] California's was a system built on racist, coercive labour-relations, and the very lives of Native Americans and African Americans were heavily policed and criminalised.[47] As a result, through a combination of official and unofficial coerced labour relations and broader white presumptions of "natural" racial

[44] Madley, *An American Genocide*.
[45] Lawrence B de Graaf, Kevin Mulroy, and Quintard Taylor, eds., *Seeing El Dorado: African Americans in California* (Seattle: University of Washington Press, 2001).
[46] Helen Hunt Jackson, *Glimpses of California and the missions* (Boston, Little, Brown, & Company, 1902). https://www.loc.gov/item/02012719/
[47] Madley, *An American Genocide*.

hierarchies, late nineteenth century California was rooted in fundamental racial inequity and discrimination.

Civilised Americans, Nature's Savages

Even from the early days of Anglo expansion into the West, racial hierarchy was omnipresent. Those that arrived after the initial forty-eighters and forty-niners were imbued with a deep sense of both the danger and possibility of the El Dorado on North America's west coast. Their descriptions of Native Americans were shaped by pre-established assumptions, built upon by often-perplexing encounters with individuals whose manner, dress, and even cuisine appeared worlds different from their experiences. Their presumptions were then further perpetuated by rumours of ubiquitous Indian outrage and violence.[48] Travel pamphlets, letters, and accounts from those on the forefront of westward expansion furnished white colonial settlers with an acute sense of the danger that possibly awaited them. These largely inaccurate notions shaped the ways that Anglo-American migrants approached the frontier.[49]

The tone of white manliness that developed here was built upon the duality of fear and a sense of righteous conquest. Manifest Destiny structured the impulses of many who sought fortune on the frontier. White Americans rarely questioned the thesis that they were destined to conquer to the western-most regions of the continent, and even the large numbers of Europeans that arrived into San Francisco

[48] Stillson, *Spreading the Word*, 10.
[49] Herbert, *Gold Rush Manliness*; Madley, *An American Genocide*; Stillson, *Spreading the Word*, 1; Brian Roberts, *American Alchemy: The California Gold Rush and Middle-Class Culture* (Chapel Hill: University of North Carolina Press, 2003).

harbour and permeated into the interiors of California were often instilled with a sense of the glory and righteousness of American continental expansionism.[50] Invariably, this self-righteousness was also self-serving, and helped to shape the ways in which American settler colonials approached those they called "native" Californians – the land-holding Mexicans who were often of mixed Native American and Spanish descent – and "Indians," many who sustained minimal interaction with Mexicans and other foreign invaders until the 1850s.

In this context, the contest of masculinity was intricately racial. In a fictional (but purportedly true) account written from London, a writer masquerading as an English doctor demonstrated how such racialised notions were palpable even to those who did not land on Californian soil. In the account, patched together using other travel accounts and letters, the invented scene reveals the details of a presumed hierarchy of men. "Indians strutted by in all the pride of gaudy calico," he related,

> the manners of the savage concealed beneath the dress of the civilized man. Muscular sun-burnt fellows, whose fine forms and swarthy faces pronounced that Spanish blood ran through their veins, gossiped away with small hatchet-faced Yankees, smart men at a bargain, and always on the lookout for squalls. Here and there one spied out the flannel shirt and coarse canvas trousers of a seaman – a runaway, in all probability, from a South Sea whaler; while one or two stray negros chattered with all the volubility of their race, shaking their woolly heads and showing their white teeth. I got into conversation with one tall American; he was native-born Kentuckian, and full of the bantam sort of consequence of his race.[51]

[50] Greenberg, *Manifest Manhood and the Antebellum American Empire*; Stillson, *Spreading the Word.*
[51] Henry Vzetelly and Edwin Bryant, *California. Four months among the gold-finders, being the diary of an expedition from San Francisco to the gold districts* (Paris: A. and W. Galignani and Co, 1849). Library of Congress: California As I Saw It. https://www.loc.gov/item/rc01000 765/.

Throughout this description, California Indians, "Yankees," African Americans, and white men from the American South all differentiated themselves in manner and appearance. Each had a typology and a place that they filled in the social hierarchy.

As the writer continued, in this racial, intensely homosocial milieu, men were "far away beyond care and civilization, in the gold-gathering region of California."[52] This understanding of California's migrants in the 1850s as outside of the purview of civilization gave rise to a general expression of sympathies for the ways that white men were affected by their departures from the controlling forces of their former social and moral environments. While the challenges of the voyage to the California and the realities of mining could be harrowing, commentators emphasised and exalted the high calibre of their travel or mining companions. When William Smith described his voyage via South America to California in 1849, he took great pains to relate his esteem for his compatriots. He asserted that

> in our company were some real good fellows— gentlemen, in the true meaning of that word, a word frequently misapplied but never by one who has had such experience as mine on this trip to California. Three or four of my companions were men I can never forget. Men of that stamp whose character develops and rises when actual difficulties and dangers come. Quiet, yet energetic and brave; pleasant in manner, but firm; self denying though generous to a fault; at all times and under all circumstances, from first to last, always the same, Nature's Noblemen, true gentlemen.[53]

Smith's admiration for his travel companions was palpable, and bolstered ideologies of the self-congratulatory nobility of those with the bravery and grit to migrate west. Such constructions of the quality of these travelling men were pervasive in imaginings

[52] Ibid.
[53] William C.S. Smith, "Narrative of a Forty-Niner, 1849-1851." HM 30493. The Huntington Library, San Marino, California.

of western settlement, and shaped imaginings of California's Anglo-American settlement throughout the century.

Even decades following the initial, arduous voyages, the rhetoric of the white, male bravery persisted. For example, in a lecture given in Los Angeles in 1876, James Ayers expressed his admiration for the "forty-niners." Rejecting more negative accounts, including Mark Twain's descriptions of frontier chaos and degradation, Ayers bristled at descriptions that suggested that 1850s California was "composed principally of uncouth, uneducated men, whose only idea of civilization had been gathered from the loose manners of the semi-civilized frontiers." On the contrary, he declared, "the flower and manhood of our nation" were the first in the gold fields. By his estimation, the men that arrived managed to swiftly "within a few months of the advent" set up "a Government based on a constitution so perfect that, with the exception of some slight amendments, it has served as the organic law of the commonwealth down to the present time."[54] In his exaltation in the nobility of Anglo-American settlement on the Californian frontier, Ayers acknowledged only a "sprinkling of the ignorant and vicious" from white Anglo migrants, and blamed the "incongruous elements" of the population as "launched" from "Mexico, Central and South America, from the Hawaiian Islands and from Australia and the coast of China." Despite them, Ayers persisted, "standing out in bold relief in the foreground were the best representatives of American manhood, of American energy and American culture."[55] Thus, nearly thirty years after the initial rush, Ayers celebrated and praised the vision of ideal white American

[54] James J. Ayers, "Pioneer Times: The Argonauts of Two Remarkable Periods, Compared," Item CO58748, 1878. Society of California Pioneers, San Francisco, California.
[55] Ibid.

manhood while simultaneously minimising or ignoring evidence to the contrary as mere aberrations of non-American foreigners.

While Ayers's descriptions are indicative of the contradictions of Anglo-American constructions of their own racial superiority, he was certainly not alone in making such arguments. As Alonzo Delano's remembrances of the frontier demonstrate, the conflicts inherent to the "logic" of racial superiority were innately at the forefront of Anglo-American and European constructions of racial superiority. Irving McKee, who compiled and annotated Alonzo Delano's correspondence, described the Americans of Delano's observations "a patriotic lot, ready to chase all foreigners - whether Indian, Mexican, or British – out of their own California (in which they had not yet set foot)."[56] Delano himself would describe American patriots as

> almost entirely composed of energetic, well-informed, resolute law-and-order men, who have characters at home, and who cannot at once depart from the habits and mental training from childhood of a civilized and moral community.[57]

Such statements about the nobility and civility of white colonisers alongside the conceit of their conquest characterised imaginings of dominant masculinity in the early years of American California. After 9 September 1850, when the United States officially welcomed California as the thirty-first state in the Union, the task of white Americans turned to making that conquest a lived reality for all who inhabited California's lands.

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[56] Alonzo Delano and Irving McKee, *Alonzo Delano's California correspondence: being letters hitherto uncollected from the Ottawa Illinois Free trader and the New Orleans True delta, -1952* (Sacramento: Sacramento Book Collectors Club, 1952). https://www.loc.gov/item/53001743/.
[57] Ibid.

White men consistently racialised and rhetorically subdued men of other races as below themselves in mid-nineteenth century California; however, it was in their descriptions of California Indians – or those with viable claims as the rightful inhabitants of the territory – that their sense of racial and gendered dominance was particularly notable. Passing remarks about "dirty digger Indians," a slur used against California Indians in the diggings, or rumours about their alleged inhumane murders of children fill Sim Moak's remembrances of Mill Creek Indians; even though Mill Creek Indians were, in fact, starved and massacred by white colonists throughout the 1850s.[58] In a broad condemnation, Sir H. V. Huntley described California Indians as "a very low grade of the human species" and, elsewhere in his remembrances as a "thoroughly dirty and lazy race."[59] Bayard Taylor, a reporter who travelled to California in 1849, saw California Indians as having "hereditary habits of sloth and stupidity." He also described them as "dirty" and "stupid."[60] Franklin Agustus Buck described the "Mountain Diggers" as "another race, perfectly wild and untameable."[61] Such habitual and pervasive condescension expressed towards California Indians indicated the ways in which white settler colonials established their supremacy in the social hierarchy and attempted to subvert the humanity of California Indians.[62]

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[58] Madley, *An American Genocide*; Sim Moak, *The last of the Mill Creeks, and early life in northern California* (Chico, California, 1923). https://www.loc.gov/item/25010432/.
[59] Sir H.V. Huntley, *California: Its Gold and Its Inhabitants* (London: T. C. Newby, 1856). https://www.loc.gov/item/rc01000796/.
[60] Bayard Taylor and T. Butler King, *Eldorado, or, Adventures in the path of empire: comprising a voyage to California, via Panama; life in San Francisco and Monterey; pictures of the gold region, and experiences of Mexican travel* (New York: G.P. Putnam; London, R. Bentley, 1850). https://www.loc.gov/item/rc01000822/.
[61] Franklin Agustus Buck and Katherine A. White, *A Yankee trader in the gold rush; the letters of Franklin A. Buck* (Boston: Houghton Mifflin Company, 1930). https://www.loc.gov/item/30029653/.
[62] Smith, *Conquest,* 10.

Yet the persistent descriptions of Native Americans as dirty and without shame often mirrored white fears about themselves in frontier spaces. Dirt and dishevelment afflicted people of all classes and ethnicities in the diggings, and concerns over excessive vices like gambling and drinking were pervasive in public commentaries of social life in the 1850s.[63] Chaos, fears of anarchy, violence and the absence of self-restraint were rife amongst white frontiersmen according to contemporary commentators. Yet, in the face of inhumane white violence against Native Americans, even disapproving commentators, like Walter Colton, understood white men as superior and more civilised when compared to Native Americans. For example, in a diary entry from December 1846, he bemoaned the "ferocity in shooting down an unarmed man" against which "humanity revolts." But noted that "we can hardly find an apology for it," even in "the brutal instincts of the savage."[64] This sentiment, while a condemnation of white violence, persevered in its construction of California Indians as "savage."

Decades later, in his history of California, Bancroft would likewise chastise immoral elements of white Californian society, noting that "society suffered by the loosened moral restraint of mining life," leading to a "development of vice and increase of crime and bloodshed, and the spread of a gambling spirit."[65] For his part, Bancroft blamed this denigration on gold, calling it "a kind of moral intoxication, a gold

[63] See, for example: Susan Lee Johnson, *Roaring Camp: The Social World of the California Gold Rush*.
[64] Walter Colton, *Three years in California -1849* (New York, A.S. Barnes & Co.; Cincinnati, H.W. Derby & Co, 1850). https://www.loc.gov/item/rc01000774/.
[65] Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft. Volume XXIII: History of California Vol VI 1848-1859* (San Francisco: The History Company, Publishers, 1888), 425.

drunkenness" that had "debased the public mind and distorted the spiritual vision."[66] Yet amidst such self-reflection, he nevertheless argued that California's Indian policy was "enlightened and christian [*sic*]," as "instead of reducing the savages to slavery or taxing them to support the government of the invader, it simply kills them."[67] Thus, amidst a general identification of moral decay on the frontier, the persistent condemnation by white men of Native American violence, appearance, and habits mirrored the shifting landscape upon which they rationalised their superiority.[68] Such constructions set the foundations that rationalised and encouraged systemic and excessive forms of violence against them.[69]

Squaring ideals of "civilised" Victorian manliness, in its varied expressions, with broadly enacted violence against California Indians suggests a contradiction. However, the often-perplexing dissonances of life on the frontier were essential elements of this period of expansion under the banner of Manifest Destiny. As historian Brian Roberts has argued,

> at the particular moment of the gold rush both respectability, as the formative ethos of a rising middle class, and competition, as the organizing ethos of the American marketplace, had become real sources of anxiety. At issue for men… was the tension between status and success. The first demanded good morals and respectability, the second something darker and more devious.[70]

[66] Ibid., 638.
[67] Ibid., 257.
[68] See also: Herbert, *Gold Rush Manliness*. Herbert argues that behaviour became a more important marker of social rank, but this did not necessarily translate to interpersonal behaviour towards racialised others; Madley, *An American Genocide.*
[69] Madley, *An American Genocide*.
[70] Brian Roberts, *American Alchemy: The California Gold Rush and Middle-Class Culture* (Chapel Hill: The University of North Carolina Press, 2000), 44-45.

It was precisely in this context that white Anglo-Americans were working out the conditions of their dominance against a variety of others. Here, behaviour came to represent a more important marker of status, over and above those markers that were vital in eastern contexts; white Anglo colonial migrants measured their value and worth through comparison. While vices like gambling and prostitution were practised with much more prolific regularity and the circumstances of mining life often meant that middle-class men, conditioned to maintain appearances, did not physically manifest the pristine appearance of their former lives, they perpetrated imaginings of their own superiority by considering themselves comparatively superior to California Indians.[71]

In many respects, this self-conscious measuring of whiteness against a barometer of racialised others demonstrates that while racial categories like "white" could be porous in the tumult of frontier life, race still shaped a boundary that structured relations between frontier people in crucial ways. The values of whiteness generally and white manliness in particular were challenged by the conditions on the Anglo-American Californian frontier, a place where boundaries of race and class divisions were threatened and directly challenged. White men were violent, dirty, disorganised, engaging in the immoral vices – like gambling, or visiting sex workers and dance halls – and working and sleeping alongside a myriad of racially different peoples.[72] In this context, the rationalisations that legitimated the renewal of settler colonial energies and that had informed the mantra of Manifest Destiny were under siege. Historian Christopher Herbert has explored the increasing importance that

[71] Herbert, *Gold Rush Manliness*.
[72] Chan, "People of Exceptional Character"; Levy, *They Saw the Elephant*; Johnson, *Roaring Camp*.

behaviour played in clarifying hierarchies of social life, replacing structures like class, race, family, and community that shaped life in the eastern United States.[73] Examinations of violence in a broad sense, and iterations of sexual violence in a more particular sense, also help to explicate how crucial matters of racial difference, even if at times nebulous and changing, were to white men during this period and in this region.

Indeed, their value and superiority were directly predicated on constructions of their own proportional civility. If they were dirty from working in the diggings, it was dirt that was washable upon emergence into "civilised" society. If they were violent, it was the rational violence of righteous conquest. At its core, this hypocrisy was rooted in the very contradictions that American Republicanism was built upon. Namely, excessively violent means to justify the destined end of conquest. Delano's description of California Indians he observed in the "paradise" of the Sacramento Valley in 1849 reveals just how crucial a sense of superiority was to white manliness in this period. "A more filthy and disgusting class of human beings you cannot well conceive," he complained,

> dark-skinned, nearly as dark as a negro, covered with dust, living upon acorns, wild fruit and fish. They have nothing of the noble bearing of the Indians east of the Rocky Mountains, and they seem to be only a few degrees removed from brutes.[74]

[73] Herbert, *Gold Rush Manliness*; Roberts, *American Alchemy*; Greenberg, *Manifest Manhood and the Antebellum American Empire*.
[74] Alonzo Delano and Irving McKee, *Alonzo Delano's California correspondence: being letters hitherto uncollected from the Ottawa Illinois Free trader and the New Orleans True delta -1952* (Sacramento: Sacramento Book Collectors Club, 1952). https://www.loc.gov/item/53001743/.

Descriptions that reduced Native Americans to a subhuman category reflected the deep anxieties of white men, who were far removed from the social and emotional contexts that had given them a sense of their importance in colonial and national metropoles. Class and race divisions which were so carefully delineated for most middle-class whites from the eastern States and Great Britain were reformulated in this sphere; in that reshaping, white manliness became a category that was violently policed.[75]

White men, reduced in labour and living conditions to the realities of men of those they saw as racially inferior, articulated the "logic" of their conquest through violent racial language. C. F. Hotchkiss called California Indians in the diggings in 1849 "poor miserable brutes." He then positioned them as subordinate to one of his animals: "my mule," he declared, giving her name 'Americanus' in a further demarcation of her importance over the nameless California Indians in the diggings, "was a queen in comparison."[76] While the squalor of the living conditions or diets of California Indians were described by these commentators with disdain, when white men exhibited behaviour usually reserved for the "savage," as in Sutter's penchant for "young Indian girls" or the slaughter of Native Americans on trumped up charges, these occasions were often sanitised by white observers.[77]

In addition to self-conscious racial superiority, white men also legitimated their behaviour through their sense of social and personal sacrifice. In the early years of

[75] Herbert, *Gold Rush Manliness*.
[76] Charles F. Hotchkiss, *California in 1849* (New York: The Magazine of history, with notes and queries, 1933). https://www.loc.gov/item/34002732/.
[77] Heinrich Lienhard and Marguerite Eyer Wilbur, *A Pioneer at Sutter's Fort, -1850; The Adventures of Heinrich Lienhard* (Los Angeles: The Calafía Society, 1941). https://www.loc.gov/item/42011300/.

California's statehood, they surrendered the comforts of home, many leaving families behind for the promises offered by dramatic material gain. As Samuel Adams reflected in his diary on his way to the frontier,

> how important now I have cut loose from home and the many ties that bound me that I might accumulate a capital to settle down upon as a basis for future operation to procure a home and the means of providing for my dear family and as a foundation of future influence…that I persevere in the course I am in and turn not from the one great end in view either to the right hand or left. Sacrificing the comforts of home and social, civil, and religious privileges in order that I may have the means for enjoying them all to a greater degree than I have ever done.[78]

As Adams's descriptions demonstrate, he was acutely aware of his departure from the "social, civil, and religious" workings that had shaped his life until his venture into new geographic and social territories. This sense of departure was crucial to the ways that men expressed their manliness in California.

Wherever white colonists migrated, they imagined themselves as the bearers of civilised society, swiftly establishing a matrix of race and gender hierarchy. While, as Hotchkiss admitted in his remembrances, (white) "men were, in the absence of society, slovenly and undignified," they were redeemable. Further, he followed his gentle critique with a caveat that they were nevertheless "gentlemen of integrity, noted for neighbourly acts of kindness, and as prompt as the hand of time. There were no lazy ones in the settlement and while at Stockton I never saw a person worse off for liquor, except the 'Diggers.'"[79] In whatever self-conscious appraisals of the degradation

[78] Samuel Adams, "Samuel Adams Journal and Papers, 1849-1901," Item: MS 1, Volume 1. California Historical Society, San Francisco, California.
[79] Charles F. Hotchkiss, *California in 1849* (New York: The Magazine of history, with notes and queries, 1933). https://www.loc.gov/item/34002732/.

of civility that white frontiersmen exhibited during their time in California, they perceived themselves to be lowering, temporarily, into an uncivilised way of life. This fleeting acquaintance with barbarity was thus constructed as a transitory means to the ultimate permanent end of individual commercial success – the primary motivator for much of the immigration into California after 1848 – and the broader triumph of Anglo Americans on the frontier. In a broader sense, this narrative also fit into the greater narrative of America itself, as "civilised" and "enlightened" men paved the way for progress by conquering nature's "savages."

The Fears of White Men

Alongside a sense of righteous conquest amongst white frontiersmen, where violence and subjugation were rationalised as elemental to the conquest California, was the pervasive expression of fear. Initial colonial migrants arrived with the intention of extracting wealth from the land, many with the ultimate intention of returning east to the families they had left behind. Even as late as 1886, Evelyn M. Hertslet confessed that her family moved from England to California with the intention "to make something pay," so they could eventually return "home again some day [*sic*]" with greater financial freedom.[80] Hertslet's accounts of her life in California also reveal the sense of pressing danger and lawlessness that permeated their lives in the state.[81] Throughout the decades of migrant arrival, many came laden with a sense of the danger that California held – it was a wild frontier on the precipice of the American

[80] Evelyn M. Hertslet, *Ranch life in California. Extracted from the home correspondence of E.M.H* (London: W.H. Allen & Co, 1886). https://www.loc.gov/item/a15001630/.
[81] Ibid.

continent, defended only by "weak and naked savages."[82] As a result, the narrative of the California gold rush was one imbued with the dangers and obstacles that stood in the way of the higher aim of wealth extraction. Following those initial years, as settlers arrived with increasing permanence, the conquest also became more tangible and solid. As Benjamin Madley and Philip J. Deloria have explored, this conquest was consistently constructed as defensive. White violence towards California Indians was rationalised, explained, and legitimated by their own pressing fear of Native American "savages."[83]

Rhetoric of the savage Indian was well-established by the time gold-seekers were crossing continent and sea to reach California. In 1847, a publication in Washington D.C. reported that the entirety of the territory that would become California was entirely "occupied by a savage population through its whole extent."[84] Travel guides and journalists fuelled fears of Indian attacks, filled with images of gruesome violence like scalping, and led many to heavily arm themselves for the journey.[85] As Alonzo Delano described his party's preparations to go into the gold fields in 1849, "each man was well armed with a rifle, pistol, and knife, with an

[82]James J. Ayers, "Pioneer Times: The Argonauts of Two Remarkable Periods, Compared," (1878) Item: CO58748. Society of California Pioneers, San Francisco, California; Stillson, *Spreading the Word,* 2.
[83] Madley, *An American Genocide*, 96; Philip J. Deloria, *Indians in Unexpected Places* (Lawrence, University Press of Kansas, 2004).
[84] *The Daily Union*, 9 February 1847, 2. Chronicling America: Historic American Newspapers. Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn82003410/1847-02-09/ed-1/seq-2/
[85] *The New York Herald*, 23 February 1858, 1. Chronicling America: Historic American Newspapers. Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn83030313/1858-02-23/ed-1/seq-1/; Madley, *An American Genocide,* 78; Twain also recorded the arms that he travelled with: Mark Twain, *Roughing It* (Hartford: American Publishing Co, 1891). https://www.loc.gov/item/07023335/.

abundant supply of ammunition."[86] Thus, those that arrived in California came in fear of violence, with their "rifles in readiness," prepared to fight against the rumoured "lawless gangs of ruffians, who lie in wait for solitary travellers."[87] Such defensiveness fuelled the construction of California Indians as unknowable, savage, and liable to commit unpredictable violence.

Even those sympathetic to the challenges of Native Americans who faced the onslaught of Anglo-American conquest tended to construct California's Indigenous populations in ways that rendered them sub-human. The process of dehumanising California Indians coupled with a sense of fear and a desire for conquest effectively, as historian Benjamin Madley argues, reduced barriers to violence and outright massacres of Native American populations. Rather tellingly, Sim Moak noted in his remembrances of citizen "justice" against California Indians in 1863 that "it did not take more than suspicion to shoot an Indian in those days."[88] Or, as British naval officer and colonial administrator Dr. Henry Veel Huntly put a similar sentiment: "A little absence of proof is not an obstacle to the execution of an Indian; one fact, however, is

[86] Alonzo Delano, *Life on the plains and among the diggings; being scenes and adventures of an overland journey to California: with particular incidents of the route, mistakes and sufferings of the emigrants, the Indian tribes, the present and future of the great West* (New York: Miller, Orton & Co, 1857). https://www.loc.gov/item/13005717/.
[87] Henry Vizetelly and Edwin Bryant, *California. Four months among the gold-finders, being the diary of an expedition from San Francisco to the gold districts* (Paris: A. and W. Galignani and Co, 1849). https://www.loc.gov/item/rc01000765/; For another example, see: Bayard Taylor and T. Butler King, *Eldorado, or, Adventures in the path of empire: comprising a voyage to California, via Panama; life in San Francisco and Monterey; pictures of the gold region, and experiences of Mexican travel* (New York: G.P. Putnam; London, R. Bentley, 1850). https://www.loc.gov/item/rc01000822/.
[88] Sim Moak, *The last of the Mill Creeks, and early life in northern California*, (Chico, California, 1923). https://www.loc.gov/item/25010432/.

sure— namely, that the Indians cannot be at all trusted."[89] Likewise, in his recollection of early California, North Carolina Methodist minister Oscar Penn Fitzgerald noted the "sweeping destruction of Indians by the excited whites, who in those days made rather light of Indian shooting. The shooting of a 'buck' was about the same thing, whether it was a male Digger or a deer."[90]

Constructions of sub-human, animal-adjacent California Indians existed alongside a fear of their inhumane violence against whites. Moak often provided especially explicit details of purported Native American violence against white settler colonials, like a man who "was found scalped with his throat cut" and a family that was killed: "they cut Miss Smith's throat, scalped her and mutilated her body in such a shocking manner it is unprintable. They then cut the old man's throat and scalped him."[91] This kind of rhetoric often fashioned white violence against Native Americans as elemental to victory and territorial consolidation, even though offensive violence was often perpetrated by white colonials first.[92] Peter H. Burnett, a lawyer and political figure in the American West described the mood in Oregon following rumours of gold discovery as rife with self-congratulatory excitement. He remembered how they had "vanquished the Indians" in Oregon, and although they were not yet aware of the treaty between Mexico and the United Sates, understood that California would soon be in American possession. "We were aware of the fact that our Government had possession of California," he recalled, "and we knew, to a moral certainty, that it would

[89] Sir H.V. Huntley, *California: Its Gold and Its Inhabitants* (London, T. C. Newby, 1856). https://www.loc.gov/item/rc01000796/.
[90] O. P. Fitzgerald, *California Sketches. New series* (Nashville: Southern Methodist Publishing House, 1881). https://www.loc.gov/item/rc01000856/.
[91] Sim Moak, *The last of the Mill Creeks, and early life in northern California* (Chico, California, 1923). https://www.loc.gov/item/25010432/.
[92] Madley, *An American Genocide.*

never be given up."[93] Thus, possession of California and the dehumanisation and conquest of California Indians were related processes integral to the consolidation of American control of the western regions of the continent.

There were many on the California frontier that did recognise the humanity of California Indians despite heavy-handed rhetoric to the contrary. When a group of men assembled at Sutter's fort in the late 1840s with the intention of targeting a group of California Indians, Heinrich Lienhard could not make up his mind to follow suit. According to Lienhard's diary, determined to retaliate for a rumoured skirmish,

> a party of armed men assembled immediately, intending to leave for the mountains to punish the Indians. Every available man was called; many of us could not make up our minds to go, however, for the cruel action taken against innocent Indians on the American River was still a poignant memory, and the thought that natives who were not guilty might have to pay for the new crime, kept my friend Thomen and me from joining the pursuit party. The following day the men who had gone out came back, and told us they had burned several huts and taken one or two squaws prisoners.[94]

Yet, despite reservations about the vigilante-style justice of white frontiersmen, Lienhard seemed to make no objections to others carrying it out. The almost definite murder of significant numbers of California Indians was a matter of brief ethical pause for Lienhard. Although he surmised that "the Indians who had been punished were innocent; guilty natives would have anticipated this attack and escaped from the danger zone," he later overcame his reservations and "bought some of the loot" that

[93] Peter H. Burnett, *Recollections and Opinions of an Old Pioneer* (New York: D. Appleton & Company, 1880). https://www.loc.gov/item/01006673/.
[94] Heinrich Lienhard and Marguerite Eyer Wilbur, *A Pioneer at Sutter's Fort -1850; The Adventures of Heinrich Lienhard* (Los Angeles: The Calafía Society, 1941). https://www.loc.gov/item/42011300/.

the murderers returned with.[95] Others noted that the violence of Native Americans was precipitated by starvation, slave-raiding, offensive violence, and forced removal processes.[96] However, both killers and defenders of California Indians viewed their relations through the lens of their own moral and social eminence. Whether advocating for protection or extermination of "the Indian" – as many reports did throughout the 1850s and 1860s – most discourse amongst white colonial settlers was predicated on a presumption of white racial superiority.

White settler colonials also frequently noted instances where rumours spurred men on to massacre villages of California Indians, even while those rumours were often recognised as quite flimsy.[97] Amidst this violent milieu, some individuals protested the enactment of excessive violence. A citizen who wrote into the *Daily Alta California* in 1850 mourned the "most outrageous acts of lawlessness and cruelty" perpetrated by whites against "innocent and labouring" California Indians in Napa. According to his report, they murdered large numbers and burned homes and provisions with the "avowed purpose of exterminating the Indians in this valley."[98]

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[95] Ibid.

[96] For an example, see: Samuel C. Upham, *Notes of a voyage to California via Cape Horn, together with scenes in El Dorado, in the years of -'50. With an appendix containing reminiscences ... together with the articles of association and roll of members of "The associated pioneers of the territorial days of California"* (Philadelphia: The Author, 1878). https://www.loc.gov/item/rc01000827/; A broader exploration of this occurs in: Madley, *An American Genocide*.

[97] Heinrich Lienhard and Marguerite Eyer Wilbur, *A Pioneer at Sutter's Fort -1850; The Adventures of Heinrich Lienhard* (Los Angeles: The Calafía Society, 1941). https://www.loc.gov/item/42011300/; See also: Samuel C. Upham, *Notes of a voyage to California via Cape Horn, together with scenes in El Dorado, in the years of -'50. With an appendix containing reminiscences ... together with the articles of association and roll of members of "The associated pioneers of the territorial days of California"* (Philadelphia: The Author, 1878). https://www.loc.gov/item/rc01000827/.

[98] *Daily Alta California*, 16 March 1850, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

However, even those with reservations about genocidal violence in California often reflected essentialist notions of "the native." In early 1848 a writer, who signed his letter to the editor "Humanitas" condemned the idea of enslaving California Indians, but suggested they should be taught "principles of morality... or, in a word, -- cultivate them."[99] In many respects, his argument for treating California's native population humanely resided on a rational argument built on the notion of racial 'types': "render one of them a service," he reasoned, "and it is never to be obliterated from his memory; on the contrary, treat him roughly, and his thirst after revenge is almost infinite, terminating only with his existence."[100] Thus, even those who sought to minimise violent conquest of California Indians, were imbued with the language of racial and cultural superiority.

In the spectrum of racial discourse, others in mid nineteenth-century California expressed few qualms with calling for complete extermination of California Indians, and justified such violence by constructing it as evidence of their inevitable population decline. A writer calling himself "Pacific" responded to the writer Humanitas, quoted above, and encouraged him to "let the destined doom (an early extinction) of the red man hasten towards its close, without enlisting his fruitless sympathies and efforts to avert his fate."[101] Such ideals were so widely pervasive, that California's first Governor, Peter Burnett, constructed the outcome as already ordained in 1851. "That a war of extermination will continue to be waged between the races until the Indian race

[99] *California Star,* 29 January 1848, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[100] Ibid.
[101] *California Star,* 26 February 1848, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

becomes extinct must be expected" he explained, "while we cannot anticipate this result but with painful regret, the inevitable destiny of the race is beyond the power or wisdom of man to avert."[102]

Debates around best practices for "subduing the Indians" persisted throughout the 1850s.[103] By 1860, a report in a Chicago newspaper commented that "Indian killing, Indian scalping, Indian massacring" was the most "profitable business" in California.[104] It further described that the

> sweet gratification of knowing how much one may do for one's country in this manner is considerably heightened by the reflection, that *the very best policy to prevent a recurrence of 'Indian ravages,' has been adopted, viz: that of destroying the women and children as well as the 'bucks'*…. A greater refinement in civilization is apt to be accompanied by a greater refinement in cruelty and infamy.[105]

With this, the commentator argued that the most effective strategy of ending Anglo-American conflict with Native Americans was systematised, strategic extermination. Moreover, he directly argued that the paradox of "civilisation" was that it must be won through the "refinement" of unmitigated violence. While not all whites on the California frontier agreed with such extreme views, Anglo American rhetoric consistently presumed the supremacy and triumph of white American republicanism.

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[102] Peter Burnett, "The State of the State Address," 6 January 1851. The Governors Library, California State Library. https://governors.library.ca.gov/addresses/s_01-Burnett2.html

[103] *Sacramento Transcript,* 6 June 1850, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[104] *The Press and Tribune,* 29 March 1860, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn82014511/1860-03-29/ed-1/seq-2/.

[105] Ibid.

For some, there was a conceivable place in the new order for Native Americans; for others there simply was not.

The self-conscious production of white manliness on the California frontier was thus intensely focused on a sense of racial superiority, grounded in a presumption of the underlying civility of white men. While white men recognised that they could act with barbarity, they constructed their barbarity as behaviour rather than innate savagery – by this logic, they were simply responding to the demands of a savage frontier in their dedicated service to Manifest Destiny. To this end, some men of colour could occasionally be looked upon with admiration, for effectively fitting into notions of the harsh edges of frontier manliness, if they conformed to some of the ideals of the white frontiersman. For example, Alonzo Delano's correspondence detailing his journey to California demonstrated his admiration for "Jim Beckwith" (James Beckwourth), a "mulatto" man who lived among the "Crow Nation," namely the Apsáalooke in the Black Hills of present-day South Dakota. Beckwourth epitomised for Delano the "bold, determined and fearless class" of people, tinctured "with a hint of savagery," that thrived in frontier spaces.[106] He believed that the capacities of some for "savagery" made them particularly well-suited for this social landscape. However, for him, the difference between non-white and white men fundamentally lay in the ability of whites to eventually escape from savagery and return – unscathed – to civilised life.[107]

[106] Alonzo Delano and Irving McKee, *Alonzo Delano's California correspondence: being letters hitherto uncollected from the Ottawa Illinois Free trader and the New Orleans True delta -1952* (Sacramento: Sacramento Book Collectors Club, 1952). https://www.loc.gov/item/53001743/.
[107] Herbert, *Gold Rush Manliness*, 124.

Ultimately, the fears of white men were a central component of the masculinity that developed in this context, and they were built upon contradictory understandings of "civilisation" and "savagery." White male superiority was undoubtedly tested in the contexts of martial violence, but only served to rationalise their claims of defence against Native Americans. Massacres of California Indians, and violence against other non-combatant groups became wrapped up in a sense of necessary, legitimate violence in service to the goal of white male conquest. The inherent ironies of this conquest-driven, martial manliness were not necessarily unique to California; however, they were particularly vital to the evolving social fabric of the State. As white, Victorian masculinity shifted to accommodate notions of justifiable, rationalised mass violence, the State enacted laws that supported these ends.

Legislating White Male Power

The martial masculinity that developed on the dual elements of conquest and racialised fear of Native Americans in the early years of California's statehood did not exist solely at the level of individuals who occupied the frontier space. Rather, from September 1849, when forty-eight delegates gathered to develop California's constitution in Monterey, their sense of racial manliness was legislated into California's founding state documents. The very existence of California Indians posed a threat to white American claims to sovereignty of California. Additionally, other racial minorities were also viewed as threatening white Americans' frontier supremacy. As a result, the documents that consolidated California as a state, and several laws enacted in the years following, continuously legislated white male power. Despite the connection many delegates had to Indigenous populations, through ties of marriage, employment,

and ancestry, the Constitutional delegates granted suffrage to all adult men, save Native and African Americans.[108]

This legislated exclusion, which allowed a system of white male power to develop in nineteenth-century California, was not necessarily a foregone conclusion in 1849.[109] Rather, the representatives that met to write the Constitution as well as the elected officials that populated California's law-making houses after 1850 were often heterogeneous. Furthermore, many of the wealthiest men in early California were Californios, or of varied Spanish, Native American, and sometimes African ancestry. Thus, the development of a power hierarchy in California grew out of a struggle, where a different kind of social order could have prevailed. In fact, it was precisely out of this struggle that a particularly exclusionary, racially hierarchical, martial manliness took shape in California.

The prevailing order that emerged from the constitutional convention gave rise to the legal dominance of white males, excluding Native American and African American men and all women from positions of legal and legislative authority. Enfranchisement, by a small voter margin, was limited to white men until after the Civil War and the ratification of the Fifteenth Amendment in March 1870.[110] This limited the recourse for men and women of colour to vote for representatives that would protect their interests, wellbeing, and safety. In the "Act for the Government and

[108] California, "Article 2: Right of Suffrage," *The Statutes of California, passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 26; See also: Madley, *An American Genocide*, 153.
[109] See the debates at the California Constitutional Convention: California, Constitutional Convention, and J. Ross Browne, *Report of the debates in the Convention of California, on the formation of the state constitution, in September and October* (Washington: J. T. Towers, 1850). https://www.loc.gov/item/10013983/.
[110] Madley, *An American Genocide*.

Protection of Indians," passed on 2 April 1850, legislators further perpetuated a social system that controlled the lives and livelihoods of Native Americans. As noted earlier, in a series of stipulations, the government effectively criminalised all California Indians by allowing white complainants to bring them before a judge without due process. The law allowed that "if any Indian shall commit an unlawful offense against a white person, such person…may, without process, take the Indian before a Justice of the Peace."[111]

In addition to criminalisation without due process, Native American's rights to testify in courtrooms were limited by the Act for the Government and Protection of Indians. Through it, the State ruled that "in no case shall a white man be convicted of any offence upon the testimony of an Indian, or Indians."[112] By 1851, the second Legislature affirmed this exclusion and expanded it, stipulating that:

> The following persons shall not be witnesses:
> 1st. Those who are of unsound mind at the time of their production for examination:
> 2d. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly: and,
> 3d. Indians, or persons having one fourth or more of Indian blood, in an action or proceeding to which a white person is a party:

[111] California, "Chapter 133: Act for the Government and Protection of Indians," in *The Statutes of California passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 408. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf

[112] California, *The Statutes of California, passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 408. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

> 4th. Negroes, or persons having one half or more Negro blood, in an action or proceeding to which a white person is a party.[113]

Such provisions confining those who could be called as witnesses in court demonstrated the nebulousness of racial categorisation, breaking access and exclusion down by an individual's imagined proportion of "racial blood." How this should be measured was not defined by the Legislature.[114] Perhaps because of the imprecision of this exclusion, these kinds of legal obstacles worked in the service of a state legal system that organised social and political responsibility as the sole purview of white men.

Moreover, the Act for the Government and Protection of Indians (1850) further legalised and encouraged raiding of California Indian communities for abduction and forced servitude. This system was especially destructive to Indigenous communities during the years of the Civil War, as labour was especially coveted.[115] Since California Indians could be brought before Justices of the Peace without due process, they had almost no capacity for self-defence. Alcohol consumption and "vagrancy" could also be complained of by "any resident citizen of the county." The language of the Act was ambiguous enough to require little excuse for the apprehension of California Indians,

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[113] California, *The Statues of California, passed at the Second Session of the Legislature* (San Jose: Eugene Casserly, State-Printer, 1851), 114. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1851/1851.pdf; Affirmed in 1863, and expanded, see: California, *The Statutes of California, passed at the Fourteenth Session of the Legislature, 1863* (Sacramento: Ben J. Avery, State Printer, 1863), 60. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1863/1863.PDF

[114] As early as 1851 this became an issue, when the question as to if Anna Fuller, "an Indian girl," would be allowed to testify. See: *Daily Alta California,* 11 October 1851, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[115] Madley, *An American Genocide*.

stating that "any Indian…who shall be found loitering and strolling about, or frequenting public places where liquors are sold, begging, or leading an immoral or profligate course of life, shall be liable to be arrested on the complaint of any resident citizen of the county." Once apprehended, charged, and deemed a vagrant, they could be hired out to the "best bidder" for four months, less any expenses they imposed upon the buyer.[116] The Act also legalised their corporal punishment.[117] While the details of white male power were worked out over the early 1850s, with adjustments and changes made to the first constitutional document that led to California's entrance into the Union, white male legislators continued to stretch their control over the lives and livelihoods of Native Americans. In 1854, the state passed the "Act to Prevent the Sale of Fire-Arms and Ammunition," making it even more difficult for persecuted, criminalised, and imperilled California Indians to protect themselves from white violence. Just as the federal government subsidised the arming of California-bound settler colonials, California legalised Native American vulnerability.[118]

The laws enacted in the first few sittings of the State Legislature offer potent examples of the paternalist, self-interested control white representatives sought to exert over the lives of California Indians. By excluding them from authority over themselves and exposing them to the threat and enactment of corporal punishment or sale to the highest bidder, state lawmakers sought to infantilise and draw them under paternalist state control. While California lawmakers implemented legal restrictions

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[116] California, *The Statutes of California passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850). https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.
[117] Ibid.
[118] Madley, *An American Genocide*.

that were heavily focused on disenfranchising California Indians from their land and access to legal recourse, they were also erecting systems of racial hierarchy that limited the freedoms of other racialised minorities. Chinese and African American witnesses were also barred from testifying against white people in court during the 1850s, demonstrating the way white legislators sought to protect and police the boundaries of their authority in the state. These legislative barriers inaugurated and then perpetuated white male power and structured a system where white men were in positions to develop and concretise their own social and moral authority.

The fact that California lawmakers also specifically worked to limit the rights of African Americans in the State in the late 1840s and early 1850s is illustrative of the State's relationship with enslaved and non-enslaved labour. While Alta California was almost certainly home to individuals of African descent, their longstanding existence in American California received limited public acknowledgement after American consolidation in 1850. It is likely that the populations in the varied Missions and Pueblos across Alta California were composed of individuals of mixed descent, which included African ancestry.[119] After 1850, the very existence of African Americans in the region raised concerns about slave and wage labour. Some slaveholders brought slaves into California to work in the mines, but many white miners in California strongly resisted the advantages this offered for higher yields. Thus, that California joined the Union as a "free" state was not an indication of its progressive values, but rather an indicator of the broad desire to protect the viability of the State's system of wage

[119] Chan, "People of Exceptional Character"; Lawrence B de Graaf, Kevin Mulroy, and Quintard Taylor, eds., *Seeing El Dorado: African Americans in California* (Seattle: University of Washington Press, 2001).

labour.[120] Nevertheless, both free and enslaved blacks from across the United States, South America, and the Caribbean travelled into California. Some used wealth gained in the mines to buy their own freedom and the freedom of members of their family. Even as a small proportion of the population, their presence marks the California landscape, expressing both their participation in local economies and the discriminatory realities they faced. For example, in a report on newly established mining camps published in the *Placer Times* in 1850, a reporter referred to a new encampment that had been dubbed the "Nigger Diggins," because "some coloured gentlemen first discovered them."[121] Similar to other racialised communities, the economic opportunity of the California frontier could offer positive outcomes for some African Americans, enslaved and free, but only under legal and social conditions of racial disenfranchisement.

Anti-Chinese sentiment was also a pervasive feature of white male dominance in California in the nineteenth century. It was following a pivotal legal case, *People v. Hall* (1854), that Chinese courtroom testimony against white defendants was also outlawed. George Hall, "a free white citizen of the State," was convicted of murder on the testimony of a Chinese witness, which raised protests amongst white Californians and let to a Supreme Court appeal that overturned the verdict.[122] By 1864, the "California Practice Act" stipulated that along with children under ten and those with

[120] After the first years of the rush, mining moved from individual placer mining to a "hierarchical industrial model." See: Mark Kanazawa, "Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California," *The Journal of Economic History* 65, no. 3 (2005): 782.
[121] *Placer Times,* 9 February 1850, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[122] *People v. Hall*, 4 Cal. 399, 1854, California Supreme Court. LexisNexis California Official Reports.

felony convictions, “Mongolians, Chinese, or Indians, or persons having one-half or more of Indian blood, in an action or proceeding wherein a white person is a party” would not be considered competent witnesses. The agitations of the Civil War had led to the removal of African Americans from this list, but racial proscriptions against other minorities continued.

By 1872, when the California Penal Code passed into law, these racial restrictions on testimony were lifted from legal language, but white concern over East Asian migration only grew more acute in California throughout the nineteenth century. Fears of Chinese communities as focal points of disease and immorality – through prostitution, opium use, and gambling – increased throughout the late nineteenth century and led to discriminatory state and federal restrictions on Asian migration. Large communities of Chinese migrants had fuelled the State’s economy through taxation schemes and made up a large proportion of low-paid wage labourers, which likely staved off the calls for exclusion that emerged as early as the 1850s.[123] The 1875 Page Law prohibited Chinese, Japanese and other Asian migrant entry into the United States if they were brought involuntarily, and women brought for the purpose of prostitution. In 1882, Congress enacted the “Chinese Exclusion Act,” which was renewed in 1892 and again in 1902, limiting the numbers of Chinese migrants allowed to enter the United States.[124]

The system set up in the 1850s and perpetuated through the Civil War established a self-conscious racial and gendered hierarchy whereby white men made

[123] Kanazawa, "Immigration, Exclusion, and Taxation” 782.
[124] Erika Lee and Judy Yung, *Angel Island: Immigrant Gateway to America* (Oxford: Oxford University Press, 2010), 6.

rules that worked in their own interests and held the power to enforce them. The delegates that came together in 1849 to establish California's constitution wrestled with the challenging question of what, precisely, constituted "whiteness" in this frontier space. While the boundaries shifted and seemed to offer momentary opportunities for a wider definition of whiteness that included Californios of mixed ancestry, racial boundaries eventually hardened along strict lines in the name of protecting native-born, white Anglo-American access to the promised riches of the goldfields.[125] Following the deep political and social debates regarding race and labour that were unleashed by the Civil War, post-war institutional changes granted enfranchisement and legal recourse to some men of colour throughout the state. By the early 1870s, sustained social, institutional, and interpersonal violence against California Indians had led to a near eighty per cent decline in their total population estimates from pre-1850.

During the 1870s, lawmakers and social campaigners increasingly agitated about and debated causes and best responses to the State's perceived immorality problem. The continued growth of Chinese migration, and especially rising numbers of Chinese women migrating into the State, shifted the social focus from racialised male labour to the racialised world of sexual commerce from 1870s onwards.[126] Thus, by the 1880s, particularly due to the expanding organisational efforts by women's groups like the Women's Christian Temperance Union, the State experienced growing public

[125] Madley, *An American Genocide;* Wilson Moore, "'We Feel the Want of Protection.'"
[126] For some discussion on this, see: Ivy Anderson and Devon Angus, eds, *Alice: Memoirs of a Barbary Coast Prostitute* (Berkley: Heyday and California Historical Society, 2016).

pressures against "vices," including drinking, gambling, and prostitution.[127] These social purity campaigns extended far beyond the boundaries of California, driving new legislation and social outcry against many issues campaigners viewed as contributing to the debasement of moral, heterosexual, white middle-class family life. In turn, this led to the rise in the legal age of consent across the United States and Europe, and created greater focus on other elements of sexual and domestic life, including rape, abortion, venereal disease, alcohol abuse, and the seduction of adolescent girls.[128] Adolescent girls increasingly represented the future of durable, stable white middle-class values, and protecting them from the pull of immoral lifestyles became all the more paramount to social purity campaigners.[129] Newspaper records reveal a general rise in reports that mention sexual crimes, including rape and "crimes against nature" (sodomy and bestiality); although crime reporting was generally on the rise during this period.[130] Ultimately, these concerns for the protection of white women and girls, and proliferating discourse on the importance of promoting their social and sexual purity, excluded similar concerns for women of colour.

The racialised social, economic, and political order promulgated throughout California – developed through frontier mythologies and legal codification of white

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[127] Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920* (Chapel Hill: University of North Carolina Press, 1995).
[128] Odem, *Delinquent Daughters*; Levy, *They Saw the Elephant*.
[129] I elaborate on this at length in Chapter Five.
[130] Estelle B. Freedman, "'Crimes Which Startle and Horrify': Gender, Age, and the Racialization of Sexual Violence in White American Newspapers, 1870–1900," *Journal of the History of Sexuality* 20, no. 3 (2011): 465-97; for a British example, see: Judith Rowbotham, Kim Stevenson, and Samantha Pegg, *Crime News in Modern Britain: Press Reporting and Responsibility, 1820-2010* (Basingstoke: Palgrave MacMillan, 2013); for more commentary on the U.S. see: Joy Wiltenburg, "True Crime: The Origins of Modern Sensationalism," *The American Historical Review* 109, no. 5 (2004): 1377-1404. doi:10.1086/530930.

dominance – was also a gendered order. Ideals of frontier white manliness, which led to institutionalised white supremacy, limited social and legal acknowledgement of the experiences of violence by women of colour. Early lawmakers established a system of white male dominance that shaped the legal context California life. At the same time, the white population of California expanded dramatically. The authority of white masculinity was predicated on a collective self-conscious idealisation of white men, by white men, as the preeminent rational and civilized authorities. Various iterations of institutional and interpersonal violence were often justified as means to an inevitable end – Manifest Destiny – and the triumph of white "civility." In this context, social acknowledgement of the sexual violence experienced by women of colour was rendered all but impossible.

White Violence and Racialised Women

Throughout the late nineteenth century, lawmakers and social campaigners in California primarily expressed concerns over the sexual safety of white women and girls, often excluding or ignoring the experiences of women of colour. Newspapers reported on occasional cases involving complainants that were expressly racialised, although these cases predominantly involved perpetrators who were also of colour. As explored earlier in this chapter, in many respects California's racially exclusionary laws rendered experiences of sexual violence experienced by racialised peoples nearly illegible, obscuring their pathways to both acknowledgement and legal justice. Reconstructing a sense of the violence that they faced in California thus requires a creative reading of archival materials. First, commentators in the 1850s, in narrating their observations of frontier life, often revealed systemic violence perpetrated against

Native American communities, which almost certainly involved sexual violence. In some narratives, sexual harms were directly acknowledged, although rarely in such terms.[131] Second, sexual violence perpetrated against racialised women can be understood by attending to the broader language and discourse that white Anglo Americans deployed against them, revealing the intricacies of a social system that worked to deny their categorisation as victims or as in need of protection. Finally, by introducing a case-study involving a white complainant who made a charge of rape, I will explore some of the key scripts of sexual purity and social expectations of gender expression that limited the social legibility of sexual violence experienced by women and girls of colour, with a particular focus on Indigenous women.

In early California, the discourses of white immigrants who arrived on the western frontier often revealed racial attitudes, which contributed to a social system that rationalised some forms of sexual violence. Men who wrote of their experiences in 1850s California occasionally indirectly referenced behaviours of white men towards women of colour that indicate the realities of unacknowledged racialised sexual violence. These references allude to the kinds of power differentials that could lead to systemic sexual violence against, for example, Native American women and that went largely unheeded in social, political, and legal spheres.[132] General commentaries on the frontier suggested that sexual interaction between California Indian women and white men were frequent. Many of these sexual relations were forged through intimate and

[131] Although I focus on the violence perpetrated against California Indian women in this section, other racialised women were also vulnerable to sexual violence. See for example: Maythee Rojas, "Re-Membering Josefa: Reading the Mexican Female Body in California Gold Rush Chronicles," *Women's Studies Quarterly* 35, no. 1/ 2 (2007): 126-148.
[132] Smith, *Conquest.*

consensual ties.[133] However, broad language that degraded the humanity of Native American women, like the ubiquitous use of the term "squaw," and the ways in which they were described as "spoils" following raids on Indigenous villages and encampments, demonstrates the pervasive sexual coercion that shaped the lives of many Indigenous women and girls.[134]

The diary of Swiss farmer, Heinrich Lienhard offers a unique insight into the insidious violence white men could perpetrate against Indigenous women and girls in California. In his diary, he records his experiences living at Johann (John) Sutter's settlement of New Helvetica over the course of the late 1840s. Without expressly acknowledging it as such, his entries reveal systemic sexual violence perpetrated against California Indian women and girls, largely through the traffic and trade of their sexual services, and the social milieu that enabled and accepted their habitual sexual violation. Indeed, his descriptions of Sutter elucidate a broader context where "respectable" men could also be persistent perpetrators of open violence. Although Lienhard's admiration for Sutter decreased the longer they were acquainted, his enumeration of his poor qualities did not lead to vocal condemnation or intervention. "His dignified and fatherly manner of speaking inspired a definite trust," Lienhard

[133] Ashley Riley Sousa "'An Influential Squaw': Intermarriage and Community in Central California, 1839–1851" *Ethnohistory* 62, no. 4 (October 2015): 707-727. doi: 10.1215/00141801-3135306; Susan Lee Johnson, *Roaring Camp: The Social World of the California Gold Rush*.

[134] Franklin Agustus Buck and Katherine A. White, *A Yankee trader in the gold rush; the letters of Franklin A. Buck* (Boston: Houghton Mifflin Company, 1930). https://www.loc.gov/item/30029653/; Heinrich Lienhard and Marguerite Eyer Wilbur, *A Pioneer at Sutter's Fort, -1850; The Adventures of Heinrich Lienhard* (Los Angeles: The Calafía Society, 1941). https://www.loc.gov/item/42011300/.

rationalised of his host.[135] Yet in his descriptions of life at Sutter's fort, Lienhard – perhaps unwittingly – revealed prevalent, community-accepted sexual violence perpetrated against California Indian women and children.

Lienhard's descriptions act as a powerful indictment of Sutter's character. "As he grew older," Lienhard observed of him, he "seemed to prefer young Indian girls."[136] Later in his descriptions, Lienhard described the network of women and girls around Sutter as a "harem," and spoke of the man's "preference" in a manner that made it more evident that his behaviour was both regularised and violent. "In the anteroom adjoining his office," Lienhard noted, "a group of Indian women were invariably waiting." Continuing on to explain that

> according to rumor they belonged to Sutter's harem. One of them was his favorite; I was told she was kept there all of the time. At first it seemed odd to meet young Indian girls of ten or twelve who had once belonged to this harem outside the fort, and then to learn later that they were ill, or had died.[137]

Only making indirect inferences, Lienhard later described one of these girls who had taken ill under mysterious circumstances and died. Rumours upheld that "the child had been criminally attacked, and the person who could give the most information about the identity of the culprit was Sutter himself."[138] This oblique reference was the closest that Lienhard came to indicting Sutter directly for violence and murder. Rather, he

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[135] Heinrich Lienhard and Marguerite Eyer Wilbur. *A pioneer at Sutter's fort, -1850; the adventures of Heinrich Lienhard*. (Los Angeles: The Calafía Society, 1941). https://www.loc.gov/item/42011300/.
[136] Ibid.
[137] Ibid., 75.
[138] Heinrich Lienhard and Marguerite Eyer Wilbur, *A pioneer at Sutter's fort, -1850; the adventures of Heinrich Lienhard* (Los Angeles: The Calafía Society, 1941), 76. https://www.loc.gov/item/42011300/.

generally alluded to the day-to-day enactment of socially upheld rape against Native American women and children, including the deaths of those killed by venereal disease or rape-related injuries, in only uncertain terms. Although he did not approve, his descriptions nevertheless sanitised rape, murder, and the circumstances of the violence, thereby participating in the cultural acceptance of such violence against Native American women and girls.

In another of Lienhard's anecdotes sexual access to a Native American woman, referred to as Mary, was a prop in the negotiation of power between Sutter and another white man. By Lienhard's account, Mary fled Sutter's sexual advances and sought protection from a former male partner, Perry McCoon. In response, "McCoon went to the captain, and told him he could have Mary if he wanted her, because he had a white wife now and would be obliged to give up his Indian squaw."[139] So pacified, Sutter and McCoon's disagreement was resolved, and the fate of Mary left to the reader's conjecture. Consideration of Mary's sexual autonomy was never a factor in this equation, even for the disproving Lienhard, and both McCoon and Sutter also apparently failed to acknowledge the possibility of her agency. Such stories, encased in general narratives of the great intrigue of life in California, reveal how instances of sexual violence against Native American women – even when perpetrated openly – were minimised by commentators and rendered nearly invisible in the records.

The power of these normalising narratives in California during this period had important, wider ramifications. Sutter's sexually violent behaviours towards women and girls of colour were not solely enacted in private. Observers almost undoubtedly

[139] Ibid.

noted and thus colluded in his violence in numerous everyday ways. Yet, despite these transgressions, he was lauded as a vital and important figure to the Anglo-American consolidation of the Western frontier. Approved on 24 January 1850, in a Senate and Assembly Joint Resolution, Sutter was honoured by the new-state's lawmakers, with the declaration that "the People of the State of California, though their Representatives in Senate and Assembly, do hereby tender their most cordial thanks to Captain John A. Sutter, for his benevolence and humanity in rendering assistance to the immigrants to this country."[140] Others admired Sutter and his wisdom in setting up New Helvetica, and his instrumentality to American frontier conquest. While commentators decried rape generally and in broad ways to condemn the chaos of frontier life, observations of sexual violence like these reveal how perpetrators could be normalised, accepted, and even celebrated.

Occasionally, the realities of the ubiquitous sexual violence sustained by California Indian women and children were expressly acknowledged. In her memoir of California, Helen Hunt Jackson, the nineteenth-century white Native American rights activist introduced earlier, noted that "horrible outrages were committed on Indian women and children. In some instances the Indians armed to avenge these, and were themselves killed."[141] A report in the *Weekly Trinity Journal* in 1858 also described the following about areas in northern California:

[140] California, "Joint Resolution of Thanks to Captain John A. Sutter," in *The Statutes of California passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 461. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

[141] Helen Hunt Jackson, *Glimpses of California and the Missions* (Boston: Little, Brown, & Company, 1902). https://www.loc.gov/item/02012719/.

> there has been no hostile disposition manifested by the Indians towards the whites in general, and that the only depredations that have been committed have been provoked by a parcel of abandoned characters who live in the vicinity of the villages, and who are in the constant habit of committing the grossest outrages upon the squaws. In a few instances these outrages have been avenged by the Indians, by shooting the aggressors or killing their stock. These acts of retribution are called Indian outbreaks, and are made the pretext for fresh outrages upon the poor red skins.[142]

While even sympathetic audiences often expressed their compassion through the lens of racial superiority, their remembrances, observations, and reports indicate the culture of broad-based, normalised genocidal violence that was often carried out through sexual violence against Native American women and children.

Until the 1880s, the degradation and depreciation of Native American women especially, but women of colour generally, stood in sharp relief against a comparative reverence for white women. Initially, prior to the demographic expansion of white women and children on the frontier, "Spanish" women were often also admired.[143] Generally, the veneration of white women was described in relation to their attire as well as racial features. While descriptions of Native American women as "having only a small tuft of grass before them" or "no idea of chastity," commentators also condemned them as "so abominably filthy that their appearance excites disgust rather than passion. Still some of the old settlers use the women as wives and become attached to them."[144] Another commentator asserted "that modesty is hardly to be

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[142] *Weekly Trinity Journal,* 9 October 1858, 1. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn85025202/1858-10-09/ed-1/seq-1/

[143] This is not to argue that Mexican women were not subjected to violence and racialisation in this space. For more on this, see: Rojas, "Re-Membering Josefa," 127.

[144] Alonzo Delano and Irving McKee, *Alonzo Delano's California correspondence: being letters hitherto uncollected from the Ottawa Illinois Free trader and the New Orleans*

looked for in the amusements of savage life."[145] When Samuel Upham wrote of a group of prisoners, "mostly females and young children," in Sonoma, he noted that they

> huddled together like beasts, nearly naked, and seemed to create no sympathy. Some were good-looking. They maintained a sullen expression, and bore up under their misfortunes with a stoicism peculiar to the aboriginal inhabitants of this continent.[146]

Habitual degradation of California Indian women and children, especially those addressed by the racial slur "digger," or other racialised terms like "squaws" or "papooses" constructed them as simultaneously unchaste and unattractive.

In comparison, white women were generally looked upon with a sense of admiration. A Maryland physician described a woman he observed at a ball in San Francisco in 1849 as "singularly graceful" with "hands and feet especially delicate."[147] In the first years of California's consolidation as a U.S. state, women who sold sex or worked in forms of evening entertainment, including Hurdy Gurdy girls and other dancers, were often looked upon with amused admiration. Charles Hotchkiss's

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True delta, -1952 (Sacramento: Sacramento Book Collectors Club, 1952). https://www.loc.gov/item/53001743/.

[145] Henry Vzetelly and Edwin Bryant, *California. Four months among the gold-finders, being the diary of an expedition from San Francisco to the gold districts* (Paris: A. and W. Galignani and Co, 1849). *Library of Congress: California As I Saw It.* https://www.loc.gov/item/rc01000765/.

[146] Samuel C. Upham, *Notes of a voyage to California via Cape Horn, together with scenes in El Dorado, in the years of -'50. With an appendix containing reminiscences ... together with the articles of association and roll of members of "The associated pioneers of the territorial days of California,"* (Philadelphia, The author, 1878). https://www.loc.gov/item/rc01000 827/.

[147] John Williamson Palmer, *The new and the old; or, California and India in romantic aspects* (New York, Rudd & Carleton, 1859). Pdf. https://www.loc.gov/item/03028206/.

memory of a scene in 1849 particularly demonstrates this, as he described that women were "a curiosity." This was especially evidenced for him when

> one day about 8 o'clock… a great uproar was made, commencing at the landing, and gaining strength as the sound reached us; every occupant was in the street, the cheer was long, loud, and strong—and behold, it was a woman, backed on a beautiful horse, richly dressed in a long riding habit, a neat jockey cap, white feather, face highly painted, and she escorted by a man well dressed, also on a beautiful bay charger. The men swung their hats, and it was a universal cheer on cheer.

The celebration of the town to receive a woman in their midst was only interrupted ten days following her arrival. After "her majesty and her pimp went through this great and wonderful ovation," a local "Vigilant Committee,"

> served a notice on them both to leave by the Sutter next day, without fail. The mandate was obeyed, and they took ten thousand dollars with them. I make no comment—the reader has the floor.[148]

In this case, the woman's engagement in sex work was a matter of humour and was tacitly accepted. With a sense of irony, the narrator referenced the woman as "her majesty," but also took the time to describe her pristine attire, granting her a degree of attractiveness and allure in his descriptions. Likewise, by describing "woman" as a curiosity, he implicitly excluded the populations of California Indian women from his equation, erasing them from inclusion in the category of their gender.

At times, the admiration of white women was constructed in direct juxtaposition with California Indian women. They were described as white "feminine angels," a trope of Christian respectability, that sharply contrasted against a backdrop

[148] Charles F. Hotchkiss, *California in 1849* (New York: The Magazine of history, with notes and queries, 1933). https://www.loc.gov/item/34002732/.

of "miscellaneous... squaws."[149] In one of Bancroft's volumes, he described that white women of "immoral" character were the still the "centres of chivalric adorers" in 1850, while mentioning in a footnote that "Indian women were freely offered at the camps."[150] Such contrasts reveal a social culture where white men normalised and accepted sexual commerce amongst white women, and simultaneously subjugated Indigenous women's humanity, sexual autonomy, and agency to their own needs and desires.[151] In this context, abuse of Indigenous women and girls was sanitised and ignored, and their experiences made nearly imperceptible in the broader landscape that dictated the terms of social and institutional recognition of sexual violence.

In a rape trial in the 1880s, some of the key social and sexual scripts of these prosecutions were especially evident. As I will explore in more detail in the next chapter, the law understood and responded to sexual violence in the narrowest of terms. Rape and assault with intent to commit rape in legal contexts connoted heterosexual sexual conflict where a man made a deliberate and intentional effort to vaginally penetrate a woman or girl against her will, amidst her persistent physical resistance. This case study, which involved the rape of a white, adolescent girl by her brother-in-law, helps to explicate the ways that expectations of gendered behaviour were also heavily racialised. Reading outwards from this case, my intention is to consider the myriad ways in which racialised women – whose experiences of sexual

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[149] Horace Bell, *Reminiscences of a Ranger; or, Early times in Southern California* (Los Angeles, Yarnell, Caystile & Mathes, Printers, 1881). https://www.loc.gov/item/rc01000760/; For another example see: Chauncey L. Canfield, *The Diary of a Forty-Niner* (Boston: Houghton Mifflin Company, 1920). https://www.loc.gov/item/21004325/.

[150] Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft. Volume XXIII*, 233.

[151] See: Johnson, *Roaring Camp*; Albert L. Hurtado, *Intimate Frontiers: Sex, Gender, and Culture in Old California* (Albuquerque: University of New Mexico Press, 1999); Madley, *An American Genocide*, 88.

violence rarely led to trials let alone resulted in the creation and preservation of legal records – were exempted from institutional recognition in complex, dynamic ways.

In the case that I will shortly turn to, the sexual purity of a white, teenaged girl who remained appropriately under the supervision of her male family members was the subject of intense legal and social scrutiny. Exploring the details of this case reveals the ways in which legal and social interpretations of rape trials could be intricately embedded in social demands on women and girls that were inherently predicated on racialised scripts of appropriate behaviour and rooted in white middle-class expectations of social conduct. The sustained focus of the legal system and the press on the conflict provides a window into a system of logic by which instances of sexually violent behaviour were considered socially and legally worthy of attention. It demonstrates the conditions that were important for broad social and institutional legibility following a charge of rape, in a context where white male violence was rationalised as a mechanism of establishing and maintaining a "civilised" society that espoused white, middle-class values. Further, its details consistently demonstrate the conditions that made an instance of sexually violent behaviour institutionally and socially acknowledged as criminal and worthy of punishment or sanction, as well as the strict demands on behaviour that had implications for all women, but especially women and girls of colour.

The trial records for the case detail a story where an adolescent girl's behaviours could be indicted alongside the violence of her attacker. Even though her father had left her at a social event in Spring 1882 under the protective watch of her brother-in-law, Birdie, the complainant, was expressly held responsible for what followed. On the evening of 1 May 1882, Birdie attended a party in the town of El

Monte in Los Angeles County with her father and brother-in-law. While her father left early, Birdie remained with Edwin, her sister's husband. Later in the evening, somewhere between the party and Edwin's home, Edwin pushed Birdie off the road, strangled her, threatened her with a gun, and raped her. Birdie would later testify in California's Supreme Court that, before she nearly lost consciousness, she struggled and called for help from anyone within earshot. As soon as Edwin released her, she sought safety with her sister, Hattie, telling her of the assault despite Edwin's threats to kill her if she did so. Although Hattie tried to prevent her from disclosing the incident to their parents, Birdie eventually told them what had occurred, leading to the criminal charge and setting off a series of events that created much discussion in California's late-nineteenth-century courtrooms. The dramatic events included contestations over Birdie's body by two male family members, her father's attempted murder of Edwin in revenge for the attack, and Hattie's beseeching letters to her father begging that he spare her husband's life.[152]

Edwin's rape of Birdie offers a particularly useful insight into the workings of a "lawless" California, as it represents the anomaly in the dynamics of sexual violence in the late nineteenth century. Race, family, and respectability ties should have restricted Edwin's sexual overtures with his sister-in-law and his violence towards her directly transgressed a social contract that demanded that he use his powers of protection to maintain her chastity, rather than abusing his familial access. Birdie's whiteness and her supplication to her father's protective instincts rendered her, as was consistently

[152] *People v. Mayes,* Case No. 2075, 1883. Los Angeles County Court Records: Los Angeles Criminal, The Huntington Library, San Marino, California; *People v. Mayes*, 66 Cal. 597, 6 P. 691, 1885. California Supreme Court, LexisNexis California Official Reports.

demonstrated through the case's course through California's justice system, legally worthy of protection. Likewise, her description of events and her reputation for being chaste leading up to the rape seemed to conform to the social demands of young women's behaviour. For women of colour, such signals of appropriate behaviour to demonstrate sexual innocence to judge, jury, reporters and a spectating public may have been fundamentally out of reach. As explored earlier in this section, discourses around Native American women, for example, tended to construct them as at once unattractive, sub-human, and sexually available. Such rhetoric also existed in broader white Anglo-American society around the sexuality of Black women and girls. Thus, it is likely that these discourses would have prevented women of colour from mobilising similar narratives of sexual innocence and purity that Birdie was able to engage in self-defence.

Importantly, Birdie's description of her assault as well as the conditions surrounding it conformed to very narrow legal imaginings of sexual violence. As noted, she presented as highly respectable prior to the assault, trusting herself only with familial men while in public company and maintaining a reputation of chastity leading up to the attack. Her experience of assault took place in a public space, and involved vaginal penetration, overwhelming force, choking, and death threats.[153] Further, she described her cries for help, her near unconsciousness, the muffling of her screams, and her swift departure from the scene as soon as she was able to flee. She reported the experience to her sister immediately, despite Edwin's demands for her silence, and

[153] *People v. Mayes,* Case No. 2075, 1883. Los Angeles County Court Records: Los Angeles Criminal, The Huntington Library, San Marino, California; *People v. Mayes*, 66 Cal. 597, 6 P. 691, 1885. California Supreme Court, LexisNexis California Official Reports.

exhibited a great deal of emotional and physical distress. Her assailant was intoxicated, although not so intoxicated as to make him unable to overpower her. Clothing torn, distraught, and terrified, Birdie sought refuge with her nearest familial relative as soon as she was capable. The conditions of Birdie's assault aligned with broad imaginings of what sexual assault should "look" like in late nineteenth-century California.[154] The majority of cases that garnered sustained legal focus conformed to most, if not all, of those conditions. As these particular signals of socially recognisable rape were difficult to demonstrate in courtrooms, even for women and girls perceived as morally chaste and appropriately pious, it is likely that the law recognised only a very narrow iteration of sexual coercion throughout this period.[155] Women who sold sex or engaged in sexual activity, were observed intoxicated in public spaces or acted and dressed in a manner that others perceived as sexually provocative could all be disbelieved, ignored, or blamed when they accused a man of sexual misconduct. For women of colour, these conditions further exempted them from social and institutional recognition.

On the other end of the spectrum, Birdie's whiteness did not entirely protect her from insinuations that she was at least partially to blame. While her case conformed to certain tropes of ideals of white female adolescence, making it socially and legally legible, her choices and behaviours were nevertheless closely scrutinised in the context of the trial. Justice Morrison, the Supreme Court Justice that overturned the County Court verdict acknowledged that

[154] *People v. Mayes,* Case No. 2075, 1883. Los Angeles County Court Records: Los Angeles Criminal, The Huntington Library, San Marino, California; *People v. Mayes*, 66 Cal. 597, 6 P. 691, 1885. California Supreme Court, LexisNexis California Official Reports.

[155] As I explore in the next chapter, the scripts did change throughout the nineteenth century.

> the prosecutrix had testified to the existence of all the facts essential to the commission of the offense [of rape], and if what she swore to was true, there can be no doubt of the defendant's guilt. She was not impeached, and in cases of this character the prosecution must generally rely solely on the uncontradicted [*sic*] evidence of the prosecutrix, as, from the very nature of the offense, it frequently happens that there is no other witness.[156]

Thus, he affirmed that while it was dangerous to convict on a complainant's testimony alone, Birdie's was not impeached through evidence of her bad character during the trial. Nevertheless, Birdie's delayed reporting of the incident to her parents and elements of her testimony were components in Justice Morrison's decision to overturn the guilty verdict against Mayes and order a new trial. Likewise, in the context of the earlier County Court trial, a judge had reminded the jury that it was up to them to assess whether Birdie had a right to entrust her sexual safety in the hands of her brother-in-law.[157] These examples demonstrate that even those who conformed to the social scripts that guided appropriate and inappropriate sexual behaviours for women could nevertheless be closely questioned, scrutinised, and undermined.

This brief exploration of the *People v. Mayes* case reveals the structures that further excluded women of colour from legal reprisal. Fundamentally, they were barred from testifying against white men for any reason throughout much of the late nineteenth century, and they were further undermined through a system that held up white, middle-class female chastity as the model for a believable rape victim. These idealised notions of middle-class respectability were persistently exemplified in Birdie's behaviours and actions, yet even she was subjected a degree of scepticism in court.

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[156] *People v. Mayes*, 66 Cal. 597, 6 P. 691, 1885. California Supreme Court, LexisNexis California Official Reports.
[157] *People v. Mayes,* Case No. 2075, 1883. Los Angeles County Court Records: Los Angeles Criminal, The Huntington Library, San Marino, California.

This suggests that social and legal recognition, both before and after racial exclusions on testimony were outlawed, remained largely out of reach for women and girls of colour who experienced sexual violence. Few records survive of trials involving the sexual violation of women or girls of colour, and rumours or instances of such violence were infrequently reported on in the press or alluded to by contemporaries in their diaries and letters.[158]

Ultimately, in this milieu, sexual violence was at once a crucial part of martial, racialised manliness expressed by white Anglo-American conquerors, and also abhorred and condemned in law and public rhetoric. With few exceptions, sexual violence by white men against women of colour was not acknowledged as rape or sexual assault, but rather normalised as part of the workings of California life. Few records remain that detail the experiences of sexual violence of racialised people, and those that do primarily reference such occasions as casual iterations of the every-day frontier. Although normalised in some contexts, rape and attempted rape in other contexts was strongly condemned, and the men who perpetrated it punished and rejected by their families and communities. The scenarios in which sexual violence became legible were those that could be used in service for ulterior political aims, involved white female victims, or featured perpetrators that could be easily vilified for reasons of behaviour, race, or relationship to the complainant.

[158] Paul Spitzzeri has argued that defendants with Spanish-language surnames were not subjected to identifiable bias by judges or juries, but does note that cases involving other racialised minorities were so few as to exclude them. Women with Spanish-language surnames did make charges against men with Spanish-language surnames in areas like Los Angeles County, but these are particularly frequent in the early 1850s: Paul R. Spitzzeri, "On a Case-by-Case Basis: Ethnicity and Los Angeles Courts, 1850-1875," *California History* 83, no. 2 (2005): 26-39. doi:10.2307/25161803; for another perspective see: Wilson Moore, "'We Feel the Want of Protection.'"

Conclusion

Sexual violence, in its normalised and accepted forms against certain people as well as in its unacceptable form of "rape," was inextricably linked to the nature of white conquest of California. Anglo-American dominance on the California frontier was built on a discourse that naturalised white male dominance. Settler colonials, who self-consciously fashioned themselves as "white men," arrived in California certain of their superiority over other "races" of man, then adapted ideologies of their "civilised" manhood to allow them to fulfil their predictions of success. Self-conscious race and gendered ideologies of this conquest, while the class implications of labour were upset and remade, began before Anglo-American and British settler colonials even arrived on the frontier. This conquest was constructed as destined, and the trope of superior civilisation that underlay the processes of that conquest was constructed as inherently natural.

As white Anglo-American men imagined themselves in expressly racial terms, many also arrived on the frontier armed with the ideological righteousness of Manifest Destiny. This construction of an Anglo-American God-ordained right to absorb the continental West was an inherently violent frame that structured life on the frontier. These ideologies of white racial superiority did not just exist at the level of discourse but were inscribed in the legal and political structures of California from the first moment of Anglo-American conquest. Such legalised exclusion barred racialised peoples from access to systemic justice and acknowledgement of harm. In this way, the culture that developed on the frontier over the long decade that spanned 1848 to the early 1860s was a formative and shaping period in the development of the State, and had long-standing implications for how sexual violence was experienced,

understood, and overlooked or responded to throughout the last half of the nineteenth century.

White Anglo Americans persistently constructed racialised "others" in a manner that established clear ideologies of "whiteness." The racial hierarchies that developed through this period did not offer unmitigated access of white men to all women's bodies, but the ideals of white manliness established in this period did serve to rationalise a system in which rape and sexual assault were generally and broadly condemned, and pervasively and consistently accepted. This had incredibly meaningful consequences for all those whose sexual autonomy was transgressed in this period, and inaugurated hidden narratives that effectively sanitised, understated, or ignored some forms of egregious violence, and acknowledged only a narrow subset of sexually violent behaviour. Throughout the late nineteenth century, those same men who legislated or supported racial proscriptions and obscured access to Anglo American systems of justice often spoke loudly and strongly against rape and sexual assault. This system shaped how, where, and against and by whom sexual violence was recorded and reported on in California.

While the imagined racial superiority of white settler colonials on the frontier were expressed against a variety of racial others, this chapter has especially focused on the racialisation of California Indians. In the context of American republican ideals, Native Americans persistently posed, through their very existence, the greatest challenge to Anglo-American claims to sovereignty.[159] In California, this translated into an intensely violent system, where California Indians were targeted with rape, assault,

[159] Smith, *Conquest*.

massacre, vilification, subjugation, starvation, and dismissal. The conquest of this territory was indelibly linked to the conquest of its people, and sexual violation was a particularly potent symbol of white expressions of their dominance. Likewise, sexual violence against women and the assault and removal of children from their families represented an attack on the reproducing futures of California Indians and was therefore elemental to processes of genocide.[160]

Racialised sexual violations had implications for other racial minorities as well. Unlike violence against California Indians, which can be read as primary to asserting claims of sovereignty over frontier territory, the obscuring of sexual violence against other women of colour in late nineteenth century California served to reassert and maintain ideals of white dominance. This process was often explicitly oriented around white Anglo-American concern over obtaining and maintaining California's natural-resource wealth, linking white territorial expansion, sexual violence, and the American Constitutional mantra of "life, liberty, and the pursuit of happiness." Here, as when it was penned, the flaw of this ideal lay in who it was reserved for – not all men, but "white" men – as its followers established a system of inequality that had deep reverberations for all those who experienced sexual violence in late nineteenth-century California.

[160] Smith, *Conquest*; Madley, *An American Genocide.*

III. "The Free Play of Malice": Law, Society, and Sexual Crimes

> "Crime has held and still holds a wild, unrestrained carnival. Life is the cheapest product of our soil."
>
> - *Morning Press,* 12 February 1881

> "There is no class of prosecutions attended with so much danger or which affords so ample an opportunity for the free play of malice and private vengeance as the class to which the present prosecution belongs."
>
> - *People v. Totman* (1901), California Supreme Court[1]

Introduction

In 1901 a California Supreme Court judge, in his comments to a grand jury, echoed a key assumption about rape and sexual assault trials that permeated legal thought throughout the late nineteenth century. "There is no class of prosecutions attended with so much danger or which affords so ample an opportunity for the free play of malice and private vengeance," he declared, echoing the phrasing of seventeenth-century British jurist Sir Matthew Hale, "as the class to which the present prosecution belongs."[2] Between 1849 and 1900, California's legal definitions of "rape" and "assault, with intent to commit rape" were remarkably consistent in their reliance on Hale's and broader common law legal conceptions. Hale's descriptions of the

[1] *Morning Press,* 12 February 1881, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; *People v. Totman*, WPA 22633, California Supreme Court, 1901. California State Archives, Sacramento, California.

[2] *People v. Totman*, WPA 22633, 1901, California State Archives, Sacramento, California; Sir Matthew Hale, *Historia Placitorum Coronæ* / *The History of the Pleas of the Crown* (London: E. and R. Nutt, and R. Gosling, for F. Gyles, 1736).

dangers of adjudicating rape trials were such a persistent feature of courtrooms across the nineteenth-century imperial world that the perception of rape as "easy to charge, hard to disprove" became a judicial truism.[3] Between the middle and end of the nineteenth century, California experienced enormous demographic, political, and social transformations. Throughout this period, the social contexts of the western frontier would undergo radical change, shaping the ways that judges, juries, officers, community members, perpetrators, and complainants would interpret, engage with, and enforce legal doctrine concerning sexual violence. Throughout all of this, lawmakers and legal representatives drew upon enduring legal frameworks rooted in English common law.

Understanding the intricacies of the legal categories of sexual crimes in California is foundational to accessing a sense of the broader social legibility of certain behaviours as sexually violent. Moreover, the development of the law in late nineteenth century California reveals crucial details about how sexual wrongdoing was conceived of and responded to. The core tenets of "law and order" were formative in the making of "California" out of the lands on the American west coast and linked to ideologies of what it meant to be a (white) American. In a newspaper article published in San Francisco's *Daily Alta California*, a writer reassured new citizens of the United States, namely Californios brought under American citizenship through the Treaty of Guadalupe Hidalgo. "The inate [*sic*] love of free institutions, law and order, inherent in

[3] For examples: Erin Ford Cozens, "'Our Particular Abhorrence of These Particular Crimes': Sexual Violence and Colonial Legal Discourse in Aotearoa / New Zealand, 1840–1855," *Journal of the History of Sexuality* 24, no. 3 (September 2015): 378–401; Elizabeth Kolsky, "The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805-57," *The Journal of Asian Studies* 69, no. 4 (2010): 1093–1117; Shani D'Cruze, "Approaching the History of Rape and Sexual Violence: Notes Towards Research," *Women's History Review* 1, no. 3 (February 2011): 377-397.

the breast of all," he explained "is one of the great distinguishing characteristics of the American people."[4] In a statement issued by the Joint Committee of the Senate and the Assembly, the two legislative Houses established in California, law formed an integral element of the superiority of American sovereignty. As they claimed,

> there can be no higher or more honorable civil and political trust delegated by a people than that of framing the laws and constructing the institutions of a new state like our own. The delegation of such an office, in any case, is a manifestation of confidence in the wisdom and integrity and faithfulness of the legislator; but in California it implies a trust far beyond any precedent in a republic during the nineteenth century; for it involves the construction of republicanism out of despotism – law and order out of anarchy—security of person and property, conscience and speech out of violence and danger."[5]

Diaries and letters from men on the frontier often reaffirmed this desire to impose the order of civil regulation, a system of logical, "civilised" rules and guidelines for social and institutional life.[6]

The Californian frontier was formed through a systematised racial and gendered violence, but the contradiction of this violence was that most who perpetrated such harm did so in the name of the triumph of white, male American civility. The United States declared the primacy of the fair application of justice in its founding documents, wrapping "law and order" up as central to achieving

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[4] *Daily Alta California* 4 February 1850, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[5] *Daily Alta California,* "Joint Address to the People of the State of California," 13 February 1850, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[6] See, for example: Alonzo Delano and Irving McKee, *Alonzo Delano's California correspondence: being letters hitherto uncollected from the Ottawa Illinois Free trader and the New Orleans True delta, -1952* (Sacramento: Sacramento Book Collectors Club, 1952). https://www.loc.gov/item/53001743/.

Enlightenment ideals of humane, rational, individual freedoms. Throughout the late nineteenth century other forms of expertise, most notably medicine, would begin to rise in primacy as sources of "truth" and "knowledge" about sexuality and to guide proscriptions on certain sexual behaviours.[7] Nevertheless, it was the law that defined and shaped broad understandings of sexual violence throughout this period, providing a system of language that rendered only certain iterations of sexual harms recognisable throughout the State. While individuals and communities could, and did, resist legal failures or undesired outcomes – appealing court decisions, forming Vigilance Committees, expelling accused perpetrators from their towns, or seeking private retribution – resistance efforts tended to take for granted the way that sexual crimes were conceived of in law. Even those campaigning to raise the age of consent during the final decades of the nineteenth century did not challenge how crimes like "rape" had been persistently constructed across the United States and broader British Empire. Rather, their efforts were often expressions of more acute anxiety over protecting ideals of adolescent female sexual purity, and often only served to reaffirm prevailing sexual scripts dictating sexual behaviour.[8]

The laws barring sexual violence were not only narrowly and specifically defined, but also made little differentiation between the harms of consensual and non-consensual sexual contact. This is particularly notable in definitions and adjudication of

[7] Mary R. Block, "Rape Law in 19th-Century America: Some Thoughts and Reflections on the State of the Field," *History Compass* 7, no. 5 (2009): 1393.
[8] I take on age of consent campaigns more fully in Chapter Five; For more on sexual scripts see: John H. Gagnon and William Simon, *Sexual Conduct: The Social Sources of Human Sexuality* (Chicago: Aldine Transaction, 1973). For use in a similar historical context to this one, see: Estelle B. Freedman, "'Crimes Which Startle and Horrify': Gender, Age, and the Racialization of Sexual Violence in White American Newspapers, 1870–1900," *Journal of the History of Sexuality* 20, no. 3 (2011): 465-97.

"crimes against nature" or anti-sodomy laws. While anti-sodomy laws particularly targeted the penetrating person, the penetrated party could be considered an accomplice if they provided their consent. Some argued that it would be physically impossible for a man to accomplish anal penetration with another man without consent and acquiescence, although it varied in legal trials whether accomplices were also indicted and tried alongside the supposed perpetrators.[9] Despite this distinction, the idea that men could be victimised by sexual violence remained peripheral in public and legal discourses throughout this period. Further, the category of "sodomy," which was predicated on moralistic and religious heteronormative sexual controls, did not emphasise consent or resistance as primary in its definitions, thereby conflating violent sexual attacks with consensual sexual activity between men.[10] These gendered distinctions about forms of sexual crime likewise permeated into the adjudication of child sexual abuse. The laws that framed the language and understanding of sexual violence were heteronormative and phallocentric. Sexual violence, which was narrowly oriented around the crimes of rape or attempted rape, expressly focused on forcible penetration of a vagina by a penis.

Thus, in the landscape of sexual violence in California throughout the late nineteenth century, the law structured the kinds of instances of sexual harm that were socially legible, responded to, and recorded for preservation in the state's institutional

[9] For examples see: *Sacramento Daily* Union, 25 March, 1857, 2; *Sacramento Daily Union,* 17 May 1864, 3; *Sacramento Daily Union,* 26 August 1876, 5*;* The *Los Angeles Herald,* 20 April 1897, 10. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[10] Perhaps a further indication of phallocentric understandings of sexuality, and legal sexual proscriptions – and in alignment with English law – I could find no laws prohibiting sexual activity between two women during this period.

archives.[11] As the law developed in California, legislators and jurists accepted many longstanding assumptions of what constituted sexual wrongdoing and crime, while also wielding the law as an instrument to reify and concretise white male dominance. As a result, the law as it was established and evolved in California throughout the mid-to-late nineteenth century affirmed common law understandings of sexual harms, while also adding race as a key site of exclusion.[12] The nature of how sexual violence was mapped out on California's shifting landscape over the late nineteenth century make those racialised and gendered anxieties that structured the implementation of law and order throughout this period visible. In turn, the structure and language of the law had implications for broader recorded social discourse about sexual harms, shaping newspaper reporting on sexual violence, and framing understandings about acceptable and unacceptable transgressions of the sexual autonomy of various gendered, aged, and raced bodies. In this way, until the last decade of the nineteenth century – when new sources of expertise began to shift social discourse in California – statutes and legal practice often provided the very language with which social discussions of sexual violence could occur.

The reliance of nineteenth century California judges and lawmakers on the legal principles Sir Matthew Hale articulated over one hundred years previous in an entirely different socio-legal context is indicative of the paradoxical endurance and malleability of the law in this context. California sexual assault law developed along a

[11] Gagnon and Simon, *Sexual Conduct*; Judith Butler, "Performativity, Precarity and Sexual Politics," *AIBR. Revista De Antropología Iberoamericana* 4, no. 3 (2009): i-xiii.
[12] Kellen Funk and Lincoln A. Mullen, "The Spine of American Law: Digital Text Analysis and U.S. Legal Practice," *American Historical Review* 123 (1): 132–64. doi:10.1093/ahr/123.1.132; Benjamin Madley, *An American Genocide* (New Haven: Yale University Press, 2016).

pattern of borrowing and adaptation, replicating the Field Codes established in New York in 1848, for example, and used English common law as a central guiding principle. Throughout the late nineteenth century, these codes took on greater local meanings as the California Supreme Court developed a set of precedents through its decisions in cases contested over vital questions like incompetent witnesses and admissible evidence. In making these decisions, Supreme Court Justices expressly referenced case law from other American states and the United Kingdom, alongside key guiding texts on process, procedure, intention, and definition.[13] The understandings of what constituted a rape or attempted rape, adjudication of culpability, the scope of potential harm, and the intricacies of whose narratives could be conceived of as indicating sexually violent crime were thus negotiated through a system of simultaneous rigidity and adaptation. Up to and beyond the end of the nineteenth century, legal outcomes were dictated by Supreme Court precedent and readings of key legal texts. As the turn of the century loomed, more diverse sexual crimes began to be considered in California's Supreme Court, foreshadowing more dramatic changes that would challenge this established legal culture after 1900.

Sexual Violence and Legal Records

While legal records offer some perspectives on how perpetrators, complainants, and sexual crimes were constructed and understood in California in the

[13] For examples referenced in the California Supreme Court, see: Simon Greenleaf, *A Treatise on the Law of Evidence,* eighth edition, (Boston: Little, Brown, and Company, 1868); or Francis Wharton and Moreton Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III.* 5th ed. (Philadelphia: Kay, 1905); See also: Funk and Mullen, "The Spine of American Law"; Madley, *An American Genocide*.

nineteenth century, they are also limiting sources for what, and who, they excluded. In California, Native American, Chinese, Mexican, African American, and Hispanic perpetrators appear in archival legal records, but non-white women and children rarely made complaints against white men. This was state-orchestrated: in 1850 California passed an Act that prevented a "black or mulatto person or Indian" from giving evidence in favour or against any white person, despite contentious debate around what constituted the category of "white" in this period.[14] This legislative reality sharply divided who could be a legal victim of sexual violence along racial lines, and significantly diminishes the representative value of historical legal records as a sample of actual sexual violence. Further, it demonstrates how the law worked, in no uncertain terms, to render women of colour less visible, collapsing them into the colonised landscape, and perpetuating narratives that privileged white, Anglo-male voices, agency, and subjectivity.

Historians that have focused on Indigenous experiences in the state frequently cite sources that suggest that white men habitually invaded California Indian homes and villages.[15] Rumours and reports from various records suggest that rape was one way that white vigilantes, seeking to quell perceived threats from Indigenous groups, established their dominance.[16] Other records show instances where the sexual services of Native American women were used to settle debts between white men, although

[14] Peter J. Blodgett, *Land of Golden Dreams: California in the Gold Rush Decade, 1848-1858* (San Marino: Huntington Library Press, 1999), 105; Madley, *An American Genocide*; Albert L. Hurtado, *Intimate Frontiers: Sex, Gender, and Culture in Old California* (Albuquerque: University of New Mexico Press, 1999), 88. I elaborated on this in Chapter Two.
[15] Madley, *An American Genocide*; Hurtado, *Intimate Frontiers*.
[16] Hurtado, *Intimate Frontiers*, 88-89.

such instances were certainly not legally recognized as sexual violence at the time.[17] Yet because of California's legislative rules the experiences of non-white women were not legally acknowledged or recognised during this period. This offers a marked signal of the kind of sexual predation by white men that was sanctioned, codified, legalised, and then written "out" of historical records by the state.

The process of making and sustaining a legal complaint of sexual assault could also be an obstacle for girls and women who were perceived as "white" and sought formal redress. Few records remain that detail the ways that law enforcement officials managed accusations, rumours, or evidence of sexual misconduct, sexually criminal behaviour, and sexual violence even for those the law acknowledged as potential victims. There is little to indicate the influence law enforcement officers had in deciding whose complaints of violence were escalated and were thus responded to by the courts. Likewise, before 1880, the Grand Jury met only four times per year to offer their decisions on indictments, which slowed the process and led to the disappearance of both defendants and complainants.[18] What is clear from the records is that some cases, particularly in towns where law enforcement was stationed, transitioned from complaints to criminal prosecutions in lower courts and several were even tried and prosecuted in the state's Supreme Court.[19] This demonstrates that California's policing officials took some complaints of sexually criminal behaviour seriously and suggests

[17] Ibid.
[18] Robert H. Tillman, "The Prosecution of Homicide in Sacramento County, California, 1853-1900," *Southern California Quarterly* 68, no. 2 (1986): 167-182. doi:10.2307/41171428.
[19] Sometimes the failures of the law were also related to complainants failing to appear in court on their court hearing date. See: *Sacramento Daily Union,* 15 August 1862, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

that they made decisions about which to legally pursue according to how they interpreted violence and crime. In both contexts the cases that were not reported to law enforcement and the complaints that they ignored or overlooked are rarely discoverable in the records.

Once a case entered the judicial system, substance of complaints and prosecutions become easier to trace. As the records of legal trials reveal, judges did not hesitate to offer their opinions as they debated the letter of the law, based on English common law, and applied it to contexts that tested its basic premises. Indictments, summons, details of bail, charge sheets, and occasionally transcripts of testimonies survive in trial records with varying degrees of detail and completion. They offer glimpses into the ways that legal representatives interpreted the law as well as how they applied it. These records also reinforce how our historical reconstructions of sexual assault trials heavily rely upon the commentaries, opinions, and discussions of male commentators or officials, and only rarely – in the context of testimonies – do the voices of those victimised by violence come to the forefront.

Newspaper records offer another source of detail for these trials, as courtrooms were spaces of public observation and garnered the interest of the press. As noted in the introduction, these records must be considered as often inaccurate and sensationalist reports, produced for entertainment. Names and details of the crimes alleged were often recorded inaccurately, or predicated on social and community conjecture and rumour. At times, editors acknowledged when information was reported incorrectly – as in one case in 1852 that first alleged the accused was married and later revealed this was an “entirely unfounded” rumour – but

undoubtedly left many errors uncorrected.[20] Despite their sensationalism and inaccuracies, the preoccupations of the press, how and what they reported on, whose cases garnered their especial condemnation, and their special access to courtroom observation all provide some insight into the relationships between institutional and broader public perceptions of sexually violent crimes. While they may not provide firm information on the experiences of complainants, they do offer insight into the legal and social workings of sexual violence throughout this period.

Likewise, instances of sexual violence that made it to courtrooms must be considered as exceptional in a broader context of sexually violent behaviours. Trials for sexual crimes offer vital access to understanding how people and institutions constructed criminals and victims. Additionally, they demonstrate how boundaries were policed and maintained between sexually acceptable and unacceptable behaviours. Considering the many accusations that progressed past preliminary hearings and resulted in indictments and trials, it appeared that men involved in adjudicating the justice system – from police constables to judges and juries – appeared to take hypothetical sexual crime seriously. However, the law and its representatives were indelible products of the social and political contexts that they operated in, which had vital implications for sexual assault trials.

[20] *Sacramento Daily Union*, 16 January 1852, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

Sexual Crimes in California Law

From the late 1840s until the early 1850s, Anglo-American law and order institutions and enforcement were relatively precarious. When delegates met for the Constitutional Convention in Monterey in 1848, establishing the process and apparatus for law and legislative bodies were a priority; their efforts established a hierarchical judiciary, with a state Supreme Court and county courts run by justices of the peace.[21] With citizenship and suffrage organised along racial lines – in direct contravention of the terms of the Treaty of Guadalupe Hidalgo – the law of California also enacted various racialised exclusions. Most notably, as explored in previous chapter, the state constitution excluded racialised persons from acting as witness against white defendants in court until after the Civil War, when California implemented new legal codes. Practically, in the few years following the 1850 admission of California into the Union, local arms of justice – from law enforcement to regional courts – were relatively weak and ineffective outside of the major population centres like Sacramento and San Francisco.

In many respects, the 1850s were marked by a tension between the state's efforts to establish effective and respected courts throughout California, and public concerns of violence and lawlessness.[22] During the 1850s, vigilante groups – officially

[21] Gordon Morris Bakken, "The Courts, the Legal Profession, and the Development of Law in Early California," *California History* 81, no. 3/4 (2003): 74-95. doi:10.2307/25161700.

[22] For example, this extensive article about men that called themselves "Hounds": *The Weekly Alta California,* 2 August 1849, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; See also the remembrances of the first Vigilance Committee by miner Lucius Fairchild: Lucius Fairchild, "Manuscript regarding Vigilance Committees," HM 68185, c. 1896. The Huntington Library, San Marino, California.

organised, broadly recognised and institutionally sanctioned "committees" as well as unofficial retributive mobs – took the enactment of justice into their own hands, meting out punishment where they perceived the state to be failing.[23] As California historians have noted, a certain degree of vigilantism was tolerated and even welcomed by some, as it was seen to bring a "simplicity, certainty, and severity of punishment" to California in a manner that the formal legal system struggled to provide.[24] In an editorial published in the *Sacramento Daily Union* in 1861, one writer expressly argued that vigilance groups had been "forced into existence by the perpetration of the wrongs upon a community which could not be redressed by law." He continued on to justify that "they armed to carry out their views – not against the State, but against the desperadoes in their midst."[25] Likewise, prisons were relatively scarce and law enforcement scattered in California's first decade, orienting the formation of the legal system around physical punishment or banishment.

As explored in more detail in Chapter Two, issues of law and order were of primary importance on America's western frontier and establishing a hegemonic system of justice was of prime importance to lawmakers in California's early years. The constitutional delegates took great pains to establish a functional, working system, and the first meetings of the legislator continued with this mission. "The citizen who accepts the station of a public law maker, in every stance assumes important and

[23] Perhaps the most famous vigilante groups were the Vigilance Committees in San Francisco in 1851 and 1856, but extra-judicial citizen punishment with little or no due process existed far beyond these more widely recognised citizen-groups. See: Benjamin Madley, *An American Genocide*.
[24] Bakken, "The Courts, the Legal Profession, and the Development of Law in Early California," 82.
[25] *Sacramento Daily Union* 26 January 1861, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

responsible duties," began a Joint Address of the Senate and the Assembly, California's two legislative houses, in 1850. However,

> he who accepts such a high trust from a people just struggling into political existence, whose laws are yet unwritten, whose institutions are in chaos, whose civil and political liberties and rights are without protection, takes upon himself a holy office, whose responsibilities are momentous to the extent of human comprehension. To build up a sovereign state out of anarchy, republicanism in its organization and wise in its laws and institutions, to take honourable positions with those encircled in the flat of the American Union, involves a weighty task upon the intellect, and judgement and sagacity of the legislator. As such duty shall be wisely or unwisely, carefully or indifferently discharged, depends on the welfare of the people.[26]

These lofty and high-minded sentiments expressed the importance that officials put upon the establishment of principled and effective centralised state system. The address further argued that "there can be no higher or more honorable civil and political trust delegated by a people than that of framing the laws and constructing the institutions of a new state like our own." Especially in California, they argued, "it implies a trust far beyond any precedent in a republic during the nineteenth century; for it involves the construction of republicanism out of despotism – law and order out of anarchy—security of person and property, conscience and speech out of violence and danger."[27] It was the very fears of despotism and senseless violence that social commentators would decry throughout the 1850s that the legislators tried to capitalise on and funnel into adherence to state institutions.

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[26] *Daily Alta California* 13 February 1850, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[27] *Daily Alta California,* 13 February 1850, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

After 1865, with a more established legal community, a growing system of in-state legal education, the increasing efficiency of formal judicial processes, precedent in state-based legal decisions, and more effective prisons, the California system of law and order was more firmly grounded.[28] Regardless, law and order remained a site of key concern for many social commentators throughout the late nineteenth century. In 1874, an article reporting on the Grand Jury declared that close attention would be paid to the proceedings because "society must be preserved, law and order must be maintained, the guilty punished, and the law-abiding protected."[29] A few days later, in the same newspaper, an editorial bemoaned "we have had enough of this pardoning of rascals by our California Governors."[30] In 1881, a long editorial the *Sacramento Daily Record-Union* lamented sentimentality in jury trials. "No community can allow murder to go unpunished" it warned "without ultimately reverting to barbarism….we must punish murder by law, or it will be punished without law."[31] In another article printed in the same year, an unnamed writer declared that "crime has held and still holds a wild, unrestrained carnival."[32] Even into the 1890s, occasional concern about crime and punishment marked public commentaries. "The people of Sacramento are getting tired of unpunished crime" the *Colusa Daily Sun* warned in January of 1895, "the spirit

[28] Clare V McKanna, "The Origins of San Quentin, 1851-1880," *California History* 66, no. 1 (1987): 49-54. doi:10.2307/25158428.
[29] *Daily Alta California,* 19 November 1874, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[30] *Daily Alta California* 28 November 1874, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[31] *Sacramento daily Record-Union,* 6 January 1881, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn82014381/1881-01-06/ed-1/seq-2/.
[32] *Morning Press,* 12 February 1881, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

of Judge Lynch is hovering in the air."[33] While these opinions did not overwhelm press reports, public commentaries tended toward a general concern over excessive crime, and demanded decisive, strong, and effective punishments from the legal system.

Towards the end of the century, calls for stronger measures of law and order were oriented around San Francisco's infamous Barbary Coast, and concerns over "white slavery" or trafficking in women and girls for sex work.[34] While the tensions between women who sold sex and social reformers would not reach a crescendo until after the turn of the century, social commentaries of immorality in California were a persistent feature of the late nineteenth-century.[35] These discussions were wrapped up in concerns of broader corruption and crime, and – later – increasing concerns over Asian migration into California. As a result, rape, seduction, unconcealed prostitution, and mounting fears of trafficking of Chinese and Japanese migrant woman, were components of broader concerns amongst social reformers of California's tendency for vice.[36] After 1900, "white slavery" was increasingly mobilised to express fears that women were habitually enticed into immorality then forced into sex work, and coincided with fears that Chinese and Japanese women, seeking entrance into California as "picture brides," were actually entering the United States to work in California's thriving, lucrative sex-work industry.[37] These fears existed at the legislative

[33] *Colusa Daily Sun,* 3 January 1895, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[34] Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (Cambridge: Harvard University Press, 2014).
[35] Ivy Anderson and Devon Angus, eds. *Alice: Memoirs of a Barbary Coast Prostitute* (Berkeley: Heyday, 2016).
[36] Anderson and Angus, eds. *Alice*; Nancy J. Taniguchi, "Weaving a Different World: Women and the California Gold Rush," *California History* 79, no. 2 (2000): 141-68. doi:10.2307/25463691.
[37] Pliley, *Policing Sexuality*.

level, and were reflected in the Page Act (1875), which prohibited Asian women from migrating to the United States to work as prostitutes, as well as the 1882 Chinese Exclusion Act, which was a more general restriction of Chinese migration.[38] On the one hand, the financial rewards in sexual commerce for women of varied national background could be great. On the other hand, women who sold sex were at a heightened risk of experiencing some degree of violence and coercion in the context of their work, although such instances are rarely recoverable in available remaining records.[39]

Perhaps due to a public and legislative interest in supressing expressions of vice, immorality, and violence throughout the late nineteenth century, it is notable that the death penalty was never punishment for rape in California. While whipping, banishment, and hanging were typical punishments in the state before prisons were readily available, and the death penalty remained in effect for murder throughout the period, punishment for rape – including the rape of children – carried a sentence of imprisonment for a minimum of five years.[40] Periodic debates marked newspapers on the appropriate punishments for such crimes. In a typical report, a writer in 1856

[38] Philip P. Choy, "Golden Mountain of Lead: The Chinese Experience in California," *California Historical Quarterly* 50, no. 3 (1971): 270; Joan B. Trauner, "The Chinese as Medical Scapegoats in San Francisco, 1870-1905," *California History* 57, no. 1 (1978): 75; Sucheng Chan, "People of Exceptional Character: Ethnic Diversity, Nativism, and Racism in the California Gold Rush," *California History* 79 no. 2 (Summer, 2000): 74-75.
[39] Social reformers worked to "save" women from lives of prostitution, and the legal charge of seduction often demonstrated how anxieties of sexual contact with young girls could corrupt them, priming them for lives of immorality and prostitution. I explore this more in Chapter Five. See also: Pliley, *Policing Sexuality*; and Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920* (Chapel Hill: University of North Carolina Press, 1995).
[40] California and Robert Desty, *The penal code of California: enacted in 1872, as amended in 1889* (San Francisco: Bancroft-Whitney), 119. https://archive.org/details/penalcodecalifo 02destgoog.

described it as "a pity" that the law did not "sever the vile head from the loathsome carcase for [child rape]. Worse than brutes and yet the law does not attach the death penalty!"[41] Various newspapers also reported on occasional bills on the floor of either the Senate or the Assembly seeking to make rape a capital punishment.[42] On the other side of the argument, records of the California Legislature demonstrate that lawmakers were not universally convinced of the efficacy or humanity of the death penalty, and periodically debated abolishing it altogether.[43]

Having no death penalty for rape was perhaps a reflection of California's reliance on common law and legal discussions from both Britain and the eastern United States in establishing its legal codes. Definitions of sexual crimes as they were established in the state were dictated by common law until the enactment of the Penal Code in 1872. Despite the legal shift in the early 1870s, the notion that rape was constituted by the forcible penetration of a penis into a vagina with ongoing and exhaustive resistance of the assailed woman remained rigid through the late nineteenth century. Evidence of resistance was only legally unnecessary to sustain charges in cases involving girls below the age of consent. The central focus on the transgression of women's bodies, most particularly the forcible introduction of a penis to a vulva and/or vaginal canal, as elemental to sexual assault appeared to be relatively taken for granted in the context of both legal and public discussions. As the Penal Code

[41] *Weekly Bute Record*, 7 June 1856, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[42] One reported on in 1881: *Marin County Journal*, 3 February 1881, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[43] For an example, see: *Sacramento Daily Union,* 4 February 1874, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

(1889) decreed, "the essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime."[44] From the adoption of California's Constitution until the late nineteenth century, tension and dispute surrounded legal cases of sexual violence cases; however, social and legislative debate tended to revolve around details like setting the age of consent or the admission of circumstantial evidence in trials and rarely challenged phallocentric, heteronormative notions that sexual violence was a (rare) crime perpetrated by men against women and girls.[45]

As a result, the cases that made their way to courtrooms throughout this period, even those that ended in acquittal, generally affirm a certain structure and understanding of sexual harm, and demonstrate in practice how legal codes shaped broader social understandings of what constituted sexual violence. While reporters, judges, juries, accusers, accused, and the wider responding public often disagreed about punishment and guilt, the cases that garnered their attentions tended to share key distinguishing features. Rape and attempted rape in law were oriented firmly around the penetration, or attempted penetration, of a vagina by a penis amidst ongoing resistance by a girl or woman. These distinguishing features excluded a range of other sexually coercive behaviours that transgressed the physical sexual autonomy of adults, adolescents, and children. Thus, while the public often decried jury decisions, protested the sentences of judges, or took the expulsion of the accused from the

[44] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 118.
[45] Only males over the age of fourteen could be prosecuted for rape. California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 118.

community into their own hands, they rarely fundamentally challenged legally structured notions of sexual harm and wrongdoing.

California law, as elsewhere, constructed forcible penile penetration as rape and the intention to forcibly penetrate a woman or girl's vagina as "assault with intent" (to commit rape). Violence involving vaginal penetration with other body parts or objects, as well as a large variety of other sexually abusive behaviours, formed legal grey areas. Beyond these definitions, individuals involved in legal processes also participated in constructions of what "victims" and "perpetrators" should look like, which in turn had an impact on legal proceedings. Judges, community members, witnesses, and other commenters policed the boundaries of acceptable behaviours; while the law appeared to take sexual crimes seriously, if narrowly, the identity of accusers featured prominently in the execution of justice.[46] Age and corresponding marital status, class, race and general presumptions of male and female sexual desire and expression could influence how a trial was conducted, the way in which it was reported on in the press, and the decisions of judges and juries.

While rape was not the only sexual crime, the core assumptions of what constituted it were inscribed in all others. Legally understood as separate from other forms of sexual and gendered violence in California in the late nineteenth century, rape was also narrowly defined by a discourse of resistance. To sustain such a charge in court, and in addition to demonstrating that a penis forcibly penetrated a vagina, the prosecution had to prove that a woman or girl over the legal age of consent

[46] *People v. Kipp*, Case 01053, 1871, Los Angeles County Court Records. The Huntington Library, San Marino, California; *People v. Patterson,* WPA 8125, California State Archives, Sacramento, California.

resisted her attacker with all her available strength. Assessing a woman's capacity to resist was at the discretion of the jury, who based their views on observations of the relative size and muscular development of accuser and accused.[47] Additionally, as legal language stipulated, rape only occurred when penetration was achieved "against her will."[48] In practice, this meant that women were required to prove that their "will" had been overcome. In a trial in 1883, the presiding judge instructed the jury that a guilty verdict could not be brought if the complainant seemed "not entirely reluctant," clarifying that "there must be overpowering force; and if the force falls short of that, there may be consent, or the act may not be against her will."[49] Accordingly, responses to violence that did not look like appropriate resistance – or included all or most of kicking, striking, biting, and calling for help – frequently meant that the violence itself could not be legally recognized as either "assault with intent" or rape.

Such legal criteria meant that cases that passed through the courts in the mid-nineteenth century usually involved evidence of physical battery beyond the commission of non-consensual vaginal intercourse. Perpetrators used weapons and physical domination to either threaten the lives of those they attacked, or to maim and beat their victims. In the 1850s, for example, a Hispanic woman testified in the Los Angeles Court of Sessions that four men struck her on the head and threatened her with a pistol before they took turns raping her.[50] Similarly, in an 1883 trial, the complainant reported that the perpetrator had stuffed her mouth with mustard

[47] *People v. Mayes,* WPA 12828, 1885, California Supreme Court. California State Archives, Sacramento, California.
[48] Ibid.
[49] *People v. Mayes,* Case No. 2075, 1883, Los Angeles County Court Records: Los Angeles Criminal. The Huntington Library, San Marino, California.
[50] *People v. Valdez, Valdez, Olivera and Silvas,* [Case No. Missing], 1852, Los Angeles County Court Records. Seaver Center, Natural History Museum, Los Angeles, California.

flowers to prevent her from calling for help, threatened her with a gun, and strangled her to subdue her resistance.[51]

Before the implementation of California's Penal Code in 1872, judges worked to impose some level of order on an unruly, ever-expanding, and ethnically heterogeneous population. Perhaps related to this, from the very first years following the implementation of California's Constitution in 1850, which set up the state's court system, Supreme Court justices demonstrated a commitment to upholding law and order. Before the implementation of the Penal Code in 1872 this commitment translated to a reliance on legal precedents of rape and assault with intent set in other American states and the definitions put forward by Hale in the seventeenth century.[52] After 1872, with the Californian Penal Code guiding legal practices in the state, some particulars of the law shifted – including the age of consent – but foundational ideologies of what constituted the crime "rape" remained consistent until the end of the century.

The structure of the California Penal Code offers important perspectives on how sexual crimes were categorised and how seriously they were considered in the socio-legal context of California in its early statehood. Exploring how rape and attempted rape were conceived of in the context of other sexual crimes helps to elucidate the way the law constructed such violence. Perhaps most significantly, assault with the intent to commit a felony, including rape, was organised under Title

[51] *People v. Mayes,* Case No. 2075, 1883, Los Angeles County Court Records: Los Angeles Criminal. The Huntington Library, San Marino, California.
[52] *People v. Benson*, 6 Cal. 221, 1856, California Supreme Court. LexisNexis California Official Reports.

VIII of California's Penal Code, "Crimes Against the Person."[53] This section also included kidnapping, robbery, and homicide. Other felony assaults included assaults to commit robbery, mayhem, a "crime against nature" (sodomy or bestiality), and grand larceny. Individuals found guilty of felony assault, according to the code, were liable to imprisonment between one and fourteen years.

Title IX of "Part I: Crimes and Punishments" of the California Penal Code outlined "Crimes Against the Person and Against Public Decency and Good Morals." This section included crimes against women, children and the family, as well as crimes against religion, and crimes relating to public conduct, like gaming.[54] Through this categorisation, attempted rape existed in an entirely different section, and alongside quite different crimes than rape. Likewise, assault to commit sodomy or bestiality were separated from instances where anal penetration occurred "by man with man, or by man with woman in an unnatural manner, or by man or woman with a beast."[55] The separation of assault to commit a felony, including rape and sodomy, from instances where penetration was achieved is particularly interesting considering the language on abortion in the same section of the Code.[56] Abortion, a crime punishable for those who administered or provided abortion tools as well as for those who submitted to them, was entirely predicated on intent. The intention to procure an abortion or the intention of a woman to submit to an abortion was the punishable crime, regardless if

[53] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889,* 103.
[54] Ibid., 116.
[55] Ibid.
[56] Nicola Beisel and Tamara Kay argue that nineteenth-century politics of abortion were "simultaneously racial and gender politics." See: Nicola Beisel and Tamara Kay, "Abortion, Race, and Gender in Nineteenth-Century America," *American Sociological Review* 69, no. 4 (2004): 498-499.

that woman was pregnant at the time or if the substance used could illicit an abortion at all.[57] This bears repeating: even if the embryo or foetus in question did not exist, or – if it did exist – could not have been harmed by the substance or actions used, the crime remained the same. Punishment for abortion ranged between one and five years for a woman who submitted to an abortion attempt and two and five years for an individual aiding or procuring an attempted abortion.[58]

While these crimes reflected local frontier concerns of the period, principally around the maintenance of public order, rape was legally defined along British constructions of the crime, privileging forced penis-in-vagina genital contact as the most egregious of heterosexual sexual crimes. This was made particularly clear in the Code's own internal contradictions. On one hand, it stated that a girl below a specific age could not, in fact, consent to sexual intercourse. On the other hand, it directed that in cases where a girl below the age of consent allowed penile penetration, it was "not properly rape, although punished in the same manner."[59] This directive thus made it clear that although a girl below the age of consent could not legally consent to vaginal sex, she could in *social* fact consent – and if so her experience of violence was not "properly" legal rape. Adding this language into the Code's explanations opened girls, particularly those close to the age of consent, to questions of their behavioural responsibilities and sexual agency. Sowing doubt in the minds of jury members of the deservedness of a girl or woman to receive justice was a consistent tactic of the defense, regardless of what legal doctrine stipulated. Further, it made it possible for

[57] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 116.
[58] Ibid., 124.
[59] Ibid., 118.

defendants – as in cases involving adult victims – to orient the focus of trials away from the actions of accused parties, and firmly toward the reputation, behaviours, and actions of complainants.

While sentencing data across the first decades of American-controlled California are sparse, those details that remain suggest rapists occasionally received sentences of over ten years.[60] However, although not a representative sample, most of the data that does remain suggests that sentences over five years were somewhat exceptional for rape, even when the victim was under the age of consent. Likewise, the punishment parameters for raping a girl below the age of consent were the same for a perpetrator found guilty of raping a girl or woman over the age of consent. The Code did not stipulate a maximum punishment for the rape of either a child or a woman, but it was a capital crime in some American states during this period. Although this was not the case in California, it suggests that there was both American and British precedent for lengthier sentences. While some cases did garner such lengthy sentences in California, many of the reported cases throughout the period appeared to end with relatively short imprisonment periods that were close to the minimum required by law. It appears that in only the rarest of cases was a man found guilty of rape handed a sentence of over seven years in California, irrespective of the age of the complainant in the case.[61] While these details are interesting, historians including

[60] Longer sentences were often discussed in the context of "crimes against nature" cases, for an example see a case where a man received a forty-one-year sentence: *People v. Moore*, 103 Cal. 508, 37 P. 510, 1894, California Supreme Court. LexisNexis California Official Reports; Sharon Block, *Rape and Sexual Power in Early America* (Williamsburg: University of North Carolina Press, Chapel Hill, 2006).

[61] An exception to this was a case that was affirmed by the Supreme Court on appeal. The perpetrator received a twenty-year sentence for raping an eleven-year-old. *People v. Manahan*, 32 Cal. 68 (1867). California Supreme Court, LexisNexis California Official Reports; D'Cruze notes similar trends in the literature from the same period in

Sharon Block argue that we must consider sentencing practices with a degree of caution.[62] As noted, the available information is incomplete and thus not necessarily representative; likewise, lengthy imprisonment did not necessarily connote meaningful "justice" to those victimised by sexual violence during this period. Nevertheless, attending to sentencing patterns and maximum punishment in statutes can indicate the relative seriousness of various sexual crimes to judges and lawmakers.

Beyond the letter of the law, other sites of expertise shaped outcomes in California's nineteenth-century courtrooms. In records of Supreme Court appeals cases, justices often cited Simon Greenleaf's standard volumes *A Treatise on the Law of Evidence*, the first editions published between 1842 and 1853, and the sixteenth and last in 1899.[63] An American lawyer, jurist, and Harvard law professor, Greenleaf's *Treatise* was of key importance to justices in adjudicating what kinds of evidence were allowed in courtrooms. In his introduction to the discussion on rape, Greenleaf reaffirmed principles that would be later replicated in the Penal Code (1872): "the essence of the crime consists in the violence done to the person of the sufferer, and to her sense of honor and virtue," but, he reminded "this offence is *defined* to be the unlawful *carnal knowledge* of a woman, by *force* and *against her will.*"[64] Perhaps the most important passage of Greenleaf's text for rape trials was his directive on

England: Shani D'Cruze, "Approaching the History of Rape and Sexual Violence: Notes Towards Research," *Women's History Review* 1, no. 3 (February 2011): 377-397.

[62] Sharon Block, *Rape and Sexual Power in Early America*.

[63] Simon Greenleaf, *A Treatise on the Law of Evidence,* 16th edition (Boston: Little, Brown, and Company, 1899).

[64] Simon Greenleaf, *A Treatise on the Law of Evidence,* 8th edition (Boston: Little, Brown, and Company, 1868), 174. Emphasis in original. Notably, Greenleaf referenced Hale in his definitions.

assessing the credibility of the prosecuting witnesses' testimony. His text explained that if a woman be of "ill fame" and "unsupported by other evidence," or

> if she concealed the injury for any considerable time after she had opportunity to complain or if the act were done in a place where other persons might have heard her cries, but she uttered none; or if she gave wrong descriptions of the place, or the place was such as to render the perpetration of the offence there improbable; these circumstances, and the like, will proportionably diminish the credit to be given'to her testimony by the Jury.[65]

In a following section, Greenleaf elaborated on the important question of how the "character of the prosecutrix for chastity" could be impeached in courtrooms. He directed that this must be done through general evidence of reputation, rather than by evidence of particular instances of chastity. However, while previous sexual activity with other men could not be used against her character, according to his directives prior sexual activity with the accused could be raised as evidence tending toward his innocence.[66]

While the common law shaped narrow definitions of "rape" and "assault with intent to commit rape" in California, seventeenth-century British jurists – like Hale – offered little guidance to nineteenth-century frontier officials working to assert colonial dominance through the law. Additionally, British legal constructions of sexual assault took for granted that judges and juries would struggle to determine if the criteria for rape or "assault with intent" were met, opening courtroom proceedings to evidence relating to a victim's age, occupation, marital status, character, behaviour, and gendered notions of race and class.[67] In conjunction with broader legislative

[65] Ibid., 176.
[66] Ibid., 177.
[67] D'Cruze, "Approaching the History of Rape and Sexual Violence."

decisions in the early years of Anglo-American expansion onto the frontier, this meant that determining whether the criteria of rape or "assault with intent" charges were legally sustainable allowed participants in the legal process to call upon their ingrained presumptions of acceptable raced and gendered sexual behaviour.

The development of legal practices for sexual violence in California was thus influenced by the complex intersections of local realities, imperial presumptions, and the precedents established in Britain. Despite these outside influences, the legal definitions of rape and "assault with intent" remained narrowly defined and uncontested throughout this period. Rape, according to British common law, involved the forced penetration of vulva by a penis, in the context of consistent resistance on the part of the complainant.[68] For a charge of "assault with intent" to be sustained in courtrooms, complainants had to demonstrate that perpetrators committed the alleged assault with the express purpose of forcible vaginal penetration. Proving either of these charges in courtrooms likewise required evidence that the complainant engaged in ongoing, persistent, and exhaustive resistance.[69] Despite radical social and political changes in other areas, these legal definitions in California underwent little change over the last half of the nineteenth century.

[68] Sir Matthew Hale, *Historia Placitorum Coronæ* / *The History of the Pleas of the Crown* (London: E. and R. Nutt, and R. Gosling, for F. Gyles, 1736). Hale's definitions also influenced nineteenth-century medical jurisprudence. See: Theodric Romeyn Beck, *Elements of Medical Jurisprudence* Vol. 1 (Albany: Websters and Skinners, 1823), 73.
[69] Hale, *Historia Placitorum Coronæ* / *The History of the Pleas of the Crown*.

California Rape Law in Practice

In July of 1856, Hugh Murray, the third Chief Justice of California's Supreme Court, drafted his opinion on a Court of Sessions appeal from Sacramento County. The case involved thirteen-year-old Lavinia Dickey who had accused John A. Benson of rape. Lavina had lived with John and his wife on their farm for some length of time.[70] In the context of the local court trial, it was revealed that Benson had not only raped her once but had regular sexual contact with her. Rather than increasing the seriousness of the crime for Justice Murray, this factor was a key reason for his decision to overrule the County Court decision, reverse the verdict, and order a new trial. The Supreme Court decision to overrule this case in 1856 would have far-reaching implications for the remainder of the nineteenth century. *People v. Benson* was frequently cited as precedent in other cases of sexual crimes throughout the century and demonstrates the ways in which written law could be reinterpreted and upheld in future cases for decades following. Likewise, while the letter of the law was relatively rigid and remained somewhat inflexible throughout the late nineteenth century, key details of how rape and assault with intent charges were tried could have far-reaching implications for the hostility experienced by complainants. By following interpretations made by Supreme Court justice decisions within the state, California's lower court judges shaped important elements of the justice system that were ultimately

[70] She was likely working as a domestic for them, although it is never stated expressly in the press reports or in the Supreme Court Appeal decision. *People v. Benson,* 6 Cal. 221, 1856, California Supreme Court. LexisNexis California Official Reports.

suspicious of complainants of sexual assault, particularly those who were perceived to have had prior sexual experience.[71]

Two key elements of Justice Murray's decision would be frequently cited by judges in the state, even alongside the very texts they contravened. The first was in direct contradiction to Greenleaf's stipulations about admissible evidence to impeach the prosecuting witness's testimony. By Greenleaf's formative instructions, a woman's reputation for chastity could be impeached, but not through the introduction of evidence of specific instances of her sexual activity. Rather, to undermine the credibility of her charge, Greenleaf instructed, only evidence of a general reputation for being unchaste and immoral could be used in courtrooms. In Justice Murray's opinion on *People v. Benson*, a case which was appealed on precisely these grounds, he first laid out Greenleaf's arguments, before explaining his own. "It is contended in this case that evidence of general reputation is admissible, but not of particular acts, and even if the evidence had been admissible, the questions should have been first put to the prosecutrix," he began. "I cannot understand why," he continued,

> upon any sound rule, general reputation should be preferred to particular facts. It is true, that it is said the party comes prepared to prove her general character, and her attention is not directed to the special facts. It appears to me that proof of particular acts of lewdness should be admitted in preference to general reputation, which may be good or bad, either deservedly or undeservedly. Facts tend to make up the sum of

[71] See: Henry J. Labatt, *A Digest of the Decisions of the Supreme Court of the State of California: contained in the sixteen volumes of Reports, from the formation of the Court, in 1850, until January, 1861, with a complete list of cases affirmed, reversed, qualified, commented upon, or abrogated by statute* (San Francisco: H.H. Bancroft & Company, 1861), 859.

> reputation, and the cause, and not the result, would be the safer testimony to rely on.[72]

With this opinion, Justice Murray shifted away from standing legal ideology about evidence, and, through his precedent, would open California rape and attempted rape trials to testimonies that detailed specific incidents of women's supposed immorality. The consequences for this were far-reaching and cited as the rationale for numerous appeals on sexual assault convictions throughout the late nineteenth-century.

The second and arguably more frequently cited reason that *People v. Benson* was mobilised in rape, assault to rape, and incest cases was in relation to a key sentence he wrote into his opinion. It read:

> from the days of Lord Hale to the present time, no case has ever gone to the jury, upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony.[73]

In trial records following this case, the warnings of judges tended to replicate Murray's warning verbatim. If lower court juries handed down guilty verdicts, and they were appealed by defendants, Supreme Court justices invariably overturned the verdicts if there was no evidence that such a warning was made to the jury.[74] In this way, through his opinion on a single case, Justice Murray established precedent in California law that

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[72] *People v. Benson,* 6 Cal. 221, 1856, California Supreme Court. LexisNexis California Official Reports; Also published in: *Sacramento Daily Union,* 23 September 1856, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[73] *People v. Benson,* 6 Cal. 221, 1856, California Supreme Court. LexisNexis California Official Reports

[74] For examples, see: *People v. Ardaga*, 51 Cal. 371, 1876; *People v. Castro*, 60 Cal. 118, 1882; *People v. Patterson*, 102 Cal. 239 36 P. 436, 1894, California Supreme Court. LexisNexis California Official Reports.

explicitly demanded that juries and judges consider the dire dangers of false accusations of rape. Simultaneously, by allowing for great leeway for defendants to introduce particular details of her unrelated sexual behaviour, trials were made even more hostile for complainants.

More generally, *People v. Benson* indicates a key element of legal responses to sexual violence charges in late nineteenth century California. Where the legal system set up the groundwork and provided the language for the careful adjudication of heterosexual sexual crimes, it was in the opinions and directives of judges, the interpretations of law enforcement officials when deciding whether to formally charge accused parties, and the decisions of juries that the broader culture of rape and sexual assault took shape. When Justice Murray overturned Benson's conviction, he emphasised the "dangerous power" that had been "lodged in the hands of the prosecutrix." At the same time, he sowed a perception of the broad improbability of the charge filed, and set up a context in which jury prejudice or "popular excitement" could lead to the conviction of innocent men.[75] In this particular case, Benson himself helped to shape this narrative when he wrote into the *Sacramento Daily Union* to complain of the manner in which the paper had condemned him before a fair trial.[76] "The wise and humane policy of the common law presumes every man innocent until he is proved guilty," Benson protested in his letter to the paper, "but the author of the report in question assumes at once that I am guilty of this vile crime, and proceeds

[75] *Sacramento Daily Union,* 23 September 1856, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[76] *Sacramento Daily Union,* 15 April 1856, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

forthwith to administer that most severe of all punishments, to wit, a mental castigation before an American public."[77] The interactions between Benson, the Court, and the public suggest the ways in which legal language was employed in the public sphere, and mobilised to promote certain narratives about truth, veracity, and character.

Another vital element to the *Benson* decision was its presumption that chaste, respectable, sexually "innocent" women were more likely to be victims of rape than their unchaste counterparts. The law and its representatives claimed that the law protected all women from sexual violence, regardless of their reputations for chastity. In the Los Angeles County Court in 1876, the presiding judge affirmed this principle for the jury. "The fact that the prosecuting witness maybe or was an unchaste woman would be no justification to commit the crime of rape upon her," he explained.[78] In 1894, a Supreme Court Justice more expressly articulated this in the case of *People v. Patterson.* "A woman may be the greatest whore in the State, and still tell the truth, the whole truth, and nothing but the truth," he admonished; "You cannot attack her credibility in that way. You cannot attack her reputation for truth and veracity by showing that she is a lewd person."[79] Despite such words, the laws of evidence

[77] *Sacramento Daily Union,* 15 April 1856, 2. Benson's conviction in the local court in July of 1856 was overturned in the September sitting of the Supreme Court, and a new trial ordered. On motion of the District Attorney in December 1856, the case was abandoned, and he was discharged by the end of the year. See: *Sacramento Daily Union,* 7 July 1856, 3; *Sacramento Daily Union,* 23 December 1856, 3; *Marysville Daily Herald,* 24 December 1856, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[78] *People v. Ardaga and Gomez*, Case No. 1466, 1876, Los Angeles County Court. The Huntington Library, San Marino, California.

[79] *People v. Patterson*, WPA 8125, 1894, California Supreme Court. California State Archives, Sacramento, California.

throughout the period allowed defendants to mobilise community perception and reputation against female complainants to impeach their testimonies of violence. Largely related to the *People v. Benson* decision, specific instances of sexual immorality could be discussed in courtrooms as evidence tending toward the innocence of the perpetrator. Legal commentators rationalised this evidence as necessary in order to corroborate or undermine an accuser's testimony, as legal officials often perceived this as the only evidence available to defendants to claim their innocence.

Moreover, in practice, wanted or unwanted sexual experiences on the part of the complainant were broadly understood as making her less likely to resist any form of sexual advances, violent or otherwise, thereafter. Justice Murray introduced this into California's legal landscape quite explicitly when he stated in his opinion on Benson's conviction that

> previous intercourse with other persons may be shown, as tending to disprove the allegation of force, and such evidence would seem to be highly proper, *as it must be obvious to all that there would be less probability of resistance upon the part of one already debauched in mind and body, than there would be in the case of a pure and chaste female.*[80]

These powerful words directly transgressed the legal language that purported to protect women and girls who charged men with rape, regardless of their prior sexual experiences. Further, when claiming that "it must be obvious to all" that prior sexual contact would reduce a woman's or a girl's "probability of resistance," Murray betrayed the ways that his legal opinions were shaped by contemporary socio-religious narratives of innocence and chastity. Social convention dictated throughout this

[80] *People v. Benson* 6 Cal. 221, 1856, California Supreme Court. LexisNexis California Official Reports. Emphasis mine.

period that sexually ignorant girls were more likely to remain innocent, and if they developed knowledge of sexuality – even if this occurred in the context of sexually violent abuse as children – they were at higher risk of leading lives of immorality and vice.[81]

The pervasiveness of this kind of perception in legal contexts was particularly evident in a similar case to *People v. Benson* tried in the Los Angeles County Court in 1869. In the rape trial of William Bunch, fourteen-year-old Susanna Oakley's courtroom confession that she had been raped several times by the defendant, rather than only the single instance detailed in the indictment, led to a motion by the defendant to throw out the case altogether.[82] Although the trial continued, a witness testified that "the mother's general character was that of prostitution," and that Susanna was also rumoured to be of immoral character as a result.[83] Thus, her reputation was impinged not only by her own actions, but also by her proximity and exposure to her mother's alleged impropriety. The strategy of the defence to impeach her testimony thus took account of both witness testimonies of observations of her immoral behaviour, as well as the general context and perception of her mother's reputation and their living situation.

This case, and many others after 1856, demonstrated the way that *People v. Benson* was referred to by judges throughout the late nineteenth century. Its applicability to other cases particularly indicates the ways in which rape and attempted rape trials throughout this period shared key features. Even those that were

[81] I explore this more in Chapter Five.
[82] *People v. Bunch,* Case No. 00953, 1869, Los Angeles County Court. Huntington Library, San Marino, California.
[83] Ibid.

contentious or surrounded by debate tended to meet a basic standard that indicated what "rape" was understood to look like, and who could be read as a potential victim. Most notably, women who sold sex and women of colour seem to have been near totally absent as complainants, except when their perception as "prostitutes" was only discovered during the trial, or when non-white women made complaints against non-white men. In 1851, thirteen-year-old Anna Fuller claimed she had been raped by Jose Lopez, and "the question of the incompetency of the witness was raised by the prisoner's counsel, on the ground that she was an Indian girl."[84] The question of witness competency in this case was settled in favour of allowing her testimony, but this could perhaps be accounted for by the racialisation of the defendant as well. Importantly, the reporting on it in the press likely indicates a wider context where complaints made by racialised women were not heeded by their communities or local law enforcement, or charges brought before a justice of the peace were not taken to trial.

Likewise, even the mere insinuation of monetary exchange between an assaulted woman and the accused could undermine her credibility. In a case tried in 1855, Ann Canterbury, a married mother of two children, charged Dr. Edward Smiley for assault with intent to commit rape. An assistant at the doctor's office testified that "Mrs. Canterbury had told him that 'she had to work too hard for a living, that her husband was of no account…and she was obliged to do bad things.'" He further alleged that she had attempted to settle the incident with the assailant by getting him to pay

[84] *Daily Alta California,* 11 October 1851, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu. For an exploration of racist laws that limited witness competency, see Chapter Two.

her "$250 for his assault on her virtue."[85] Another witness also "heard the Doctor say that the complainant wanted to get money from him," and the court allowed a different physician treating Ann to disclose into evidence she had gonorrhoea.[86] These details severely undermined her claim of violence and reduced her credibility to onlookers.

Decades later, money undermined the prosecution of another case. As reported in the *Los Angeles Herald* in 1893, an accuser's stepfather testified that he had proposed a private financial settlement with the accused. Such a financial arrangement was especially pertinent in this case, since the complainant had given birth to a child as a result of the rape. Nevertheless, the reporter covering the trial remarked that the mention of potential money exchange "made the jury look very much askance at him," and entirely knocked "the props from under the case."[87] In totality, the strategy of the defence appeared to systemically introduce the idea of both the sexual immorality of the complainant as well as financial exchange. According to reports, this evidence was only an insinuation of sexual commerce, but reveals the kinds of evidence allowed in courtrooms against women's complaints that could impeach their deservedness in public perception of their right to be considered a "victim."[88]

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[85] *Daily Alta California,* 31 March 1855, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[86] Ibid.
[87] *Los Angeles Herald,* 8 September 1893, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[88] As discussed earlier in this chapter, as well as Chapter Two, women of colour were systemically denied access to the status of "victims" of sexual violence. See also:

In another case, a girl who was below the age of consent, and thus legally incapable of consenting to penetrative sex, was undermined by the suggestion of financial exchange. In 1873, Richard Powell was tried for the rape of Joelia Forest Elliott, or "Nellie." Annetta Liversed, a neighbour to the defendant and a witness in the case, took the stand and testified that she had observed the incident in question through a split in the wall panelling to the accused's room. She reportedly stated that she "was first attracted to the parties by seeing the girl go in and hearing [the accused] shake money." She then looked through space in the wall and "saw him give [Nellie] money; [Nellie] made no objections to his doing what he did, and made no outcry; she asked if somebody was not looking; he said 'never mind.'" Even though Nellie was below the age of consent, and thus not legally capable of consenting to penetrative sex, this witness also testified that "she appeared to consent to all he did."[89] That the defence could mobilise explicit charges of Nellie's culpability, even though she was below the age of consent, illustrates the potent role that monetary exchange played in the adjudication of sexual conflict and perceptions of "innocence." The case itself further reveals the ways that judges could collude in these narratives and allow girls below the legal age of consent be subjected to character interrogation and assassination.

To combat these narratives, in the cases that went through the court systems, female accusers regularly offered up visible markers of violence to corroborate their experiences of violence on the parts of their bodies that judges and juries could not

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Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005).

[89] *Sacramento Daily Union*, 29 January 1873, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

see. Some legal records also demonstrate that doctors could be called upon to testify to those physical markers on complainants' bodies that were not visible in the courtrooms, or to confirm the probability that penetration had occurred in young victims.[90] In large part, their roles seemed to primarily offer a visibility to evidence that was otherwise invisible to judges, juries, and courtroom spectators; namely, providing their descriptions of possible trauma to women's genitals. Beyond doctors, physical appearance, clothing and past behaviour were all held up in courtrooms as evidence. Additionally, women and girls described their emotional responses for juries, judges, and other courtroom onlookers, focusing particularly on their fear. Complainants often reported threats of lethal violence in their testimonies, describing the weapons that were wielded as proof of a perpetrator's seriousness. Furthermore, fear of the perpetrator's retaliation was often cited to explain any delay between the commission of sexual assault and disclosure to family members and authorities.[91] In the late nineteenth-century, California settler colonial populations were characterised by a degree of transience and courtroom trials could be held some distance from where the

[90] Doctors were predominantly relied upon in child abuse cases, which I discuss at more length in Chapter Four. For some examples: *People v. Morales,* Case No. 353, 1858, Los Angeles County Court Records. Seaver Centre, Natural History Museum, Los Angeles, California; *People v. Hamilton* 46 Cal. 540, 1873, California Supreme Court. LexisNexis California Official Reports; *Los Angeles Herald,* 2 September 1890, 3. Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn84025968/1890-09-02/ed-1/seq-3/; For discussion on this in the U.K. context see: Victoria Bates, *Sexual Forensics in Victorian and Edwardian England: Age, Crime and Consent in the Courts* (London: Palgrave Macmillan, 2016).

[91] *People v. Mayes,* Case No. 2075, 1883. Los Angeles County Court Records: Los Angeles Criminal, The Huntington Library, San Marino, California; *People v. Benson,* 6 Cal. 221, 1856 and *People v. Patterson*, 102 Cal. 239 36 P. 436, 1894, California Supreme Court. LexisNexis California Official Reports. California Supreme Court, LexisNexis California Official Reports.

crime took place. As a result, in many instances, delayed reporting or institutional response could prevent the execution of sexual assault prosecutions.[92]

As trial records demonstrate that a victim's overwhelming fear of bodily harm or death were expected components of rape or "assault with intent" charges, instances of sexual coercion that did not involve such violence may have been ignored by authorities or remained unreported by victims. For perpetrators, threatening death or intense physical abuse if a victim reported being attacked could indicate their own concern of social or legal reprisal. In *People v. Hamilton* (1873), the complainant did not tell her mother that her step-father had raped her until two years after it had occurred, and testified that the "reason for her silence that he threatened to kill her if she disclosed the facts, and that she was afraid of him."[93] When Edwin Mayes raped his sister-in-law after a party in 1883, he strangled her, stuffed her mouth with mustard flowers to silence her cries, and threatened her with a pistol. Following the rape, he threatened her life if she disclosed the incident to anyone.[94] Women's and girls' fear of violent and even deadly reprisal for reporting sexual violence were overwhelmingly consistent features of reported cases throughout this the late nineteenth century.

Regardless of the threats made against them, California laws, and specifically "Title IX: Crimes Against the Person and Against Public Decency and Good Morals" of

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[92] *People v. Mayes,* Case No. 2075, 1883, Los Angeles County Court Records: Los Angeles Criminal. The Huntington Library, San Marino, California.
[93] *People v. Hamilton,* 46 Cal. 540, 1873, California Supreme Court. LexisNexis California Official Reports.
[94] *People v. Mayes,* Case No. 2075, 1883. Los Angeles County Court Records: Los Angeles Criminal, The Huntington Library, San Marino, California; *People v. Mayes*, 66 Cal. 597, 6 P. 691, 1885, California Supreme Court. LexisNexis California Official Reports.

the California Penal Code after 1872, required that women and girls above the age of consent resist their attackers with their utmost strength. In fact, when the verdict from the Superior Court in Los Angeles was overturned by California's Supreme Court in *People v. Mayes* (1885), one of the justices took issue with the lower court's instructions to the jury that it was "not necessary to show that she used all the resistance in her power. If her resistance was in good faith, and honestly made, and was thus the utmost according to her light, and the circumstances under which she was placed," then it was sufficient. In his opinion overturning the lower court's verdict, Supreme Court Justice Thornton directly disagreed with this instruction, rhetorically asking what the jury could know

> of the internal state of [the complainant's] mind at the time of the commission of the assault on her, which is obviously referred to in the words 'according to her light'? These words were calculated to mislead and confuse the jury, and, in my opinion, constitute error for which defendant is entitled to a reversal.[95]

In this manner, resistance was a key element to sustaining rape or attempted rape charges, but could also be a site of ambivalence. To adjudicate these uncertainties, lower court judges and Supreme Court justices exerted a great deal of power in determining how much resistance was enough, and how a woman should demonstrate that her exertions were sufficient during trials.

This was perhaps most evident when Maria de Los Angeles was charged with assault with a deadly weapon in San Diego's Superior Court in 1881.[96] According to her

[95] *People v. Mayes*, 66 Cal. 597, 6 P. 691, 1885, California Supreme Court. LexisNexis California Official Reports.
[96] *San Diego Union and Daily Bee*, 31 August 1881, 3 California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California,

Supreme Court appeal documents, Maria assaulted Juan Jose Murillo with a knife "with means and force likely to produce great bodily injury."[97] In instructing the jury, the Supreme Court laid out that "the defendant would be justified in using a deadly weapon if the prosecuting witness was attempting to commit any rape or to have intercourse with the defendant except by consent."[98] However,

> a mere slap by the prosecuting witness, or attempted familiarity, without there was danger of its going any further, is not sufficient for her to use a deadly weapon or to make an attack of this kind. The mere fact that the prosecuting witness may have slapped her in the face without doing any great bodily harm, or have attempted familiarities which she did not like, would not be sufficient, unless there was danger of the attempt going further or an attempt at intercourse without her consent.[99]

In this case, the defendant had to prove her innocence by also proving she reasonably believed not only that the prosecuting witness intended to rape her, but also that the intensity of her response was warranted. This was likely even more difficult for her, as she was racialised in press reports, and called a "squaw."[100] Although in the Supreme Court opinion the justices affirmed that "appearances may justify a reasonable person in resisting by all necessary force what such person believes to be an attempted felony" – referring to the fear of an attempted rape – they also affirmed the "right so to resist a felony actually attempted," in reference to the assault with a deadly

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Riverside. http://cdnc.ucr.edu; *People v. de Los Angeles,* WPA 12241, 1882, California Supreme Court. California State Archives, Sacramento, California.

[97] *People v. de Los Angeles,* WPA 12241, 1882, California Supreme Court. California State Archives, Sacramento, California.

[98] Ibid.

[99] People v. de Los Angeles, WPA 12241, 1882, California Supreme Court. California State Archives, Sacramento, California; *People v. de Los Angeles*, 61 Cal. 188, 1882, California Supreme Court. LexisNexis California Official Reports.

[100] *San Diego Union and Daily Bee,* 25 August 1881, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

weapon.[101] Ultimately, with her conviction affirmed in the Supreme Court, Maria de Los Angeles's case offered a potent example of the bind that women found themselves in when it came to rape and sexual assault. Women and girls were perceived to be weaker than men, but were still required to resist with their available strength the advances of those who sought to violate them; however, if they were too successful in maintaining their "honour," they could then be held accountable for their defensive violence.[102]

In the County Court trial *People v. Mayes* (1883), introduced in the previous chapter, the presiding judge offered lengthy instructions to the court about physical resistance. "In arriving at your verdict in this case" he began, "you have a right to take into consideration the age size and respective strengths of the parties as evidence bearing upon the question of the ability of the alleged injured party to successfully resist an assault."[103] Encouraging assessment of visual cues to determine relative strength as evidence in court, the judge also framed the primary legal concern as the guilt or innocence of the accusing party. A man accused of rape, it followed, was only guilty if the "alleged injured" woman was determined innocent of letting him do so. "You have also a right," he declared, "to take into consideration the relations existing between [the complainant] and the defendant as evidence tending in some degree to show that she had a right to trust herself to the defendant without fear of molestation

[101] *People v. de Los Angeles*, 61 Cal. 188, 1882, California Supreme Court. LexisNexis California Official Reports.
[102] Her attacker was also tried and convicted for "simple assault." See: *Sacramento Daily Union*, 24 September 1881, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[103] *People v. Mayes,* Case No. 2075, 1883, Los Angeles County Court Records: Los Angeles Criminal. The Huntington Library, San Marino, California.

from him."[104] With these opening words to the jury, the judge defined a legal case that sought to probe, analyse, and judge the actions and responses of the complainant over and above the guilt of the accused. Maintaining a focus on the responses, actions, behaviours, and perceived state of the accusing party, most judges took as fact that women often lied about consent and their efforts to resist the sexual advances of men.

Perhaps stemming from Hale's oft-cited caution that rape "is an accusation easily to be made" and difficult "to be defended by the party accused, tho never so innocent," women were generally treated with a great deal of scepticism when it came to their experiences of sexual violence in California, before and after California's Penal Code came into effect in 1872.[105] The likelihood that a woman could connive for the destruction of an innocent man by falsely accusing rape or "assault with intent" was not only imaginable to men and women in the period, but probable. As a judge in one of Mayes's trials told the jury, "there is no class of prosecutions attended with so much danger or which afford so ample an opportunity for the free play of malice or private vengeance as prosecutions for rape."[106] He further elaborated: "in view of the facility with which charges of this character may be invented and maintained," the courts must be very strict with the rules of such cases.[107] In this, and many other cases up and down the west coast, judges reminded juries that they must take great care when

[104] Ibid.
[105] In their quotations of Hale, nineteenth-century judges frequently omitted Hale's recognition that rape is also "hard to be proved" by the complainant: Hale, *Historia Placitorum Coronæ* / *The History of the Pleas of the Crown*, 635.
[106] *People v. Mayes,* Case No. 2075, 1883, Los Angeles County Court Records: Los Angeles Criminal. The Huntington Library, San Marino, California.
[107] Ibid.

assessing women's stories of assault, and attend carefully to the details to ensure their honesty.[108]

The strict requirement of resistance was only immaterial in cases that involved girls below the age of consent. Perhaps because of this vital role in adjudicating sexual assault claims, the legal age of consent shifted in California throughout the period. When California joined the Union in 1850, the State was consistent with other parts of North America, Britain, and the wider British Empire, in setting this age at ten-years-old. Charge sheets in the 1860s began to note when girls were between the ages of ten and twelve, and by the 1890s girls up to the age of fourteen or sixteen were often still acknowledged as in girlhood.[109] While debate consistently surrounded it, both within the state's houses of the government and without, the age of consent was raised from ten to fourteen in 1889, from fourteen to sixteen in 1895, and – although beyond the scope of this exploration – it was raised to eighteen in 1911, where it remains today. In this shifting context, fixing the age of the complainant proved consistently important in cases where the victim was both young and unmarried. As the end of the nineteenth-century drew nearer, changes to the legal age of consent also gave rise to a growing concern about "seduction," or the luring of young, impressionable girls over the age of consent into sexual activity and immorality. Both contention around the age of consent and the parameters of seduction in law were indicative of changing perceptions of the relationship between childhood and sexual agency, as well as the tensions that could arise between public commentators, social reformers, and the

[108] For more examples: *People v. Shea,* 125 Cal. 151, 1899 and *People v. Fleming,* 94 Cal. 308, 1892, California Supreme Court. LexisNexis California Official Reports.
[109] Age confusion had plagued legal discussions of rape for a long time, see: Hale, *Historia Placitorum Coronæ* / *The History of the Pleas of the Crown*, 730.

law.[110] In cases involving women over the age of twenty-one, age generally ceased to form a crucial element to judicial processes, and in these instances marital status often played a more defining role in adjudicating her respectability.

While it was vital for legal proceedings to fix the exact age of a girl close to the age of consent, as this could change the burden of proof for a complainant, legal doctrine did not specifically stipulate how age could or should influence character assessments of complainants. Beyond the age of consent, a girl or woman's age indicated to judges and juries their potential for sexual awareness and culpability. On the one hand, girls existed within a category that many understood as requiring the protection of their fathers, male guardians, or the state. On the other, constructions of women as capable of seducing men into states of sexual fervour also appeared to implicitly drive conversations of sexual violence.[111] Girls and women were frequently infantilized well past the age of puberty, and access to their sexuality persisted as a central element of family organization and marriage throughout the period.[112] Yet their potential to knowingly or unknowingly sexually entice men simultaneously constructed them as powerful sexual actors, influencing how accusations of sexual assault played out in courtrooms.[113]

Shifting notions of the relationship between age and sexuality reflected broader conceptualisations of sexual violence, as the age of a complainant was a key

[110] I explore all of these in more detail in Chapter Five.
[111] Odem, *Delinquent Daughters*, 3.
[112] Odem, *Delinquent Daughters*, 2; Catherine Hall, *White, Male, and Middle Class: Explorations in Feminism and History,* (Cambridge: Polity Press, 2007).
[113] Joanna Bourke has described this as the construction of women's "unconscious complicity." Joanna Bourke, "Sexual Violence, Bodily Pain, and Trauma: A History," *Theory, Culture & Society* 29, no. 3 (2012): 44.

way that judges assessed their capacity to be victims. Nevertheless, the legal age of consent was not always a driving force behind public understandings of girls of "tender" years. Despite the fact that she was fifteen-years-old in 1893, a girl was described at trial as a "pitiful little complaining witness" and "a mite of a girl.[114] Use of the term "child" was liberally dispensed to girls as old as thirteen, regardless of where the law placed their sexual maturity.[115] On the other hand, the law set the age of fourteen as the age at which boys were capable of committing a rape, and no age of heterosexual sexual consent existed in law for males throughout this period.[116] Discussions of age in courtrooms particularly reveal the central role of idealised notions of sexual assault victims. In a context where sexual assault trials tended to focus on evaluations of women's reliability as deserving complainants, age offered judges a concrete method of evaluating a woman's capacity to be sexually mature. In a case in 1889, for example, an eleven-year-old was described in an article about a rape trial as "rather small for 11 years old," but "plump and good looking."[117] Such commentaries on looks for the paper's readership offered up a potent, if unconscious, rationalisation of her sexualisation by the perpetrator.[118] Age confusion, while illustrative of broader understandings of the distinctions between childhood and adulthood in this period additionally reflected that participants in the justice system

[114] *Los Angeles Herald,* 8 September 1893, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[115] See, for example: *People v. Pollock*, Case No. 01141, 1872, Los Angeles County Court Records: Los Angeles Criminal. The Huntington Library, San Marino, California.
[116] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 118.
[117] *Los Angeles Herald,* 12 October 1889, 8. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[118] Ibid.

usually sought to assess the sexual knowledge and potential of girls and women rather than determine the guilt of male perpetrators. If a girl was not a girl, and was in fact a woman, she could then be held to account for the ways in which she failed to protect herself from violence, seduced or incited the violence – intentionally or not – or claimed sexual assault to absolve herself from regret following a consensual sexual encounter.

Ultimately, the onus of moral responsibility for regulating and controlling sexual behaviour outside of marriage was on women, despite their broader social and legal positions as attachments to men. Age, in a similar way to race, was a way the judicial processes for cases of sexual or intimate violence both worked to the detriment of women and girls and proved ineffective at meting out justice according to the principles of the judicial codes of the era. Nevertheless, particularly in cases where victims were quite young, judges explicitly acknowledged harm as a source of concern. In a County Court case in Los Angeles in 1865, the judge noted the "great damage" that the violence had on the seven-year-old victim.[119] These concerns could range from concern over life-threatening injuries to the long-term ramifications of stigma and shame that could surround their premature sexual experiences.[120] In their directives to juries in California, judges frequently made explicit reference to the seriousness of the crime of rape, and admonished their juries to handle such cases with great care.[121] In these and other cases, judges appeared to particularly consider the ill-effects of the

[119] *People v. Ramon,* Case No. 00722, 1865, Los Angeles County Court Records. Seaver Center, Natural History Museum, Los Angeles, California.
[120] For an example, see this article on girls and the age of consent: *Los Angeles Herald,* 27 May 1897, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[121] *People v. Totman*, WPA 22633, 1901, California Supreme Court. California State Archives, Sacramento, California.

sexual crimes in broad societal terms. While judges proved somewhat more sceptical of women's honesty when it came to rape claims, they did recognise that experiences of violence could have longstanding implications for those victimised by it and acknowledged the capacities of some women to be victims.

Men, Boys, and "Crimes Against Nature"

Where the adjudication of victimhood for girls and women was predicated on factors like age, race, and prior sexual experiences, men and boys were rarely noted as victims of sexual violence throughout this period at all.[122] Statute for violent sexual crimes presumed assault and victimisation to be heterosexual, involving the forcible penetration of a penis into a vagina. Even the "carnal abuse" of children was encapsulated in rape statutes, which presumed the successful or attempted penetration of a vaginal canal.[123] While women were constructed as victims, men, if over the age of fourteen, were understood as perpetrators. As the white male violence that characterised the development of hegemonic masculinity in California throughout this period attests to, the rationalisation of certain kinds of violence against certain kinds of bodies or in particular circumstances was foundational to the formation of California as an American state. In some situations, "whiteness" could be flexible throughout this period, but racial differences were violently policed from the individual interpersonal to the state level. Bolstering the development of white male power was

[122] Stephen Robertson found similar for boys in New York. See: Stephen Robertson, "'Boys, of Course, Cannot Be Raped': Age, Homosexuality and the Redefinition of Sexual Violence in New York City, 1880–1955," *Gender & History* 18, no. 2 (2006): 357-379.
[123] Ibid.

a pervasive perception amongst white Anglo Americans of the greater degree of civility and the higher formation of reason and intellect of white men over those excluded from the mantle of "whiteness." This meant that men who were perceived as "white" held positions of power over others and was a part of a process that ultimately obscured their pathways to acknowledgement in contexts of sexual victimisation.

White manliness in California diversified to accept a greater array of behaviours and activities that the precepts of Victorian ideals of middle-class manliness excluded.[124] In this widening of acceptable white male identities, it seems as though until the end of the nineteenth century, the sexual relationships of men with other men or boys, in either violent or consensual iterations, were condemned as entirely unnatural and tended to garner little specific social commentary. The records for legal trials for sodomy, or "crimes against nature" are sparse, and Supreme Court appeals also appeared infrequently. Those that do remain suggest that instances of sodomy could be perceived as a form of assault, although the crime in these cases was not a crime against an individual, but rather a crime against "nature," public decency, and good morals.[125] As rape law shifted over the course of the nineteenth century, lawmakers sought to make the explicit connection that sexual violence was a crime that wounded the person of the (female) victim, but "crimes against nature" remained static in legal constructions throughout the period.

As there are so few details that offer insight into the intricacies of "crimes against nature," it is difficult to make firm assertions. The Penal Code, first passed in

[124] See Chapter Two.
[125] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889,* 29.

1872, organised sodomy and bestiality under the single banner of "crime against nature" in Title IX, Chapter V of the Code alongside bigamy and incest.[126] These crimes targeted behaviours that transgressed the boundaries of religiously-defined "natural," or procreative, sexual activities. Section 286 simply stated that "every person who is guilty of the infamous crime against nature, committed with mankind or any animal, is punishable by imprisonment in the State prison not less than five years."[127] Sodomy cases appear consistently in newspaper records that detailed the numbers of charges for crimes in California. These reports usually just listed the crimes brought to trial, and only occasionally included the names of the accused.[128] Single sodomy cases appear in these records, but rarely garnered enough attention for editors to cover and print the details of trial proceedings. It is likely that editors actively chose not to cover sodomy trials, instead noting simply when men were brought up on such charges. When they did, they were usually brief and cursory: condemning the act or acts alleged as "revolting."[129] *The Los Angeles Herald* was relatively typical when it reported on a case in April 1897. It described that

> at 10:30 oclock [*sic*] last night Walter Parter, an old man, was brought in from Ballona township by Deputy Constable Hughes and placed in the county jail, charged with

[126] I return to incest in my discussion of child abuse in Chapter Four.
[127] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889,* 129.
[128] *The Nevada Journal,* 22 February 1856, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/; *Los Angeles Herald,* 2 January 1891, 2. Chronicling America: Historic American Newspapers, Library of Congress https://chroniclingamerica.loc.gov/; *Los Angeles Daily Herald,* 1 February 1887, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/; *Sacramento Daily Record,* 1 January 1880, 9. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/.
[129] *The Los Angeles Herald,* 20 April 1897, 10. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/.

> having committed a crime against nature. The details of his infamous crime are too revolting for publication.[130]

The category of "crimes against nature" covered all acts, consensual and non-consensual, of anal penetration into the body of an animal, woman, or man. Neither sexual pleasure nor adult male sexual victimhood were addressed in legal or newspaper records, and those who wrote of their experiences in California also usually remained silent on matters of sexual behaviours between men.

Despite the relative silence about sex between men, common law, which shaped the production of California's legal codes, acknowledged the possibility of such activity through prohibition.[131] The law stipulated that consent was not necessary for the charge, but an individual who consented to anal penetration would be considered an accessory to the crime.[132] These laws had been discussed as a part of common law in William Blackstone's commentaries, where they were expressly predicated in evangelical religious prohibitions and positioned as crimes that were both antithetical to nature as well as against God.[133] Unlike with laws that had implications for heterosexual sexual violence, the legal language that appeared in the Penal Code from 1872 had changed little from the laws established in the state in 1850, and few debates around the particularities of sodomy law mark the records of legislative shifts throughout the late nineteenth century. While concerns around age of consent, and the precise nature of the meaning of "resistance" were consistent features of public

[130] Ibid.
[131] Same-sex sexuality between women did not seem to be considered in legal or social commentary.
[132] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 129.
[133] Sir William Blackstone, *Commentaries on the Laws of England in Four Books: Book IV* (Philadelphia: Childs & Peterson, 1860), 215.

and policy debate in California during this period, lawmakers and social commentators remained relatively silent on the issue of sodomy.

This relative silence was not universal throughout this period, or to broader cultural milieus that developed in frontier mining contexts. Historians of British Columbia in the same period, a settler colonial context that experienced a population influx following gold discoveries from the late 1850s, have explored and demonstrated that homosocial culture, and the threat of possible homosexual relationships, were acknowledged and responded to by the British Colonial Office.[134] In a social environment where male-male interpersonal relationships were abundant and sexual contact between them was feared, California appeared to be relatively unmarked by agitations of homosociality as a threat to hegemonic white masculinity. Likewise, texts on medical jurisprudence published for a wider American audience not only acknowledged sodomy but proclaimed its prevalence. In the seventh edition of the *Manual of Medical Jurisprudence* (1873), Tayler Alfred Swaine and John J. Reese asserted that "trials for sodomy and bestiality are very frequent, and convictions of men and boys have taken place for unnatural connection with cows, mares, and other female animals."[135] In California, little public discussion prevailed about such crimes, either with regards to human or animal anal penetration.

The consistency in legal language, which acknowledged and condemned sodomy as a "crime against nature" throughout the late nineteenth century – a period of fluctuating racial proscriptions and marked by shifts in age of consent debates,

[134] Adele Perry, *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849-1871* (Toronto: University of Toronto Press, 2001).
[135] Taylor Alfred Swaine and John J. Reese, *Manual of Medical Jurisprudence*, 7th edition, (Philadelphia: Henry C. Lea, 1873), 725.

particularly from the 1870s onwards – suggests a relative incapacity of lawmakers and social commentators to consider and contend with the sexuality of men with other men. The system of racial and gendered dominance of white men established in 1850, and which only began to be dismantled after the Civil War, was built on an ideology of white male dominance. That dominance presupposed the greater moral and social authority of white men, of all social classes, over people of colour, especially Native Americans, African Americans, and Chinese migrant populations. While the violence of white men against men of colour was rationalised as defensive violence, and thus necessary, the violence of white men against women of colour was obscured, ignored, and rarely acknowledged as such. In a parallel manner, sexual violence of men against other men – unlike instances of non-sexual assault – did not fit into established narratives of white masculine dominance, and thus seem to have been only tacitly acknowledged.

Instances of sexual victimisation of boys were also rarely acknowledged.[136] As I will explore further in the succeeding chapter, in law, the sexual assault of children primarily focused on the evidence of vaginal abuse of female children, in accordance with broader concerns over vaginal penetration. Sexual abuse of boys, at least until wider definitions of child sexual abuse began to circulate in the 1890s, was often broadly overlooked and thus underreported. One section of the Penal Code only implied the sexual innocence offered to boys when it stipulated that boys below the age of fourteen could not be prosecuted as consenting accomplices in a "crime against

[136] As noted in other contexts, this was not unusual. See: Louise Jackson, *Child Sexual Abuse in Victorian England* (London: Routledge, 2000).

nature" charge.[137] Even though children operated in the sphere of "innocents," an unwillingness, or perhaps inability, to content with male sexual impulses for other men or boys seems to have prevailed in this space.

In commentaries of the vulnerability of children to carnal abuse, the "children" discussed were almost universally girls. Sexual abuse of children narrowly defined the forms of abuse that were acknowledged in social, legal, and medical contexts. Thus, in broad terms, "carnal abuse" laws were most usually applied to instances of abuse against girls. When boys were abused and their cases were acknowledged in the courts, newspaper reports did not usually express concerns over their welfare or loss of innocence. In a Los Angeles County Court case in 1860, Jose Sylvas was convicted of a crime against nature on a seven-year-old boy, and received one year in the state prison as punishment.[138] This sentence was below the minimum five-year sentence stipulated by law, suggesting the seriousness with which it was considered. In the records for this case, the question of consent or resistance on the part of the boy were not raised, and the crime was entirely oriented around the transgression of a male body by another male body, rather than the violence or harm done to the victimised boy. In the late 1890s, a newspaper was more explicit in its recognition of a boy as a "delicate child" who was "poorly used," but the indictment was nevertheless filed under the statute of "crimes against nature."[139] Unlike in rape cases, where guilt was constructed "in the outrage to the person and feelings of the female," "crimes against

[137] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 129.
[138] *People v. Sylvas*, Case 441, 1860, Los Angeles County Court. Seaver Centre, Natural History Museum, Los Angeles, California.
[139] *Los Angeles Herald,* 15 March 1896, 7. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

nature," were crimes against the appropriate order of sexual contact as stipulated by God, nature, and thus the law.[140]

In a case reported on in 1874, an article explained that "John Henry was put under arrest yesterday afternoon for an infamous crime against nature."[141] The two witnesses against him, presumably those who had been assaulted by the accused, were described as "two boys."[142] The reporter offered no other explanatory details about the case, and failed to note the age of the witnesses, as would have been usual in reports on child sexual abuse involving girls.[143] Only six years earlier, a case reported on 15 September 1867 in the *Daily Alta California* explicitly raised the issue of age in a case charging a "crime against nature," but with reference to the accused. According to California law, passed in 1850 and maintained in the legal changes during the 1870s, "an Infant under the age of fourteen years shall not be found guilty of any crime."[144] In this particular case, "Napthaly Levy, convicted of a gross and outrageous indecent assault on a boy," was imprisoned and awaiting the decision of the Judge, whose punishment would be influenced "by the number of years [Levy] has lived" as he was

[140] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 37.
[141] *Daily Alta California,* 24 April 1874, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[142] Ibid.
[143] Ibid.
[144] California, "Chapter 95: An Act adopting the Common Law, passed April 13, 1850," in *Statutes of California, Passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 219. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

near the age of fourteen.[145] As these cases suggest, the sexual victimisation of boys was rarely acknowledged, and only briefly so when raised, from 1850 until the 1890s.

In 1897 the Supreme Court heard the appeal of *People v. Boyle*, which involved a man who was found guilty in a lower court of a "crime against nature" committed against a boy. The defendant sought a reversal of his conviction, arguing that he was not guilty of the crime because he penetrated a boy's mouth, and not his anus. Importantly, the appeal transcripts provide more explicit detail about how a "crime against nature" was understood in this period and further demonstrate that the age of the complaining witness did not garner particular attention.[146] Until this point, California court records reveal almost no instances of criminal allegations of sexual contact beyond those that involved genital penetration, either consensually or by force. In many respects, that oral penetration was noted in *People v. Boyle* is indicative of a broader legal shift that marked the late 1890s. In this and the increasing prevalence of incest charges, California courts appeared to recognise a greater diversity of sexual charges during the last decade of the century, foreshadowing transformations that would take place after the turn of the century. While it is difficult to assess why the courts and the press both seemed to remain relatively discreet in articulating the details of sexual violence towards male children, it is clear that such cases were not usually legally interpreted during this period as "carnal abuse." Judges, prosecutors, and even a commentating public appeared to let instances of the sexual abuse of boys pass without the kind of moralising concern they applied to girls. As a

[145] *Daily Alta California,* 15 September 1867, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[146] *People v. Boyle*, 116 Cal. 658, 48 P. 800, 1897, California Supreme Court. LexisNexis California Official Reports.

result, sexually abused boys seem to have been rarely acknowledged through legal recourse and were habitually denied access to recognition as victims.

As a matter of comparison, a case in 1891 involving a sixteen-year-old male accused of raping of a young girl, "seven or eight years old in appearance, but older in years," was reported on with significantly more drama.[147] The report carefully recorded the condemnation of the judge, and printed his assertion that rape against a child is "a heinous offence, one which is condemned in all countries and by all nations." The judge's sentence of ten years imprisonment, after referring to the perpetrator as "a youth of tender years," and the courtroom scene were all detailed in a dramatic newspaper report.[148] That nothing could "restore" the young girl to "her former condition," was the driving impulse for the judge's condemnation, according to the article. Even though vaginal sexual intercourse with girls below the age of consent was illegal throughout this period, the matter of consent was consistently raised in legal contexts. Conversely, legal language throughout this period held that "consent or non-consent is immaterial" to sustain a crime against nature.[149]

While publicly recorded responses to the sexual abuse of boys do not indicate a similar level of concern as for the sexual abuse of girls, perpetrators accused of a "crime against nature" were occasionally also condemned for unrelated sexual crimes. In 1856, a man was arrested in San Francisco "charged with having committed one of the most atrocious and disgusting crimes known to our statutes, to wit: that of rape,

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[147] *Santa Cruz Sentinel,* 29 August 1891, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[148] Ibid.
[149] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 129.

having violated the person of his own daughter, a little girl of about eight years." Making the charge even more salacious, the reporter went on to explain that this was "the same man who, a few montes [*sic*] ago, was charged with having committed a crime against nature, but I believe was not convicted owing to some flaw in the proceedings."[150] In 1857, an Italian plaster worker was arrested on a charge of a "crime against nature," and, it was reported, he had previously been accused of attempting "rape on the person of a child about ten years."[151] These notations indicate a context where a "crime against nature" was used by commentators to connote general sexual perversion that existed parallel to, but remained separate from, child sexual abuse against girls.

Likewise, the possibility that men and boys could be vulnerable to sexual violence was only infrequently acknowledged. In 1873, a druggist in San Francisco, O.L. Stiglaar, was charged with a crime against nature. While the details of the case were deemed as "unfit for publication," the article characterised the primary witness as a "demented youth about sixteen years of age." The testimony he made against Stiglaar was, in turn, described as "incoherent and inconsistent," which ultimately led the reporter to conclude that he was in a "state of mental weakness that quite disqualified him for a credible witness."[152] Owing to this, as well as some interest by a physician, the reporter admitted scepticism of the validity of the charge, concluding that "strong

[150] *Sacramento Daily Union*, 8 October 1856, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[151] *Sacramento Daily Union,* 25 March 1857, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[152] *Weekly Butte Record,* 9 August 1873, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

evidence was given against the probability of [Stiglaar's] guilt."[153] Through his reporting, the journalist consistently expressed a desire to dismiss the charge as false, allowing him to avoid contending with the implications of the abuse of an adolescent male with intellectual disabilities, as well as the implications of male sexual victimisation.

While "crimes against nature" were not discussed in terms of sexual vulnerability or violence, they were generally condemned. A report in the *Daily National Democrat* in 1859 described one accused perpetrator as a "brute in human shape."[154] Perpetrators of such crimes could be so negatively perceived that their names were sometimes omitted to protect their identities, at least prior to conviction. "A HORRIBLE CASE" read the headline on a report in 1864, "an Irishman, whose name for the present we withhold, was examined before Justice Smith of this place on a charge of committing that most atrocious of all crimes, the infamous crime against nature." In fact, the report stated, "the circumstances disclosed in the examination are too revolting and disgusting to appear in print."[155] In another reported in 1897, "an old man" faced a charge of a "crime against nature," but "the details of his infamous crime" were "too revolting for publication."[156] These examples, which were replicated throughout the late nineteenth century in California, make it difficult to differentiate

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[153] Ibid.
[154] *Daily National Democrat*, 22 November 1859, 2. Chronicling America: Historic American Newspapers. Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn84038814/1859-11-22/ed-1/seq-2/.
[155] *Marysville Daily Appeal,* 27 November 1864, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[156] *The Los Angeles Herald*, 20 April 1897, 10. *Chronicling America: Historic American Newspapers*. Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn85042461/1897-04-20/ed-1/seq-10/.

instances of consensual sexual relations between men, sexual coercion perpetrated against men and boys, and bestiality. Where heterosexual sexual violence was narrowly defined to capture only particular forms of violence against women and girls, it also excluded the possibility of men as victims of sexual violence, and severely limited discussions of the vulnerability of boys to sexual predation.

Details about some legal cases were also kept from the public when defendants requested to have the courtroom galleries emptied of spectators and reporters. In the proceedings of *People v. Crepeau* (1869), the reporter described that "when Court was called yesterday the City Hall was well filed by men and boys, who were attracted thither by a morbid curiosity to hear the testimony." However, those eager for more details would be disappointed, as "when the case came up for examination, the counsel for defense moved to have all outsiders execuded [*sic*] from the court room; the motion was granted an [*sic*] the court room cleared."[157] Such cases suggest that men accused of "crimes against nature" could be subject to ridicule and condemnation from the public, and thus sought to keep the details of the accusations against them private.[158]

Legally speaking, it appears as though those cases that did appear in courtrooms would be taken quite seriously, so long as the charge was not proved to be fraudulent. As with rape charges, commentators appeared to anticipate that sodomy

[157] Marysville Daily Appeal, 2 March 1869, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[158] Request to clear courtroom galleries were also granted in incest cases, where women were often reported as keen observers: See: *The Los Angeles Herald*, 19 January 1893, 5. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/.

charges were more common than the crime itself, and could be used against enemies to humiliate or to punish adversaries for unrelated disagreements. In a well-reported case in 1873, a man was charged with a crime against nature, but it was surmised before the investigation by one reporter that it was a false charge. The accused maintained this narrative, certain that he could "establish his entire innocence."[159] Instead, he claimed the charge was a case of revenge over unrelated business dealings, designed to discredit his reputation. Supreme Court Justice McFarland replicated the familiar refrain of heterosexual rape cases in a case in 1894, when he offered his opinion on a case for a "crime against nature" where the perpetrator was sentenced to forty-one years imprisonment. "The offense charged in this case is in its nature coarse and detestable," he admitted, but "it is an offense easily charged and difficult to disprove; it affords great facility for a false accusation, made for the purpose of revenge and injury; and usually its proof depends mainly upon the testimony of an accomplice."[160] As this judge suggested, charges of sodomy could be treated with a similar scepticism as charges for heterosexual rape, although women seemed to be more broadly distrusted as accusers of sexual crimes.

When a charge of a "crime against nature," was sustained, conviction records suggest that guilty parties could be treated quite harshly. As with other sexual crimes, sentences could range from a few years' imprisonment to decades in San Quentin, the

[159] *Daily Alta California*, 1 August 1873, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[160] *People v. Moore*, 103 Cal. 508, 37 P. 510, 1894, California Supreme Court. LexisNexis California Official Reports.

California State Prison.[161] Many cases suggest that guilty parties were regularly sentenced to between five and ten years, in alignment with what the law stipulated. Newspaper records for these cases rarely differentiated between bestiality and sodomy, and even more rarely made explicit distinctions between consensual and non-consensual sex.[162] Even charges brought by District Attorneys on behalf of the state could decline to specify if the act charged was upon a human or animal. In a case tried in Kern County, and later appealed in the Supreme Court in 1894, William Moore was charged with a "crime against nature." The case was appealed by the defendant because the charge failed to make this specification.[163] Yet in this case, and in others, judges seemed to reject concerns around the vagueness of a charge of a "crime against nature." In 1881, Justice Thornton of the California Supreme Court denied an appeal on these grounds, asserting "every person of ordinary intelligence understands what the crime against nature with a human being is."[164] Thus, in contrast to rape charges, sexual crimes perpetrated by men against other men, and even boys, were not bound by the same concern with specificity as those perpetrated by men against girls and women.

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[161] *Marysville Daily Appeal,* 28 December 1869, 3; *Sacramento Daily Union*, 28 October 1858, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[162] Fourteen years for a "crime against nature": *Sacramento Daily Record-Union,* 27 April 1892, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/; California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 129.

[163] The Supreme Court judge did overturn the judgement, but for other reasons, stating that the charge was sufficient as it stood. *People v. Moore*, 103 Cal. 508, 37 P. 510, 1894, California Supreme Court. LexisNexis California Official Reports.

[164] *People v. Williams*, 59 Cal. 397, 1881, California Supreme Court. LexisNexis California Official Reports.

The fact that consent was not material to "crimes against nature" in courtrooms appears to have led to a conflation of consensual and non-consensual acts of penetrative anal sex. Language indicators suggest when a case was consensual, as when two men were jointly charged with a crime, and when it was not, as when the charge indicated "assault with intent to commit a crime against nature." In a case in 1864, for example, initial reports described that "J Crone and Ah Tuck" were jointly charged with a "crime against nature," but Ah Tuck was later convicted of an assault with intent against J. Crone.[165] In 1887, two men, Denis McMahon and Louis Stein, were jointly charged for the crime.[166] Likewise, for these sexual crimes, prison was used as a deterrent to discourage the behaviour. As reports of pardons throughout the period also demonstrate, men who committed "crimes against nature," could be accepted back into general society with little resistance expressed by the public.[167] This was the case regardless of whether the offence was consensual or non-consensual, or if the anal penetration was in the body of a human (male or female) or animal.

Similar to rape law, laws against anal penetration were oriented around the agency and criminality of the person penetrating the body of the other, but also implicated the person who was penetrated as potentially culpable. Unlike rape law,

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[165] *Sacramento Daily Union,* 17 May 1864, 3; For another example from 1876, see: *Sacramento Daily Union,* 26 August 1876, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[166] *Los Angeles Daily Herald,* 12 Oct. 1887, 3. Chronicling America: Historic American Newspapers. Library of Congress. https://chroniclingamerica.loc.gov/.

[167] *Sacramento Daily Union,* 28 April 1866, 2; there were more pardons in 1873: *Sacramento Daily Union,* 1 January 1874, 2; in another case, the Governor pardoned John Dally on the condition that "he leave the State prior to December 1st, 1873, and do not return inside of four years." *Daily Alta California,* 13 September 1873, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

social commentary of "crimes against nature" did not dwell upon the damage of instances of penetration on the reputation of those who had either consented to or had been forced into such sexual acts. It was the very construction of sodomy as "against nature" that made it more difficult to contend with in the broader context of gendered and racialised discourses of the period. The superiority of white men, constructed on violent conquest, was also predicated on the superior instincts of white civilisation, over the more "animalistic" tendencies of other races.[168] Commentaries that constructed California Indians as closer to nature and their base physical instincts, somewhat ironically helped European and Anglo-American newcomers to construct them as more transgressive of white Anglo-American constructions of "nature." Reconciling sexual desire of men for other men, or – for that matter – boys was a consideration that was seemed to be actively avoided. On one hand, if sodomy was a crime "against nature," then it was a crime that defied the laws of evolutionary logic and reason. Rape, on the other hand, was thus a more naturalised expression of violence, or "natural" heterosexual desire improperly controlled and directed.

Conclusion

Most cases for sexual crimes that went through the courts in California during the last half of the nineteenth century involved sexual behaviour that was insufficiently kept out of public view. Trial records highlight that sexual crimes had as much, if not more, to do with appearances of orderly, moral behaviour as they did with protecting

[168] I discuss the racial hierarchies in California at more length in Chapter Two.

the chastity of girls and women deemed worthy of such protection.[169] Sexual assault cases in both regions suggest that many colonial settlers believed that when a woman or girl's behaviour was inappropriately brash, sexual, or independent, she may not have only attracted undue attention, but deserved the negative consequences she sustained.[170] Legal records also suggest that institutions and community members took for granted that charges of sexual crimes were less common than the frequency with which they were charged, and thus approached complainants with suspicion and scepticism.

While judges, newspaper reporters, and captivated courtroom observers appeared to understand rape and "assault with intent" as terrible and troubling crimes, their concern was tempered by the presumption that women were not altogether truthful of their experiences of such violence and that accusations of sexual crimes could be used to humiliate or harm an accused party. While some judges acknowledged harm to victims as an outcome of sexual violence, they rarely expanded upon the potential emotional consequences of sexual violence for girls and women, and never acknowledged the distressing implications of legal processes themselves. Further, although precedent began to shape more regionally specific judicial responses to sexual assault in the later decades of the nineteenth century, longstanding legal presumptions inherited from centuries of British jurisprudence continued to permeate both American and British legal cases on the western coast throughout the period.

[169] *People v. Mayes,* Case No. 2075, 1883, Los Angeles County Court. Los Angeles County Court Records: Los Angeles Criminal, The Huntington Library, San Marino, California.
[170] Ibid.

The opinions and directives of judges, law enforcement officers, medical professionals, juries and reporters in courtrooms throughout this period reveal a peculiar logic that surrounded sexual violence. In trial contexts, judges played important roles in leading juries and the public to make certain kinds of assessment of blame and cemented narrow definitions of "rape" and "assault with intent." Alongside these judicial authorities were a host of other figures whose interpretations of sexual violence played roles in frontier courtrooms. The professional opinions of these men were deeply inflected with their gendered, raced and classed presumptions of "normal" sexual behaviour and ideas of acceptable and unacceptable violence.

In the context of the nineteenth-century western North American frontier, the period was one of great transition and change for white Anglo-American, European, South America, Japanese and Chinese migrants, native Indigenous populations, free and enslaved blacks, and Hispanic and Anglo Californios. Throughout this period of imperial transition, sexual assault trials reflected broader colonial imperatives and power dynamics, and revealed complex, often contradictory, understandings of sexuality and agency. Ultimately, the structure and function of the legal system as it developed in California throughout the period explicitly operated to protect women from sexual violation; however, British legal precedent oriented the function of imperial law toward the creation and maintenance of a "moral" and "civilised" society, rather than operating for the interests of individuals victimised by sexual violence. As a result, those involved in the adjudication of criminal trials, overwhelmingly male settler colonials, infused Victorian notions of racialised, classed and gendered hierarchies into the fundamental workings of the legal system.

In light of the law's formulation of sexual crimes as egregious transgressions of moral society, actual charges of sexual violence were often met with the judicial reminder that "it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[171] This well-worn logic figured prominently in the minds of nineteenth-century judges on the North American mining frontier, as they repeated it often and took pains to instruct juries to think similarly. In general, rape and attempted rape were broadly constructed as detestable crimes. Conversely, women were considered quite capable of capitalising on this seriousness to settle personal scores. Rhetorical concern for the safety and sexual sanctity of women, particularly white "respectable," middle-class women, coupled with an unevenly but consistently applied distrust of women's honesty, created a sexual-social space of contradiction and paradox throughout the period. While the demographic and institutional contexts in California transformed throughout the last half of the nineteenth century, legal understandings of rape and attempted rape remained consistent until into the 1890s.

Regardless of relatively clear and stable legal definitions of rape and "assault with intent," judges found ample opportunity in California to guide jurors toward a general scepticism and distrust of female complainants. For court justices, trials were opportunities to instruct juries – and perhaps the public – on how to understand evidence, complainants, accused parties, and their roles in the legal system.[172] A deeply held judicial concern regarding the disadvantage of an individual accused of rape, and the potential duplicitousness of women, led to the frequent repetition by

[171] See: Hale, *Historia Placitorum Coronæ* / *The History of the Pleas of the Crown*.
[172] For one example, of many, see: *People v. Marshall*, WPA 9231, 1881, California Supreme Court. California State Archives, Sacramento, California.

judges that "the accused is almost defenseless, and Courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury."[173] In context of this troubling logic, the legal system and its representatives simultaneously condemned sexual violence as heinously inexcusable and genuinely rare. Their warnings to juries, and by proxy courtroom spectators and a wider community of newspaper readers, appeared to presume public feeling would work against the interest of accused parties, and cause a break-down in legitimate processes of law and order.

To a certain degree, tensions could and did arise between public passions against some accused perpetrators of sexual crimes and the desires of judges to ensure the fair application of justice. Throughout the entirety of the late nineteenth century, concern over law, order, and justice were of great importance in California. From its roots as a chaotic frontier space, through challenges with vigilantism and large-scale genocidal violence against California Indians, racially exclusionary laws, and a reputation for pervasive immorality that lasted well into the twentieth century, California in the late nineteenth century was marked by a deep Anglo-American concern over the ascendency of the formal institution of American law. Longstanding constructions of sexual violence embedded in common law, adapted by California statutes, and altered through local precedent, were reflective of pervasive presumptions of victims, perpetrators, and the nature of sexual harms.

By narrowly understanding sexual violence as a rare heterosexual crime of vaginal penetration with a penis, committed by recognisable perpetrators against

[173] *People v. Benson,* 6 Cal. 221, 1856, California Supreme Court. LexisNexis California Official Reports.

white, sexually chaste women, adolescent girls, and female children, the law and its representatives only adjudicated a small minority of sexually coercive instances throughout this period. As the end of the century loomed, these narrow definitions began to be challenged, and legal records were marked by a broadening array of the diverse sexual behaviour, and forms of coercion, that had long been elemental in people's lives. Until the end of the century, the rigid confines that limited recognition and response to sexual violence were replicated even in cases that involved inarguably "innocent" victims, namely children. Implicit social and institutional narratives of age and race had indelible implications for how and when sexual transgressions could or could be recognised throughout this period.

IV. "Brutal Lust": Childhood, Gender, and Carnal Abuse

> "You have been convicted of an attempt to commit one of the most heinous crimes, one that has no extenuating circumstances; one that is worse than murder or larceny, because sometimes in the case of murder it is done in the heat of passion, while in some cases a larceny may be committed to raise money for some pressing want. In this case, however, there was nothing but brutal lust."
>
> -*San Bernardino Daily Courier*, 21 May 1892.[1]

Introduction

In 1892, a judge was reported comparing the sexual assault of a child with murder and larceny. While in his imagining, both latter crimes could have involved extenuating circumstances, the rape or attempted rape of a child did not. Rather, such a crime would only amount to the expression of a "brutal lust."[2] While the dividing lines between children and adolescents proved increasingly contentious and nebulous throughout the late nineteenth century, characterised by conflicting rhetoric on the sexual agency of girls and mounting hysteria about social purity throughout the nation, children symbolically offered a category of unproblematic innocence in need of protection.[3] Yet incidents of publicly recognised sexual violence involving children were particularly illustrative of the social scripts that confined their visibility to certain

[1] *San Bernardino Daily Courier*, 21 May 1892, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[2] Ibid.
[3] I will explore this in more detail in Chapter Five.

transgressions against certain bodies. Cases of indecent exposure, sexual assault within families, as well as in-home abuse of young domestic servants and teachers attempting to rape school children, were all recorded in newspapers and legal records, suggesting that there was a general willingness to acknowledge and report on the vulnerability of children to adult sexual desire and violence.[4] However, these cases also illustrate a greater willingness to recognise abuse against young girls, particularly young white girls, and the ways that gender and class presumptions shaped when and how sexually assaulted children could and would be seen and responded to.[5]

Thus, despite their hypothetically unproblematic status, crimes against children could be, and were, still subjected to a degree of contestation. Girls near to the age of puberty but below the age of consent were not exempt from accusations of culpability in courtrooms.[6] While the age of consent shifted throughout this period, it was in cases involving children aged ten and younger that a more consistent tenor of condemnation reigned against perpetrators, regardless of the age of consent in a given period.[7] While the age of ten is a somewhat arbitrary marker of the upper end of "childhood," children – particularly girls – between birth and ten were more likely to be understood

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[4] See a case where a teacher is accused of raping a six-year-old student: "Rape," *Sonoma Democrat,* 3 July 1862, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; Or a case of indecent exposure to "little children," *Daily Alta California,* 26 May 1866, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[5] For similar observations in a different context, see: Louise Jackson, *Child Sexual Abuse in Victorian England* (London: Routledge, 2000), 1.

[6] This is also similar to Victoria Bates's observations of England, see: Victoria Bates, *Sexual Forensics in Victorian and Edwardian England: Age, Crime and Consent in the Courts* (London: Palgrave Macmillan, 2016).

[7] The age of consent in California was age ten until it was raised to age fourteen in 1889, and sixteen in 1897. I elaborate more extensively on the changes in the age of consent in California in the next chapter.

of as children and reported on as such. Above the age of ten the treatment of individuals as children or adolescents began to vary more deeply, wrapped up in ideologies about sexual knowledge, biological development and race and class scripts.[8]

While the bodies of girls were sites of contestation and debate around morality, the bodies of boys were sources of ambivalence. Cases of sexual abuse perpetrated against boys seemed to be rare in courts, at least so far as the surviving records suggest.[9] Cases of boys below the age of fourteen – the threshold at which boys could be held legally accountable for any crime, including rape, in California – accused of sexual abuse of children were also quite rare. While males as victims and males as perpetrators are separate spheres of exploration, they often appeared in conjunction with one another in the records.[10] American law as adopted in California – following common law – defined rape as forcible vaginal penetration of a female by a male, negating women as possible perpetrators of sexual abuse and denying boys and men access to such charges where they were victims.[11] As explored in the previous chapter, while there is no intention here to erase or deny the experiences of sexual abuse of boys or men, sexual crimes perpetrated against them during this period were

[8] Again, the construction of a grey area between the identity of the "child" and that of the "adult" will be explored further in Chapter Five.
[9] There were far fewer reports of abuse against boys in press than against girls, and those that did exist were not elaborated on in any particular detail. For similar finding elsewhere, see: Jackson, *Child Sexual Abuse in Victorian England*, 4.
[10] Male victimhood was also complicated by sodomy laws. See Chapter Three on men, boys and anti-sodomy laws.
[11] Women as potential abusers of children began to be part of medical conversations closer to the end of the nineteenth century. See: Allan McLane Hamilton and Lawrence Godkin, *A System of Legal Medicine, Volume I* (New York: E.B. Treat, 1894).

legally – and, in large degree, socially and medically – considered under the mantle of laws against sodomy.[12]

Social and institutional attention afforded to the sexual abuse of girls, and the silence accorded to sexual abuse of boys, was in large part related to those in positions to set the discussion in the public sphere. Judges, politicians, and journalists tended to represent the white middle class. The men that acted as judges in courtrooms and held the authority to make California's laws also conceived of the problem of child sexual abuse and incest as problems relatively focused on working-class families with lower standards of morality and "dirtier" homes. These class-based ideologies appeared to have implications for how child sexual abuse was understood and responded to. Roger Davidson, with reference to early twentieth century Scotland, has argued that the sexual abuse of children was often discovered as a result of sexually transmitted infection, which doctors and jurists occasionally confused with symptoms of poor hygiene.[13] A range of motives for making accusations of sexual harm by men against children were also entertained by lawmakers, including extortion for money or retribution for personal wrongs committed against a parent.

In hypothetical terms, the sexual abuse of young girls offered a platform for public commentators to perform their disgust and horror of those who would perpetrate such violence. This offered a social outlet to condemn reported cases of sexual abuse in a region often criticised for its lawlessness and violence. Hypothetically

[12] The primary focus on this thesis is on heterosexual sexual violations, but the crime of sodomy is explored in some detail in Chapter Three.
[13] Roger Davidson, "'This Pernicious Delusion': Law Medicine, and Child Sexual Abuse in Early-Twentieth-Century Scotland," *Journal of the History of Sexuality* 10 no. 1 (2001): 62-77.

uncomplicated understandings of child victimhood allowed, for example, the broader recognition of the sexual abuse of girls of colour as compared to the rape of women of colour. Juries and communities frequently rallied to the support of girls who had been victimised as well, using these cases as lynchpins for discussion on the degeneracy of Californian social life. Likewise, the medical thinkers who shaped the evolving field of medical jurisprudence often built upon the concept of the "uncorrupted" girl body as the ideal to aspire to for girls and women alike. In many respects, until the last decade of the nineteenth century, the sexual abuse of young girls offered opportunities to the public and social institutions, like the law, to work against a sense of total state-based disarray. Even when journalists reported on communities overstepping judicial processes by kidnapping criminals from prisons and lynching them, their disorder seemed to represent, at least for white Californians, a restoration of the status quo.

Disagreements marked legislative and public discussions of what the age of consent should be from the 1860s onward, although social purity campaigners increased their pressures to raise the legal "age of consent" – which focused more on the age at which sexual access to girls would be protected – across the United States in the 1880s.[14] Broadly articulated concern for the sexual integrity of (female) children, most consistently those below the age of ten, remained a matter of public concern after 1850. A women's aid group called the California Ladies' Protection and Relief Society, for example, began operating in 1852, with the expressed mandate of supporting women and children in need. As an organisation, they offered temporary shelter to vulnerable and destitute Christian women and their children, and placed

[14] Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (New York: Palgrave Macmillan, 2005), 77.

orphaned children with families seeking domestic or manual labour support.[15] While not specifically working to combat sexual violence towards children, organisations like this were expressly Christian organisations working to establish and maintain moral authority in the state.[16] In this context, the abuse of power by men was not always ignored or denied when it came to the abuse of girls. Cases of religious men and teachers abusing girl children in their care or of men taking advantage of young domestic servants living in their homes garnered both attention and disgust amongst the public. Expressions of distaste toward such men that abused their access to girls also translated into action for many concerned members of the public.[17]

While girls below the age of ten were rarely implicated as at fault for enticing an assault, the perception of their innocence that protected them from suggestions of responsibility led to other concerns in courtrooms. Along a spectrum of religious knowledge, children who took the stand were required by law to understand God as well as demonstrate an appropriate consciousness of the solemnity and seriousness of a legal oath. Girls were frequently examined to determine if they would be allowed to testify as witnesses in their rape trials, and it was left to judges to determine if their narratives would be admitted as evidence in trials. Girls younger than ten who took the stand to testify of abuse were occasionally praised for their ability to tell sound, logical

[15] So long as those in need were chaste Christians: San Francisco Ladies' Protection and Relief Society Records, MS 3576. California Historical Society, San Francisco, California; See also in the British context: Kim Stevenson, "Fulfilling Their Mission: The Intervention of Voluntary Societies in Cases of Sexual Assault in the Victorian Criminal Process," *Crime, Histoire & Sociétés / Crime, History & Societies* 8, no. 1 (2004): 93-110. www.jstor.org/stable/42708564.

[16] San Francisco Ladies' Protection and Relief Society Records, MS 3576. California Historical Society, San Francisco, California.

[17] *Sacramento Daily Union,* 24 June 1863, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

stories. The implication of this, of course, that sexual abuse must follow logical threads, and thus if a girl's explanation was not linear or logical, then her accusation may not be true.

This apparently uncomplicated condemnation of sexual abusers who perpetrated violence against girls operated in conjunction with complex medical and legal discourses that constructed and idealised the untouched, non-sexualised girl's body. This idealisation of the "pure" female body that orbited around vaginal descriptions formed a discourse that exempted parallel constructions of the sexually violated young male body. Likewise, for most of the late nineteenth century, a sustained and narrow focus on evidence of trauma to the vulva and vagina shrouded an array of sexual abuse and molestation that did not involve vaginal penetration. Medical expertise was occasionally called upon, for example, to determine if a girl was too young – implicitly, to answer if her vaginal canal was too small – to be raped at all. Thus, despite occasional cases of sodomy involving male children, discourses on rape and sodomy rarely came together until shifting understandings of sex and sexual behaviour began to alter the medical profession's discussion of medical jurisprudence in the last decade of the nineteenth century. These details suggest that the sexual abuse of children, while a very serious social transgression, also offered a template onto which idealised versions of sexual assault were inscribed.

Nineteenth-Century Medical Jurisprudence

As explored in Chapter Three, California law was established through systemic adoption of codes and methods in criminal procedure used in other American states

and in the United Kingdom. Texts on evidence, criminal procedure, and crimes and punishments were adapted and adopted in California criminal practice throughout the late nineteenth century and guided the decisions of judges in the adjudication of legal cases. While I will later turn specifically to California's negotiation of medical knowledge and evidence within the context of trials, this section first explores some of the broader medical discourses that were circulating throughout the United States in this period. While the use and application of circulating medical expertise for criminal practice were not always noted expressly in California's legal or newspaper records from the period, their use in courtrooms is occasionally evident when they became the sources of conflict. For example, the murder case of *People v. Wheeler* (1882) offers a glimpse into this deeper world of circulating "knowledge" in courtrooms, as the verdict was appealed in the Supreme Court due to the use of a disputed medical text.[18] The moments where judges or defendants expressly noted the use of such texts, and thus their use was recorded by court transcribers and they were expressly incorporated into remaining written records, indicate that a much more elaborate system of "expert" referencing was a key feature of late nineteenth century courtrooms. As a result, this section explores the context of some texts of medical jurisprudence that went through multiple editions throughout the end of the nineteenth century to offer some indication of the nature of medico-legal discourses that surrounded sexual crimes during this period in the American context.

Medical professionals that began to consider the application of their expertise for legal contexts developed their theories by calling upon circulating medical

[18] *People v. Wheeler*, 60 Cal. 581, 1882, California Supreme Court. LexisNexis California Official Reports.

understandings of bodies and diseases, as well as through the use of trials from both the United States and England. In one of the earlier influential texts of this field, *Elements of Medical Jurisprudence* (first published in 1823), Dr. Theodric Beck – a physician and lecturer in Medical Jurisprudence in New York – began his chapter on rape by noting that it was a legally-defined crime involving an attempt to "injure or destroy the purity of the female."[19] With this opening, Beck signalled to his readers the moralistic tone that underpinned medical discourse on legal cases of rape in nineteenth-century America. His exploration of sexual violence was oriented to focus on the purity of the female body. By the publication of the second edition in 1825, he had added a notation in the section about "crimes against nature" (that is, sodomy), further revealing that the rape of boys was an afterthought in both the medical and legal spheres, and secondary to the discussion of the appropriate appearance of "pure" female genitalia.[20] In its oversight of the rape of men and boys, the text instead focused on the intricacies of recognising the various signs of forced vaginal penetration.

For Beck, the bodily signs of forced vaginal penetration were most obvious on children, as most of his assessment revolved around the visual signs of youth and virginity. Venereal disease, tearing, the state of the hymen, discharge, and other physical signs of sexual contact were considered more indicative in cases involving girls than those involving women, because a sexually active woman who engaged in consensual penetrative sex may, according to Beck, have a similar vaginal appearance

[19] Theodric Beck, *Elements of Medical Jurisprudence* (Albany: New York, 1823), 72; Beck was expressly cited in California courts, see for example: *People v. Neary,* 104 Cal. 373, 37 P. 943, 1894, California Supreme Court. LexisNexis California Official Reports.
[20] Theodric Beck, *Elements of Medical Jurisprudence,* 2nd edition (London: John Anderson Medical Bookseller, 1825), 71.

to a sexually-active woman who was raped.[21] This medical perception was based on a fundamental understanding of the nature of immature, innocent bodies, and the implications of violence upon them as well as the dichotomy between their pure, untouched state and the bodies of adult women.

The construction of the innocent (female) body also existed outside of medical spheres. Cases of child sexual abuse in late-nineteenth century California illustrate how ideas of morally grounded innocence were deeply bound up with the preservation of women's ignorance to sexual knowledge. As historian Stephen Robertson has argued, in the making of modern sexuality, children and the associations of different age categories must be considered a serious category of analysis.[22] Cases of abuse against children were perceived quite differently to cases of rape against adults, but broader narratives about sexual violence were also linked to cases of child sexual abuse in many ways.[23] As Beck's work on medical jurisprudence suggests, female children were not considered a distinct category to adult women, but their bodies offered an idealised template onto which signs of sexual violence could be more clearly inscribed. This contrasted with women and pubescent girls whose bodies were frequently sites of suspicion and possible desire. Beck's description of the female child's "natural" anatomy further inscribed this divide by first placing the hymen as an important indicator of a girl's purity, and then acknowledging the potentially destructive force of

[21] He was not alone in this perception. See also: J.J. Elwell, *A medicolegal treatise on malpractice and medical evidence: comprising the elements of medical jurisprudence,* 3rd edition (New York: Baker, Voorhis & Co., 1871); Francis Wharton and Moreton Stillé, *Wharton and Stillé's Medical Jurisprudence, Volume III,* 5th edition (Philadelphia: Kay, 1905).
[22] Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880-1960* (Chapel Hill: University of North Carolina Press, 2005).
[23] Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition, 136.

menarche to its integrity.[24] Furthermore, any kind of sexual activity or exploration of the genitals, including masturbation, could – Beck asserted – lead to the destruction of the idealised, untouched appearance of the vaginal canal.[25]

Throughout the United States during the nineteenth century, medical practitioners played a variety of roles as witnesses in courtrooms. In the 1850s and 1860s, a certain antagonism existed between the "rival professional collectives" of lawyers and doctors that at times put them at odds with one another.[26] While doctors increasingly professionalised and organised around positions of expertise, this expertise was not always recognised for the purposes of witnessing in courtrooms. Lawyers were not above challenging the reputations and knowledge of doctors whose medical testimonies undercut their cases. This made many doctors hesitant to offer medical testimony in mid-nineteenth century America.[27] Texts on medical jurisprudence frequently cautioned physicians about the kinds of evidence that they may be called upon to provide, and suggested they only offer their expert opinions in matters they were certain of.[28]

Despite this antagonism, doctors were called as witnesses in child abuse cases from the 1850s until the end of the nineteenth century in California. This may have been because it was assumed that confirming penetration through physical examination was easier in a child than in an adult. In some respects, medical experts

[24] Beck, *Elements of Medical Jurisprudence*.
[25] Ibid.
[26] James C. Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America* (Oxford: Oxford University Press, 1993), 107.
[27] Ibid.
[28] See: J.J. Elwell, *A medicolegal treatise on malpractice and medical evidence: comprising the elements of medical jurisprudence,* 3rd ed. (New York: Baker, Voorhis & Co., 1871), 570.

seemed to agree with this wider assumption. By Beck's admission, determining whether a woman had been raped was quite difficult, but in child abuse cases, where the question of consent was legally impossible, all that was required was confirmation of whether penetration had occurred at all.[29] That rape was defined in common law as the forcible penetration of a penis into a vagina had implications for how physicians saw their roles as experts in courtrooms. The presumption that physical force would be employed against a victim, even if it was not required in girls below the age of consent, meant that, as Beck's text alludes, physicians understood themselves as investigating the signs and marks of violence all over the entire body.[30]

Beck's instructions on the signs of rape began with an exploration of the medically understood signs of virginity. The untouched, chaste body, in Beck's estimation, was characterised by certain colours, textures, physical barriers, narrowness and tightness. For example, several physical markers of youth were used to mark the childhood female body, including the hymen, "carunculæ myrtiformes" (the folds of the vaginal canal), and the colour and texture of the labia. While the absence of one of these markers alone, Beck admitted, was not definitive, "if the fourchette [inner folds of the vulva] be ruptured, and the fossa navicularis [depressions between the hymen/vaginal canal and the labia] obliterated, the only deduction we can draw, must be an unfavourable one," namely that the female in question had been vaginally penetrated.[31] Through these assertions, he constructed a set of interlocking,

[29] Girls below the age of consent a girl were legally incapable of consenting to sexual intercourse. See Chapters One, Three, and Five for more on the age of consent.
[30] Beck, *Elements of Medical Jurisprudence*; See also: Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition, 128; Stephen Robertson, "Signs, Marks, and Private Parts: Doctors, Legal Discourses, and Evidence of Rape in the United States, 1823-1930," *Journal of the History of Sexuality* 8 no. 3 (1998): 345-388.
[31] Beck, *Elements of Medical Jurisprudence*, 78.

overlapping criteria that were at once imprecise regarding the question of rape, yet used to assert a level of expertise regarding the purity of girls and women for use in courtrooms. Notably, Beck's work aligned with the eventual disregarding of emission as a necessary proof for rape, constructing the "forcible use of another's body" as "the real crime" in these cases.[32]

Beck's work can be situated in a longer line of medico-legal inquiry in this period. In constructing his medical understanding of rape for legal contexts, he referred to the work and research of key legal texts that defined and explored the legal definitions of rape in England, including William Blackstone's *Commentaries on the Laws of England*, first published in 1753. As explored in the preceding chapter, the law in the United States, while structurally different to the conventions of common law, developed according to many of the fundamental assumptions regarding sexual crimes established in English courtrooms. Key experts including Blackstone – whose writings were frequently relied-upon as legal guides – alongside medical examinations and observations of cadavers, helped to orient medical thinking on rape that was foundationally linked to longstanding legal definitions of such crimes.

Although both legal and medical professionals focused on vaginal penetration as the key element of a rape cases, they had different professional knowledges of what conditions of force and wider circumstances constituted rape or attempted rape. Throughout the nineteenth century, as doctors were increasingly called upon to corroborate or scrutinise charges of rape, "medical jurists broadened their understanding of rape to fit the legal definition… and narrowed the range of situations

[32] Mohr, *Doctors and the Law*, 21.

in which they claimed to be able to determine whether a woman had been raped."[33] Increasing professionalization and the expansion of "medical expertise," which developed with evolving and proliferating scientific methods, led to a divergence in legal and medical discourses in the early nineteenth century, and the negotiation of new institutional relationships in the late nineteenth century. Despite these practical shifts and increasing recognition of certain doctors as "experts," the kind of equivocating evident in Beck's *Elements of Medical Jurisprudence* existed amongst many of his contemporaries and successors.

Texts on medical jurisprudence released throughout the United States in the decades following Beck's influential publication also demonstrate that the instructions disseminated for medical witnesses in legal cases evolved with changing understandings of the relationship between the medical and legal professions. In Alfred Swaine Taylor and John J. Reese's 1873 publication *Medical Jurisprudence*, the authors began by outlining the legal parameters of rape, rooted in common law and British legal discourse, and urged medical witnesses to first notice the precise time and date at which they were summoned to conduct the exam.[34] These directions notably encouraged medical professionals to think more specifically about the adaptation of their practice to the kinds of questions that would be asked in courtrooms. California's legal records demonstrate that the length of time between the alleged assault and the medical examination of the complaining witness was a matter of great significance. Likewise, their discussion emphasised the various pitfalls that could undermine

[33] Robertson, "Signs, Marks, and Private Parts," 348.
[34] This text was directly referenced as a resource in a California Supreme Court appeals case 1885, see: *Gallagher v. Mkt. S. R. Co.,* 67 Cal. 13, 6 P. 869, 1885, California Supreme Court. LexisNexis California Official Reports.

appropriate professional judgement in medical professionals, reminding medical readers of legal stipulations like the fact that rape in law included any vaginal penetration, however slight, and young children were sometimes subjected to deliberate genital injury by women to extort men they falsely accused.[35]

While Taylor and Reese were less dedicated to the description of a pure virginal canal than Beck, they did focus on the possibility of profuse discharge and symptoms of disease or abuse in young girls due to impure habits, raising the possibility of the transmission of venereal disease through sharing of bathwater or beds with infected persons.[36] By 1895, Allan McLane Hamilton and Lawrence Godkin, in *A System of Legal Medicine,* recognised a wider variety of sexual behaviours as child sexual abuse and indicated a change in understandings about perpetrators and victims.[37] "A common form of indecent assault upon children," they explained, "is where an adult male or female permits or compels a child of either sex to perform an act of manustupration [masturbation] upon him or her."[38] Likewise, in the fifth edition of Francis Wharton and Moreton Stillé's *Wharton And Stillé's Medical Jurisprudence,* published in 1905, the authors argued that a

> full and complete connection between an adult male and a child under twelve years of age is, on the first attempt, manifestly impossible; repeated efforts, however, may produce such a dilation of the parts as to render it finally possible.[39]

[35] Alfred Swaine Taylor and John J. Reese, *A Manual of Medical Jurisprudence,* 7th edition (Philadelphia: H.C. Lea, 1873), 703.
[36] Ibid., 708.
[37] Also evident in other texts. See for example: Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition, 137.
[38] Hamilton and Godkin, *A System of Legal Medicine, Volume I*, 651.
[39] Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition, 137.

While such possibilities had been remarked upon decades earlier by other medical researchers, observations of more varied forms of sexual assault against children were discussed with increasing regularity by the end of the nineteenth century. These broadening discourses on child abuse also began acknowledging that women could be perpetrators, and that abuse could occur without the genitals of the child – male or female – having been touched, manipulated, or wounded by an abuser. In keeping with a focus on child abuse as having a moral effect on the abused, Hamilton and Godkin expressly directed their readers that "no injury except a moral one" could have "been done to the child" to still sustain a charge of child abuse.[40] Hamilton and Godkin also made reference in their descriptions of abuse to Richard von Krafft-Ebing's 1886 publication, *Psychopathia Sexualis,* specifically citing his description of a woman who committed an "indecent assault" upon a male child.[41] These acknowledgements signalled the shift in broader American trends in medical understandings of sexual behaviour and sexual crime that were especially notable in legal contexts beginning in the 1890s.

The Medico-Legal Body in California

In California's courtrooms throughout the late nineteenth century, key texts – including those detailed in the previous section – were referenced in a variety of criminal cases. While doctors were reported on as present in courtrooms as early as the 1850s, texts of medical jurisprudence and expertise were increasingly referenced by the Supreme Court throughout the late nineteenth century. In California, medical

[40] Hamilton and Godkin, *A System of Legal Medicine, Volume I*, 652.
[41] Ibid., 650.

practices and the development of the medical profession were somewhat haphazard in the 1850s, but quickly developed following the first few years of the initial gold rush. Physicians who arrived in the gold rush period often came with mining in mind, but many later recognised the financial benefits inherent to the high demand for medical services. While in these initial years of demographic expansion, many of those who claimed to be doctors had most likely completed minimal formal medical training, respected and highly trained physicians did arrive in the rush of 1849. For example, in a short biography amongst the papers of gold rush physician Dr. Washington Ayer, a writer affirmed his opinion that the

> argonauts of the medical fraternity almost without exception were moreover gentlemen of culture and refinement, and early lent their aid and influence in establishing literary, religions [*sic*], and elermosquary [likely: eleemosynary, or charitable] institutions in the rapidly growing settlement on the shores of the Sunset Sea.[42]

A physician but a politician and a member of the board of education, Ayer's influence on early California culture was much wider than just that of the medical profession.

While not all doctors garnered respect in California, they were consistently called to examine women and girls who made complaints of sexual assault, and their opinions were often called upon in courtrooms throughout the end of the century. Most likely due to the ubiquitous belief that the bodies of young, sexually ignorant – and thus "pure" – girls would sustain greater visible signs of sexual "interference," doctors were more frequently called to testify in child abuse cases than in adult rape cases. In this way, cases involving children were opportunities for doctors to assert

[42] "Washington Ayer," Record: C057702, 1853. California Pioneer Society, San Francisco, California.

their medical expertise regarding sexual contact.[43] If they could confirm that a child had been vaginally penetrated, then their insights would be a crucial piece of the trial; since consent was immaterial to girls below the legal age of consent, proof of recent penetration confirmed, at the very least, that the child had been legally raped.

The testimonies of doctors were rarely transcribed for news reports, and few survive in legal records. However, reports on legal cases in California demonstrate how pivotal their roles could be to sexual assault trials involving children. As nineteenth-century literature on medical jurisprudence indicates, medical understandings of sexual violence grew broader throughout the late nineteenth century, diversifying and shifting ideas of sexual abuse.[44] As the professional standard for medical roles in courtrooms changed and solidified, guides for doctors on medical jurisprudence diversified their explanations for various genital symptoms previously ascribed to sexual abuse. In California, doctors were called into courtrooms throughout the late-nineteenth century, and their opinions were often relied upon to confirm or deny if a child had been sexually abused. In a case in 1854, a newspaper reported that "owing to the magnitude of the crime" – the attempted rape of a three-year-old girl in Columbia, Tuolumne County – the public was sceptical of the charge.[45] Contradicting this scepticism, multiple physicians had been examined for the case, and were "of opinion that an attempt [of rape] had been made." Both the newspaper reporter and

[43] Despite the exceptions and possibilities presented by Beck. Beck, *Elements of Medical Jurisprudence*.
[44] In the 1905 edition of their text, Wharton and Stillé describe vaginal penetration with fingers, and the possibility, albeit rare, of female sex offenders. See: Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition.
[45] It is unclear if the disbelief stemmed from the age of the victim, or the position of respect of her father. *Sacramento Daily Union*, 20 August 1854, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

the judge were satisfied that the opinions of the physicians justified a case, and the accused was imprisoned to await trial.[46]

In cases involving adult and pubescent girls and women, the distinction between rape and assault with intent to commit rape was both morally and legally significant. Legally, the former was a felony and the latter a misdemeanour, and each carried different sentencing ranges, although with some overlap.[47] Morally, as I will explore further in the next chapter, the difference between an "accomplished" rape and an attempt at rape was also significant, as vaginal penetration was heavily associated with the loss of a girl's or woman's purity and, thus, her "ruin." This distinction was legally consistent in cases of children below the age of consent, as the only practical legal difference between cases involving adults and children was that consent was hypothetically immaterial for children.[48] However, public commentaries in the press frequently blurred the moral distinctions between rape and attempted rape for children, and doctors often related the two more closely when compared to cases involving adults.[49] Judges also seemed to condemn the attempted rape of children more harshly than the attempted rape of girls close to the age of consent, or adult women.[50]

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[46] Ibid.
[47] See: Chapter Three.
[48] See: California and Robert Desty, "The penal code of California: enacted in 1872, as amended in 1889," (San Francisco: Bancroft-Whitney), 116-122.
[49] Especially as the rape of small children was considered physically impossible in many cases. See, for example: *People v. Hamilton*, 46 Cal. 540, 1873, California Supreme Court. LexisNexis California Official Reports.
[50] For example, the epigraph that opened this chapter: *San Bernardino Daily Courier*, 21 May 1892, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

Throughout the late nineteenth century, surviving legal records also demonstrate that doctors were frequently included in subpoenas for both child and adult rape cases. Beyond their presentation of physical evidence regarding penetration, they also testified to their broader physical observations, including symptoms of venereal disease and lacerations or bruising on the rest of the victimised child's body, as well as their medical predictions for the outcomes of the injured party. In a case in 1872, Dr. S. S. Crane testified in court for a trial against another doctor accused of raping an eight-year-old girl named Lillie. His testimony was reported on in the *Sacramento Daily Union* and reflects how the press would omit the questions posed to the witness, making their testimonies sound akin to uninterrupted monologues. In this case, Dr. Crane's asserted that he practised medicine, and had

> examined the little girl a week ago; found her underclothing soiled; she complained of being a little sore. The counsel for the defense cross-examined the witness as to whether the marks indicated that the child was suffering from a disease of a venereal nature or one which was natural to females; witness stated that he not made a very close examination, as he had not expected to be a witness, but he concluded from the examination that he had made that she was suffering from a disease of a venereal nature. His evidence indicated strongly that an outrage had been committed.[51]

As this excerpt reflects, his medical opinion was tempered by a professional desire to make it abundantly clear that his observations were not certainties.[52] His evidence

[51] *Sacramento Daily Union*, 13 May 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[52] Testimonies were not often printed in newspaper reports on rape cases, as the details of these cases were often seen as inappropriate for print. This article offers some insight to the ways that the press did report on courtrooms, offering the narratives of witnesses as if they were monologues, rather than responses to questions, and switching between first- and second-person perspectives with little indication of who was speaking.

indicated that an "outrage" had been committed but did not amount to definite fact. While medical witnesses were called upon to give their professional opinions, they took great care to emphasise that these were, in legal terms, only opinions.[53]

Doctors were also called as witnesses to offer their professional opinions on the physical possibility of rape. In the records for an appeal heard by the California Supreme Court in 1873, the Supreme Court Justice noted that "two physicians were called, who testified that though it was not impossible for a man to have carnal knowledge of a child of such tender years, it was in the highest degree improbable that bleeding and great bodily pain would not ensue."[54] Texts on medical jurisprudence throughout the period generally recognised that there was medical debate related to whether a girl's vaginal canal could accommodate an adult male's penis, some challenging the perception that a child could be "raped" at all.[55] Perhaps to accommodate legal recognition that child rape was possible, medical texts offering insights for trials tended to acknowledge the debate, while also suggesting that if such penetration did occur, it would be accompanied by significant signs of violence on the child's genitals. In Hamilton's 1895 publication *A System of Legal Medicine,* he also cited several examples to suggest that a girl's vagina could be manually enlarged by an assailant through the insertion of objects, including sticks, stones, and candlesticks.[56]

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[53] As Wharton and Stillé admit: "The evidence… lies, to a large extent, in other than medical lines." See: Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition, 128.

[54] *People v. Hamilton*, 46 Cal. 540, 1873, California Supreme Court. LexisNexis California Official Reports.

[55] See for examples: Taylor and Reese, *A Manual of Medical Jurisprudence,* 7th edition, 701; and Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition, 137.

[56] Hamilton and Godkin, *A System of Legal Medicine, Volume I*; Wharton and Stillé also discussed dilation to enlarge the vaginal canal. See: Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition, 137.

Generally speaking, such estimations regarding size and the likelihood of penetration were applied to girls at a range of ages below the age of ten, but occasionally cases of very young children passed through courtrooms where such questions of possibility did not appear to be matters of great contestation.[57]

While the physical possibility of vaginal penetration was raised in courtrooms in the course of child rape trials, doctors were relatively silent on the symptoms and indications of anal rape on the bodies of girls. Beck's second edition of *Elements of Medical Jurisprudence* (1825) was edited to include a short reference to sodomy in his section about rape.[58] This appeared to remain consistent through the evolution of medico-legal texts published in the United States throughout the latter half of the century. For example, in Taylor and Reese's, *A Manual of Medical Jurisprudence* (1873), they described the possibility of anal rape on children, but did not expand as extensively on the signs and symptoms in the genital appearance of boys as they did with vaginal rape.[59] As discussed, by the end of the century, Hamilton's treatment of sexual violence acknowledged the widest variety of behaviours as possible iterations of the sexual abuse of children, while simultaneously diversifying the alternative narratives to explain away symptoms or signs of abuse as matters of hygiene, deliberate tampering to blackmail alleged perpetrators, or the early sexual explorations of children on their own bodies. Despite these diversifying discourses,

[57] See, for one example: *Sacramento Daily Union,* 2 September 1852, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; this may also be because reporters did not always attend to the difference between guilty verdicts for rape and guilty verdicts of attempt to commit rape.
[58] Beck, *Elements of Medical Jurisprudence,* 2nd edition, 71.
[59] I discussed sodomy charges in more detail in Chapter Three. Taylor and Reese, *A Manual of Medical Jurisprudence,* 7th edition, 700.

both medical and legal discourses tended to focus on the bodies of girls in their discussions of sexual violence, often overlooking or downplaying the physical appearances of abused boys.

Broadly, child abuse perpetrated against boys was acknowledged in legal and medical contexts throughout this period, but far less so than abuse involving girls. In California, very few cases of sexual assault against boys perpetrated by men went through the court system, at least so far as surviving records suggest. While medical writers appeared to have more diverse understandings of possible sexual behaviours than legal officials – some authors noting the possibility of sodomisation of both male and female children, for example – the acknowledgement of such crimes did not reflect a requisite preoccupation in public reporting or in the cases that went through California's courts during the period. The sexual abuse of boys was legally acknowledged as sexual assault but prosecuted under the umbrella of "crimes against nature," where consent was immaterial to the crime. Boys below the age of fourteen were not considered legally culpable in any capacity, so when men sexually violated boys below this age, they could not be implicated as accomplices.

It is therefore unlikely that the sexual abuse of boys was ever considered in California's courtrooms under anti-rape laws, as the language in California's statutes consistently defined rape as a crime perpetrated against women and girls. For example, in the Penal Code (1889), the notes defining "carnal abuse of children" specifically stipulated that "carnal knowledge of a child by *her* consent is not properly rape."[60] While members of the medical and legal professions frequently disagreed

[60] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 118. Emphasis mine.

regarding the details around rape, many of their fundamental assumptions stemmed from similar understandings about purity and morality. Likewise, each failed to challenge a focus on vaginal penetration until the end of the nineteenth century.

Incompetent Witnesses

Doctors may have also been particularly relied upon in child abuse trials because children were not universally permitted to testify during this period. As explored in Chapter Three, sexual assault trials were legally allowed to proceed based upon the testimony of an accusing woman alone, although judges were required to warn juries to take extraordinary care when considering such cases.[61] Circumstantial evidence to corroborate the charges was ideal for legal proceedings, but common law legal commentators had long acknowledged that rape was a crime usually perpetrated without witnesses.[62] In cases involving children, the key point of evidence required for conviction could be complicated by ignorance and innocence. Namely, children below the age of ten had to be assessed by judges, on a case-by-case basis, to determine their competency to testify in court.[63]

While children were more likely to be assumed to be passive in matters of sexual violation, rather than the conscious actors pubescent and adult women could

[61] See my discussion on *People v. Benson* in Chapter Three; *People v. Benson,* 6 Cal. 221, 1856, California Supreme Court. LexisNexis California Official Reports.
[62] Blackstone, *Commentaries on the Laws of England in Four Books: Books III & IV*; Hale, *Historia Placitorum Coronæ* / *The History of the Pleas of the Crown*.
[63] This was not unique to California but was a general challenge of common law. See: Kim Stevenson, "'Children of a Very Tender Age Have Vicious Propensities': Child Witness Testimonies in Cases of Sexual Abuse," *Law, Crime and History,* 7 no. 1, (2017): 75-97.

be, their lack of knowledge posed a challenge in courtrooms.[64] Within medical and legal discourses, it was generally agreed upon that false accusations of rape were common, even amongst children.[65] However, while women's false accusations were constructed in legal and medico-legal discourse as conscious attempts to malign the accused man, the false accusations of children were usually perceived to flow from a child's ignorance and their susceptibility to manipulation by malicious mothers or other outside influences.[66] In 1852, a girl close to the age of consent was discovered to have made an accusation because she had been beaten by the accused.[67] In 1872 the *Sacramento Daily Union* reported on an "infamous plot," to discredit a local doctor. "A woman – Mrs. Rogers by name – had by threats of violence and by working on the girl's ignorance" induced an eight-year-old girl to make a false allegation.[68] In another case in 1897 a nine-year-old's accusation was deemed false during a second trial, because three physicians agreed that she remained a virgin.[69] It was precisely the innocence and ignorance of children that made their competency as witnesses questionable to legal officials. As the law understood the primary evidence of a rape trial to stem from the complaining witness's testimony, this was of great concern to the prosecution of child abuse. While the question of "knowledge" in seduction cases had the potential to disqualify a girl or young woman near the age of puberty from the

[64] See: Seduction Chapter
[65] See, for example: Hamilton and Godkin, *A System of Legal Medicine, Volume I*, 653.
[66] Ibid.
[67] *Daily Alta California*, 3 April 1852, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[68] *Sacramento Daily Union*, 2 August 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[69] *Los Angeles Herald,* 1 August 1897, 12. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

identity of "victim," the presumption of a female child's lack of "knowledge" could exempt her from providing what was often the only available first-hand account in a sexual assault trial.[70]

As I will explore in Chapter Five, a deep concern characterised sexual assault cases of girls near the age of consent who were perceived to be adolescent and potentially sexually mature. Much of the concern focused on issues of their knowledge, particularly their understanding of the moral implications of their behaviour and sexual contact in general. In some ways, concerns about children can be seen on this spectrum. While their bodies were not biologically sexually mature, concern about their corruptibility persistently surfaced in sexual assault trials, and very young girls were often perceived to have at least the potential for sexual desire. For example, a girl as young as eight-years-old, whose testimony was reported on in the *Sacramento Daily Union* in May 1872, appeared to have been questioned about her habits of playing with boys and whether or not she attended Sunday school.[71] The following year, a nine-year-old was constructed as a culpable sexual actor when a witness testified that she had accepted money from the accused.[72] Such questions were anything but innocuous, raising implicit concerns over the importance of a proper moral upbringing and thus chastity and innocence.

[70] The concept of "knowledge" is also explored in Chapter Five.
[71] *Sacramento Daily Union*, 13 May 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[72] *Sacramento Daily Union*, 29 January 1873, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

If rape and sexual assault trials were characterised by a general scepticism of complainant testimonies, concerns about children as witnesses revolved around their admissibility at all. Judges were keen to advise juries of the dangers of the uncorroborated testimonies of children, and they were tasked with the role of deciding whether their testimonies could be admitted as evidence. Children were occasionally allowed to testify on the stand, but only if the court deemed that they understood the seriousness of an oath. In the Supreme Court appeal on *People v. Bernal* (1858), a case that would be later referenced in case law relating to children's testimonies, Supreme Court Justice J. Field explained that there was "no precise age within which children are excluded from testifying." Rather, their competency had to be determined not by their age, but by the degree of their understanding and knowledge."[73] He warned that it was essential that they should "possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath."[74] The assessment of children's ability to understand the meaning and seriousness of an oath was a vital element to determinations of witness competency. As Justice Field explained,

> if over fourteen years of age, the presumption is that [witnesses] possess the requisite knowledge and understanding; but, if under that age, the presumption is otherwise,

[73] *People v. Bernal*, 10 Cal. 66, 1858, California Supreme Court. LexisNexis California Official Reports; The decision was also printed in the press, see: *Sacramento Daily Union*, 10 September 1858, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[74] *People v. Bernal*, 10 Cal. 66, 1858, California Supreme Court. LexisNexis California Official Reports.

> and it must be removed upon their examination by the Court, or under its direction and in its presence, before they can be sworn.[75]

As this makes clear, there was no universal standard in California for children witnesses below the age of fourteen, the age of legal accountability, but rather a general recognition that individuals matured and thus understood the nature of an oath on the Bible and their moral obligations, at different ages.[76] Notably, according to the law in California, the general age of incompetency as a witness was set at age ten in 1851, and was reaffirmed during the legal shifts in California that occurred in the early 1870s.[77] Regardless, unlike the age of consent throughout this period, the age at which a child could testify was somewhat flexible and left to the discretion of judges.

In a case of child sexual abuse reported early in 1855, a four-year-old child took the stand. A reporter remarked that her intelligence was "truly remarkable" for such a young child, citing her ability to speak multiple languages as evidence, but that her knowledge was not sufficient in the eyes of the judge to allow her to testify as a complaining witness.[78] The report outlined that the attempt to "violate the child was

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[75] *People v. Bernal*, 10 Cal. 66, 1858, California Supreme Court. LexisNexis California Official Reports; *Sacramento Daily Union*, 10 September 1858, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[76] This is somewhat problematic when related to the age of consent, which I will explore more Chapter Five.

[77] See: California State Assembly, *The Statues of California, passed at the Second Session of the Legislature* (San Jose: Eugene Casserly, State-Printer, 1851), 114. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1851/1851.pdf; and California, California Supreme Court, and N. Newmark, *The Code of Civil Procedure of the State of California, adopted March 11th, 1872, and amended in 1880: With notes and references to the decisions of the Supreme Court* (San Francisco: S. Whitney & Company, 1880), 587.

[78] *Daily Alta California,* 4 Feb 1855, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

fully proved" by medical testimony, but her lack of understanding of God led the presiding judge to determine that "she was not in a state to be fully conscious of the solemnity of an oath."[79] The decisions of lower court judges relating to the question of the competency of child witnesses varied greatly. As this was at the discretion of each judge, there was not a uniform age at which a child would be determined as incompetent. Nevertheless, this discretion meant that judges brought very young children onto the stand to ascertain their capacity to act as witnesses.

Children continued to be assessed as suitable witnesses throughout the late nineteenth century. In an article specifically discussing debates about child competency, the writer described the "entertainment" of the spectators in a Supreme Court session in 1888 during a trial as the court determined a child's competency as a witness. The dialogue between the witness, the defence and the prosecution demonstrated the challenging questions that could be put to children to determine their competency. According to the newspaper transcription of the discussion, the child's competency was assessed through the following exchange:

> "Can you tell me what truth is?" "Just have his answer taken down," said the District Attorney, "I have been wanting to find out what the truth is for a long time." Walter [the accuser's brother] did not attempt to define truth. "Can you tell me who God is and where he lives," continued the lawyer. "There are a good many wise men who have given that question up," said the Court. "We can hardly expect a child to tell us."[80]

[79] Ibid.

[80] *Los Angeles Herald*, 1 September 1888, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

Yet despite courtroom disagreements like this, children did have to pass a certain threshold of knowledge, and demonstrate such knowledge in court, to be accepted as competent witnesses. This case from 1888 especially demonstrates how vital demonstrable knowledge of God was in courtrooms. Walter, the accuser's ten-year-old brother was deemed an incompetent witness by the court, while Tillie – the complainant, and aged four – was allowed to testify after she stated "it was naughty to tell lies and that little girls who did so got burnt up."[81] Such examples reveal how variable determinations of witness testimony could be in nineteenth-century courtrooms, and the fundamental role that understandings of heaven and hell played in these assessments.

While lower court judges sometimes barred children from testifying, defendants would also use a judge's decision to allow the child's testimony as grounds for appeal, which garnered the attentions of the Supreme Court. In a few Supreme Court opinions, the Justices overturned guilty verdicts because they estimated the complaining witness too young to understand the nature of an oath, and offered opinions on cases appealed due to the "passion" elicited in the jury by the mere presence of a distraught child on the stand.[82] In these cases, they usually cited their roles as arbiters of the strict rules of the justice system.[83] Lower court judges also often took the guidance of the law as of primary importance in cases, even in the face of

[81] *Los Angeles Herald*, 1 September 1888, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[82] *People v. Graham*, 21 Cal. 261, 1862, California Supreme Court. LexisNexis California Official Reports.
[83] *People v. Benson*, 6 Cal. 221, 1856 and *People v. Hamilton*, 46 Cal. 540, 1873 and *People v. Ardaga*, 51 Cal. 371, 1876. California Supreme Court, LexisNexis California Official Reports.

great distress and passion on the part of the public and sitting juries. In the 1855 case of a four-year-old described as demonstrating remarkable intelligence for her age, the jury disagreed with the County Court judge's decision to bar her from testifying, and they were dismissed by the judge as a result.[84]

While Supreme Court justices were more likely than lower court judges to maintain strict readings of the law, they did sympathise with the difficulty of these cases. Children's testimonies could clarify if an attempt of rape was made, or if any degree of penetration had occurred. Since mid-nineteenth-century medical knowledge held that symptoms of poor hygiene could mimic those of venereal diseases and children sharing beds with symptomatic adults could also contract infection, such symptoms were not definitive to physicians, or to jurors, that sexual contact had definitively occurred.[85] Likewise, medico-legal texts warned physicians of the similarities between non-infectious and disease-related vaginal discharge.[86] As a result, while contextual factors, bleeding, expressed discomfort by the child following assault, vaginal discharge, and distress could be used as evidence, the testimonies of assaulted girls were vital to sustaining sexual abuse charges.

While the courts could be cautious on the question of admitting children's testimonies as evidence, reporters habitually recorded their estimations of children's

[84] *Daily Alta California,* 4 Feb 1855, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[85] Hamilton and Godkin, *A System of Legal Medicine, Volume I,* 656; Wharton and Stillé, *Wharton And Stillé's Medical Jurisprudence, Volume III,* 5th edition, 138-145; Taylor and Reese, *A Manual of Medical Jurisprudence,* 7th edition, 708.
[86] J.J. Elwell, *A medicolegal treatise on malpractice and medical evidence: comprising the elements of medical jurisprudence,* 3rd edition (New York: Baker, Voorhis & Co., 1871), 571.

intellect. In David Dickey's trial for attempted rape of a child in 1855, the complainant's testimony strengthened the prosecution's case. "The little girl was compelled to undergo a lengthy cross-examination," a reported explained, "but her statement was consistent throughout and baffled the efforts of counsel to entrap her."[87] Her ability to maintain consistency throughout her testimony and espouse reason and logic rendered her more reliable as a witness to observers and convinced the reporting journalist of the accused's guilt. The tendency to praise girls for unswerving, clear testimonies was consistent throughout the late nineteenth century. In 1891, for example, a reporter described ten-year-old complainant, Bertha, as giving an impression of "mental precocity," speaking with "remarkable coolness," making it "a difficult matter for the defense to entangle her in contradictions."[88] In this case, the reporter seemed to view the charge with some suspicion, but still admired Bertha for her capacity for calm and collected testimony.

In 1863, *The Sacramento Daily Union* printed the details of "The Lester Case," involving the rape of a nine-year-old girl by a man who lived in the same rooming house as the victim and her family in San Francisco. The "child of tender years" – who remained unnamed in the press coverage – was questioned as to her competency by the judge. Her responses were illustrative of the kind of knowledge and understanding that the courts sought to determine in children. "She said she would be ten years old on the tenth day of August next," the report began, continuing on to relate that she

[87] *Sacramento Daily Union,* 8 June 1855, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[88] "The Dalton Case," *Los Angeles Herald,* 18 September 1891, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

> was never in Court before; knew what it was to take an oath; it was to swear to tell the truth; if she should tell a lie instead she thought she would go to hell, and besides they would put her in the station house; her brother-in-law told her that to-day; he only told her to tell the truth, and if she didn't she would be put in the station house; he did not tell her she would go to hell; a couple of gentlemen who came up to see her told her that, but she knew it before; could not remember who first told her, but the Bible said so.[89]

The courts were primarily interested in making sure that she understood hell, and the consequences that lying would have for her soul.[90] Since children were not criminally liable for perjury, her belief that she would be "put in the station house," was likely just a scare tactic to encourage her to tell the truth. Effectively, both the metaphysical and the earthly implications of perjury in court were techniques to instil in her the seriousness of her role and prevent her from underestimating the requirement of her truthful testimony. This example suggests understandings of hell and the teachings of the Bible were especially vital in courtrooms when children testified – more so than their reported fears of imprisonment – and that such religious knowledge must predate their accusations.[91]

Concerns about children as incompetent witnesses marked trials throughout the mid to late nineteenth century. Throughout this period, children's competency to testify was determined through an assessment of their moral or religious knowledge

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[89] *Sacramento Daily Union,* 24 June 1863, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[90] Like the Soto Case, reported on in 1888: *Los Angeles Herald*, 1 September 1888, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[91] Lester seemed to be a serial offender, as officers discovered another child who had been lured into his rooms, and shown obscene texts: *Sacramento Daily Union,* 17 June 1863, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

and resulting perspective on lying. The Code of Civil Procedure, which was also applied in criminal procedure, directed that children "under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or relating them truly" should be excluded from testifying.[92] While legal categories, like the age of consent, established the legal vulnerability and intellectual differences between adults and children, the law in this period did not make clear and flexible accommodations for children's testimonies, thereby frequently disqualifying them from telling their stories in courtrooms and increasing pressure on circumstantial and physical evidence.

This pressure for circumstantial evidence occasionally led to the sexualisation of children in courtrooms. For the most part, while their testimonies could be scrutinised for veracity, children under ten-years-old usually escaped suggestions of culpability for attracting sexual violence. However, in some instances, the legal representatives for the defence would mobilise narratives that could raise questions about a girl's consent. In a case reported on 1873, a nine-year-old, who was seen by a third-party witness accepting money from man who she also allegedly had sexual intercourse with, was not automatically protected by the age of consent law that theoretically absolved her from a legal capacity to consent.[93] The commercial exchange, which suggested to onlookers that she was engaging in prostitution, seemed to call into question her right to be considered a child. The mere spectre of money

[92] California, California Supreme Court, and N. Newmark, *The Code of Civil Procedure of the State of California, adopted March 11th, 1872, and amended in 1880: With notes and references to the decisions of the Supreme Court* (San Francisco: S. Whitney & Company, 1880), 587.
[93] *Sacramento Daily Union*, 29 January 1873, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

instilled a certain idea of intellectual knowledge on the part of the girl that denied her the right, at least in court, of her legal incapacity to consent to sex, regardless of context.[94]

Witness competency raised an important challenge to the adjudication of child rape cases. Rape trials had long been recognised as unique in common law constructions, as they were legally allowed to proceed on the sole testimony of the complaining witness. While the rape and assault with intent to commit rape of children was a particularly abhorred crime, the very innocence of the victim that made the crime so detested also made it challenging to prosecute. Clashes over witness competency also revealed the dissonance in rhetoric around various expressions of knowledge in children and, as I will explore in Chapter Five, adolescents. Children were a protected category in terms of consent, because their age rendered them ignorant to the social and moral implications of sexual activity, yet this innocence could also make them legally incompetent as witnesses of any sexual abuse that they had sustained. Despite this contradiction, children's testimonies were sometimes allowed in courtrooms, and the public was eager to rally in support of those victimised children whose stories came to their attention.

Protecting the Innocent

Amidst these complex negotiations of culpability and sexual possibility, charges or suspicions of child sexual abuse in late nineteenth-century California were generally

[94] *Sacramento Daily Union*, 29 January 1873, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

received with public outrage, commentary, and speculation in the press. Judges cautioned juries to ensure that they upheld their social roles as unbiased arbiters of justice, but public outcry against accused perpetrators could mobilise communities to the defence of victimised children. In several cases, lower court judges denied or ignored the concerns of defendants who worried about community and juror bias against them, suggesting that even judges had the potential to be swayed by concerns for child safety, and let their disgust for accused perpetrators influence their legal decisions. While California's higher courts demonstrably worked to ensure the provision of fair justice, child sexual abuse garnered a great deal of social and public outcry and concern.

Community responses to child sexual abuse allegations are most evident in newspaper records, which recorded their opinions of cases in no uncertain terms. "A man, or brute, or demon," began an article in the 22 December 1853 issue of the *Sacramento Daily Union,* committed a rape on the person of a little girl aged six years."[95] Even though the article was brief, the writer took care to note that never, in their existence as a public journal, had they "been obliged to chronicle an event of equal baseness and of so demoniacal a type, except the desecration of the dead bodies in the Yerba Buena cemetery."[96] While late nineteenth-century reporters often engaged in hyperbolic, sensationalist language, child sexual abuse received particularly intensive pontificating. As in the example above, child sexual abuse was compared to

[95] *Sacramento Daily Union*, 22 December 1853, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[96] Ibid.

unearthly, inhumane, transgressions, and perpetrators were often likewise characterised as demons or monsters.

Articles of child rape, usually appearing as quite short, perfunctory reports, rarely provided specific descriptions of the exact abuse perpetrated against children. Instead, reporters alluded to "outrages" and the appearance of distress and general disarray of children. Nevertheless, where they spared the reading public details regarding the harm sustained by victimised children, they engaged in strong condemnation of perpetrators. These denouncements often conjured hell and inhumanity, ascribing brutishness to those that would take advantage of the vulnerable child. In 1854 a report from Sonora County described the great excitement elicited regarding the "fiend in human form" also described as a "monster," that attempted to rape the three-year-old daughter of "a very respectable citizen."[97] In this description, the journalist focused less on the violence sustained by the child, and more on the devilish, inhumane monstrosity of the perpetrator.

Some of these rhetorical propensities can certainly be considered in a context of a sensationalist media culture, yet an article submitted by "A Citizen" also employed such devices. Referring to a case where a schoolteacher attempted to rape a six-year-old girl, the commentator explained that the accused had behaved "like a brute lost to

[97] *Sacramento Daily Union*, 20 August 1854, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.; Another case reported on in 1890 referred to a child victim with reference to her father. See: *Los Angeles Herald.* 2 September 1890, 3. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/lccn/ sn84025968 /1890-09-02/ed-1/seq-3/.

sense and humanity."[98] A brief report on news from Oregon in the 22 May 1865 issue of the *Daily Alta California* included a single sentence on a case, but still managed to describe the perpetrator as a "hoary-headed old scoundrel."[99] Others described men who had lost sense and humanity, debasing themselves and their victims through their behaviour. In 1872, a newspaper stated that "an eternity of punishment after death should await" a Mexican man accused child abuse.[100] In another in 1880, an attempted rape on a seven-year-old girl was deemed "heinous" and lacking a punishment of "sufficient severity to meet the offence."[101] In these ways, public commentators and reporters condemned men accused of raping or attempting to rape children, and decried them for their evilness. Such descriptors often served to separate child abusers as an inhumane category of person, deserving of only the worst fates.

Condemnations of accused men who assaulted "children" – most usually girls below the age of ten – were liberally printed in newspapers, regardless of the legal status of the accusation and often without direct regard to the age of consent. These condemnations frequently encouraged or sympathised with violent retribution, claimed death as "too good a fate" for accused men, and described communities that clashed over questions of familial vengeance and formal avenues of justice. If

[98] *Daily Alta California,* 3 July 1862, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[99] *The Daily Alta California*, 22 May 1865, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[100] *Morning Union,* 1 February 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[101] *Sacramento Daily Union*, 13 August 1880, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

retaliatory murder was not raised as a legitimate response in public commentary, community expulsion or lengthy imprisonment certainly was.[102] The *Daily Alta California* reported in 1851 on an "outrageous" case of man arrested for attempting to rape a girl, aged eight, and soberly related that while "it had been decided" – presumably by members of the civilian public – to "take the man and hang him," he was eventually given up to be held accountable by the justice system.[103] While the 1850s in California was often lauded for its vigilantism, these trends of calling for the murder of accused child abusers or reports of communities coming together to apprehend perpetrators fleeing justice remained relatively stable throughout the late nineteenth century.

After the peak period of vigilantism was over, community justice continued to operate in California. When a school teacher in Healdsburg, Sonoma County was accused of attempting a rape on a six-year-old in 1862, a July report in the *Sonoma Democrat* asserted that "convicted or acquitted, the scandal itself will drive him from this community."[104] In fact, another report in early July revealed that this was meant quite literally, when a member of the public writing into the *Daily Alta California* reported that the offender "was last seen running through a cornfield to escape Officer

[102] A sixteen-year-old boy was lynched for attacking three girls, and some in the public thought he got what he deserved. See: "A Sixteen-Year Old Boy Lynched by Masked Men," *Sacramento Daily Union,* 12 January 1881, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[103] *Daily Alta California,* Vol 2 No 78 25 February 1851, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[104] *Sonoma Democrat,* 10 July 1862, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

Binns and an indignant community."[105] In 1865, a short article out of San Francisco with the headline "A Case of Unutterable Infamy" closed with the sentiment that "no parent should ever ask for a warrant for the arrest of the offender" in cases involving "little girls," as the law fell "far short of providing an adequate punishment for the crime."[106] The insinuation here, of course, encouraging the murder of the presumed offender by the child's parents.

These threats did not exist solely on the level of rhetoric. In 1872, a man shot a "Mexican" who was accused of raping his daughter. Although the man did not immediately die of his injuries, it was hoped – by reporters – that he would, and "killing the monster by inches" would be "too good for him."[107] Reporters went so far as to count some accused perpetrators as lucky that fathers were away from home at the time of the assault, as they would be justified in exacting their revenge.[108] While newspapers habitually celebrated or encouraged retaliatory violence against child abusers, they rarely provided lengthy commentaries on the particulars of the cases.

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[105] Graham was eventually apprehended, put on trial and sentenced to twelve years in state prison. He appealed this decision, and the verdict was overturned by the Supreme Court. In September of 1863 a newspaper reported that he had escaped prison before his second trial, and his whereabouts were unknown. *Daily Alta California,* 3 July 1862, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; and *Marysville Daily Appeal*, 17 September 1863, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[106] *Daily Alta California,* 2 April 1865, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[107] *Morning Union*, 21 January 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[108] For example: *Sacramento Daily Union,* 13 August 1880, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

While in several reported incidents, accused perpetrators were killed in retaliation, murder was not the only response of parents and family members. Monetary compensation was also a possible form of extra-legal justice, and on several occasions entire towns, regions, or counties would rally to either ensure the provision of formal justice or to hold men privately accountable.

The possibility that a parent, particularly a father, would desire vengeance also played a role in the ways that child abuse investigations were conducted. In 1880, a case in Sacramento was reported as a "death-deserving attempt" of rape by a "so-called man."[109] The report detailed that a witness, another bystander, and the local police chief all colluded to apprehend the suspect before informing the girl's father of the charge. Affirming their concerns about his response, the girl's father was reported to have later remarked that "he was glad the man was arrested and out of reach before he knew of it, for he would not have allowed anything to prevent his instantly killing him."[110] Likewise, community members who heard of this particular case were also generally reported on as agreeing that "no punishment was of sufficient severity to meet the offense."[111] Sentiments like these, invariably arising in press reports of cases of sexual violence, also demonstrate a tension between popular calls for harsh punishment and the reach of the law. As a state, California never had the death penalty for rape, a fact that a few reports critiqued. [112]

[109] *Sacramento Daily Union,* 13 August 1880, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[110] Ibid.
[111] Ibid.
[112] I discuss punishments for rape in more detail in Chapter Two.

Although parents, community members, and reporters often agreed on the matter of public justice and violent retaliation against child abusers, legal representatives attempted to subdue their vigilantism in favour of formal justice. In a column published in the *Grass Valley Union* in 1870, a reporter addressed the tensions between judges and a public calling for blood. Describing the public lynching of a man found guilty of raping and murdering seven-year-old Maggie Ryan, the writer contemplated the insanity of public mobs that nevertheless restored sanity to social life by ridding communities of violent child offenders. The irony of their violence, to him, was that they righted the wrong done to both individual and society. "He committed a rape on a little girl," the writer described of the perpetrator, "he does not feel any compunctions for the act, but he is afraid that he will be hung." As a result, the writer continued, the perpetrator must be "morally insane," because

> a sane man would feel badly about such an act. In view of such insanities, and considering the numbers who get clear of punishment through such insanities, it is not wonderful that people get insane and form mobs who hang insane criminals. If insanity excuses the violation of little girls, we plead the people have some excuse when they hang such brutes. The world is better off with fewer of these insane murderers prowling around.[113]

The moral argument here suggested that the workings of the law, and the civilians that made up the juries with the power to convict criminals, were not considered above reproach. The law – with its formal restrictions – prevented the moral outcome that the author saw as vital: the death of the accused and thus his permanent removal from society.

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[113] *Grass Valley Daily Union*, 27 August 1870, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

In a case reported on in 1887, the public rallied to the support of an eleven-year-old, who was over the age of consent but nevertheless perceived as an "unfortunate little girl."[114] The "sickening" details of the case, and the "unquestionable evidence of assault shown upon" her body were enough for the reporters to maintain the accused's guilt. "A few hot-headed individuals" apparently agreed, as they determined "that the brute should not be allowed to have a trial." One report further described that "as a wretch guilty of one of the highest offences known in the calendar of crimes, public opinion seems to lead strongly in favour of lynching."[115] Such cases reflected the ease with which the public could decide that a child complainant was truthful, and condemn the accused to extrajudicial violent punishment, which stood out in sharp relief against the broader backdrop of scepticism and scrutiny that surrounded accusations of sexual violence.

Reports like these also revealed the power dynamics and interplay between local responses and the state's commitment to upholding the integrity of legal process. Generally, a sense of abhorrence prevailed over cases of child rape and communities occasionally rallied to the support of victims and their families, offering donations so they could secure legal representation, responding with violence against accused perpetrators or helping law enforcement secure their arrest, and generally denouncing child abuse as unacceptable. These community biases did not escape the notice of defendants on trial for child rape, drawing California's Supreme Court into local scandals as the highest arbiter of a fair judicial process. For example, one perpetrator

[114] *Los Angeles Herald,* 16 July 1887, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[115] Ibid.

appealed his case in the Supreme Court in 1862, as he believed that community sentiment against him led to a biased jury and an unfair trial. Ultimately, the Supreme Court justices agreed, and his conviction was overturned due to the jury passion against him.[116] A similar case, *People v. Hamilton* (1873), was overturned in the Supreme Court due to jury bias in the original trial. Justice Crockett, the Supreme Court justice that overturned the original verdict, claimed that allowing the verdict to stand would be "a blot on the jurisprudence of the country, and a libel upon jury trials." [117] He believed that the jury had clearly decided the defendant was guilty before they had heard the evidence. Throughout their trials, both accused men were aware of strong public feelings against them for their sexual charges and sought trials in other counties to escape the disapproval and condemnation of neighbours and acquaintances.

Although such public indignation was not exclusive to child sexual abuse cases, it was a matter of especial concern in the Supreme Court. Despite Justice Crockett's strong words against the verdict in *People v. Hamilton,* he still expressed some measure of sympathy for the outcome. In his notes on the case, he recognised that

> a charge of so heinous a nature, when supported by even the slightest evidence, arouses in the public mind an intense indignation against the supposed culprit; and it is not surprising that the same feeling sometimes finds its way into the jury-box. That is it did so, to some extent, in the present case, is manifest from the unseemly conduct of one of the jurors, who in the progress of the trial interrupted the counsel for the defense in a most improper manner, and evinced clearly that he was under the

[116] *People v. Graham,* 21 Cal. 261 (1862). California Supreme Court, LexisNexis California Official Reports.
[117] *People v. Hamilton*, 46 Cal. 540, 1873. California Supreme Court, LexisNexis California Official Reports.; Also reported on in the press: *Sacramento Daily Union*, 5 January 1874, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

> influence of passion or prejudice or both. On the whole, we think the ends of justice demand that the cause shall be tried anew.[118]

While he did not condemn the social indignation, his reversal of the verdict suggested a strong commitment to upholding the principles of the law over and above securing the punishment of those accused of sexually abusing children. This positioned Supreme Court justices in direct opposition to lower court judges, and demonstrated the complex and variable ways that instances of child sexual abuse were perceived by California's institutions, the individuals that comprised them, and the public.

Fears of "Dark" Perpetrators

Public outrage against perpetrators of child sexual abuse was especially vengeful when racialised men were accused of rape or attempted rape on white children. In 1852, newspaper reported on a dangerous, perpetrator, with a "dark complexion," and his "Mexican" accomplice, who raped a child in the mining region of Campo Seco, Calaveras County.[119] Another report on a different case in 1852 began "RAPE. – A Mexican, employed on a ranch a few miles from town, last week committed a most brutal outrage on a little German girl, *only six years of age!*"[120] When white men perpetrated crimes against children, newspapers rarely noted that they were

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[118] *Sacramento Daily Union,* 5 January 1874, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[119] *Sacramento Daily Union*, 2 September 1852, 3; *Sacramento Daily Union*, 7 September 1852, 4; *Sacramento Daily Union,* 18 September 1852, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[120] *San Diego Herald*, 27 August 1852, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu. Emphasis in the original.

white and only occasionally identified the perceived race of the child; however, when the perpetrator was a person racialised as "other" to white, their race and that of their victim became much more specifically reported on.[121]

Especially in the early 1850s, newspapers reported on many cases of Mexican men assaulting children. Threats of violence against children from "natives of Mexico" served to create a spectre of sexual danger to the moral wellbeing of children as coming from external threats, and generally supported assumptions of general social chaos in the early years of white Anglo-American settlement. During the 1850s, populations of children expanded with the broader population increases, and growing numbers of families migrated onto America's western frontier. Census data for 1850, although somewhat inaccurate, recorded approximately four thousand white children aged ten and under in the state; by the 1860 census, they were estimated to number closer to sixty-five thousand.[122] The danger of the dark-haired, dark-skinned child rapist loomed large, and raised assertions of the better efficacy of vigilante justice over the workings of the law.

In the early 1850s, the danger of Mexican perpetrators was particularly evident in reports of sexual assault against children. Through the decades, as demographics shifted, reports diversified to identify black and Chinese perpetrators.[123] The danger of

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[121] Especially in the 1850s, during the most dramatic population increase, the press did occasionally note national origins of European men. See, for example: *Daily Alta California,* 24 September 1852, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[122] See: See: U.S. Bureau of the Census, *Seventh Census of the United States: 1850* (Washington, D.C., 1853); U.S. Bureau of the Census, *Eighth Census of the United States: 1860* (Washington, D.C., 1864).

[123] These populations grew as demographics shifted in California. See: See: U.S. Bureau of the Census, *Seventh Census of the United States: 1850* (Washington, D.C., 1853);

Native American perpetrators remained somewhat consistent through the period, although most cases reported involved intraracial violence amongst Indigenous communities or on Reservations.[124] This was likely not reflection of the actual sexual assaults that took place in California throughout the period, but rather an indication of broader policies toward Native Americans in the state that obstructed their access to justice and legal recourse. Generally, although the particular racial identifiers shifted, cases involving racialised perpetrators were perceived as particularly loathsome to the wider white population, especially when they assaulted white children.[125]

The sexual safety of all girls was often spoken about as a broadly conceived concern. However, the legal and social inequities built into California's institutional and social life undoubtedly played intersecting roles in the selective legibility of non-white child innocence and victimhood. In a Los Angeles County Court case in 1854, a Native American child, between seven and eight years old, was attacked, raped, and sustained lacerations on her vagina that threatened her life. The accused, referred to in the indictment as "Alipas, an Indian," was found with significant amounts of blood on his clothing, but testified in court that he did not know if he was guilty as he was intoxicated on the night in question and could not remember his actions. The grand

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U.S. Bureau of the Census, *Eighth Census of the United States: 1860* (Washington, D.C., 1864); U.S. Bureau of the Census, *Ninth Census of the United States: 1870* (Washington, D.C., 1872); U.S. Bureau of the Census, *Tenth Census of the United States: 1880* (Washington, D.C., 1883).

[124] See: Bureau of Indian Affairs, Hoopa Valley Agency, "Indian Court Records and Related Correspondence, 1895-1935," Record Group 75, Box 206, various documents. National Archives, San Francisco, California.

[125] For example: *Daily Alta California,* 15 August 1865, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

jury ignored the charge, and the case was dismissed. [126] This case did not appear to garner very much press attention, but two years earlier, when a "Mexican" raped a white child with similar effect, the public was reportedly gleeful when the girl's father shot the perpetrator in retaliation.[127] While it is difficult to draw definitive conclusions from the sparse information available in these cases, it is clear that intersecting narratives about race and gender played important roles to the ways in which individuals and institutions were able to see and, in turn, respond to instances child sexual abuse.

Reading into archival silences also suggests a level of institutional impunity when it came to perpetrators of sexual violence who attacked non-white girls. While in cases involving non-white perpetrators, concerns for the safety of girls and innocence were universally constructed, the general silence of the press on interracial child abuse perpetrated by white men reveals a selective sympathy offered to those victims who did not conform to ideals of white, middle-class innocence.[128] Cases of white men raping racialised victims are not completely absent from the records, as in a case in 1852 when a Joseph Kuher, "a Hungarian," was convicted in the San Joaquin Court of Sessions for raping a Mexican girl, but they appear with significantly less frequency than the abuse of white children.[129] On the surface, the condemnation of the rape or

[126] *People v. Alipas,* Case 183, 1854, 10-13, Los Angeles County Court. Seaver Centre, Natural History Museum, Los Angeles, California.
[127] *Morning Union,* 21 January 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[128] For the legal inequities written into California law, see Chapter Three.
[129] Los Angeles County Court records suggest that trials in the early 1850s in Southern California were conducted in Spanish. This is indicative of the transitional nature of this period. *Daily Alta California,* 24 September 1852, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

attempted rape of young girls seemed to be relatively equally offered to girls, regardless of their race or class position. However, due to California's laws, which outlawed the testimonies of certain people based on complex racial markers until the early 1870s, the cases involving Indigenous, Black or Hispanic girls nearly always involved perpetrators who were also not considered "white." While both the law and the public treated child abuse with the utmost seriousness, this structured inequity directly silenced the abuses of white men in ways that are nearly impossible to assess through official records. The cases that involved men or boys of colour as perpetrators against all girls were reported on with greater frequency, indicating the complex iterations of racialised discourses that shaped the legal and social responses to child sexual abuse.

In an illustrative case, a ten-year-old Indigenous girl's body was found in a river in 1866. The accused, an Indigenous male, identified himself as fifteen-years-old, but an article in the *Daily Alta California* directly contested his claim, saying that he had "the appearance of being two or three years older," and thus must be "some seventeen years old."[130] The girl, aged ten, was the age of legal consent, but reporters and the physicians that examined her body for signs of violence focused on her young age. "Several physicians," according to the report, "made an examination of the body, and found that a rape had been committed."[131] While medical texts of the period viewed the signs of rape as quite similar to consensual sexual intercourse, reports did

[130] *Sacramento Daily Union*, 20 September 1866, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[131] Ibid.

not contest the assertion of rape. This is particularly important as legally rape was primarily sustainable through the testimony of the complaining witness, or third-party witnesses to the crime, if available. Even though the girl had drowned, and there were no third-party witnesses, the press nevertheless declared that the perpetrator was undoubtedly guilty.

In this case, the construction of a narrative of a girl's violation and victimhood was built directly upon a related understanding of Native American masculinity as violent as well as uncomplicated by the moral impulses inherent to Christian sexual mores. The spectre of a dark perpetrator of sexual violence was further reified through a broad tendency to include more particularly gruesome details of violence against children in cases where the perpetrators were not white. Horror and disgust were relatively universally doled out to accused child abusers in public commentaries in the press, but sexual offenders identified by racial markers were usually involved in the most violent assaults against children reported on in the press. Journalists included details like the use of weapons to widen vulvas and vaginal canals, cuts and "lacerations," the communication of venereal disease, and the resulting deaths of victims due to disease and/or injury when reporting on child sexual abuse perpetrated by racialised men.[132]

Public narratives of the particularly heinous violence of non-white perpetrators stood in direct opposition to banal ways that retaliatory violence was recorded. As discussed, newspapers frequently suggested that death was "too good" for

[132] *Sacramento Daily Union,* 2 September 1852, 3; "The Kate Case," *Morning Union*, 21 January 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

perpetrators, regardless of how they had been racially categorised.[133] However, Native American, Black, Mexican, and Chinese men were more frequently reported as having been shot by the fathers of their alleged victims, often with little sensationalism. In 1865, the father of a "small little white girl of nine years of age," attempted to kill the accused perpetrator, who was also described as a "brutal-looking negro of the lowest type."[134] In 1869, an article described that

> on last Sunday a Chinaman, who had been employed by Charles Nuce, of the Tuckee House, at Crystal Peak, committed rape upon a daughter of Nuce's, only six years old. The child has contracted a loathsome disease. Nuce made the Chinaman own to having tampered with the child. He then took the Chinaman to the bank of the river, shot him and threw him into the stream. The Chinaman struggled and crawled out, when Nuce beat him over the head with a stone and he fell back into the river, and it was the last that was seen of him.[135]

In 1872, a Mexican was said to be "suffering badly" during his trial, from a gunshot wound delivered by the victimised girl's father.[136] In a follow up report, the writer wrote: "that Mexican, who committed a rape on a little girl, at Moore's Flat, is about to die. An eternity of punishment after death should await him."[137] Such unsympathetic

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[133] For example, see: *Morning Union*, 21 January 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[134] *Marysville Daily Appeal,* 15 August 1865, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[135] *Sacramento Daily Union,* 12 May 1869, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; *Sonoma Democrat*, 29 May 1869, 8. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[136] *Morning Union,* 21 January 1872, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[137] Ibid.

statements and notably non-sensationalist reporting of retaliatory violence characterized those incidents when non-white men were accused of raping white female children.

Child Abuse in the Domestic Sphere

Discourse of the racialised perpetrator of child abuse was also linked to the domestic access of men to non-familial children in California's working-class mining settlements, towns, and swiftly expanding cities, where working-class and middle-class people of varied national and ethnic background mingled. Discussion of a case involving a Chinese employee of a white family and their twenty-month-old daughter in 1865 was a reason for the *Sacramento Daily Union* to issue a warning to parents to "guard their daughters with greater care and precaution than is usual in our city or State."[138] The *Weekly Butte Record,* a newspaper based out of the northern mining supply town of Oroville, located at the base of the Sierra Nevada mountains, was more explicit in its judgement: "a great many people will see in this horrible fact," referring to the assault, "a righteous judgement upon those who employ the leprous beasts in their households in preference to white girls."[139] The closeness between families and male-employees, especially when they were racialised, was seen as a point of

[138] *Sacramento Daily Union,* 29 May 1865, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[139] *Weekly Butte Record,* 3 June 1865, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

vulnerability in these cases, offering opportunities for non-familial men to take advantage of sexual access to female children.

A few years earlier, another report from Sacramento described a "a colored man, known by the name of General Ford," a porter employed in saloons around the city, who was working and staying at the family home of Mrs. Doran. Employed to do "work about the house," Ford had been sleeping on the floor of the children's bedroom in the Doran home, when it was discovered that one of the children, aged eight or nine, had been assaulted.[140] Ford was arrested for the crime, and the case was set to be tried in the Police Court, but he was eventually released from custody when the prosecuting witness failed to attend several different court dates.[141] Press reports on cases like these provide glimpses into the complex worlds of California life. Brief notations remarking upon moments of escalating conflict offer hints of the convoluted relations between people in California's late-nineteenth century, and the ways in which domestic spaces often included a mixture been familial and non-familial individuals that shared sleeping quarters and relied upon one another for various forms of labour.[142]

[140] *Sacramento Daily Union,* 1 August 1862, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[141] *Sacramento Daily Union,* 15 August 1862, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[142] While newspaper accounts often provide only a rough sketch of the incidents they report on and were usually heavily burdened by gendered and racialised biases, often offering their opinions about guilt or innocence long before court proceedings had ended. Legal records for cases like these are often unrecoverable in the archives, or – when they are – very sparse in detail.

In fact, where the indecent assault of working-class children garnered legal attention, the details of their sleeping arrangements – often several individuals to a room and bed – could be noted to explain their vulnerability to assault. Men's access to non-familial children was common due to shared housing arrangements, rooming homes, and the labour of young girls as domestic servants in middle-class homes. Ultimately, it was orphans or children from working-class families who were more vulnerable to exposure to non-familial men. The San Francisco Ladies' Protection and Relief Society recorded the placement of orphaned white children in "good Christian" homes from the 1870s onwards and young girls were often hired as domestic help to support the income of working-class families.[143] While these placements offered a solution to the perceived social problem of destitute and uncared for children, their roles as domestic help for labouring families could create opportunities for sexualised attacks, many of which likely did not rouse public report or attention.

From 1850, the "interference" of men with girls who lived in their homes was tacitly acknowledged by the cases that went through courtrooms and sparked the attentions of the press. Notably, these cases rarely pointed to incestuous sexual violence, but rather revealed social arrangements where young children were

[143] It seems that this support was primarily reserved for women and children who were "moral" Christians, and white, as in a case in 1895 an exception was made for a girl "with some Chinese blood in her," who was adopted out to a white family, to be – by their description – raised as a white person. San Francisco Ladies' Protection and Relief Society Records, "Orphans Case Histories, 1871-1909," MS 3576, Series 1, Box 5, Volume 11. California Historical Society, San Francisco, California; The Society was legally allowed to indenture minors by a law passed by the Legislature in 1862. See: California, *The Statutes of California passed at the Thirteenth Session of the Legislature* (Sacramento: Benj. P. Avery, State Printer, 1862), 515-516. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1862/1862.PDF.

frequently left in the care of family friends, acquaintances, or boarders.[144] For example, a schoolteacher in Healdsburg occasionally rented a room and had his washing done at the Hickle family's home. In early July 1862, a scandal broke out when it was reported that he had taken advantage of Mrs. Hickle's absence, and attempted to rape the eldest of her children, aged six. It was further reported that the charge "was not the only offence of the kind that he has committed in this town, but heretofore it has not been known so publicly, and it is to be hoped that by the publication of this, the public generally may be warned of him, wherever her may go."[145] The fact that he took advantage of his position of trust and was also a schoolteacher for local children fuelled a strong community response against him. Moreover, in this case, it was his privileged access to the victimised children through his presence in their family home that made them especially vulnerable to his opportunistic assault.

Other similar cases were acknowledged where men working in or around family homes, family friends, or boarders took advantage of what one report out of Anaheim called "a favourable opportunity," to assault children.[146] Such accesses likely led to

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[144] After a divorce, for example, one mother kept a boarding house to provide for her children. See: *Sacramento Daily Union,* 26 February 1863, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[145] *Daily Alta California*, 3 July 1862, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[146] *Sacramento Daily Union*, 10 November 1868, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; There are many examples of these situations, where a man working or boarding in the family home took advantage of proximity. For another example, see: *Marysville Daily Appeal,* 22 July 1866, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; Schools offered another place of access for young children, see for example: *Sacramento Daily Union,* 23 July 1860, 3. California Digital

abundant abuses that never caught the public's attention. For decades following California's first constitution in 1850, the state enacted legislation that offered legal avenues for white Anglo Americans to abduct Native American children for labour and domestic service.[147] As the cases above demonstrate, the domestic sphere could provide non-familial men greater sexual access to children who were removed from their own families of origin or orphaned. Discovery of child abuse was also vitally linked to the watchful gaze of protective authority, as parents were key observers of physical symptoms of abuse in children, and mothers especially were the most frequent people that children complained to of pain, unusual discharge, and other symptoms of venereal disease.

Vitally, children required adult support to escalate a complaint of abuse. An adult relative, guardian, or employer was essential in the process, as they would be required to file a complaint against an abuser on behalf of the affected minor to even begin an investigation, let alone escalate the charge to legal adjudication or gain public attention. It is likely that abuse against girls of colour working as domestic support in family homes may never have been noted by adults or may have been met with denial or suppression and secrecy. Even cases involving white children could be settled without legal interference, with fathers killing abusers, or families accepting monetary

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Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; Or another case where a family friend offered to look after a child for several days: *Sacramento Transcript*, 6 February 1851, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; Or another case where a man was accused of raping his wife's relative: *Daily Alta California,* 2 April 1852, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[147] Madley, *An American Genocide*, 161.

compensation.[148] Without the observation of symptoms of abuse from a close adult, and the willingness of that adult to intervene and file a formal charge, children would likely have sustained individual or repeated incidents of sexual abuse without much power of formal legal recourse, or any form of response at all.

Domestic vulnerability could also come from parents and stepparents. In 1873, in the previously noted case of *People v. Hamilton*, James Hamilton was tried for raping his stepdaughter in Solano County. Although the girl did not tell her mother of the assault until two years later, the charge nevertheless resulted in a trial, and Hamilton was handed a lengthy punishment of fourteen years. The County Court judgement was eventually reversed for re-trial in the Supreme Court. Supreme Court Justice Crockett noted in his Opinion that "a charge of so heinous a nature, when supported by even the slightest evidence, arouses in the public mind an intense indignation against the supposed case," and explained that one of the jurors in the original trials was thusly "under the influence of passion or prejudice, or both."[149]

Especial outrage over this case stemmed from the relationship between the victim and perpetrator, as his role as her stepfather put him in a position of familial closeness to her. While it was somewhat unconventional for a case to be tried two years following the perpetration of the original crime, and perhaps even more unusual for the sentence to be so long for a charge of assault with intent to rape, the disgust

[148] *Sacramento Daily Union*, 10 November 1868, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[149] *People v. Hamilton*, 46 Cal. 540, 1873, California Supreme Court. LexisNexis California Official Reports; *Sacramento Daily Union*, 5 January 1874, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

and indignation that motivated the condemnation of Hamilton was related to his perceived transgression of this familial role, and his failure to fulfil his patriarchal duty to protect her. Likewise, a report in 1866 noted that a man found guilty for raping his stepdaughter was sentenced to twenty years in the State Prison, "the sentence is a severe one, but the crime is one of great enormity and the attendant circumstances of a most aggravating character."[150] Thus, perpetrators who took advantage of positions of trust and familial closeness appeared as rather heinous villains in California's late-nineteenth century press. In these cases, perpetrators were viewed as transgressors of both innocence as well as the social contract that they keep children in their care safe from harm.

The ultimate offence against the patriarchal role, the sexual abuse of children by parents or other close blood relatives, was broadly overlooked throughout this period. Until the early 1890s, incest was infrequently reported on in the press, and when it was noted it was usually abstractly or in reference to distant cases. A California newspaper reported on the case of Johnathan Burroughs in Massachusetts, who was charged with raping three of his daughters in 1858.[151] Likewise, in 1859, a man was convicted in California for trying to marry his niece, and the reporter remarked that it was "the first conviction for such a crime in this State."[152] In 1862, in its special correspondence from St. Louis, the *Sacramento Daily Union* reported that a District

[150] *Sonoma Democrat*, 20 October 1866, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[151] *Sacramento Daily* Union, 14 April 1858, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[152] *Daily Alta California,* 6 August 1859, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

Court judge in Dubuque, Iowa remarked that the case of a man who committed a rape on his ten-year-old daughter was "the first instance in the history of the law of a crime of exactly such a character."[153] In broad terms, incest was referred to, spoken about, and occasional cases were noted in newspapers, although few court documents remain that attest to these. Despite this broad awareness in California's public commentaries, the intersections of incest with the rape and carnal abuse of children in the home were rarely acknowledged.

A few cases tried in California's Supreme Court in the late 1890s garnered public attention, which involved the abuse of fathers against their daughters. A particularly notable case, *People v. Fultz* (1895), reveals how shifting medical knowledge had implications for both the recognition of incestuous rape in the first place, as well as the judicial opinions formulated in response.[154] In this case, a girl named Lizzie made allegations regarding years of abuse that she had sustained at the hands of her father. Almost universally in late-nineteenth-century California, indictments for rape required the detailing of a particular and specific instance of abuse. For Lizzie, alleging ongoing, persistent abuse in her home served to undermine, rather than strengthen, her courtroom believability, as rape was constructed throughout this period as a singular crime perpetrated against an unwilling, physically resistant victim that was only accomplished in rare circumstances.

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[153] *Sacramento Daily Union,* 7 February 1862, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

[154] *People v. Fultz,* 109 Cal. 258, 41 P. 1040, 1895, California Supreme Court. LexisNexis California Official Reports.

Contrary to these perceptions, Lizzie's story involved systemic, longstanding abuse that she had been unwilling or unable to report over many years. As a victim from a very young age, her vaginal canal likely bore no symptoms of "rape," according to prevailing understandings, and her body lacked physical symptoms of persistent resistance. At their core, these details subverted almost every level of the social and legal scripts dictating imaginings of what rape and sexual abuse "looked" like. As a result, these frameworks served to near entirely obscure systemic long-term sexual abuse of children, which also often took place within families and amongst trusted relations. Likewise, the sought-for physical symptoms of rape according to medical knowledge of the period – tearing, swelling, and lacerations around the vulva and in the vagina – were often not present in a child who had sustained abuse over a long period of time.

By 1895, when George Fultz appealed his conviction and fifteen-year sentence, legal and medical understandings about the workings of child sexual abuse were beginning to shift. As the Supreme Court Judge, Justice Vanclief, stated in his opinion, "it is insisted that the court erred in permitting evidence of rapes and acts of lewdness, committed by the defendant upon and with his daughter, other than that charged in the information." Nevertheless, as this case involved "peculiar conditions," he argued that "such evidence was properly admitted." He reasoned that such evidence was required,

> to account for there having been no outcry and no pain suffered by the child, as she testified, when the particular act charged was committed; and also to account for the absence of laceration and the abnormal capacity of the vagina at the same time, as

> shown by the testimony of the physician who examined her person soon after the alleged commission of the act charged in the information.[155]

For this reason, the incestuous rape of children is illustrative of a broader reality of the social construction of "sexual violence." Even when recognised through prohibition in law, certain forms of abuse – like incestuous rape, pervasive white male violence against women and girls of colour, sexual abuse that did not involve vaginal penetration, and the sexual abuse of boys – were not part of broad social ideas of sexually violent crimes. The legal definitions of "rape" and "assault with intent to commit rape," which were deeply influenced by religious ideologies of appropriate sexual expression and fed into medical understandings of these crimes, had direct and myriad implications for what kinds of cases could be identified, addressed, and prosecuted as child abuse throughout the period.

The fact that children faced much danger in the home and often from relatives or other acquaintances was not reflected in the cases that went to courtrooms. Likewise, the instances of child abuse in the domestic sphere that did come into public view – primarily through newspaper reports – rarely appeared to grasp or recognise the possibility that children could be victimised by long-term familial sexual abuse. As in broader narratives of rape, more than one occasion of assault by the same perpetrator against the same girl or woman often served to undermine the claim of violence, since it suggested to legal officials a collusion or consent on the part of the victimised person. Sexual abuse in the domestic sphere, often perpetrated by a person in a position of trust, would likely have directly conflicted with these broader

[155] Ibid.

narratives of sexual violence, and thus rendered many cases all but invisible for public intervention.

Conclusion

Ultimately, sexual crimes against children were understood as different to sexual crimes against adults, indicated by a frequent habit of referring to these violent incidents as "carnal abuse" or "indecent assault," but were adjudicated according to the same system of definitions of sexual crimes. In other words, while the age of consent protected female children from accountability for sexual contact, the parameters that narrowly conceived of sexual abuse as rape or assault with intent to commit rape – each specifically defined as vaginal penetration with a penis – were consistent for children as for adults. The biological and intellectual differences that separated children from adults did not create a different set of understandings about what sexual assault "looked like" for individuals of different ages.

Throughout the decades when California transformed into an Anglo-American state with its own identity and character, child rape cases were consistently attended to in courtrooms and in press reports of California life. Judges in higher courts, who understood themselves as the protectors of the sanctity of the American judicial system, expressed sympathy for the passions of jurors when they performed their distress over child sexual abuse. While these justices occasionally found cause to reverse the lower court decisions as a result of such passions, they appeared to understand the human sympathies that led individuals and communities to condemn accused child rapists.

As a result of these negotiations, there were some consistencies in the adjudication of justice. Men of colour were particularly vilified when they were accused of sexual violence against children, and stories of white male retaliatory murder against them were reported on with little remorse. Nevertheless, broad views of child sexual abuse, when seen and perceived as such, held it up as a blemish on the social life of California. Girls of colour who made accusations against men of colour were usually granted a comparable degree of sympathy and compassion in public accounting to their white counterparts. Thus, even in a context where great violence was a part of California social life, the expression of this violence in sexual forms toward children, particularly female children, was perceived as an unacceptable transgression of innocence. Racialised and classed notions of victims and perpetrators played into these trials, but juries, communities, and – if lengthy sentences can be used as an indication – lower court judges did seem to take on responsibility of protecting children from danger, particularly sexual danger. While the nature of these sources makes it impossible to know how many cases of child rape failed to capture public attention, the cases that did fit into constructions of how child abuse "should" appear merited generally strong and intense responses.

Through a mutual judicial and public desire to protect children, in some ways supported by medical professionals willing to make assessments regarding the potential that a girl had been penetrated, general imaginings of what constituted sexual abuse of children were quite narrowly defined. Recognition and treatment of child abuse complaints amplified assumptions about sexual violence that were established in common law and permeated social discussions of sexual harm. The sexual abuse of boys, expressed in cases of sodomy, was not accounted for along the

same principles of "abuse," making the sexually abused boy nearly invisible to contemporaries. Likewise, narrow notions about what, precisely, the harm of sexual violence was – namely the desecration of the innocent, emblematised by the sanctity of the vaginal canal – limited social recognition of male victimhood. Thus, the sodomised boy was rendered nearly invisible in the landscape of California's adjudication and policing of childhood sexual abuse, and the sodomised girl entirely so. The heinousness of rape, linked as it was to vaginal penetration, was considered legally and morally wrong due to the way that it polluted the victim.[156] While defiling the innocence of children was a matter of particular abhorrence to contemporaries, questions of knowledge and culpability became much more complicated once the "child," approached puberty.

[156] By contrast, as was more fully explored in Chapter Three, sodomy was a moral and legal boon to the perpetrator.

V. "Of Previous Chaste Character": Rape, Seduction and Moral Consciousness

> No punishment which man can inflict is commensurate with the crime of rape on an innocent girl. God alone can deal righteously with such black-hearted treason to society.
>
> - *Sonoma Democrat*, 11 August 1877

> The age at which the girl most needs the protection of the law is that when her susceptibilities are most easily played upon, her passions most easily aroused, and her ruin most easily accomplished – the period between puberty and eighteen.
>
> – *Sunday Union*, 15 February 1891[1]

Introduction

A great scandal stirred the August 1877 term of the Sonoma County Court. A physician in Santa Rosa was accused of having unlawful "carnal connection" with seventeen-year-old Flora Lester. There was "deep interest in the matter" amongst the town's residents, as W.W. Royal was not only a family acquaintance and providing medical care to Flora's ailing sister, but also married and many years her senior.[2] Flora, a student at the nearby Methodist College, was "always particular to obey" her parents, and although she was described as social, she "never attended dancing

[1] *Sonoma Democrat,* 11 August 1877, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu; *The Sunday Union*, 15 February 1891, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov.
[2] *Sonoma Democrat,* 11 August 1877, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

parties."[3] Despite her commitment to maintaining an image of unimpeachable moral character, her reputation for adolescent innocence would be shattered before she reached her eighteenth birthday.

On 29 March 1877, Dr. Royal made a house call at the Lester household and requested that Flora accompany him home to visit with his wife. With her mother's permission, Flora joined the doctor in his carriage for the journey.[4] What ensued along that ride and in his medical office afterward were not matters of great debate in either the County Court trial in 1877 or the Supreme Court appeal that would follow in 1878. That Royal pulled the buggy over and started to grope her, stopping when she resisted his advances, was broadly agreed upon by both sides. All also seemed to generally agree that he then drove the buggy to his medical office and made some indication that he would like Flora to go inside. Flora testified that she did not want to go up into his office with him, but felt she had no alternative.[5] Eventually, when the two of them were alone in his office, Royal had penetrative vaginal intercourse with her.[6]

The events of that March day in 1877 were not broadly debated by commentators either in or out of courtrooms in the ensuing months. Rather, the questions that coloured judicial instructions, figured into jury decisions, and drew public attention were oriented on how and to what degree Flora resisted the physician's efforts to "accomplish his purpose," and how and to what degree she was

[3] *Sonoma Democrat,* 4 August 1877, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[4] Ibid.
[5] Ibid.
[6] *People v. Royal*, Case 936, 1877, Sonoma County Court. California State Archives, Sacramento, California.

obligated, as a young woman, to resist such advances to sustain either a charge of rape or a charge of "seduction" against him. The level of her resistance would shape the basis for Royal's repeated legal appeals – alongside his allegations of judge, jury, and community bias against him – and eventually led a Supreme Court Justice to overturn the County Court guilty verdict. These questions would also be matters of great fascination to the wider community, as the details of the case were discussed in public houses and private homes.[7] At seventeen, Flora's responsibility for protecting her chastity, especially against a man in a position of authority over her, was a matter of a great deal of social confusion and contest.

This case and others like it in late nineteenth-century California offer deeper insights into the ways in which sexual coercion and harm were conceived of, and how matters of sexual crime and contest were indelibly related to broader social changes. In the landscape of early Anglo-expansion onto the California frontier, fears for women's safety were deliberated frequently in the press, and the diaries and memoirs that document the first years of American conquest describe a frontier that was a dangerous place for a "lady." These discussions, and the growth in discourse around the charge of "seduction," were emblematic of the racial politics that imbued understandings of sexual harm throughout the period, and the narratives of protection that surrounded certain women and girls. Exaggerated reports of the absence of women in California in the late 1840s and early 1850s often overlooked or ignored large populations of Hispanic and Native American women, while at the same time commentators bemoaned the danger of the chaotic frontier for "ladies." Race and

[7] *People v. Royal*, Case 936, 1877, Sonoma County Court. California State Archives, Sacramento, California.

connection to a recognisable white, middle-class family-unit were central components in social contexts where those who were either deserving or undeserving of social and institutional protection were systemically differentiated.[8] This was perhaps nowhere more acutely notable than in the development of the legal category of seduction.[9]

As the presiding justice in the Sonoma County Court, Judge Pressley, wrote in his July 1877 instructions to the jury for *People v. Royal*, "an average girl" of seventeen would be "conscious of the nature of the act of sexual intercourse."[10] In conjuring sexual consciousness, he raised an important concern that would form crucial elements of trials for both rape and seduction cases throughout this period. As a judge, he sought to formulate the trial around a central and crucial assessment of mental capacity, awareness, and maturity. These constructions, which were articulated in the landscape of the late 1870s, indicated a shift in social understandings of intellectual and sexual maturity in girls, and foreshadowed broader changes in understandings of adolescence that would follow in the ensuing decades. Flora's maturity and moral consciousness in this case were concerns with potent implications for the degree to which she should be held accountable for her "ruin," and reveal some of the deeper intricacies of the negotiations of culpability that pervaded broad understandings of sexual crimes in late nineteenth-century California. According to Pressley, if Flora did

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[8] California, *Statutes of California, Passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 428. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

[9] As Stephen Robertson has noted regarding the United States, between 1848 and 1900, "thirty-five states added seduction law to their statute books." See: Stephen Robertson, "Seduction, Sexual Violence, and Marriage in New York City, 1886-1955," *Law and History Review* 24, no. 2 (Summer 2006): 333.

[10] *People v. Royal*, Case No 961, 1877, Sonoma County Court. California State Archives, Sacramento.

have a moral consciousness of the implications of penetrative sex and failed to adequately resist a man's advances, then it would be possible that she had simply given in "to her passions" and become a reluctant but willing participant in her own corruption.[11] In such case, the defendant would not be guilty of rape; but could still be held accountable for "seduction."[12]

The debates around the chastity, moral consciousness, and sexual-social responsibility of young women in the period of their adolescence were key elements to a logic that shaped understandings of sexual coercion in late nineteenth-century California. The social positioning of young, adolescent women as neither children and fully dependants, nor completely independent and adult, made their social status and freedoms matters of great contention to contemporaries. As Victoria Bates argues with reference to Victorian England, age was an important category for analysis in legal contexts, and a focus on puberty and bodily changes in young women and girls indicated a fear of uncontrolled female sexuality.[13] As a result, those legal cases that involved young women complainants particularly highlight how principles of evangelical moral-consciousness were worked into legal understandings of sexual crimes and also shaped the lens through which the public viewed such allegations. Nevertheless, at least in the case of W.W. Royal and Flora Lester, the law and public commentators often disagreed about matters of wrong and appropriate punishment when it came to shielding those young women deemed worthy of protection.

[11] *People v. Royal*, Case No 961, 1877, Sonoma County Court. California State Archives, Sacramento.
[12] Ibid.
[13] Bates, *Sexual Forensics in Victorian and Edwardian England: Age, Crime and Consent in the Courts* (London: Palgrave Macmillan, 2016), 8-9.

As explored in Chapter Three, social and legal concerns about sexual violence were largely oriented around the maintenance of moral authority and social order. In the first epigraph that opened this chapter, a journalist decried the rape of an innocent girl as "black-hearted treason *to society,*" signalling how ruining of a girl's innocence was a transgression against a certain social order.[14] Protecting the moral innocence of young white women before marriage was also a matter of maintaining a certain control over their entrance into sexual knowledge, which, according to ideal evangelical religious tradition, should come after marriage. The expressions of discomfort or disgust of commentators in the press and judges in courtrooms persistently demonstrated that details of sexual assault or aggression offered opportunities to express anguish over the decay of respectable society, particularly when sexual violence was directed at those they perceived as "innocents." This category of "innocent" was somewhat complicated when applied to young women, whose bodies may be undergoing changes that outstripped their moral consciousness.[15]

As historians of childhood and youth have demonstrated, social and scientific conceptualisations of a stage between childhood and adulthood, or a period of adolescence, would not enter broad and popular American discourse until the 1890s.[16]

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[14] *Sonoma Democrat,* 11 August 1877, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu. Emphasis mine.
[15] Bates, *Sexual Forensics in Victorian and Edwardian England*.
[16] Mary E. Odem, *Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920* (Chapel Hill: University of North Carolina Press, 1995); Kent Baxter, *The Modern Age: Turn-of-the-Century American Culture and the Invention of Adolescence* (Tuscaloosa: The University of Alabama Press, 2011); Joseph F. Kett, "Adolescence and Youth in Nineteenth-Century America," *The Journal of Interdisciplinary History* 2, no. 2 (Autumn 1971): 283-298.

In the decades leading into this period of increased discussion around adolescence, public, legal, and legislative discussions in California increasingly grappled with the sexual responsibilities of girls and young women during their teenage years. These discussions were often confused and implicitly contradictory, at times ascribing maturity to girls as young as ten and immaturity to women over the age of eighteen. However, between 1848 and 1900 lawmakers, groups petitioning for public morality, and a commenting public gradually shifted to understand the emotional and intellectual sexual maturity of young women as occurring later and later, and increasingly distinguished between physical and intellectual development. Many of the debates around seduction and rape also presupposed that the initial loss of innocence led to the sexualisation of girls and almost-inevitably led to the development of sexual desire, regardless of whether they came by this knowledge by rape or consensual sex.[17]

While the age of consent and the age of majority offer some distinctive guidelines to ages that marked, at least in law, the moment at which a girl could be considered old enough to make choices for her sexual life, these ages were less clear in practice than they appeared in writing.[18] Despite this, a woman or girl's maturity was crucial to what instances of sexually coercive behaviour could or would be recognised by legal authorities and prosecuted by the District Attorney, or attended to as scandals in the press. Through these debates, physical maturity – marked largely by visible markers of puberty, and therefore determined by outside male audiences – was often understood as somewhat related to intellectual maturity, and much of the confusion

[17] Bates, *Sexual Forensics in Victorian and Edwardian England*.
[18] Ibid.

around how to understand the culpability of girls undergoing the transition between girlhood and womanhood can be traced to these disagreements.[19]

Girls between the age of consent and below the age of majority marked a category that highlighted many of these paradoxes. Age persistently figured as a feature of primary import to cases, and some of the most prominent instances of upset or concern about sexual behaviour and sexual assault emerged out of cases where girls and women existed in this liminal zone of early womanhood. A certain degree of naive willingness amongst some young women was occasionally tolerated in the press, for example, if they were perceived to be ignorant to the nature of sexual activity and had been lured into sexual experiences through the strategies of duplicitous men. Notably, public outcry over "seduction" and concern for its victims invariably involved instances of coercive sex experienced by white adolescent girls, especially those that still lived with their families of birth.

As the decades of California's statehood progressed, the total numbers of women increased in the state, and concurrently the ratio of white women rose in proportion to Native American women.[20] During the period when this demographic shift became particularly notable, from 1870 to 1900, there was a correlating rise in concern over the protection of young, white women, and the lurid dangers of male sexual appetites. This kind of concern over the purity of young women nearing an age

[19] For example, see: *The Los Angeles Herald,* 27 May 1897, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

[20] Jo Ann Levy, *They Saw the Elephant: Women in the California Gold Rush* (Norman: University of Oklahoma Press, 1992): xvi-xvii; As discussed in Chapter Two, the total Native American population decreased throughout the late nineteenth century. See also: Benjamin Madley, *An American Genocide* (New Haven: Yale University Press, 2016).

of marriageability, which led directly into widening discussions on morality and public order in the 1890s, was a rhetoric that agonised over the sexual safety of white adolescent girls and women just as they represented a growing demographic throughout the state.[21] The limited existing evidence for cases of seduction of adolescent girls of colour, or public agonising over dangers posed to their moral sanctity, suggests that their sexual safety was not a matter of broad consideration in mainstream social and institutional spaces. Rather, the evidence that does remain generally demonstrates a lurid interest in the violence of racialised communities against one another, and broadly ignores threats to the safety of racialised girls entering young womanhood.[22]

The lack of legal and media sources that account for the sexual dangers experienced by young women of colour are also a direct result of California's racially exclusionary laws. As noted elsewhere, the first legislature of California in 1850 passed into law the ruling that "no black or mulatto person, or Indian, shall be permitted to give evidence in favour of, or against, any white person."[23] While occasional cases of rape went through regional courtrooms that involved Indigenous accusers, these were rare, almost always involved very young children as victims, and infrequently involved white perpetrators.[24] Public perceptions also often perceived Native, Black, Mexican, South American, Chinese, and Japanese women as prostitutes, or socially adjacent,

[21] See Chapter One for more details on demographic changes.
[22] Child abuse of non-white girls is somewhat of an exception to this, which I explored in the previous chapter.
[23] California, "Chapter 99: Crimes and Punishments, Third Division," in *Statutes of California, Passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 230. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.
[24] See Chapter Four for a more complete assessment of child abuse and race.

particularly in urban centres like San Francisco and Los Angeles.[25] Likewise, surviving Supreme Court records reveal little evidence that the rape of non-white women and girls, let alone their enticement into sexual activity, garnered much legal attention or concern.

Sexual access to women, white and non-white alike, was both coveted and, at least according to public outcry, often poorly protected in social contexts. In California, unmarried men and women had relative freedom to their counterparts in eastern States to informally associate and interact with one another.[26] These realities led to court cases where behaviours of both accusers and accused were questioned in minute detail, and judges, juries and other commentators grappled with their own contradicting perceptions of the appropriate and inappropriate, and the limits of forgivable transgressions to morality norms. These social contexts could also account for instances, as in the case of Flora Lester, where a young woman could be seen as vulnerable and in need of protection, even if her charge of sexual harm did not conform to broad understandings of rape or attempted rape.

From California's entrance into the Union, journalists and jurists debated the implications of sexual violence for young women. In public imaginings, the stories of duped, naïve and moral-minded women, who were charmed by the advances of wily men served as both entertainment in the press, as well as a warning to immigrating women and their families. Until increasing state intervention in the late 1880s and 1890s, sexual commerce in California was immensely lucrative and relatively prevalent

[25] Susan Lee Johnson, *Roaring Camp: The Social World of the California Gold Rush* (New York: W.W. Norton & Company, 2001), 299.
[26] Johnson, *Roaring Camp*, 163.

throughout the state. In this context, where a foundational gold-rush economy blurred class divisions, the rigid lines that separated chaste, moral women and degraded, morally-bankrupt "fallen" women were matters of deep distress amongst social commentators and state officials alike. In broader ways, the lines between social classes were also upset and redrawn according to changing dimensions of wealth in rapidly shifting cities and towns across California. In the disorder of this space, protecting young women from sexual knowledge until they were safely ensconced in white, heterosexual, Christian marriage was a matter of great public anxiety.

"Seduction" and the Law

The social and legal meanings of "seduction" are indicative of the race, age, and morality conflicts that shaped the growth of California in the late nineteenth century. As the age of consent came under greater scrutiny, and gradually rose throughout the century, the term "seduction" – a legal category employed by families, guardians, and affected women to procure damages from men who tempted married women away from their husbands or girls who relinquished their chastity under promises of future marriage – began to be more liberally employed by journalists, state representatives, and other public commentators. These broad imaginings mimicked legal discussions of seduction. Legal commentators generally envisioned seduction as harming married women who were duped into adulterous immorality or adolescent girls who lacked the moral capacities to understand the nature of sexual behaviour but had a physical maturity that left them vulnerable to enticement and ultimate "ruin."

In common law, the tort of seduction originated in the transgression of master-servant relationships. In William Blackstone's *Commentaries on the Laws of England*, he remarked that "it appears to be a remarkable omission in the law of England, which with such scrupulous solicitude… secures the morals and good order of the community," that so "little protection to female chastity" was afforded in law. Rather, a focus on the violence of rape belied, in his estimation, a "perhaps greater danger" stemming from the "artifices and solicitations of seduction."[27] His critique was oriented around this focus on the power differentials between master and servant, as a father charging a man with the seduction of his daughter must be able to demonstrate that "from the consequences of the seduction his daughter is less able to assist him as a servant" or, that the seducer "in pursuit of his daughter, was a trespasser on his premises."[28] In Volume IV of *Treatise on the Law of Evidence*, Simon Greenleaf reaffirmed this master-servant construction, stating that "in an action for seduction, the plaintiff must be prepared to prove, (1) that the person seduced was his servant; and (2) the fact of seduction."[29] As a result, the legal construction of this offence was often forged on the grounds of either pregnancy, incurring a financial burden to the seduced woman's father or master, or the loss of her status and

[27] Sir William Blackstone, *Commentaries on the Laws of England in Four Books: Books III & IV* (Philadelphia: Childs & Peterson, 1860), 142. https://archive.org/details/commentaries003.
[28] Blackstone, *Commentaries on the Laws of England in Four Books*, 142; The 1850s marked a period when seduction began to be increasingly understood as a moral crime. See: M. B. W. Sinclair, "Seduction and the Myth of the Ideal Woman," *Law & Inequality: A Journal of Theory and Practice* 5, no. 1 (1987): 48.
[29] Simon Greenleaf, *A Treatise on the Law of Evidence, Volume II*, 13th edition (Boston: Little, Brown, and Company, 1876), 516.

reputation.[30] For the families of unmarried young women, marriage to her seducer could thus form an ideal outcome to resolve such cases.[31]

While the tort of seduction was discussed by British commentators from the seventeenth century, and was a frequent feature of press reporting in California from 1848 until the early 1870s, it was initially excluded from California law.[32] In 1850, the statutes passed by the first California state legislature expressly barred it in their adoption of common law. The "Act to Regulate Civil Cases" (1850) stipulated that "no action shall be maintained for criminal conversation [adultery] or for seduction."[33] Legal and public understandings of the action situated seduction as often perpetrated against married women, who were lured away from their husbands to commit adultery and break the bonds of their martial agreement. Likewise, both the seduction of married women and the seduction of unmarried women who remained under the protection of their fathers posed challenges to ideas of bloodlines and legitimate birth. Newspapers affirm that this understanding of the term was also held in public parlance, as reporters related salacious and scandalising stories of loyal and loving

[30] Specifically: "the jury may consider [the father of the seduced woman's] loss of comfort as well as the service of the daughter, in whose virtue he can feel no consolation, and his anxiety as the parent of other children, whose morals may be corrupted by her example." Greenleaf, *A Treatise on the Law of Evidence, Volume II*, 13th edition, 521.

[31] Stephen Robertson, "Seduction, Sexual Violence, and Marriage in New York City, 1886-1955," *Law and History Review* 24, no. 2 (Summer, 2006): 331-373.

[32] In this regard, California seemed to follow British legal thinking that did not include seduction as a punishable crime, but later followed in a general trend throughout the United States in the period of legally defining "seduction" from "rape." Robertson, "Seduction, Sexual Violence, and Marriage in New York City, 1886-1955," 333.

[33] California, *The Statutes of California, Passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 428. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

wives manipulated, tricked, and tempted into sexual contact with other men or the tales of young women, conned by promises of marriage.

"A married lady, young and handsome," away from her husband, stirred up interest in 1853 when the story of her seduction by "one of the gay Lotharios" of the California town of Columbia was reported on in the press. "This was a case that excited considerable interest in our town," one reporter confessed, "the excitement for awhile was intense."[34] While this reporter surmised that the seduced woman had grown "dissatisfied" with her husband, he also described her as a "captive" of her seducer, who made her a "fair, but frail prize."[35] Other reports replicated such constructions of women as "foolish" and weak-minded, easily duped and tricked by ploys of men, or vulnerable to the "alert" and watchful seducer, who sought "victims from among the youthful, unsophisticated, and beautiful of the opposite sex."[36] Throughout the 1850s, these narratives increasingly focused on the vulnerability of young, usually unmarried teenaged girls whose physical development outstripped their understandings of moral and sexual matters.

Concerns over the protection of "foolish" women were part of the public discourse in California. As early as 1851, the state's first Governor bemoaned the exclusion of seduction from California statutes. In an address published in the

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[34] *Sacramento Daily Union,* 4 January 1853, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[35] Ibid.
[36] *Marysville Daily Herald,* 19 August 1853, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu; D. B. Bates, *Incidents on land and water, or Four years on the Pacific coast. Being a narrative of the burning of the ships Nonantum, Humayoon and Fanchon, together with many startling and interesting adventures on sea and land* (Boston: J. French and Company, 1857). https://www.loc.gov/item/rc01001055/.

Sacramento Transcript, he recommended "an entire repeal of this section," stating "that the law may throw around the chastity of our wives and daughters that protection which ought to be afforded by the laws of every civilised country in the world."[37] Such constructions were indicative of a ubiquitous fear amongst many in the state that young, impressionable, and feeble-minded girls could be cajoled and deceived into living lives of immorality. These fears were compounded by a general acceptance of the idea that any exposure to sex rendered women exponentially more vulnerable to further sexualisation. One report agonised about those who had "commenced that downward course of life, which a woman, when once she sins, is sure to tread in," perpetuating a pervasive perception that a woman's character once ruined was rarely salvageable.[38] When Elizabeth Crawford, a "victim of seduction," died in San Francisco in the summer of 1855, the "circumstances of her death created general sympathy and comment," but seemed to fit into the general narrative of tragedy that surrounded seduced women.[39]

Considering these salacious tales, commentators frequently expressed frustration throughout the 1850s and 1860s that no law existed to deter men from manipulating ignorant girls and women into sex. "We believe in what may be considered a rather extreme doctrine," a writer recorded in an 1854 issue of the *Daily Alta California* that seduction should be a capital offence that garnered the death

[37] *Sacramento Transcript*, 13 January 1851, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[38] *Daily Alta California*, 20 December 1854, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[39] *Daily Alta California,* 16 July 1855, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

penalty. The writer reasoned that only death could "atone for the misery in life and the misery in death, of the innocent girl who has yielded up her soul and body to the seducer," and become a cast off, relegated to a life of "sorrow and to hopelessness." Further, he explained, "we believe that death alone can atone for the anguish which wrings the heart of the fond husband," when his wife has been

> enticed away from him by the promises or the gold of a heartless villain, often a professed friend. 'Death to the seducer!' is a motto, which, if enrolled oer [*sic*] the doorway of society, would make society better and purify it from many of the stains which now blot its face.[40]

These calls for the death penalty for seduction were especially notable considering that even rape did not carry the death penalty in California.[41] Nevertheless, the anguish, misery, hopelessness, and sorrow that seduction created, according to this writer, rendered it a most serious and egregious offence, undermining appropriately moral, and religiously-sanctioned sexual unions between husbands and wives.

Decades later, these concerns were still expressed by commentators in California. "The indifference with which government has regarded this great crime against virtue and society is truly wonderful," one writer complained about seduction in the *Sonoma Democrat* in 1871. On the one hand, "to take the life of another with premeditation is regarded as the highest offence that can be committed." Yet, on the other hand,

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[40] *Daily Alta California*, 20 December 1854, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

[41] California and Robert Desty, *The penal code of California: enacted in 1872, as amended in 1889* (San Francisco: Bancroft-Whitney, 1889), 119. https://archive.org/details/penalcode califo02destgoog.

> he who deliberately renders life more intolerable than death, blasts all hope of happiness in future, closes the door of society against his victims, and destroys the peace and felicity of the family circle, generally escapes punishment unless the victim or some of her friends, regardless of law or the want of law, hunts the offender down with bludgeon, knife or pistol.[42]

His expressions mirrored arguments justifying private vengeance for sexual violence that were often notable in instances of child sexual abuse and argued that the loss of a woman or girl's virtue represented a worse fate than death. The public, according to his assessment, generally agreed with summary revenge, and juries often acquitted those who committed violence against seducers and rapists. By contrast,

> legislative bodies have not considered seduction to be such an offence against society as to require severe punishment. The approval of lawless vengeance by society and the refusal of juries to convict for the offense have long been and still are a standing protest against the indifference of the law making power, and an appeal for appropriate legislation. We agree… that the punishment should be increased, but would go further and make seduction a capital offense, or at least imprison the offender for life.[43]

Newspapers and stories of these fallen women often commentated with some degree of pity for the duped girl, who was too young to entirely understand the distinction between "right" and "wrong," even as her biological development made her susceptible to male advances and the onset of possible sexual desire.

A story published in the *Marysville Daily Herald* in 1850 detailed the story of a married woman who arrived in San Francisco to meet her husband. When the woman

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[42] *Sonoma Democrat,* 2 December 1871, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[43] Ibid.

was unable to find him, an acquaintance of the couple convinced her that he had tragically died, took her under his protection, and seduced her. When her husband returned and discovered his wife in a sexual relationship with their friend, the seducer fled. Related in detail by the press, the story was presented as an unfortunate tale of an unwitting woman putting her trust in a dishonest manipulator. While such seduction was not illegal, the story nevertheless garnered public interest, and perpetuated a narrative that a morally upstanding and trusting woman of any age could be deceived by the manipulations of opportunistic men.[44] Tales like these, which were relatively common in newspapers from 1850 onwards, offered both entertainment, and warning to the public about the malleability of innocent, earnest women. Further, they perpetuated a conceptualisation of California as populated by rough and ready men, willing to take advantage of daughters and wives.

In another case for sensationalist retelling, a young woman was reportedly courted by a man, drugged, impregnated, and then convinced to leave her parental home for California in 1856, to give birth in secret.[45] The case received particular attention in the press because the accused seducer was shot by the girl's brother in retaliation for the wrong. Unlike several other perpetrators of retaliatory violence against seducers, the young woman's brother was charged by the State and put on trial. Throughout his trial, reporters related an admiring, spectating public that supported the brother's use of vigilante justice and called for his acquittal. "When the

[44] *Marysville Daily Herald*, 8 October 1850, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[45] *Sacramento Daily Union,* 18 December 1856, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

Judge asked the Jury, 'Gentlemen, have you agreed upon a verdict?' a breathless stillness pervaded the assembly," one journalist wrote,

> every eye was strained, every ear attentive, and, in my anxiety to hear the verdict, I forgot the prisoner, and closely watched the clerk, as in a clear voice he read, "We, the Jury, find the prisoner not guilty." A breathless calm succeeded for about one second, and then spontaneous shouts of applause burst from the crowd, again and again, which echoed and re-echoed through the old court-house.[46]

Not only demonstrating the ways that cases of sexual transgressions and ensuing dramas could form the basis of extensive public entertainment, the case further reveals a public commitment to certain forms of extra-judicial retribution.[47] Stories like these that related the enticement of women, their ruin, and the aftermath were of great interest and entertainment, garnering a great deal of sympathy for those who were led astray and angst over the ensuing loss of reputation to their families.

These cases also reveal the complexities of sexual conflict in California before the state made seduction a crime. Complainants and perpetrators were put on trials for other, related incidents that did fall under legal codes. In another report in 1858, the *Daily Alta California* reported on a "breach of friendship" when a married woman was seduced by her husband's acquaintance. In this case, the limits of the law were expressly noted, when seducer was released from custody as "he could be punished by no law known to the Court."[48] In *Baker v. Baker* (1859), a man sued for divorce on the grounds that his wife had given birth to a child that was not his, in a case that

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[46] Ibid.

[47] Retaliatory violence was also often tolerated in cases of child abuse. See Chapter Four.

[48] *Daily Alta California,* 5 March 1858, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

demonstrated the ways that seduction could undermine the workings of "moral" society. The defendant, who confessed that she had fallen pregnant before her marriage, admitted her seduction "under great distress of mind, from sense of shame, and the humiliation of her position."[49] Notably, Justice Field of the Supreme Court, who offered his opinion on the case, sympathised with the plaintiff, arguing that he did "all that a just and upright man could do to vindicate himself" by relieving "himself from the burden of a dishonoured wife, and her child of bastard blood."[50] In these and other cases throughout the first decades of California's statehood, seduction was broadly viewed as a pervasive, dangerous yet entirely legal phenomenon in heterosexual courtship rituals. Stories of seduced wives and daughters, their pregnancies, deaths, or capitulation to lives of immorality and prostitution, led to frequent calls for the introduction of a law that would discourage men from unmitigated attempts to persuade, cajole, and dupe women and girls into sexual activity.

Before the introduction of anti-seduction statutes in California, men and women sometimes resorted to alternate means of gaining justice when sexual relationships went wrong for themselves or their daughters. The "unusual excitement" in Sacramento in mid-January 1852 illustrated such extra-judicial forms of retribution. Just after three in the afternoon a woman, "of unusual intellect and strength of purpose," had requested an audience with J. Q. Adams, who was detained in the Sacramento Station House on the charge of having abducted and seduced her

[49] *Baker v. Baker*, 13 Cal. 87, 1859, California Supreme Court. LexisNexis California Official Reports.
[50] Ibid.

seventeen-year-old daughter.[51] In their brief exchange, the woman reportedly asked him if he would marry her daughter, and – upon receiving an "unsatisfactory response" – shot him in the abdomen.[52] Despite attempting murder, the unnamed woman was publicly lauded. Commentators understood her actions as the desperate retaliation for a horrible wrong done to her daughter, and "indignation against him who had driven a mother to such a desperate revenge reached a high pitch."[53]

The story likely also gained especial notoriety because Adams had capitalised on his close familial relationship with the woman and the girl he had seduced. The mother and daughter had travelled with him from Philadelphia in 1851. On this journey, Adams had "succeeded in making an impression upon" the seventeen-year-old, and after arriving in California, had induced her to leave her mother, seducing her under a false promise of marriage.[54] Due to the fact that the girl had "yielded to his desires under the promise of immediate marriage," and was reportedly quite

[51] While states like New York had statutes in place for seduction by this time, California did not until 1872. It is thus unclear on what charge he had been held in the station house. Possibly for breach of promise of marriage, but this usually would not have involved imprisonment. See: Robertson, "Seduction, Sexual Violence, and Marriage in New York City, 1886-1955," 344.

[52] *Daily Alta California,* 14 January 1852, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu; The names of the woman who shot him and her daughter were deliberately omitted from press reports. See: *Sacramento Daily Union*, 14 January 1852, 2. Adams later died from his wounds: *Sacramento Daily Union,* 17 January 1852, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

[53] *Daily Alta California,* 14 January 1852, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

[54] Stephen Robertson has expanded upon the relationship between breach of promise of marriage suits and seduction suits. See: Robertson, "Seduction, Sexual Violence, and Marriage in New York City, 1886-1955," 344; For more on breach of promise, see: Ginger Frost, *Promises Broken: Courtship, Class, and Gender in Victorian England: Courtship, Class, and Gender in Victorian England* (Charlottesville: University Press of Virginia, 1995).

"attached to her seducer," it was Adams and his "unholy passions" that emerged as the villain in reports of this story. Further, these details led a reporter to assert that "the action of the outraged parent in the affair will scarcely be condemned by any," and "universal sympathy is felt in her situation, as also that of her injured child."[55] While in 1852 Adams could not have been indicted on a charge of "seduction," since such a crime was excluded from California statutes, the case demonstrates the widespread public currency of the term. As the incident involved a young, white woman, under the guardianship of her mother, and presumed herself protected by an older, family friend, the events likewise fit neatly into the imagined scenarios of sexual danger that pervaded seduction narratives in the period.

The resolution of this case also indicates broader understandings of the harm of seduction. In an article published only a few days later, the seduced girl, now named by the press as Emily Bond, was reportedly wed to Adams mere moments before he died. "Judge Robinson, who has from the first manifested deep interest and heartfelt sympathy for the afflicted mother," orchestrated the marriage, and Emily's mother affirmed "that she would forgive [Adams] all, if this ceremony could be perfected."[56] The report on the union made no mention of a criminal prosecution for the murder of Adams, but rather appeared to understand the resolution in this case as complete. Emily Bond swiftly transformed from "ruined" to widow as a result of her marriage and

[55] *Daily Alta California,* 14 January 1852, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[56] *Sacramento Daily Union*, 16 January 1852, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

the quick death of Adams, offering her absolution from her sexual transgressions and righting the moral status quo desired by observers.

Ultimately, before the first anti-seduction law was passed on 1 March 1872, with "An Act to Punish Seduction," women used other methods to demand recognition or financial support from men.[57] In 1859, a woman took her seducer to court for abandoning his duties to his child. As part of the claim, she expressly contended that the defendant "under a promise of marriage" seduced her "and she had a bastard child in consequence of the seduction."[58] After acknowledging his paternity and supporting both mother and child for over a year, the accused had refused further support. The plaintiff in this case used her seduction as a way of garnering attention for her plight, but ultimately seemed to seek legal redress based on paternity. Regardless, the claim caused some confusion and debate amongst legal commentators and representatives, who disagreed as to whether there was precedent that would uphold the actions of the accused as illegal.[59] Likewise, a man attempted to shoot and kill an alleged seducer in January of 1861 as a means of exacting private justice.[60] In another case in 1861, a

[57] Rather notably, the first Act added to the California Penal Code that referenced "seduction" outlawed the seduction of girls below the age of eighteen and referred expressly to prostitution, revealing the anxieties over the morality of unmarried girls that dominated discussions in this realm. I will elaborate on this below. See: California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 120, 716; California, *The Statute of California, Passed at the Nineteenth session of the Legislature, 1871-72* (Sacramento: T.A. Springer, State Printer, 1872), 184.
[58] *Sacramento Daily Union*, 10 May 1859, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[59] Ibid.
[60] *Mariposa Gazette,* 8 January 1861, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

jury acquitted a nineteen-year-old woman for the murder of her seducer.[61] Others victimised by seduction could also inflict violence on themselves, as with one woman who attempted suicide after she was "seduced by some scoundrel."[62] These cases reflect that prior to the introduction of a law that proscribed seduction, seduced women and girls, as well as their families, used alternative laws to gain legal recognition, or resorted to extra-judicial forms of retribution.

While agitation and prolific general discussion around "seduction" were common amongst the public, the legislature, and even in courtrooms, seduction remained only unofficially recognised by California law until the introduction of "An Act to Punish Seduction," in March 1872.[63] As early as 1870, the Committee of Public Morals had introduced a bill to outlaw seduction, but had focused expressly on the issue of adolescent girls seduced through promises of marriage.[64] However, the seduction bill that was passed into law instead narrowed in on the luring of girls below the age of eighteen into prostitution or sexual activity. The first iteration of the seduction law specifically began by making liable: "every person who inveigles or entices any unmarried female, of previous chaste character, under the age of eighteen years, into any house of ill fame, or of assignation, or elsewhere, for the purpose of

[61] *Sacramento Daily Union*, 12 October 1861, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[62] *Daily Alta California,* 7 November 1862, 1. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[63] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 120, 716; California, *The Statute of California, Passed at the Nineteenth session of the Legislature, 1871-72* (Sacrament: T.A. Springer, State Printer, 1872), 184.
[64] Such a bill was referred to them in 1866. See: *Sacramento Daily Union*, 2 March 1866, 1; *Sacramento Daily Union*, 17 February 1870, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

prostitution." It carried on, including "any person who by any false pretences, false representation, or other fraudulent means, procures any female to have illicit carnal connection with any man."[65] Punishment in 1872 was set at a maximum of one year imprisonment in the State Prison (San Quentin) or a maximum one thousand dollar fine, or both.[66] As the enactment and development of the law on seduction in California indicates, its formalisation coincided with growing concerns about the chastity and potential immorality of young women, which could result in their falling into lives of prostitution and presumed moral destitution.

In the revisions to the Penal Code in 1889, the law prohibiting seduction in California was formalised under three main clauses. These clauses demonstrate that by the end of the 1880s, discussion and debate around seduction increasingly centred on concerns for adolescent female sexuality, and worked as a deterrent to men seeking to either seduce ignorant young women, or capitalise on their inexperience to entice them into selling sex in the thriving sexual commerce world of California. Under Title IX of Crimes and Punishments, "Crimes against the Person and against Public Decency and Good Morals," Section 266 stipulated legal punishment for men who enticed girls below eighteen into prostitution or men who enticed any women by false pretences into sexual activity, as described above.[67] Section 267 further outlawed the abduction of girls below the age of eighteen, still living under parental protection for purposes of prostitution, and Section 268 specifically outlawed seduction and sexual intercourse

[65] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 120, 716.
[66] Ibid; California, *The Statute of California, Passed at the Nineteenth session of the Legislature, 1871-72* (Sacramento: T.A. Springer, State Printer, 1872), 184.
[67] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*), 120.

with a girl below the same age "under promise of marriage."[68] In a final section, added to the Penal Code in 1889, the marriage of the seducer and seduced could prevent prosecution, so long as the marriage took place prior to the finding of an indictment.[69]

By 1874, the punishment for seduction had been raised from a maximum punishment of one year, to a maximum punishment of five years. The change in the statute set punishment specifically as "imprisonment in the State prison not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."[70] The increase in admissible punishment for such crimes suggests that legislators viewed incidents of seduction with increasing concern, and sought to punish perpetrators more harshly. The formalisation of anti-seduction laws also intersected with mounting pressures from social morality campaigners and public sentiment to change the age of consent. Under ongoing pressure throughout the 1870s and 1880s, the introduction of bills to prevent seduction coincided with efforts to delay the age at which a girl could legally consent to sexual intercourse. The 1889 Penal Code amendments demonstrated the success of these campaigns, as the age of consent for girls rose from ten to fourteen, rising again in 1897 to sixteen. These campaigns would continue through the turn of the century, eventually culminating with the age of consent changing to age eighteen.[71]

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[68] Ibid., 121-122.
[69] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 122; Robertson, "Seduction, Sexual Violence, and Marriage in New York City, 1886-1955."
[70] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 120.
[71] Throughout this period, boys continued to be only held criminally responsible for rape or for submitting to a "crime against nature," at age fourteen, unless their

Sexual Maturity and the Age of Consent

"Primarily the age of consent was fixed for two purposes," an article in Sacramento newspaper the *Sunday Union* explained to readers in a February 1891, "to protect first those who, by reason of their tender years, are presumed to be incapable of the wrong; second, to protect men who, without such a guard of limitation, would be liable to persecution and the wiles of the vicious female."[72] This writer's assessment of the origins of the age of consent articulated some of the complexities that it held for lawmakers throughout the late nineteenth century. If the age of consent was to serve both of these dual purposes, setting it as near to the predominant age of puberty was the aim; a low age of consent would supposedly protect children from assaults of men by prohibiting any sexual contact with them, while simultaneously protecting men from the plotting of post-pubescent women seeking to extort money or marriage from them through claims of unlawful sexual intercourse.[73]

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strength of mind and body could be proved by the plaintiff. See: California and James Deering, *The Penal Code of California: Enacted in 1872; As Amended up to and Including 1897* (San Franscisco: Bancroft-Whitney Co., 1897), 102. https://archive.org/details/penalcodecalifo00deergoog; The debates in the legislature on the issue of changing the age of consent to eighteen were reportedly quite "bitter." See: *Sacramento Union*, 15 March 1911, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

[72] *The Sunday Union*, 15 February 1891, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/; The legal "age of consent" was a specific legal category that stipulated the age at which the law considered a girl capable of consenting to sex. As Matthew Waites has argued, this is perhaps more appropriately described as the age of protection. My replication of "age of consent" through this section is simply reflective of the ongoing language employed by legal officials, lawmakers, and public commentators throughout this period. See: Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (New York: Palgrave Macmillan, 2005), 77.

[73] *The Sunday Union*, 15 February 1891, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/.

Despite the origins in age of consent law, the report also demonstrates that by the end of the nineteenth century estimations of youth, childhood, and adolescent sexuality were shifting such that legislators and lawmakers began to focus on protecting girls and young women. These shifts pushed the age of consent nearer and nearer to the age of majority, imposing greater legal deterrents between men and the sexual temptation of adolescent girls. After all, some argued, if the law exempted women from entering into contracts of marriage without parental consent, "why should it not hold her as legally incapable of consenting to her ruin during minority?"[74] As these arguments reflect, while understandings of protectionism over the sexuality of girls between the ages of puberty and eighteen were matters of increasing concern throughout the late nineteenth century in California, they were wrapped up in the social and legal desire to control, curtail, and quash adolescent female sexuality. While support for the change in the age of consent was not universal, the debates continued both within California's Legislature and without, until into the twentieth century.[75]

As a result, the legal age of consent in California offers a particularly salient example of how contradictory and confused ideologies of sexual culpability were in early California.[76] When lawmakers drafted the first state constitution prior to 1850, they followed the practice of other American states and set the legal age of consent at

[74] *The Sunday Union*, 15 February 1891, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/.
[75] An article in published in early February 1899 reflects that is was an ongoing concern. See: *The Record-Union*, 1 February 1899, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/.
[76] Age of consent is a category that was legally reserved for girls. The law stated that no person could be held accountable for criminal activity until the age of fourteen, so boys below this age could not be charged with any crime, let alone sexual crimes. There was no law in California against the sexual abuse of boys, save those that fell within the confines of "crimes against nature." I discussed this in Chapter Three.

ten years old.[77] In legal documents in the decade that followed, twelve was occasionally used as an upward marker of sexual maturity. From the 1860s, bills to change the age of consent were consistently presented in the California legislature, and by 1889 – with some pressure from organisations like the Women's Christian Temperance Union, petitioning for the age to rise to eighteen – the age of consent was set by the Legislature at fourteen.[78] Again, in 1897, in the context of broadening social purity movements and age of consent campaigns across the United States, and increasing anti-prostitution movements across the state, the age of consent was changed to sixteen.[79] The age of consent was crucial to the legal proceedings of rape cases because a girl below the age of consent was not legally capable of consenting to sexual activity, and the law outlined that "carnal knowledge" of a female below this age "with or without her consent" constituted the crime of rape.[80] Thus, it was not technically legally admissible to make a claim that a girl below this age consented to

[77] California, *The Statutes of California, Passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 229. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf; Californians would continue to consider other American states when they debated changes to the age of consent law, see: *The Sacramento Daily Record-Union,* 29 January 1895, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/.

[78] A general confusion pervaded on this issue, as newspapers sometimes incorrectly listed the age of consent as higher than age ten prior to 1889. See: *The California Farmer and Journal of Useful Sciences,* 17 June 1864, 158. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

[79] See: California, Francis J. Davis, and Commission for revision and reform of the law, *Index to the laws of California, 1850-1907, including the statutes: the codes, and the constitution of 1879, together with amendments thereto; also a list of sections of the codes added, amended or repealed since their adoption* (Sacramento: W. W. Shannon, 1908), 611.

[80] California, *The Statutes of California, Passed at the First Session of the Legislature* (San Jose: J. Winchester, State Printer, 1850), 234. https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

sexual contact; nevertheless, in practice accused men often argued in courtrooms that girls below the age of consent had acquiesced to their sexual advances as a means of defence.[81]

In the article that opened this section, the writer, in articulating circulating debates on the age of consent throughout the United States, reflected that social understandings of the protection of adolescence had evolved throughout the last half of the Century. "The age at which the girl most needs the protection of the law," he argued" is when her susceptibilities are most easily played upon, her passions most easily aroused, and her ruin most easily accomplished – the period between puberty and eighteen."[82] Writing from early 1891, his arguments in favour of protecting adolescent girls until the age of eighteen were likely linked to demographic changes in California that had increased the numbers of white women in the state substantially from their numbers in the early 1850s, and with them the numbers of white adolescent girls.[83]

In the first decade of American colonial consolidation of California, the age of consent seemed to garner relatively little concern or commentary, both legally and in the press. During the first decade of its statehood, California was somewhat analogous in the broader context of the United States. As a minority of the population, white

[81] I explored this in more detail in relation to child abuse in Chapter Four.
[82] *The Sunday Union*, 15 February 1891, 2. Chronicling America: Historic American Newspapers, Library of Congress. https://chroniclingamerica.loc.gov/.
[83] I discuss demographic changes in more detail in Chapter One. See: See: U.S. Bureau of the Census, *Seventh Census of the United States: 1850* (Washington, D.C., 1853); U.S. Bureau of the Census, *Ninth Census of the United States: 1870* (Washington, D.C., 1872); U.S. Bureau of the Census, *Tenth Census of the United States: 1880* (Washington, D.C., 1883); U.S. Bureau of the Census, *Twelfth Census of the United States: 1900* (Washington, D.C., 1901).

women enjoyed greater freedoms than elsewhere in the country. They were legally allowed to own property and were amongst some of the first people to discover and mine for gold, alongside men.[84] Concerns over their sexual safety were almost entirely denied by contemporaries, who described their great happiness to see white women arrive in the state.[85] However, tensions and legal debates around the status of young women's responsibility for maintaining their own sexual purity increased throughout the late nineteenth century in California. This growing concern over the protection of adolescent female sexuality coincided with the changing demographics of not only white girls and women, but also of white, morally protected girls and women immigrating into the state with their family units.[86]

The fluctuations and legislative debates around the legal age of consent were reflected in courtrooms. While the legal age of consent was quite clear, individual cases garnered extensive conversations where the intricacies of individual maturity were debated at length. "If you believe that Flora Lester knew right from wrong," mused Judge Pressley to the sitting jury in the 1877 Sonoma County Court trial that opened this chapter, "and her mind had been enlightened on the subject of the impropriety and wrong of her having sexual intercourse with a man unless she was married to him" then, it follows she may not have been raped.[87] He suggested that they could determine this through various means, including ascertaining if she was of average intellect, and her teachers at school saw her as comparable to her peers. If so,

[84] Jo Ann Levy, *They Saw the Elephant: Women in the California Gold Rush* (Hamden: Shoe String Press, 1990).
[85] Ibid.
[86] As noted earlier in this chapter, the relative population of white women to white men in the State began to balance by the early 1870s.
[87] *People v. Royal*, Case No 961, 1877, Sonoma County Court. California State Archives, Sacramento.

he surmised, she would have known about the "nature of this act," and the context of her sexual encounter with Royal would not constitute rape.[88]

The care with which the County Court judge instructed the jury to consider the potential for Flora's "knowledge" and that he asked them to discuss her innocence were indicative of a much wider and ongoing debate around the age of consent and the age of majority. On one hand, a girl was perceived to be the sexual property of her next of kin, allowed to make her own decisions about marriage only after the age of eighteen. On the other, after the age of ten or twelve, or fourteen or sixteen, depending on when the law had set the age of consent and other various ages of sexual culpability, she was legally capable of accountability for allowing herself to be vaginally penetrated. These ideologies sprang from legal and social understandings of biological maturity as a marker of a girl's transition to womanhood, reflecting deeply ingrained understandings of the mental capacity to consent as stemming from the way a girl's body could be sexualised by others.

For example, California's Penal Code referenced in its notes defining consent, "a woman ceases to be a child when she reaches the age of puberty."[89] Such a definition, if upheld in court, could thus construct a girl as mentally capable of understanding and consenting to sexual activity as soon as her body physically suggested this capacity to others. Such perceptions were shared by public commentators throughout the late nineteenth century. In an article published in the *Los Angeles Herald* in 1897, documenting the rise in the age of consent California, a

[88] Ibid.
[89] California and Desty, *The penal code of California: enacted in 1872, as amended in 1889,* 118.

writer contended that "Nature," or puberty, should set the age of consent, with the recognition that "owing to lack of mental or physical development, heredity or environment, or all combined, some girls are mere children until 18 years of age, and at 14 years are hardly equal to other girls at 10."[90] Such estimations further legitimated the diverse ages of consent established throughout the United States, as biological development was thought to be especially linked to climate.[91] Throughout the late nineteenth century, changing understandings of seduction also reflected a shift in public and institutional understandings about the relationship between physical and mental maturity.

As a result, throughout the mid and late nineteenth century, the age of consent was quite murky territory for those upholding the law. Girls around this age could be constructed as sexual actors in legal contexts, while public commentators in the press were often more liberal with their categorisation of girls as "children." For example, in 1868, in response to a case in the Police Court of San Francisco, a one writer for the *Daily Alta California* took issue with the age of consent law. "In the cases to which we refer," he argued,

> the children are a little over ten years old, and because they have passed the limit prescribed by law, are supposed to be capable of knowing the consequences of the act to which the law presumes that they may consent. Such a supposition is abhorrent as

[90] *The Los Angeles Herald,* 27 May 1897, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[91] Ibid.

> well as unreasonable, and common sense would dictate such an amendment to the statute in this particular.[92]

Such opinions reflected that the law in California was often debated by the public. As the century continued, and increasing controls were imposed upon adolescent girls and their would-be seducers, commentators also often described victimised adolescent girls in both infantilising and sexualising terms. One fifteen-year-old Mexican girl's charge of rape reported on in 1893 seemed to be disbelieved by the writer because of her childlike stature, and he described her as a "pitiful little complaining witness."[93] Even though she had given birth as a result of the assault, he remarked "it was difficult to imagine that such a mite of a girl could be a mother."[94] At the same time, likely because she was racialised as Mexican, she was questioned under oath as to if she had visited a dance house prior to the assault, in an attempt to sexualise her behaviour and undermine her charge.[95] "The girl is a well grown child for 14," another reporter remarked in 1895 of another complainant, "plump, rosy and vigorous."[96] Throughout the period from 1850, when California established its own legal system, until 1900, public commentators, lawmakers, and legal representatives

[92] *Daily Alta California*, 21 February 1868, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[93] *Los Angeles Herald,* 8 September 1893, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[94] *Los Angeles Herald,* 8 September 1893, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[95] Ibid.
[96] *Los Angeles Herald,* 30 July 1895, 9. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.

equivocated and contradicted themselves in their representations of age, consent, and adolescent sexuality.

The age of consent debates also reflected the ambivalence of the public and lawmakers around what age a girl should be held accountable for her sexuality. This was not simply about defining an age at which a girl should be protected from her own ignorance around matters of sex, but also about when a young woman could or should reasonably understand the implications of sexual activity and sexual desire, and make conscious decisions as a result.[97] According to the law, if a girl or woman over the age of consent was conscious of the act of sex and inadequately resisted, regardless of the perpetrator's position of authority over her or any other circumstances of ignorance and confusion, it was not rape.[98] As a result, the legal age of consent simultaneously operated to protect those girls deemed innocent and curtail a woman's sexual agency, demonstrating a broad concern over the danger of young women's sexual desire.[99] Conversely, no age of consent was ever set for boys in the statutes, although a boy could only be held criminally liable at age fourteen. In this way, the law reflected, or perhaps reified, a reality in which men were sexual actors and women and girls were victims. Young white women were perceived to be at risk of victimisation by violent

[97] *People v. Royal*, Case No 961, 1877, Sonoma County Court. California State Archives, Sacramento.
[98] Ibid.
[99] For more perspectives on these issues see: Louise Jackson, *Child Sexual Abuse in Victorian England* (London: Routledge, 2000); Kim Stevenson, "Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases," *Feminist Legal Studies* no. 8 (2000): 343-366; Bates, *Sexual Forensics in Victorian and Edwardian England;* Odem, *Delinquent Daughters*; Robertson, "Seduction, Sexual Violence, and Marriage in New York City, 1886-1955."

men, particularly as normal heterosexual sexual relationships were broadly conceived of as characterized by a certain degree of male force and female passivity.[100]

As historians have demonstrated elsewhere, laws around rape and sexual assault often had less to do with protecting the physical autonomy of girls and women, and much more to do with protecting the value of their chastity while maintaining public morality. Ideas of trauma or longstanding emotional implications of experiences of rape would not figure into rape trials until the twentieth century, but California's jurists and those who commented on cases in the public sphere all contended with their implicit understanding that young white women could and should be protected from both knowledge of sex as well as the experience of it.[101]

The desire to protect young women from the destruction of their innocence overlapped with laws regarding prostitution. In California during this period, women could gain great wealth and even high social standing through sexual commerce, from working in brothels to acting as mistresses or escorts to California's wealthiest men.[102] Throughout the second half of the nineteenth century, particularly in urban centres like San Francisco, California's economy involved a thriving sex-work industry, which was broadly tolerated until changing morality politics and new concerns around Asian immigration into the state shifted the social and legislative rhetoric in the 1890s.[103]

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[100] Ibid.

[101] Joanna Bourke, "Sexual Violence, Bodily Pain, and Trauma: A History," *Theory, Culture & Society* 29, no. 3 (2012): 25-51; Willemijn Ruberg, "Trauma, Body, and Mind: Forensic Medicine in Nineteenth-Century Dutch Rape Cases," *Journal of the History of Sexuality* 22, no. 1 (2013): 85-104.

[102] See: Julia Ann Laite, "Historical Perspectives on Industrial Development, Mining, and Prostitution," *The Historical Journal* 52, no. 3 (September 2009): 739-761; Johnson, *Roaring Camp: The Social World of the California Gold Rush*.

[103] Ivy Anderson and Devon Angus, eds, *Alice: Memoirs of a Barbary Coast Prostitute* (Berkley: Heyday and California Historical Society, 2016).

While sex work itself does not constitute a form of sexual coercion per se, as many women willingly chose to exchange money for sex to great economic benefit, lawmakers, jurists, and public commentators often perceived young women as at-risk of being enticed into such work without adequate moral consciousness of what they were agreeing to. The formulation of anti-seduction laws expressly demonstrated this concern. As a result, the protection of young women was socially and institutionally set up as morality struggle, with the influences of a good family, and paternal protection on one side, and wealth and independence, in exchange for innocence, offered by brothel owners, madams, and pimps on the other.

As with concerns over prostitution, much of the damage of rape was perceived to be related to the moral and reputational fall of a young woman gaining "carnal knowledge." Girls "of previous chaste character" who were seduced or raped faced the same reputational ruin, and a parallel degradation of their value as pure, chaste, and innocent potential wives. As a result, rhetoric around rape and assault with intent to commit rape was logically related to unwitting enticement of young women into sexual activity due to ignorance. This linked laws on seduction, which sought to protect young women from their newly forming sexual desire by deterring men from taking advantage of their ignorance, and laws on sexual assault, which sought to protect women and girls by creating some legal and thus social limitations to men's access to women's sexuality.

Seduction and Sexual Violence

When Flora Lester was raped by her physician in his medical offices in 1877, the two County Court trials and the California Supreme Court trial that followed highlighted an important debate around the differences between the crime of rape and the crime of seduction. In the first documents prepared by the District Attorney's office, Royal was charged with the crime of seduction, but – apparently at the recommendation of Judge Pressley – this charge was quickly changed to rape. After several demurrers and challenges from the defence team following Royal's first arrest in March 1877, including allegations that Judge Pressley and members of the jury were biased against the accused, the first trial took place in July 1877. Judge Pressley – perhaps to dispel any concern of his bias – wrestled with the spectre of seduction in his lengthy instructions to the jury. In these, he continually noted that at seventeen, Flora should have had the moral consciousness to understand what Royal's ultimate aim was, and was thus obligated to employ every form of resistance available to her.[104] The Judge raised the possibility for the jury that Royal could have "excited her passion," leading her to give in to his efforts, which could not be legally considered rape, and that her resistance must be proven to have been made "in good faith" to sustain such a charge. [105] He also took pains to remind the jury, that "no matter how licentious the defendant may have been or how immoral may have been his acts in the community," they must find "with moral certainty" that he not only vaginally penetrated Flora with

[104] *People v. Royal*, Case No 961, 1877, Sonoma County Court. California State Archives, Sacramento.
[105] Ibid.

his penis, but that he did so against her every will and resistance, or with the knowledge that she did not know the nature of the act of sexual intercourse.[106]

In raising the possibility of Flora's "passion" and continually referencing her capacity for a moral consciousness about the implications of sexual activity, Judge Pressley drew on language embedded in both rape and seduction law. In relating the two, he highlighted a central weakness of social ideals of morally upstanding, white young-womanhood, which demanded the ignorance of young women and girls to sexual matters to preserve the image of their innocence, alongside enough knowledge of male sexual appetites to allow them to adequately protect themselves from "ruin." Ultimately, these ideals led to the central concern that the unpoliced sexual development of young women and girls that could lead to their seduction and ruin, or their rape and ruin, depending on their moral consciousness and the level of their demonstrable resistance. The differences between these were mostly a matter of degree, as in both instances their innocence was lost in their entrance into sexual knowledge, leaving them open to further sexualisation and degradation.

Thus, the legal category of seduction generally focused on the luring of young women, "of previous chaste character," into prostitution or an immoral lifestyle. This stipulation of prior chastity was a key element to seduction cases in courtrooms after 1872. If a young woman was proven to have had previous sexual experiences then a charge of seduction would not be sustained, as in 1884 where a trial was abruptly interrupted because it was discovered that the accuser was "not of a chaste

[106] Ibid.

character."[107] In another case that entered the Supreme Court appeals process in 1890, court records demonstrated that the defendant claimed that "he had not 'seduced' [the complainant] in the ordinary sense of the word, because, as he testified, she had been unchaste with others before her alleged relation with him."[108] Quite different than rape in the California statutes, seduction specifically accounted for those cases where the young woman in question had consented to sexual penetration, but was enticed, manipulated, or duped into offering her consent, and – vitally – was of "previous chaste character."

In a broader sense, seduction could also indicate a luring into an immoral lifestyle, because the victimised girl or woman did not yet have the maturity to understand the implications of her agreement to sexual contact, morally or socially. As a result, a charge of seduction could be brought by a father on the grounds of a loss of his daughter's sexual purity, harm to her feelings, her removal to a house of prostitution, or cost associated with the health implications of venereal disease, pregnancy, and child birth. Importantly, to sustain a charge of seduction in court, the law explicitly demanded that a woman demonstrate and prove that until the moment of the sexual activity or activities alleged in the indictment, she had not engaged in any kind of "immoral" or sexually impure activities or behaviours. It follows that the law on seduction thereby absolved men of criminal and social blame if they enticed or inveigled a woman of "unchaste" character into sexual activity, regardless of their techniques of manipulation or subterfuge. Such constructions thereby allowed

[107] *Sacramento Daily Union*, 29 May 1884, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[108] *Hitchcock v. Caruthers*, 82 Cal. 523, 23 P. 48, 1890, California Supreme Court. LexisNexis California Official Reports.

significantly more latitude to men to coerce and manipulate sexually active women, or those perceived by onlookers to be sexually available, into sexually activity with them.

While lawmakers in the California legislature developed legal languages of seduction from the 1850s onwards through repeated proposed bills, the movement to introduce seduction into the law was not met with universal support. A commentator conceded in the *Russian River Flag* in 1868, that while one lawmaker's proposal appeared admirable, some deliberations revealed several "objectionable features."[109] In "nine hundred and ninety nine instances out of every thousand," he remarked, "true virtue with proper conduct" would offer "sufficient protection to the female sex."[110] By his estimation, when it remained the entire responsibility of a woman to stave off the advances of salacious men, they remained necessarily more vigilant about ensuring their reputations for good character. He urged that

> it must be admitted that there are a few among the weaker sex who are possessed of wicked hearts, and who are artful too in their sins, as well as unfortunate man; and it is easy to imagine how some of the over-*credulous* sons of Adam might be *deluded* away from the paths of rectitude and virtue, by these *counterfeit* daughters of *chaste* character, and between him and the State prison affect a marriage unnatural as revolting.[111]

Upending notions of young women's tendency to a natural innocence, and the danger they faced at the hands of sexually voracious men, the writer suggested that offering women too much support would create the very social mischief that the law sought to prevent. In his construction, it was men that were vulnerable to women's advances,

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[109] *Russian River Flag*, 7 March 1868, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[110] Ibid.
[111] Ibid. Emphasis in original.

especially if young women were offered further power over men in the form of anti-seduction laws.

In an even more overt protest over proposals for a law on seduction, another writer penned a parody amendment to a seduction bill, pointing out what he saw as a double standard. "Amend Section Third," he declared, by adding to it that

> any female white person above the age of thirty years who shall by means of false hair, false eyes, false teeth, pads, hoops, break-works, tilters, cushions, plumpers, color, paint or any other deceitful or unlawful contrivance inveigle or entice or seduce into matrimony or concubinage [*sic*] any innocent male person of pervious chaste character, more or less, under the age of twenty-one or above the age of fifteen years, shall upon conviction be punished the same manner.[112]

This parody reflected the sense that lawmakers were taking the protection of young women too far. By comparing elements of women's fashion to men's tactic of promising marriage as a tool to convince women to have sex with them, the writer additionally demonstrated his view that such manipulations were normal to heterosexual courtship and the efforts of men to gain as much sexual access to women as they could get away with. It suggests that in public understandings, heterosexual sexual relationships were fraught with a certain degree of manipulation, and – for men in particular – a degree of forceful enthusiasm was a natural part of their repertoire.

The lack of clarity between criminal seduction and normal sexual courtship was paralleled in a similar opacity between seduction and rape. A girl below the age of consent was not legally capable of offering her consent to sexual activity; however,

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[112] *Morning* Union, 23 April 1868, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

just as girls below the age of consent were occasionally held responsible for their experiences of sexual coercion in California, girls above the age of consent were at times acknowledged as not entirely cognisant of the implications such sexual activity.[113] The distinguishing feature between seduction and rape was thus the issue of the woman's consent. For rape cases where the accuser was over the age of consent, trials hinged upon the ongoing, exhaustive resistance of the accuser, and the accused overpowering her "will" despite her efforts. In seduction cases, the qualifying factor was that the girl or young woman had shown no previous inclination toward immoral sexualised behaviour but had been convinced – largely as a result of her youthful naiveté – to agree to sexual activity.

Flora Lester's case again illustrates these broader trends. When her charge was heard in the Supreme Court of California in 1878, the Supreme Court Justice noted almost immediately that there seemed to be some conflation in this case between rape and seduction. He argued that from the appearance of the County Court records that she had not, in fact, been raped, but had been seduced by the physician. This opinion was a direct contravention of the County Court judge's interpretation of the law, as he recommended that her case be shifted from seduction to rape. In the original indictment, Royal was charged with seduction, but while this charge appears on the earliest dated records, it had shifted to rape by the time a second round of charge paperwork was filed with the County Court. The District Attorney made the case that Royal, an older man in a position of authority to Flora Lester, made requests of her that she was inclined to follow due to her youth and trust in him.

[113] I explore sexual abuse of girls below the age of ten in detail in Chapter Four.

For example, a primary argument of the defence was that Flora willingly complied when Royal asked her to enter his office alone with him. That she walked into this room, knowing that they would be alone together, was a central argument in court for why this could not be considered rape. "I have no doubt that Royal never had any purpose of rape until in the solitude of his office," Barclay Henley, the District Attorney protested in his respondent's brief for the Supreme Court, but "hot, crazed, delirious with passion and with the very demon of lust aroused within him, with all moral consciousness dead, and blind to all consequences, he rushed to the commission of this foul crime."[114] In his efforts to prosecute Royal, Henley made the argument that rape was predicated on the commission of men's passion without a woman's consent; conversely, the rhetoric on seduction was oriented around the successful enticement of women's responding passions to such advances.

In 1878, several years after the introduction of the crime of seduction into California law, the state Supreme Court overturned a Humboldt County Court decision in a rape case that navigated some of the distinctions between rape and seduction in legal practice. In the case notes of *People v. Brown,* two married women alleged that they were riding on a public highway when a man named as F.A. Brown came upon them, followed them, and ignored their repeated demands that he "get away."[115] After pulling one of the prosecuting witnesses off her horse, he "threw her down and raised her clothes." With "his privates exposed, and her clothes up" Brown had a clear intention of vaginally penetrating the complainant.[116] Nevertheless, the Supreme

[114] *People v. Royal,* WPA 13605, 1878, California Supreme Court. California State Archives, Sacramento, California.
[115] *People v. Brown*, 47 Cal. 447, 1874, California Supreme Court. LexisNexis California Official Reports.
[116] Ibid.

Court overturned the guilty verdict, on the basis of the defendant's appeal that the "jury failed to discriminate between the attempted seduction of the prosecutrix and an attempt to ravish."[117]

In the appeal notes, the defendant's counsel argued that the "large, young, vigorous" stature of the complainant tended to undermine the charge of rape. Further, he rationalised, she was in company with her sister-in-law, in a public place, on a Sunday morning, "where they were liable to, and actually did meet several people on the road," when the defendant approached them. He was thus sceptical that the accused would have "made the assault complained of in the presence of a witness who knew him well – where detection was certain, and within one hundred yards of an inhabited dwelling." Further, he continued,

> the defendant used no discourteous language, nor made any improper advances until the alleged assault… the prosecutrix voluntarily dismounted from her horse… during a struggle of from twenty minutes to half an hour defendant said not a word to her, and made no threats of bodily harm.[118]

These constructions demonstrate how seduction law was incorporated into the broader legal contexts of heterosexual sexual conflict. A charge of rape, which carried relatively harsh punishment, demanded a high degree of evidence pertaining to a woman's resistance to sustain. In this case, the defendant's council went as far as claiming that the assailed woman's "non-resistance was an invitation to defendant to persist in his endeavours, and success would be insured over an easy virtue."[119] In a

[117] Ibid.
[118] *People v. Brown*, 47 Cal. 447, 1874, California Supreme Court. LexisNexis California Official Reports.
[119] Ibid.

landscape where gender organisation presumed that heterosexual sexual courtship involved a natural element of artifice, manipulation, and opportunistic force to overcome a woman's socially required hesitation, demonstrable adequate resistance could be difficult to sustain in court.

A Supreme Court trial in 1889 further established that sexual violence throughout this period existed on a spectrum of case-by-case subtlety. Juan Manchego was charged with assault with intent to commit rape on his thirteen-year-old stepdaughter. However, he was convicted by the Superior Court of San Luis Obispo County of simple assault. [120] Supreme Court Justice Foote, who offered his opinion, continually used the word "seduce" in his opinion, without ever conjuring the legal charge itself. Instead, he noted that sustaining a criminal charge of rape required not only that the defendant assaulted the complainant, but that he did so with the intention of overcoming her will to penetrate her. By his opinion, "if he violently laid hands on her with the intent by force to overcome and have an improper connection with her, but not of forcibly ravishing her, he would then be guilty of simple assault."[121] By this opinion, assaulting a woman as a means to rape her was only assault with intent to commit rape if he did not desist in his efforts at her ongoing resistance. Even though "he took hold of her, threw her down, and performed certain indecent and violent acts upon her person, unnecessary to describe, which she resisted and then screamed," he was vindicated from the charge of assault with intent to commit rape "when he let her go and went away on horseback."[122] Notably, simple

[120] *People v. Manchego*, 80 Cal. 306, 22 P. 223, 1889, California Supreme Court. LexisNexis California Official Reports.
[121] Ibid.
[122] Ibid

assault was a far lesser crime in statutes than seduction, rape, or assault with intent to commit rape.[123]

Debates over what constituted seduction also mark legal records throughout the period. In *Hanks v. Naglee* (1879) the Supreme Court overturned a verdict in favour of the plaintiff based on immoral contract. While the defendant had offered marriage to the plaintiff to "surrender her person," such an offer was constructed by the court as a "contract for illicit cohabitation" and "tainted with immorality."[124] Importantly, the case indicates a minute distinction in a law that expressly sanctioned men for seducing women with promises of marriage. By this Supreme Court decision, while the law stated that for a man to convince a woman of his intention to marry her as a strategy of lessening her resistance to his advances, the expressed exchange of sex for a marriage agreement that the defendant did not intend to honour was entirely legal, due to its perceived inherent immorality.[125]

In a later case, a Supreme Court justice made further instructions on the matter, stating that in order to convict the defendant of seduction "it is necessary for the state to prove that the person seduced was an 'unmarried female of previous chaste character,' and that she consented to sexual intercourse with the defendant upon the sole consideration of his promise to marry her."[126] Without proof of all these elements, he explained, the crime itself could not be proved. "It is as essential for the

[123] See: California and Desty, *The penal code of California: enacted in 1872, as amended in 1889*, 108-109.
[124] *Hanks v. Naglee*, 54 Cal. 51, 1879, California Supreme Court. LexisNexis California Official Reports.
[125] Ibid.
[126] *People v. Krusick*, 93 Cal. 74, 28 P. 794, 1892, California Supreme Court. LexisNexis California Official Reports.

prosecution to show that the person against whom the offense was committed is of the character named in the statute," as this was used to demonstrate that the sexual intercourse was only achieved by the accused "under a promise of marriage." This was crucial to such charges, according to this judge, as

> The statute does not attempt to punish the seduction of a married woman, or of one whose character was not previously chaste, nor does it attempt to punish illicit cohabitation, or the seduction of an unmarried woman whose character was previously chaste which is accomplished either in whole or in part by any other means or from any other motive than a promise of marriage.[127]

These legal distinctions continuously worked to limit the application of the law, to control for a very particular set of circumstances. Namely, as the above quotation indicates, the seduced party must have acquiesced to sexual intercourse not for any other reason than the naïve presumption that she would be imminently wed to her seducer.

Ultimately, the legal category of seduction offered an alternative to a rape charge for a young white woman to be at least partially absolved of responsibility for engaging in sexual activity. Like other sexual crimes, this section of the Penal Code was interpreted and understood in various ways by District Attorneys and defendants and their representatives. Further, as in the case of Flora Lester, the courts could and did conflate seduction and rape, leading to extensive discussion and occasional confusion over what form of unlawful sexual contact had occurred. Nevertheless, it was of great importance to judges, legislators, defendants and plaintiffs to untangle these threads, as although seduction was a crime, it was not of the same gravity as rape; further, if

[127] Ibid.

the perpetrator of seduction was unmarried, the conflict could often be resolved through the marriage of the two parties.

Implicitly, stories of seduction demonstrated the contradictions of a moral society that demanded a girl's virtuous innocence to matters of sex, as well as her shrewd ability to avoid sexual danger. As did the writer who dismissed seduction as a valid crime in 1868, many people believed that only in rare cases would a girl, adolescent, or adult woman be assaulted if she adhered to a truly chaste and upstanding moral code.[128] Rather, if she lived according to the prescribed norms of civilised society, a life of "true virtue with proper conduct," then she would not be put in harm's way.[129] Thus, most women who claimed sexual assault could likely be held accountable – in some way – for their failures to adequately protect themselves from falling from virtue.

Community and Authority

Young women could be vilified or have their experiences dismissed if they were perceived to be unchaste, but in some cases, rape, attempted rape, and even seduction cases garnered sympathy, rather than distrust, for accusers. Flora's case particularly highlights the degree to which communities and legal officials could rally in support of young women who they perceived to have had their ignorance and inexperience exploited by figures of authority. Perhaps remarkably, legal

[128] *Russian River Flag*, 7 March 1868, 4. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[129] Ibid.

documentation for the *People v. Royal* trials reveals that jurists and District Attorneys could and did recognise relatively nuanced conceptualisations of power and manipulation, acknowledging the fear, distress, and confusion that could lead a young woman to comply, under duress, with the wishes of her attacker.

As early as 1851, a newspaper article with the headline "Sad," bemoaned a missing girl who was rumoured to have been in the company of a man, and decried those who would take advantage of a girl's youthful ignorance: "it seems hard that with impunity the young and untutored children of our country should be exposed to the wiles and deceptions of every graceless scamp that infests this community."[130] Distance and tragic outcomes also seemed to rally discourse that favoured seduced women as "poor" and unwitting victims. In 1850 newspapers in California reported on a case in Massachusetts where a nineteen-year-old woman was seduced, fell pregnant, and agreed to an abortion. When the abortion attempt failed, the performing physician – apparently desperate – hit the woman over the head several times and strangled her to death. The insensibility of the violence in this narrative tied seduction to tragic ends.[131] As explored earlier in the chapter, the public often linked the luring of young, innocent women into sexual activity as a gateway into deeply tragic lives or premature, painful death.

Flora Lester was also a sympathetic victim throughout Sonoma County. Royal petitioned the court several times to have his case moved, as he perceived an

[130] *Daily Alta California,* 15 May 1851, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[131] *Daily Alta California,* 16 April 1850, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

enormous ill-will towards him in the community.[132] When this failed, he attempted to have a juror removed from his jury, because of allegations that he had discussed rumours and theories of the case in a public setting. Generally, the case received enormous attention in the County, and the courtroom was reportedly full of community members who had gathered to watch the trial. Their strong interest and intense response to Royal prompted Judge Pressley to make it a closed session. This public sympathy also seemed to influence the greater latitude and forgiveness extended to Flora for some details that would, in many other cases, cause a charge to be thrown out. Royal's relative age to Flora, for example, was used in court to suggest that he would have great difficulty overpowering her, if she sustained continued resistance. Flora also never testified that he threatened her life, thus raising the question in the trial about her failure to call for help. Such cries for help were vital to sustaining rape charges in courtrooms throughout the late-nineteenth century. While these details hung as questions over the trial, that they did not cause the charge to be dismissed likely stemmed from her own upstanding position in her community. Her general naiveté was generally acknowledged in court records, although the extent of her innocence was a matter for debate.

Perhaps because she was a sympathetic victim, the District Attorney made a rather nuanced case about her subjective experience of victimisation for the prosecution. While with Royal in his carriage, he argued, Flora did not call out for help because of her worry about "the shame of public exposure resulting from an appeal to

[132] *People v. Royal,* WPA 13605, 1878, California Supreme Court. California State Archives, Sacramento, California.

strangers."[133] When she followed Royal into his offices at his request, he maintained, she was bewildered, unsure, and could not believe that "this man would be so mad and brutal as to employ force."[134] Ultimately, he argued that because Royal was a trusted authority figure in her life, Flora could not rightly perceive the danger that she faced.[135] In the first County Court trial, the presiding judge also instructed the sitting jury that they could consider his position of authority, and his particular "knowledge of the organism of females" in finding their verdict.[136] In all of these details, there was a legal recognition that his profession and position of authority over Flora made him more persuasive and capable of confusing Flora's youthful mind.

Constructing the sympathetic young woman victim required that Flora fit into tropes of innocence and sexual unconsciousness. If she fell into these categories, then she was worthy of protection and could garner community support according to ideologies of, as the *Sacramento Transcript* described it in 1851, "man's inconstance and women's frailty."[137] Or, as another article much later exclaimed: "strong, powerful, athletic, educated young men," with reference to a case involving a fraudulent marriage designed to lure a young women into sexual activity, "plotting against a poor, helpless, injured young woman."[138] But this kind of acknowledgement and

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[133] *People v. Royal,* WPA 13605, 1878, California Supreme Court. California State Archives, Sacramento, California.
[134] Ibid.
[135] Ibid.
[136] *People v. Royal*, Case No 961, 1877, Sonoma County Court. California State Archives, Sacramento.
[137] *Sacramento Transcript,* 6 February 1851, 2. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[138] *Daily Union*, 8 July 1886, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

understanding was not extended to all of those young women that made accusations of seduction or rape, and public opinion did not always sway to their support. The construction of the ideal naïve adolescent contrasted with competing narratives about the awakening of sexual appetites in young women, particularly those young women too young to understand the longstanding repercussions of giving into new desires. Since the reputation of a woman was "so involved" in such matters, many believed that women would naturally try to claim rape when they had only been seduced, rather than admitting to their disgrace.[139]

The Supreme Court decision to overturn the County Court outcome of Flora's case makes this ambivalence about adolescent female sexuality even more evident. To argue for the charge of rape, the prosecution called a medical witness in the County Court trial to testify to the mental weakness of females when their passions were excited. In his testimony, he argued that it was possible for men to excite in young women "passions to such an extent as to influence their judgement and mental condition," which could bewilder, frighten, and generally make it more difficult for them to resist in the manner that the law required of them to sustain a charge.[140] While this assertion held in the County Court, in the Supreme Court the presiding justice challenged it, referring first to the County Court instructions. "The Court charged," he began, quoting the County Court trial records,

> if from all the evidence, you are satisfied that on or about the time alleged the defendant by manipulation, art of device, or by other means so bewildered or

[139] *People v. Royal*, Case No 961, 1877, Sonoma County Court. California State Archives, Sacramento.
[140] *Sonoma Democrat,* 4 May 1878, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

> overpowered the mind and will of this girl as to render her at the time unconscious of the nature of the act of carnal intercourse, or powerless to resist it, and under those circumstance he had carnal intercourse with her, he is guilty of rape.[141]

Nevertheless, he argued,

> such language conveys the notion distinctly that seduction may be rape; that the employment of any art of device by which the moral nature of a female is corrupted, so that she is no longer able to resist the temptation to yield to sexual desire, will render sufficient[ly] less proof of resistance than would otherwise be necessary; that consent thus obtained is no consent. The proposition entirely overthrows the established law in respect to the offence with which the defendant is charged.[142]

With this, the he overturned the lower court's decision, and demonstrated the divisions that sexual crimes could evoke in legal contexts. Interpretations of statutes of sexual crimes demonstrated how judicial opinions and instructions could be deeply influenced by social understandings of morality and the development of female sexual "knowledge."

While the County Court judge allowed for a liberal definition of the charge of rape in her case, Flora was not exempted from strategies to undermine her character throughout the trial. The defence suggested she had previous sexual encounters with the accused, pointed out inconsistencies in her testimony, and insinuated culpability by pointing at various elements of her narrative – including that she did not cry for help and that she walked up the stairs into Royal's office of her own volition. Such tactics of finding inconsistencies in a girl's narrative of events, or simply stating – often without proof – that she had previously engaged in sexual activity, could sway juries

[141] Ibid.
[142] Ibid.

away from sympathy. In another case in 1883, a sixteen-year-old accused her brother-in-law of choking her, threatening her with a firearm, and then raping her by the side of the road following a party.[143] The judge in this case reminded the jury to consider whether the complainant had a right to trust her safety in the presence of her brother-in-law. These methods amounted to degrading an accuser's reputation for chastity by questioning the wisdom of her choices. In another case in 1899, a young woman's association with "women of questionable virtue" was enough to discredit her reputation for chastity and thus have her charge of seduction thrown out.[144] While these concerns for protecting adolescent girls were of paramount concern hypothetically, much like in cases of rape, seduction cases also came with dire warning about if young women could be trusted as complainants.

Insinuations of poor moral character also greatly changed how young women were perceived. Fourteen-year-old Susanna Oakley, several years younger than Flora, took the stand against William Bunch to testify of her experience of rape in 1869. In this case, several details of her living conditions and class-status put her moral character up for debate. Witnesses testified that Susanna had been seen in the company of other men, and that her mother – who she lived with – had a general character "of prostitution."[145] Ultimately, Susanna's testimony revealed that Bunch had raped her several times before the incident in question. In a case against Nicholas Kipp, filed in 1871, his accuser's testimony also revealed that she was not vaginally

[143] *People v. Mayes,* California Supreme Court, WPA 12828, 1883. California State Archives, Sacramento. I discussed this case in more detail in Chapter Two.
[144] *Los Angeles Herald,* 21 December 1899, 12. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside, http://cdnc.ucr.edu.
[145] *People v. Bunch,* Case 00953, Los Angeles County Court: Los Angeles Criminal. Huntington Library, San Marino, California.

penetrated with the accused's penis, and thus the charge of rape could not be sustained. Likewise, Flora testified that Royal completed the "act of copulation" four times in twenty minutes, which was taken in court to be nearly impossible, and thus used as evidence of "her ignorance of what that act means."[146] In these cases, young women's ignorance with regards to sexual activity and its relationship to the law had implications for how they were perceived in court, and revealed how nebulous terms like "carnal knowledge" could be for deliberately sheltered young women.[147]

In narrating their experiences of sexual coercion, these young complainants often only discovered their ignorance around certain matters of sex and sexuality in front of courtroom audiences. The scandal around Flora's case in the County Court meant that it was a closed courtroom, although reporters still published details of the trial for the public.[148] In other cases, whole communities tried to observe the legal proceedings. It was in these environments, facing all-male juries, and often loud and responsive community observation, that young women detailed their sexual experiences in their testimonies, and may have also discovered their own lack of knowledge around matters of sex. Trials for these cases tended to be popular, as the controversy sparked much public debate, instilling support or rejection for those that made claims. Thus, young women's experiences of sexual violence, and their corresponding confusion around sexual intercourse, were expressed in humiliating contexts. In Flora Lester's case, her testimony was interrupted by occasions of her

[146] *People v. Royal,* WPA 13605, 1878, California Supreme Court. California State Archives, Sacramento, California

[147] *People v. Kipp,* Case 01053, 1871, Los Angeles County Court: Los Angeles Criminal. Huntington Library, San Marino, California.

[148] One particularly detailed article: *Sonoma Democrat,* 4 August 1877, 5. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.

tears and other demonstrations of her distress.[149] Regardless of legal vindication, their "ruin" was fodder for public entertainment, and the shame that jurists acknowledged in their experiences of assault were likely replicated in courtrooms.

As the above cases demonstrate, while young, white women and girls could be viewed by the public and legal officials as requiring protection, or offered some leniency for certain sexual transgressions, interpretations of their behaviour were indelibly linked to social constructions of race and class. Some adolescent, post-pubescent girls were certainly considered as in need of protection, but the behaviour of others could be constructed as transgressive. Where characterisations of their imbecility and innocence absolved some, other complainants were undermined by perceptions of their moral decay "by dissipation, riotous living, and total disregard for all overtures and warning of friends."[150] Those that were not extended the forgiveness that class and race privilege provided them, were occasionally seen as correctable through incarceration and reform, with the potential of leaving conditions of imprisonment or confinement "wiser" and "better."[151]

[149] *People v. Royal,* WPA 13605, 1878. California Supreme Court. California State Archives, Sacramento, California.
[150] *Marin Journal,* 16 October 1869, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu.
[151] *Marin Journal,* 16 October 1869, 3. California Digital Newspaper Collection, Center for Bibliographic Studies and Research, University of California, Riverside. http://cdnc.ucr.edu; Odem, *Delinquent Daughters*.

Conclusion

Maintaining the sexual innocence of young women in late nineteenth-century California was a matter of great concern for both lawmakers and judges. Throughout the decades following 1850, the age of consent moved from ten to fourteen in 1889, fourteen to sixteen in 1897, until it reached eighteen in 1911. As one of the highest ages of consent in the nation, this reflected a concern amongst lawmakers, as well as those petitioning for the change, around maintaining the sexual purity of young women well-beyond the point of puberty. Yet through these changes, young women could get married as young as sixteen with parental permission, which meant that age of consent could also be overridden by parental approval. This suggests that the age of consent was not necessarily about preventing women's sexual activity altogether but preventing their sexual activity outside of marriage. Concerns about young women's access to sexual activity before marriage were deeply affected by concerns about sexual commerce and the lure of prostitution as a source of income and freedom. The crime of seduction, explicitly written to hold men accountable for enticing innocent girls and young women into sexual activity, connected sexual crimes like rape and assault with intent to commit rape with seduction. In both instances, a young woman's purity was considered ruined by her introduction to "carnal knowledge," regardless if this ruin came by consent or force. Sustaining a charge of rape in court allowed her some form of vindication and allowed her to avoid, at least in law, responsibility for this ruin. Sustaining a charge of seduction after its introduction into California law in 1872 did not allow her to avoid responsibility but offered a mechanism of holding men accountable.

The public also had strong opinions on legislation and legal applications of sexual crime law. In some contexts, public commentators did not agree with the lawmakers, and made their mocking disapproval known. In other instances, they came out in support of young women, particularly when those young women adhered to ideals of chaste victimhood that allowed them to appear sympathetic, naïve, and pitiful. While the opinions of lawmakers and judges were also written down in significant detail, juries made their own opinions known in their verdicts. Sometimes these verdicts did not align with written law or with judicial instructions, like in the case of Flora Lester. Journalists also reported on excited courtroom spectators, whose support for perpetrators or victims were also part of the fabric of courtroom environments.

Through the introduction of anti-seduction laws in 1872, the state of California offered young women opportunities to hold men accountable for sexual violence and coercion, thereby putting on display their varied tactics of manipulation and coercion. While a successful case of seduction launched against a man would not necessarily exempt a young woman from disgrace, it could and did also hold men accountable for that fall. Likewise, a successful case of rape against a man could not entirely save a young woman from the reputational implications of the social knowledge of her ruin, but it could absolve her from moral responsibility. These avenues for vindication were by no means easy to navigate, particularly considering the deliberate manner in which young women, particularly young women in morally upstanding families and positions, were kept ignorant about sexuality for as long as possible. Certain young women, namely white, appropriately behaved, sympathetic ones, could come out the other side of a rape or seduction charge with community support on her side.

Precisely what a young woman had to do was not always clear, as judges themselves seemed to be unsure exactly what forms of resistance were enough to sustain a rape charge. Judge Pressley told the jury in the case of *People v. Royal* that "if the girl is young and if her mind was not enlightened on the question of the matter of the act charged this consideration will lead the court and jury to demand less clear opposition on the part of the female than in the case of an older and more intelligent female." This he followed with directive that there must not be an indication of consent, that "she must, gentlemen, [have used] all of the powers of resistance of which she [was] at the time capable."[152] On one hand, he seemed to suggest that exhaustive resistance in this case was not required because of her young age; on the other he argued that she must have used every power of resistance available to her. This conflation was acknowledged later by the Supreme Court justice, when he overturned the County Court's guilty verdict.

Ultimately, young women existed in a nebulous biological and intellectual space between child and adulthood. In this in-between state, they were perceived to be more susceptible to sexualising influences, and vulnerable to the lure of desires that they did not completely understand. This concern about the sexual vulnerability of young women increased throughout the late nineteenth century, as lawmakers continually revised and debated laws designed to deter sexually predatory behaviour and protect the chastity of young white women. As the age of consent rose throughout the century, the punishment for seduction grew harsher, and public commentary

[152] *People v. Royal*, Case No 961, 1877, Sonoma County Court. California State Archives, Sacramento, California

continued to agitate about the potential for adolescent girls to succumb to sexual desire and fall into lives of immorality and vice.

If the age of consent was a legal mechanism put in place to protect girls from the predations of men, the crime of seduction was a legal deterrent to protect girls from their own sexual susceptibility. In both, young women's bodies and minds were matters of great social concern and maintaining their "purity" for marriage became increasingly important to the creation of a morally upstanding, orderly California. While from the 1850s lurid stories of seduction entertained newspaper readers in California, by the 1860s, increasing legislation and social commentary led to tighter and stricter laws on sexual conduct, particularly designed to protect the chastity of emotionally immature, morally naïve, but physically developed young white women from the desires of men. These protectionist attitudes, expressed through increasing state intervention throughout the late nineteenth century, were not necessarily designed to limit harm to young women as individuals, but rather fundamental to the creation of a morally upstanding state through the bodies of young white women.

VI. Conclusion: To Ravish and Carnally Know

> The said W.W. Royal on the 29th day of March A.D. eighteen hundred and seventy seven at the County and State aforesaid: with force…in and upon one Flora Lester, a female of the age of sixteen years, then and there being, violently and feloniously did make an assault upon her the said Flora Lester then and there feloniously did unlawfully and against her will ravish and carnally know.
>
> - *People v. Royal* (1877), Sonoma County Court[1]

Legal and social understandings of sexual crimes shifted throughout the late nineteenth century. From the establishment of white Anglo-American hegemonic rule in California territory in the late 1840s through to the end of the century, judges, lawmakers, journalists, perpetrators, accusers, communities, witnesses, and other onlookers debated and contested the boundaries of sexual violence throughout the state. At the same time, laws established in California replicated definitions and understandings of sexual harms that originated in England, which were in turn based on deep and enduring religious constructions of sexuality. Exploring diverse expressions of sexual violation in nineteenth-century California thus demands an understanding of both its complex and shifting dynamics, and the ways that these took shape upon a relatively rigid and stable platform of legal tradition. Until now, a study of this complexity has not been approached by historians in the California context. As a result, this study offers important and new insight to the intellectual landscape of the

[1] *People v. Royal*, Case 937, Sonoma County Court Records, 1877. California State Archives, Sacramento, California.

state, as well as to broader narratives of the key role of sexual violence to understandings of settler colonial processes.

Throughout the late nineteenth century, the capacity for institutions and community onlookers to "see" sexual violation was mediated by complex notions of "innocence." Yet access to recognition as an innocent was tantamount to recognition as a rape victim. Each of these, sexual innocence and sexual victimhood, were wrapped up in gendered and classed ideologies of sexual knowledge and social culpability. In California, as elsewhere in the United States, these identity factors were expanded in the mid-nineteenth century to include race as a key site of exclusion. While racial exclusion was not specifically incorporated into sexual crime statutes, broad legal prohibitions introduced in the state after 1848 served to exempt racialised communities from access to general legal recourse. Although many of these were eradicated from statutes following the Civil War and with the introduction of the California Penal Code in 1872, the reverberations of systemic racism continued to have an impact on recognition and response to sexual violence perpetrated against racialised minorities through the end of the century. Namely, systemic and institutionalised racism helped to fuel a structure that tacitly accepted and allowed for sexual harms to be perpetrated against women and girls of colour. In turn, the legibility of this violence to contemporaries was circumscribed, revealing how violence operated in the interests of the powerful in the California settler-colonial state.[2]

In this thesis, my discussions of race have especially focused on the structural and social inequities that shaped the experiences of California Indian women and girls.

[2] Francisca Loetz, *A New Approach to the History of Violence: "Sexual Assault" and "Sexual Abuse" in Europe, 1500-1850*, trans. Rosemary Selle (Leiden: Brill, 2015), 3.

As white Anglo Americans consumed and populated the territory of California under the auspices of Manifest Destiny, their energies of conquest especially targeted California's Indigenous peoples. Violence was an indelible feature of their invasion. While settler-colonials targeted California Indians with violence, they simultaneously engaged in a rhetorical campaign to rationalise their excesses. Both the violence against and the discourse of Native Americans throughout the state created a specific as well as functional meaning of interpersonal abuse, rendering sexual coercion an indelible feature of colonisation and conquest. Thus, when the state sanctioned violence and legalised racial exclusions, interpersonal intimate violations at the individual level were escalated to intimate violations of the state against racialised women and children.[3]

While the state perpetrated and enabled sexualised violence against racialised minorities in California, state officials, lawmakers, and legal representatives also policed and debated the boundaries of innocence. In these discussions, age figured as a point of contention and change throughout the late nineteenth century. Age, knowledge, and innocence were important in public and legal discussions about sexual culpability and the responsibilities of complainants to appropriately safeguard themselves from the sexual excesses of men. Medical, legal and social constructions of the girl child's body idealised its asexual state in ways that traversed race and class boundaries. Dominant white Anglo-American society in California – from lawmakers and judges to social commentators and juries – prioritised the maintenance of the innocent child's body, especially the innocent girl's body, in an unsexed state.

[3] Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005), 3.

However, public and institutional desires to safeguard children's "purity" and protect them from sexual predators were notably narrow in focus. Concerns over child abuse demonstrate how powerful narratives of heterosexual, phallocentric "rape" made myriad forms of sexualised violence against children all but invisible to contemporaries. Racialised and working-class children, more likely to lack trusted sources of support or adult observers to recognise symptoms of venereal disease or injury, were thus particularly vulnerable to sexual victimisation.

Sexual vulnerability and age also figured prominently in state and community efforts to police adolescent female sexuality. Changes in the age of consent and the initial exclusion, and later inclusion, of anti-seduction laws in California suggest that the state was increasingly interested in protecting white, middle-class girls through their adolescence. As the end of the century loomed nearer, lawmakers and social campaigners increasingly differentiated between biological maturity – namely the onset of puberty – and intellectual maturity. The category of "child" was applied liberally by some throughout the period, especially those who encouraged or campaigned to raise the age of consent. While age of consent legislation and anti-seduction laws imposed legal deterrents upon men who expressed or acted out sexual interest in teenaged girls, changing laws and social movements also expressly worked to insulate and supress adolescent female sexuality. Rhetoric throughout this period took for granted that vaginal penetration, either forced or consensual, would awaken sexual desires in children and adolescents. This linked the policing of adolescent sexuality to both discourses on sexual violence and agitations over prostitution. Ultimately, the increasing desire amongst social purity campaigners to reassert the primacy of heterosexual Christian marriage was instrumental to changing legislation

through the state. The rise in the age of consent throughout the last decades of the nineteenth century and the introduction of anti-seduction legislation deliberately sought to limit the sexuality of post-pubescent girls – especially white middle-class girls – to the confines of marriage.

While social commentators asserted strong and often unequivocal opinions about sexual abuse, broad understandings of sexual violence were built on the foundations of institutional constructions of sexual harms. Longstanding precepts of British common law, which had endured through time, social change, and across geographic territory, eventually arrived in California under the auspices of Manifest Destiny during the mid-nineteenth century. In the fifty years following its entry into the American Union, California developed its own legal culture, based upon these principles and adapted for the demands of frontier realities. Racial exclusions, agitations about the age of consent, and state-based legal precedent all made the adjudication of sexual crimes in California regionally particular. Simultaneously, California lawmakers and judges replicated central common law "truths" about sexually violent crime, such that the longstanding well-established meanings of "rape" endured in these new social, political, and legal contexts.

Across the race, age, gender and class divisions that could change a victimised woman into an agent of her own "ruin," sexual violence was persistently understood in heterosexual, phallocentric terms. The desecration of the vaginal canal was the key point of contention in laws prohibiting sexual violence, which meant that "rape" and attempted rape were legally defined along very specific lines. Even when the public or legislators disagreed with jurists and judges about the law, these disagreements were rarely contests over their core definitions. Instead, debates circulated around guilt,

innocence, appropriate punishment, admissible evidence, and interpretations of "force, "resistance" or "consent," largely with reference to individual cases. Widely reported courtroom debates meant that the public likewise absorbed and replicated these concerns. As a result, legal definitions were essential to shaping broader discourse of rape until the rise of medical and scientific understandings of sexuality challenged the primacy of legal expertise during the last decade of the nineteenth century.

Rape was constructed as a monstrous, terrible crime in late-nineteenth-century California. Often more intensely than legal officials, the public condemned perpetrators using language that conjured hell, demons, and beastly behaviour. Social commentators often decried what they viewed as California's lenient sentencing and encouraged the husbands and fathers of victimised women and girls to take retribution into their own hands. Real or threatened private vengeance for sexual harms was especially prevalent in the public discourse surrounding instances of child sexual abuse. Men who raped children undermined constructions of manliness across all competing and dominant understandings of men's social roles. White Anglo-American notions of both restrained and martial manliness demanded that men act in the interests of protecting the "innocent" subject as an elemental component that legitimated their social and institutional dominance.

As historians of rape have persistently argued, the condemnation of the "evil" rapist followed along class and race lines.[4] The discursive creation of the demonic sexual predator was more easily applied by white Anglo Americans to an imagined

[4] See, for example, Joanna Bourke, *Rape: Sex, Violence, History* (Emeryville, CA: Shoemaker & Hoard, 2007), 416.

threat of "uncivilised" and "barbaric" "savages." Exploring rhetoric and response to child sexual abuse especially highlights the racial tensions embedded in imagined, "dark" rapists. Nevertheless, it was not only racialised men who were condemned as child sex abusers. While they often figured as the imagined looming danger to innocent girls, white men – even white men in positions of authority – were condemned, prosecuted, and cut off from their communities when they sexually abused children in socially legible ways. This demonstrates that the sexual abuse of children did not solely exist at the level of abstract fear. Rather, it could and would be seen so long as it aligned with formulas dictating sexual violence that were developed with reference to adult women.

The stigma associated with being labelled a rapist was also real and palpable: communities, law enforcement, and even lawmakers at times tacitly accepted and allowed extrajudicial retaliation for sexual violence. Likewise, communities rallied behind accusers and against some accused men to literally cull them from towns and counties. As Joanna Bourke has argued, while "violence is assessed differently in various communities," and some occasions of sexual harm did not bear as much stigma as others, "rapacious tendencies and sexually aggressive acts almost always incite some degree of shame, embarrassment and guilt."[5] Directly related to the shame of the label of "rape victim," there was also stigma associated with the label of "rapist."[6] Legible incidents of rape thus condemned both perpetrators and victims to a form of social "othering," and incidents of rape that were acknowledged by institutions and communities thereby became battlegrounds of who was to blame.

[5] Joanna Bourke, *Rape*, 416.
[6] Ibid., 417.

In a society structured by patriarchal, heterosexually organised misogyny, men tended to be blamed when they flagrantly transgressed their roles as protectors according to particular scripts. The figure of the rapist challenged prevailing demands of manliness in nineteenth-century California. Even conquest-laded martial manliness pervasive on the frontier called on men to devote their energies to protecting the innocent and deserving in the interests of a "higher" civilisation.[7] This meant that men who violently overpowered women and girls, inflicting marks of their superior strength and forcing penile entry into vulvas and vaginal canals, often transmitting venereal disease to victims in the process, could and would be sanctioned and punished. However, incidents of sexual violence that deviated from these social scripts, allowed men – especially white men – opportunities for absolution from the stigma of "rapist." In the contexts of California's conquest, invasion into the most intimate spheres of others often became a means of affirming certain social hierarchies. In these cases, the blame and harm of sexual violence could then be placed squarely upon the shoulders of victims.

Even as late-nineteenth century shifts in legal and medical cultures diversified scripts of sexual violence, they often served to reify ideologies of innocence and never entirely challenged pervasive idealisations of what rape should look like or who was at risk of victimisation. The contradictions embedded in rhetoric and responses to sexual violence throughout this period were related to a broader uncertainty about how, precisely, rape harmed individuals and society. After 1848, legal understandings of sexual violence in common law recognised rape as a crime against individuals, but

[7] Ibid.

lawmakers nevertheless framed it in the context of "public decency and good morals."[8] Many took for granted that rape was an egregious crime, with multifaceted negative implications. Shame, stigma, and loss of status were all associated with victimisation. For unmarried girls and women, these social implications could result in the reduction in their future marital opportunities. Likewise, the physical, social and economic costs of pregnancy could have consequences for male patriarchs, husbands and fathers along with victimised women. In the case of married women who were raped, the interruption of clear paternal bloodlines could raise questions about parental financial responsibly.

Alongside these practical and economic implications, the physical effects of rape were also acknowledged. After all, in California law, "the essential guilt of rape consist[ed] in the outrage to the person and feelings of the female."[9] This ranged from the consequences of violence – bruising, lacerations, cuts, and other injuries – to venereal disease and even death. The rape of girls perceived to be "innocent," namely virginal, was also closely linked by contemporaries to an increased susceptibility to the lures of immorality and prostitution. Especially in the last two decades of the nineteenth century, protecting them from "sexual knowledge," in every capacity, was increasingly associated with ensuring the moral future of the state and nation.[10]

The ambivalences around the precise harm of rape were increasingly troubling to contemporaries as the turn of the century drew nearer. New understandings of

[8] California and Robert Desty, *The penal code of California: enacted in 1872, as amended in 1889* (San Francisco: Bancroft-Whitney, 1889), 116.
[9] California and Desty, *The penal code of California*: *enacted in 1872, as amended in 1889*, 118.
[10] Louise Jackson, *Child Sexual Abuse in Victorian England* (London: Routledge, 2000), 1.

sexual bodies and a broader acknowledgement of varied sexual behaviours challenged the limited frameworks that the crime of rape had been built upon centuries earlier. These changing discussions of sexual behaviour made the question of the harm of rape more crucial to define as clear medical and legal concepts. This was especially so as changing notions of sexual violation made new ways in which bodies, even male bodies, could be violently violated more visible. Throughout the period I have examined here, the law was a principle organiser of understandings of sexual harms, such that the crime of rape and broader discussions of sexualised violence tended to reveal parallel, if not matching, conceptualisations. As the century neared its end, medicine vied for the social and institutional authority to produce knowledge of sex and sexuality, including in the realm of sexual violence. The confrontations between medicine, psychiatry, and sexology on one side and law on the other, were crucial in the development of key tropes of sexual violence into the twentieth century. Specifically probing the relationships between these, sometimes oppositional, spheres from the late nineteenth to early twentieth centuries is a key site for future historical research.

Regardless of region or focus, attending to the durability of certain "truths" about rape in society and culture is a vital realm of exploration. As Carine Mardoroussin argued in *Framing the Rape Victim: Gender and Agency Reconsidered*,

> since its emergence on the public agenda in the 1970s, rape has been perceived as a crime that is perpetrated by men and that affects women. In fact, it has been 'naturalized' as the social crisis that concerns women.[11]

[11] Carine M. Mardorossian, *Framing the Rape Victim: Gender and Agency Reconsidered* (New Brunswick: Rutgers University Press, 2014), 2.

Likewise, she argues that the imposition of varied dichotomous constructions of rape – monstrous or banal, against women by men, victim or agent – are vital to the workings of a system of toxic masculinity in which rape is just one feature. This construction of rape in the social culture of the United States since the 1970s can be extended more deeply into the past. The twentieth century saw dramatic changes in understandings of bodies and sexuality; medicine, psychiatry, race science, and sexology were all on the rise by the late Victorian period. As evident in the period explored here, medicine and the field of medical jurisprudence began to shift the ways the sexual abuse was recognised in courtrooms. Nevertheless, the roots of common law constructions of sexual harm – a phallocentric, heterosexual model – continued to shape the ways that "rape" was understood amongst the public and within government and social institutions. Even as prevailing sites of expertise changed and judges and juries began to recognise more diverse understandings of sexually violent crime, idealised visions of what rape should look like and formulaic profiles of idealised perpetrators and victims endured in broader cultural discourse. The dimensions of race and class, alongside changing understandings of age, gender and the protection of sexual "purity," shifted some scripts of inclusion and exclusion throughout the nineteenth century such that they continually reflected the structures of prevailing social hierarchies.

Through the conflicts and contests that emerged out of the adjudication and response to sexual harms, the law and broader dominant society each revealed themselves as ill-equipped to recognise and understand diverse forms of sexual violence. In many respects, this aligns with Francisca Loetz's estimation that studies of the consequences of violence allow us to understand how society "legitimates, tolerates or sanctions certain forms of violence," and thereby such violence "both

jeopardizes the social order and at the same time consolidates it by provoking the sanctioning of boundary transgressions."[12] In many respects, exploring the ways that conflicting narratives of sexual violence functioned to both affirm and challenge certain social orders in California throughout this period has been a core aim of this project.

Researchers of sexual violence have long noted the pervasiveness of dichotomies in constructions of rape alongside the rhetoric that surrounds it. More than this, the pervasive ideology that rape was complex and thus very difficult to adjudicate amounted to a social logic that created a middling area between monstrous rapist and ideal man. The seducer or the man who convinced, cajoled, or eroded a woman's hesitations and denials was not necessarily a celebrated figure, but neither was he comprehensively condemned. Rather, those who used some degree of force to procure sexual access to women and girls above the age of consent were relatable men with strong, overly enthusiastic sexual appetites. This served to deepen an understanding of rape as something other and monstrous, as well as easily recognisable through a clear manifestation of its evilness. While rape was strictly prohibited, the label of rapist was selectively and very carefully applied and a social logic arose that effectively sanctioned myriad forms of sexualised violation, especially against those who were not conceived of as appropriately "innocent" victims. Actively policing the access to "innocence" and thus the label of "rape victim," legal officials, lawmakers, and social commentators simultaneously positioned the rapist as inhuman, inhumane, and therefore uncommon. Through this logic, sexual violence could be at

[12] Loetz, *A New Approach to the History of Violence*, 3.

once legally and socially denounced as evil as well as a legitimate tool in the maintenance of race, class, and gender hierarchy.

In these ways, sex and sexualised violence are key sites of exploration to understand and demystify the logics of American imperial nation-building. While rape and sexual violence have been discussed in histories of California, they have predominantly been handled as peripheral in broader narratives of conquest. Here, I have argued that sexual violation, which usually entailed the intimate invasion of women's and girl's bodies, figured as a key element of territorial conquest and a vital component to establishing and rationalising white men as the pinnacle of California's social hierarchy. Sexual violation perpetrated by an individual, or multiple individuals, against others was acknowledged, ignored, or actively obscured by contemporaries within a racist, gendered, class-organised social system. Longstanding legal principles of rape as very difficult to adjudicate and firm denouncements of only vaguely articulated harms made it more useful to affirm prevailing structures of power. Perceptions of its complexity made it a malleable and changeable concept just as it was constructed as finite. As a result, prevailing understandings of the phenomenon of felonious, unlawful, forced ravishment and carnal knowledge, against her will, were crucial tools of American expansionism, and built upon enduring foundational logics of sexual violation.

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