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SOCIAL CHANGE AND RAPE LAW IN HAWAII

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SOCIAL CHANGE AND RAPE LAW IN HAWAII

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ABSTRACT

This case-study in the sociology of law is an examination of social influences on the form and content of the legal prohibition against rape in the Hawaiian Islands during the period from prior to Western contact through 1981. It employs a model which integrates concepts from the work of W.I. Thomas and other symbolic interactionists with macro-structural and cultural variables. The model is used to analyze the effects upon rape law of changes in sexual, ethnic, and class stratification, as well as the importation of an Anglo-American legal system, a "generalized sex taboo," and other Western cultural forms.

The findings suggest that the Westernization of Hawaii transformed the status of women into sexual property and relegated them to non-public roles. Women also were divided into "respectable" and "unrespectable" categories based on their observance or non-observance of norms of sexual exclusivity. Rape law at the operational level protected only those who were "respectable." Rape and rape law became laden with symbolism. The symbolic content increased as marked ethnic and class stratification developed in the late nineteenth and early twentieth centuries, leading to a number of socially defined "sex crime waves." During these

episodes, the male, Caucasian (haole) elite made demands on the legal system to control the presumed dangerous sexual proclivities of the non-white underclass. These demands were shaped and filtered through whatever behavioral model had hegemony at the particular time, be it hereditarian-eugenic, social-environmental, or individual psychiatric. The English-language newspapers were the prime definers of these situations, providing the basic information and images upon which legal demands were based. Constructed on false or questionnable premises, and assuming the subordinate status of women, the episodes of rape concern and rape law reform had little or no lasting significance other than the support of the existing sexual, ethnic, and sexual stratification systems.

The post-World War II pericd brought an increasing breakdown of the ethnic and sexual stratification systems in Hawaii and in the rest of the U.S. as well as a loosening of the norms of sexual regulation. Changes in the sexual stratification system became self-conscious in the feminist movement in the 1970's. The feminist movement in Hawaii and elsewhere took rape over as its own issue and dismissed such concepts as the protection of "honor" and "womanhood" as the primary values underlying rape law. Rather the value of self-determination and the assaultive aspects of rape were emphasized. Significant changes in rape statutes and in rape law administration were made. Rape law was extended to

protect those women who would have previously been defined as "unrespectable." It is suggested that in some ways Hawaii is coming full circle with respect to sexual stratification and rape law after a long period of aberration when traditional Anglo-American rape law dominated.

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INTRODUCTION

1.1 PURPOSE OF THE STUDY

During the past two decades scholars in the sociology of law and in criminology have increasingly realized that detailed case studies of the conditions related to the criminalization of certain behaviors, and the study of the patterns of enforcement of these proscriptions, can make important contributions to the understanding of the role and processes of law in society.

The purpose of this study is to add to the growing body of descriptive and theoretical knowledge of criminal law by examining the law against forcible rape in Hawaii. The study will take a single behavior, the gaining by a male of sexual access to a female by force or duress, in a single socio-geographical unit, Hawaii, and examine its institutionalization as a prohibited behavior, and changes in the form and content of the prohibition from the period prior to Western contact with the Islands up to the present.

This is a study in the sociology of law in the sense that it attempts to analyze the linkages between elements of the legal system and other, non-legal, social institutions,

patterns and processes.[1] Among other things it addresses the issues proposed by Jeffery (1956:672) as the central concerns of the sociology of criminal law: 1) "the conditions under which behavior comes to be defined as criminal, 2) how legal norms intersect and are integrated with the norms of other institutional structures," and 3) how the preceding are affected by social change.

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[1] Rheinstein (1954:xlvii) describes the subject matter of the sociology of law as follows:

> If understood in its full purport, sociology of law would have to comprise an investigation into the relationship between all legal and all other social phenomena. It should thus concern itself first of all with the question of why law, in the sense of politically organized enforcement of a social order, has arisen at all; how the enforcement machinery can be organized and how it operates; to what extent it is effective, and by what factors the varying degrees of its effectiveness are determined; what factors influence the content of those rules of social conduct which are legally enforced; why, how, and in which ways the content of these rules is changed with changing social conditions; which factors determine which fields of human conduct are under given circumstances to be subject to legal control, which are to be subject to ethical, religious, conventional, or other forms of social control, and which are to be left free of all social control altogether. These are just some of

1.2 SUBJECT MATTER AND SETTING

Rape law is an appropriate subject for study in the sociology of criminal law for several reasons: first, there is tremendous cultural variation in social definition of and social reaction to the act. Although rape is nearly universally proscribed in all cultures,[2] the sanction and specifics of the prohibition vary widely. At one extreme was the traditional reaction (lynching) in the American South to an alleged rape of a white woman by a black.[3] At the other extreme are the numerous societies in which the offender is merely required to provide compensation to the victim or her kin (Strathern, 1974:27). In some societies the phenomenon of rape is unknown (Mead, 1935:104), and in some it is institutionalized as a sanction in itself (Mead, 1931:195, 1956:400; Strathern, 1974).[4]

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the problems which would have to constitute the subject matter of a systematic sociology of law aiming at comprehensiveness.

[2] In a sample of 110 societies selected from the Human Relations Area Files, Brown (1962) found that 99% punished in some manner the rape of a married woman, and 95% punished the rape of an unmarried woman.

[3] There is a large literature of examples; see for example Dollard (1957), Purden (1936), Raper (1933), and White (1929). One observer of the Southern social system regarded Southern whites' fears of rape of a white woman by a black as a "Southern rape complex." (Cash, 1941)

[4] For an encyclopedic treatment of rape and social reactions to it, see Brownmiller (1975).

Second, rape tends to be a highly symbolic act which has often emerged as the focus of community concern and indignation. As such, it provides an opportunity for investigation of criminal law as it relates to and is affected by highly charged expressive sentiments and symbols which focus mass action and popular demands on the legal system.

Third, it is a behavior which has historically been troublesome for the legal system (cf. Uviller, 1952). Kalven and Zeisel (1966) in their study of American juries found that there tended to be serious disagreements between judges and juries on whether they would convict or acquit in rape trials. In 26 cases in a sample of 102 in which the jury reached a verdict, there was disagreement between the judge and the jury. In twenty (76.9%) of these disagreements the jury acquitted when the judge would have convicted. The difficulties of elements of the legal system in satisfying community concerns about rape have led to frequent demands for legal change.

Finally, rape and its social meaning are integrated with core social patterns and institutions, e.g., sex roles, and ethnic and class relations. It has even been proposed that rape is the fundamental mechanism which historically has been used by men as a group to subjugate women as a group (Brownmiller, 1975).

Hawaii is a particularly appropriate setting for a socio-historical study of criminal law in general and especially of rape law. During the period covered in this study social change has been the dominant feature of human existence in Hawaii. Beginning with a homogeneous and isolated Polynesian society and culture, Hawaii experienced an influx of persons of American and European background in a manner that transformed every aspect of indigenous culture. But even before this intercultural confrontation worked itself out, the importation of large numbers of persons of Asian background added an additional element of diversity.

In addition to the marked diversity that has characterized the human population of Hawaii, there has been a changing pattern of access to power, prestige, and wealth. To the extent that cultural diversity has been manifest in law making and law breaking behavior, the differential access of ethnic groups to political power is crucial to the pattern of change in the criminal law.

Given this situation, then, Hawaii provides an ideal opportunity for analysis of social change and change in the criminal law, especially in relationship to power and cultural diversity.

Unfortunately, such concerns have heretofore escaped sociologists and historians of Hawaii. The history of legal institutions in Hawaii has yet to be written. Consequently,

a major burden of this study has been the search for information on the broad trends of legal change in Hawaii as the necessary context for the comprehension of developments in the specific area of rape law.

The study departs from the dominant mode of criminological research of past decades which focused on the criminal offender and the etiology of criminal behavior. It is not the purpose of this study to explain rates or frequencies of rape, explain why some individuals engage in rape and others do not, propose how persons who rape can be cured or deterred, or describe the characterisitcs or behavior of victims or the best methods for their treatment. These are, of course, important issues which are currently receiving the attention of other investigators.[5] These matters do become relevant to this study as popular or scientific theories about them form the ideational basis for action or reaction that affects the legal system.[6]

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[5] See, for example, Ruch and Chandler (1978, 1979).

[6] Both Sutherland (1950a) and Tappan (1955) have demonstrated how popular misconceptions about the nature of sex offenders became the basis for "sexual psychopath" legislation in many states between 1930 and 1950.

1.3 THE SOCIOLOGY OF CRIMINAL LAW

1.3.1 Antecedents

Edwin Sutherland, long the dean of American criminology, began the first edition of his long lived and influential text, Criminology, with the observation that the field of criminology includes not only the study of criminal conduct but "the policies used in dealing with crime and criminals." He went on to say that:

> An understanding of the nature of law is necessary in order to secure an understanding of the nature of crime. A complete explanation of the origin and enforcement of laws would be, also, an explanation of the violations of laws. (Sutherland, 1924:11)

Although the study of the origin and enforcement of law was valued as a requisite of the explanation of criminal conduct, Sutherland's conception of the boundaries of criminology was broad for its time. By the time the fourth edition (Sutherland, 1947) of his text was published criminology was described as comprised of three principal divisions:

> (a) the sociology of law, which is an attempt at scientific analysis of the conditions under which criminal laws develop and which is seldom included in general books on criminology, (b) criminal aetiology, which is an attempt at scientific analysis of the causes of crime; and (c) penology, which is concerned with the control of crime." (Sutherland and Cressey; 1947:1)

This explicit recognition of the importance of the sociology of criminal law to criminology has been retained in the subsequent six editions of Sutherland (1955), and Sutherland and Cressey (1960, 1966, 1970, 1974, 1980).

Sutherland's interest in the sociology of criminal law was not limited to the first page of his texts. In 1929 he published "Crime and the Conflict Process" in which he proposed a version of crime and culture conflict that could have been written by a conflict theorist of the 1970's. According to Sutherland:

> Thus crime is conflict. But it is part of a process of conflict of which law and punishment are other parts. This process begins in the community before the law is enacted, and continues in the community and in the behavior of particular offenders after punishment is inflicted. This process seems to go on somewhat as follows: A certain group of people feel that one of their values--life, property, beauty of landscape, theological doctrine--is endangered by the behavior of others. If the group is politically influential, the value important, and the danger serious, the members of the group secure the enactment of a law and thus win the co-operation of the State in the effort to protect their value. The law is a device of one party in conflict with another party, at least in modern times. Those in the other group do not appreciate so highly this value which the law was designed to protect and do the thing which before was not a crime, but which has been made a crime by the co-operation of the State. (Sutherland, 1929, in Schuessler, 1973:103)

Indeed, this notion of the conflict of cultures became a fundamental assumption underlying "differential association," Sutherland's best known contribution to criminological theory. Nevertheless, despite early indications of an interest in the sociology of criminal law, Sutherland never did much in the area.[7] Like others of his

[7] A notable exception is Sutherland's (1950a) classic piece on sexual psychopath laws in which he traced the process by which many states adopted sexual psychopath laws as a

generation he was primarly concerned with developing a scientific criminology with the capacity for prediction and control of criminal conduct (Schuessler, 1973;x).

Other mainstream criminologists who touched on issues of relevance to the sociology of criminal law were Sellin (1938) and Vold (1958). Sellin rejected legalistic definitions of crimes and proposed the scientific study of underlying conduct norms. He suggested that individuals become caught in situations of conflicting conduct norms based in the diverse groups to which they belong. However, most criminologists did not follow Sellin's suggestion, finding conduct norms every bit as changeable as criminal laws. Gibbons (1979:67) points out that Sellin's primary influence on later criminologists was the incorporation of culture conflict in most discussions of crime causation during the 1940's and 1950's.

Vold, on the other hand, went further than either Sutherland or Sellin in pursuing the implicatons of the conflict idea on criminal law. Drawing on Simmel's work on group conflict as a normal element of social life and the motivation of groups to protect their positions, Vold extended this perspective to the concerns of law making and law breaking, the former being the actions of political grcups enlisting the "assistance of the organized state to

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result of a process of community mobilization based on false perceptions of the nature of the threat and its solution.

help them defend their 'rights' and protect their interests." (Vold; 1958:208) However, Vold viewed his conflict formulation as limited to rather clear instances of group conflict such as political rebellion, industrial conflict, and open racial conflict. It is doubtful that Vold would have viewed rape as a consequence of the kind of group conflict encompassed by his theory.[8]

The greatest interest in the sociology of law came not from within the field of American criminology but from the field of law. Jerome Hall, close friend and associate of Sutherland, was a critic (1936, 1941) of "positivist criminology," with its focus on the offender, and advocated a criminology that is synonomous with the sociology of criminal law (Hall, 1945:354). Indeed, Hall's description of the general boundaries of criminology (sociology of criminal law) are entirely consistent with the approach that guides this research. According to Hall (1945:355-56) criminology:

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[8] Vold (1958:219) wrote:

> On the other hand, it is also clear that group conflict theory is strictly limited to those kinds of situations in which the individual criminal acts flow from the collision of groups whose members are loyally upholding the in-group position. Such theory does not serve to explain many kinds of impulsive, irrational acts of a criminal nature that are quite unrelated to any battle between different interest groups in organized society.

However, see Brownmiller's (1975) political analysis of rape which regards it as a key mechanism by which men as a group establish and enhance their dominant position over women.

> must be concerned, firstly, with meanings of the rules of criminal law--and this requires investigation of their origins, the legislative history, the relevant preceding and accompanying social problems with emphasis on the opinions and attitudes of various groups, marked out from the more or less passive "majority," and, of course, the authoritative interpretations of the courts and other official organs are essential to this inquiry. Against this background of the social meanings of the various prescriptions under scrutiny it is necessary to study intensively the penetration of the various symbols, relevant affective states, opinions, attitudes, etc., into the particular groups whose behavior is of special interest. This requires an elaboration of the various modes of activity that emphasize correspondence with or divergence from the general social "ideology." Since it may be assumed that there will always be both correspondence and divergence in any given society, the need, as regards "culture conflict," is accordingly, two-fold: firstly, to supplement studies pointed in that direction with others on "culture correspondence" and, secondly, to carry on the most detailed investigations possible into the various relevant social forces--religions, educational institutions, newspapers read, local traditions including the comeraderie of gangs, local leadership, etc.--until the point is reached where a vivid, realistic insight into the local meanings of the general social normative systems, especially those embodied in the criminal law, can be secured. The goals of the above two sorts of investigation are quite definite ones--determination of the meanings of the prevailing criminal norms in the society generally, and their specific interpretation by the particular group under study.

These were not armchair exhortations by Hall. He had produced in 1935 (Hall, 1935) a study of the law of theft which remains a classic study in the sociology of law.

Despite the work by Sutherland, Sellin, Vold, and Hall which might have opened up criminology or general sociology to analyses of criminal law, very little was done until the 1960's.

During the 1960's and 1970's serious challenges were directed at mainstream criminolcgy from critics both within the field and in the related field of deviance. In the field of deviance, original labeling formulations by Lemert (1951) led to a shift of interest from the nature of behavior of the deviant to the social process by which persons came to be placed in deviant statuses. Labeling theorists do not view any behavior as inherently deviant but rather propose that deviance is the successful creation of deviant categories and the application of them to particular individuals. Labeling theorists have tended to have a certain sympathy for the deviant and a rather critical view of the motives, morals, and behavior of the official agencies of deviance definition (e.g., Becker, 1963; Erickson, 1966; Scheff, 1964). Labeling theory has been controversial in the fields of deviance and criminology. However, despite many criticisms (e.g., Akers, 1968; Gibbs, 1966; Taylor, et al., 1973), a major influence of labeling theory on criminology has been the calling into question of definitions cf crime and the behaviors of those who develop and apply them. This was a major break from the criminology of preceding decades and provided an important stimulus to the more fundamental reorientations of criminological analysis to be discussed below.

1.3.2 Conflict and Radical Criminology

Gibbons (1979:165) observes that the increased interest in conflict-oriented perspectives in criminology did not arise out of a need to provide new approaches to anomalies in existing explanatory paradigms of crime. Rather, events in the world outside of sociological research and theorizing such as black militancy, the Vietnam war, and associated political turmoil, the development of youth counterculture, widespread police illegality and brutality, and recognition of white-collar crime have seriously called into question the underlying assumptions of mainstream criminology concerning the social bases of the law.[9] At the same time, the entire field of sociology, in part for the same reasons, has been undergoing the same challenges as criminology, with sharp critiques of the structural-functional paradigm in sociology (e.g., Gouldner, 1970) and new interests in Marxist and general conflict theory (e.g., Collins, 1975; Duke, 1976).

Huff (1980) points out that the term "radical criminology" is used to refer to a variety of theoretical perspectives with important differences even though they all incorporate conflict as a central concept and reject normative consensus as a major organizing element of societies. One major distinction among conflict theorists

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[9] Gibbons (1979:165) cites Horowitz (1971), Sykes (1974), and Allen (1974) as his sources on factors leading to the rise of conflict and radical criminology.

concerns the distribution of power among groups. Some theorists adopt a more or less pluralist or interest-group position on the distribution of political power (e.g. Chambliss, 1964; Chambliss and Seidman, 1971; Quinney 1970; Turk, 1969).[10] The other position, which represents more of a clear break with mainstream criminology, adopts a Marxist position that specifies that the powerful groups that define law are in fact the ruling class and that law is a major mechanism through which it retains power (e.g., Chambliss, 1976a, 1976b; Platt, 1974; Quinney, 1974, 1977, 1979; Taylor et al., 1973).

The rise of conflict perspectives in criminology has been beneficial in redirecting some scholarly efforts to analyses of criminal law. In a sense it has rejuvenated criminology and has tended to reintegrate criminology with the forefront of sociological theorizing. It is unfortunate, but perhaps inevitable, that the debate in criminology has at times been more politicized and polemical than reasoned and scholarly. Some radical work has concentrated more on attacking mainstream criminology than in providing alternative theoretical propositions or empirical findings (e.g., Taylor et al., 1973). Defenders of the mainstream have replied in kind.[11]

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[10] Chambliss and Quinney have more recently moved from their earlier interest group perspectives to Marxist positions.

[11] See Turk's (1980) and Schur's (1980) calls for moderation and reason and Klockars' (1980) and Toby's (1980) attacks on the radicals.

Another negative consequence of the form and content of the dialogue between the mainstream criminologists and the adherents of the conflict perspective is the gross oversimplification of major issues into a simple-minded conflict-consensus dichotomy. Hopkins (1975) contends that the models have not been unambiguously formulated and are insufficiently specific in their predictions as to be falsifiable. Thus, conflict theorists point to studies that show powerful interest groups as the prime movers in criminal legislation. Their opponents point out that the behavior at issue in these studies is usually some victimless crime that is not at the core of criminal law. They point to their own studies purporting to show a high degree of consensus, even cross culturaly, about wrongful behavior (e.g., Newman, 1976; Rossi, et al., 1974). Conflict theorists counter with the concepts of false consciousness and objective conflict. Consensus theorists point to enactments appearing to be inimical to the interests of elites and conflict theorists counter that these are not really against the interests of the ruling elite and, in any event, are only minor concessions necessary to retain the basically exploitative system.

Hopkins (1975) contends, and I agree, that at this point attempts to adjudicate between the two models are likely to be unproductive. Rather, empirical work should use the insights of both to propose questions about how criminal law

emerges, is maintained, and is changed. Questions about group power, orientation toward values, expressions of interests, compromise, and the existence or nonexistence of omnipotent elites should not be prejudged. Also, while the extent to which all criminal law or particular criminal laws reflect "public opinion" or the dominance of particular groups is an interesting one, it is not the only interesting and important question in the sociology of criminal law.

This study was not begun with a particular approach or set of assumptions beyond a general orientation grounded in the sociology of law. It started with a problem orientation, an interest in examining and explaining the controversy about rape law that was emerging in the mid 1970's. Before much had been done with that limited temporal focus, it became apparent that current controversies are grounded in social arrangements, concepts, and an images that have a long recorded history in Hawaii, and even longer one in England and America. As these links were investigated it became clear that rape law in Hawaii has had a rich and varied history, the analysis of which could be a contribution to the sociology of law. It further became clear that rape and rape law have had a high symbolic content, that change has tended to follow some crisis, that the subject has been a topic of intense debate, and that class, ethnic, and sexual stratification have strongly influenced rape law. As these patterns became clear certain

sociological concepts came to be seen as relevant and necessary tools of analysis. These concepts, related into a model of sorts, are presented below.

1.4 LEGAL ACTION AND THE DEFINITION OF THE SITUATION

This study attempts to explain legal action as it is induced by social change. The legal action that it seeks to explain is rape law. Legal action is the making of demands on the parts of the legal system-- legislatures, courts and enforcement agencies, the passing of statutes, the patterning of enforcement activities, the issuing of appellate and trial court judicial decisions, the finding of jury verdicts, etc. Legal action is goal directed; that is, it is directed to achieving or remedying some state of affairs. It is also a "gesture" in the symbolic interactionist sense in that the taking of legal action indicates meaning to the actor and communicates meaning to other persons.

A major insight of the symbolic interactionist approach to the analysis of human behavior is that action cannot proceed in the absence of some set of understandings on the part of actors of the elements of the state of affairs they are confronting. The process of arriving at these understandings and the set of understandings themselves were called by Thomas (1917) the "definition of the situation." In relation to action Thomas contended:

> definition of the situation is a necessary preliminary to any act of the will, for in given conditions and with a given set of attitudes an indefinite plurality of actions is possible, and one definite action can appear only if these conditions are selected, interpreted, and combined in a determined way and if a certain systematization of these attitudes is reached, so that one of them becomes predominant and subordinates the others. (Thomas and Znaniecki, 1918-1920 reprinted in Volkart, 1951:57-58).

In a later work Thomas further explained the importance of the actors' definition of the situation to action:

> An adjustive effort of any kind is preceded by a decision to act or not act along a given line, and the decision is itself preceded by a definition of the situation, that is to say an interpretation, or a point of view, and eventually a policy and a behavior pattern. (Thomas, 1937:8 as quoted in Stryker, 1980:31).

Volkart (1981:85-87) points out that the nature of Thomas' concept of the definition of the situation changed throughout his work. In his earliest work using the term (Thomas, 1917) he emphasized the externality of situational definitions as cultural attributes of the group which socialize and control their members. But in The Polish Peasant (Thomas and Znaniecki, 1918-20) the concept had been shifted to focus more directly on the subjective orientation and interpretive processes of the individual actor attempting to come to terms with problematic situations in his or her life. Nevertheless, while Thomas' attention may have turned more to individual psychological processes in defining situations, he did not reject the importace of externalities. Also, in The Polish Peasant he said:

> Every concrete activity is the solution of a situation. The situation involves three kinds of data: (1) the objective conditions under which the individual or society has to act, that is, the totality of values-economic, social, religious, intellectual, etc.--which at the given moment affect directly or indirectly the conscious status of the individual or the group. (2) The pre-existing attitudes of the individual or the group which at the given moment have an actual influence upon his behavior. (3) The definition of the situaton, that is the more or less clear conception of the conditiors and consciousness of the attitudes. (Thomas and Znaniecki, 1918-20 quoted in Volkart, 1951:57)

So, it is clear Thomas still gave importance to externalities but regarded them as one component out of which the definition of the situation is constructed, not themselves the definition of the situation. Thomas' reiteration of the importance of group based cultural elements, even as he moved to the more individualistic social psychology that has come to be a distinguishing characteristic of modern symbolic interactionism, is a point to be more fully considered below.

The term "definition of the situation" contains two key words: "definition" and "situation." The definition and the defining process will be treated in more detail in the next section, but "situation" is a key concept for this study which merits discussion at this point. Thomas believed that the particular activity he meant by definition of the situation is evoked when a disturbance arises in routine (Volkart, 1981:79-81). The actor is called upon to examine, interpret, and possibly act. There is no such thing as a

"normal situation," then. If it is "normal," it is not a "situation."

Thomas also used the term "crisis" to refer to situations. According to Thomas when things are running smoothly behavior is mostly influenced by "habit." The disturbance of habit is a "crisis" and the result is "attention." Attention leads to attempts to establish new habits and policies to meet the crisis--in Thomas' words--"control." Thomas viewed the response to crises as a major source of social change. The relation of crisis to definition of the situation is again best revealed in Thomas' own words:

> Such conditions as the exhaustion of game, the intrusion of outsiders, defeat in battle, floods, drought, pestilence, and famine illustrate one class of crisis. The incidents of birth, death, adolescence, and marriage, while not unanticipated, are always foci of attention and occasions for control. They throw a strain on the attention, and affect the mental life of the group. Shadows, dreams, epilepsy, intoxication, swooning, sickness, engage the attention and result in various attempts at control. Other crises arise in the conflict of interest between individuals, and between the individual and the group. Theft, assault, sorcery, and all crimes and misdemeanors are occasions for the exercise of attention and control. To say that language, reflection, discussion, logical analysis, abstraction, mechanical invention, magic, religion, and science are developed in the effort of the attention to meet difficult situations through a readjustment of habit, is simply to say that the mind itself is the product of crisis. Crisis also produces the specialized occupations. The medicine-man, the priest, the law-giver, the judge, the ruler, the physician, the teacher, the artist and other specialists, represent classes of men who have or profess special skill in dealing with crises. (Thomas, 1909 reprinted in Volkart, 1951:219)

Volkart (1951:219) observes that Thomas (1937) later referred to these specialists as "special definers of the situation," a comment significant not only because it specifically refers to "lawgivers" and "judges," of specific substantive interest in this study, but also because it reveals Thomas' belief that not all definers of the situation are equal--some persons occupy culturally recognized statuses in which they perform roles which permit or require them to develop authcritative definitions of the situation for the consumption of others. This element represents an important link between the concept of definition of the situation and social structure, a concept and a relationship to be considered in more detail below.

Summing up, the perspective adopted in this study is that if one wishes to understand legal action as it relates to rape law one must investigate the defining of situations leading to the legal action, with the view that the actions taken are attempts to control or remedy the situation <u>as defined</u>. Situations are the same as "crises," that is some disruption of habit such that the smooth course of action may no longer be pursued. Crises lead to "attention" which is followed by interpretive processes by actors in order to comprehend their situation. In defining situations several important components come to the fore. First, actors engage in creative interpretive processes drawing in part on their personalities, life experiences, etc.; in so far as this is

true, definitions are not determined by such external social facts as social structure and culture. However, Thomas clearly indicates his belief, and it is one which guides this study, that cultural elements influence the meanings eventually developed by actors, language for example being a key formative cultural element. Thomas also makes some mention of the influence of specialized roles in defining situations, again an interest shared with this study.

1.5 SYMBOLIC INTERACTION

W.I. Thomas, whose work was discussed above, is usually regarded along with G.H. Mead, John Dewey, C.H. Cooley as one of the founders of the perspective or human behavior which later was named by Blumer (1937) "symbolic interactionism."[12] Although "symbolic interactionsim" has many varieties and closely related perspectives (cf. Meltzer, et al., 1975:53-81)) we can take Blumer's (1969:2) presentation of its core concepts as an adequate beginning of this discussion. First, is the premise that "human beings act toward things on the basis of the meanings that the things have for them." Second, "the meaning of such things is derived from, or arises out of, the social interaction one has with one's fellows." Third, "these meanings are handled in, and modified through, an

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[12] Both Meltzer, et al. (1975) and Stryker (1980) provide discussions of the development of the symbolic interaction perspective reviewing the contributions of key figures in psychology, philosophy, and sociology.

interpretive process used by the person in dealing with the things he encounters."

In this view, then, human behavior is not fully explained by reference to such externally coercive factors as social structure and culture or such internally coercive factors as instinct and personality. Nor is human behavior explained by a stimulus-response model in which humans mechanistically respond to stimuli of invariant meaning. Rather, if one wishes to understand behavior one must study the emergent meanings, definitions, classifications, and interpretations of actors upon which their behavior is based. Meaning for an actor is a product of social interaction in which meanings are "formed in and through the defining activities of people as they interact." (Blumer, 1969:5) Meaning is built up through communication by use of symbols. Symbols are entities that may be used by the actor to call forth the same response both in himself and in the other with regard to an object or event. Language is a primary set of symbols constructed, applied, and manipulated to develop and communicate meaning.

But the actor is not the passive recipient of meanings communicated in interaction. Symbolic interactionism's model of the person is one of the person as the creative interpreter and manipulator of information. Again quoting Blumer (1969:5), "The actor selects, checks, suspends, regroups, and transforms the meanings in the light of the

situation in which he is placed and the direction of his action." Situations are defined and redefined continually and one may not completely predict the response of an actor by knowing the external stimuli to which the actor is exposed. Herein, of course, lies the indeterminacy which is a distinctive element of the symbolic interaction perspective and which sets it off against, at least in its dominant formulation, positivist sociology.

Symbolic interactionists generally do not deny the usefulness of such concepts as culture and social structure but view them as secondary to, and the product of, day to day interaction. Culture and social structure are constituted and reconstituted by interaction as they enter and affect the meanings of actors; and they are changed as meanings are changed by human creativity in symbolic interaction.

Numerous criticisms have been made of the symbolic interaction perspective both by persons friendly to it and by non-symbolic interactionists.[13] Critics have contended that key concepts such as "self" are poorly defined, concepts are not well operationalized, nor are testable propositions easily generated.[14] The perspective is overly

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[13] The best review of criticisms of the symbolic interaction perspective is contained in Meltzer et al. (1975). This brief presentation of criticisms draws on that source and Stryker (1980).

[14] While Blumer (e.g., 1969) rejects the standards of positivistic science for symbolic interactionism as inconsistent with the perspective, others, for example

individualistic in its focus rather than sociological. It focuses on the ephemeral and processual aspects of everyday life and neglects such "macro" level elements such as social structure, social power, and historically and economically determined relations.[15] It is also said to be ideologically biased to support a liberal version of the status quo. The objective realities of stratification, and the differential distribution of status, wealth, and power in society are neglected (Stryker, 1980:147).

While all of these criticisms are important and have occasioned extended debate, it is those that critique symbolic interactionism for neglect of macro-structures that are of most interest to this study. Clearly a study such as this one, which attempts to examine a political system of action (law) over 150 years of history, must use a framework that not only allows for the consideration of emergent meaning, but also allows for consideraton of precisely those social elements neglected by most symbolic interactionist

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Manford Kuhn (1964), have attempted to apply to symbolic interactionism such conventional scientific practices as rigorous conceptual definition, proposition development, and precise measurement.

[15] Maines (1977) contends that Blumer and symbolic interactionists generally have been wrongly criticized about an inability to deal with social organization and social structure. He points out the compatibility of information theory (structured communication) with symbolic interactionism and also points to a large number of empirical studies analyzing the negotiated order of interaction that mediates between formal structure and rules (particularly of organizations) and actual interactional processes.

work--history, power, social stratification, and social organization.

Fortunately, as Stryker (1980) and Maines (1977) contend, and I agree, there is nothing inherent in symbolic interactionism which precludes consideration of these elements. Indeed, they demand inclusion in so far as symbolic interactionism presents itself as a general sociological perspective and not a limited social psychology.

Some recent work has attempted to develop symbolic interactionism or use its concepts in ways that avoid the common criticisms. Stryker (1980) points to Turner (e.g., 1976, 1978), McCall and Simmons (e.g., 1978) Weinstein and Tanur (1976), and Burke and Tully (1977) who, along with himself, attempt to develop

> an empirically based, testable set of general theoretical propositions, who take seriously on theoretical, conceptual, and empirical levels--the realities of social structure, and who do not rule out in principle any of the scientific methods and techniques available for the study of human behavior. (Stryker, 1980:135)

These efforts have, however, attempted to relate symbolic interactionism to social structure through the concept of role, emphasizing the importance of roles in shaping interaction with self. Less apparent is conceptual or empirical work integrating the insights of symbolic interactionism and those aspects of social structure relating to stratification, power, and class conflict.

Another, certainly less developed, set of efforts attempts to relate these concepts to symbolic interaction. Hall (1972), for example, presents a symbolic interactionist analysis of politics in which he conceptualizes politics as a negotiated order in which power is used for purposes of impression management (in a Goffmanesque sense) and for convincing others to accept particular definitions of situations such that they behave in desired ways. Control of information flow and the ability to mobilize support through the deployment of symbols are key aspects of this process and the province of elites. Hall concludes that

> The paradigm (symbolic interactionism), once harnessed to a concern with stratification and power, is ideally suited to handling the inevitable sources, manifestations, processes, and consequences of conflict and change. It seems designed to deal with the vitality and reality of a social life which has a political system that never stops or runs down but faces new contingencies, issues, groups, conditions, and decisions as well as the reinterpretation of formerly rationalized matters. (Hall, 1972:70)

A considerably more rudimentary attempt, from an explicit Marxist perspective is Lichtman's (1970) essay on symbolic interactionism. Lichtman proposes the necessity of integration of the subjectivism of symbolic interactionism with the objectivism of Marxism. For Lichtman a complete understanding of society involves comprehension of it "as it officially understands itself" and "as it exists objectively." Of primary interest to Lichtman, like Hall, is the question of the controlling influence of the

definition of the situation and how it is built up. Lichtman (1970:79) contends that "The channelling of interpreted meaning is class structured. It is formed through lived engagement in the predominant class-controlled institutions of the society."

In conclusion, symbolic interaction is the means by which the definition of the situation is developed and communicated. Most traditional symbolic interaction analysis has focused on micro-level processes despite claims that symbolic interactionism is a general perspective. To the extent that such "external" concepts as culture and social structure have been used they have been regarded as an <u>outcome</u> of interaction and little analysis has been done of their shaping and constraining influence. Some attention has been given to social structure through the concepts of role and status. Recently, an attempt has been made to bring into symbolic interactionism the macro-concepts associated with social stratification, e.g., class and power. Some symbolic interactionists would regard these attempts as violative of the very fundamental premises of the perspective. Others see nothing inherent in symbolic interactionism to prevent the use of these concepts. Certainly, the integration of the perspectives is suggested by the subject matter of this study and by the sociology of law generally.

We now turn to a discussion of social structure, and later culture, to examine how they might be used in the forthcoming analysis.

1.6 SOCIAL STRUCTURE

Thus far it has been proposed that legal action, following W.I. Thomas and others, must be preceded by definition of the situation. Such definition is developed and changed by the processes of symbolic interaction. It has further been proposed that these processes are influenced, but not determined, by social structure. Now it is necessary to look more closely at the way in which this study will analyze social structure as an influence on rape law.

As traditionally defined "social structure" refers to the organization of statuses and roles as components of social systems, e.g., Bredemeier and Stephenson, 1964. Many recent studies in the sociology of criminal law, usually within a conflict perspective derivative of Marx, have focused more specifically on these aspects of social structure related to the economic organization of a society and to its class structure. The appearance of these studies has led to the "conflict-consensus" debate that dominates the current literature. While this study will not directly enter that debate, with its many oversimplifications, it does share with the conflict perspective the premise that the class

structure of a society is of fundamental importance in shaping criminal law and legal change. All aspects of the criminal law are the result of purposive human action to protect or enhance particular values and interests. While the distribution of adherence to particular values, and abstract ideational elements, throughout the class structure remains an important empirical question, specific interests, the relationship of persons to material resources in a society, by their very nature are not evenly distributed among the members of different classes.

One major way that social structure affects symbolic interaction and thereby definition of situations is through the differential distribution of interests and experience. If one attributes any validity to Marx's observation that existence shapes consciousness, then one would have to accept the proposition that different classes and status groups in a society would have an initial predisposition to develop different consciousness and, because of social segmentation and communication and interaction patterns, to develop shared definitions of the situation based on their interests.

Secondly, those persons at the top of the class structure, with the greatest wealth and power, are able to use these resources to influence, consistent with their definition of the situation, the content of criminal law and the form in which it is used to control theatening behavior.

In order to do so in a manifestly democratic society, they must seek the support or acquiescence of persons in less powerful positions. This activity may take the form of convincing them or revealing to them that some condition or situation threatens purported widespread values or interests. Thus one of the major ways in which criminal law is developed and changed is through the defining of situations such that widespread support is mobilized for change. The ability to have one's definition of the situation promulgated and accepted depends in large part on one's resources and status in the community. And the ability to define situations is the ability to determine outcomes. As Hall (1972:51) observes, based on Goffman, a basic method of controlling the behavior of others for one's own interests is by influencing their definition of the situation.

The media are prime definers of situations, providing selected factual material and appropriate symbols to evoke desired responses. Although exceptions do exist, the media are almost always a key part of the power structure of a community and usually define situations to serve dominant interests.

As mentioned above, Thomas pointed out that various specialists are recognized definers of situations. These include officials, educators, ministers, etc. Again, occupiers of these statuses are unlikely to attempt to

define situations in ways which radically vary with dominant interests. First, they are selected for their positions in part due to their demonstrated conventionality, and continuance in their positions depends on continued conformity. In sum, then, we expect that key definers of the situation will act in such a way that the definitions constructed will support or at least not seriously threaten class interests.

Now, I must hasten to say that it is not being contended, as some conflict theorists seem to, that all aspects of criminal law are the direct expression of class interests. First, many issues in criminal law and criminal justice just are not all that important to the general pattern of security of persons and property which is a prime interest of dominant groups in society. Many of the specific issues that excite criminal justice personnel and specialists, e.g., flat versus indeterminate sentences, are not of great interest to economic elites as long as it appears that whichever is being used <u>reasonably</u> assures the safety of persons and property. Second, since verifiable knowledge about what policies and practices best repress crime is scarce, elites are hard pressed to know which policies to support, thus there may be disagreement even among representatives of elite interests over the details of criminal law content and procedure. Ends, the repression of crime, may be shared but specific means may occasion

disagreement. As groups disagree over means they may employ their own symbolic manipulation and construct their own definitions of the situation which suggest lines of action. To propose, then, that criminal law largely serves the interests of elites is only telling half the story. If one wishes to investigate the details of criminal law and criminal procedure one must view as problematical the expression of these interests in criminal law.

Two other major aspects of social structure are of interest in this study: ethnic and sexual stratification. The most visible characteristic of the population of Hawaii is its ethnic diversity. Beginning with a large aboriginal population, Hawaii has received successive waves of immigrants of Anglo-American, Chinese, Japanese, and Filipino ancestry along with small numbers of persons of other ethnicity. The timing and conditions of migration, among other factors, resulted in differential ethnic placement in the stratification system in Hawaii and differential relationship to all aspects of the legal system. Although overt ethnic conflict has been less prevalent in Hawaii than in many other ethnically diverse societies, ethnic conflict has existed throughout Hawaii's history and has influenced Hawaii's criminal law.

The final major aspect of social structure of direct relevance to this study is sexual stratification. The patterns of relationships between men and women affect all

aspects of rape and rape law. In particular the subordinate status of women in Anglo-American society and in Asian societies, the first of which contributed some immigrants and the dominant culture, and the later of which contributed many immigrants, has influenced the basic conceptualization of the act of rape, and important elements of how rape law has been formulated and enforced. Not the least of these effects was the nearly complete absence for most of the recorded history of Hawaii of women in official roles in the legal system.

In sum, the position taken here is that any study that wishes to seriously investigate law and social change must be sensitive to the influences of social structure. Social structure influences the definitions of situations likely to be constructed by different segments of a society and it influences the probability that these definitions can be made to become the controlling definitions upon which legal change is based.

1.7 CULTURE

It was stated above that social structure is an important determinant of the general form and content of criminal law. Nevertheless, law cannot be analyzed in any satisfying detail, by exclusive reference to the structural characteristic of a society. It is useful to introduce the concept of culture. Although some sociologists regard the

concepts of social structure and culture as virtually identical, an analytical distinction is useful. Kroeber and Parsons (1958:582) have offered one such distinction focusing on culture as ideational and social structure ("social system") as relational. Culture they regard as "transmitted and created content and patterns of values, ideas, and other symbolic-meaningful systems as factors in the shaping of human behavior and the artifacts produced through behavior." They define "society" or "social structure" as "the relational system of interaction among individuals and collectivities." Extending Kroeber and Parsons' emphasis on culture as ideal, symbolic, and meaningful, Jaeger and Selznick (1964) define culture as expressive symbolism and emphasize the importance of symbols

> to provide focus, direction, and shape to what otherwise might disintegrate into chaotic feeling or absence of feeling. Mass political action gains coherence and discipline from symbolic leadership, ritual, and exhortation. Without symbolism, it is often difficult to transform an important occasion ... into a meaningful experience. (Jaeger and Selznick, 1964:662-63).

They suggest the analysis of elements of culture (language, norms, values, knowledge, religion, art, law, etc.) in terms of their contribution to the symbolic order.

Peterson (1979) in turn extends the notion of culture as symbol and in a wide ranging analysis of the literature contends that there has been a shift in the analysis of culture literature to down play the focus on norms arising

from values and to focus on expressive symbols. Various strains of writing and research emphasize symbolic products as indicators of underlying social structures, and expressive symbols as the code for creating and recreating society, expressive symbols as a product of "specialized milieux such as the arts, science, religion, and the law" (Peterson, 1979:139).

In the discussion of symbolic interaction it was noted that culture as a concept is not one that has concerned symbolic interactionists. Culture has largely been seen as secondary, the consequence rather than the shaper of day to day interaction. Nevertheless, as those interested in cultural analysis become more and more interested in symbols one can see lines of convergence as culture is brought back in.

The position taken in this study is that culture, which consists importantly of established symbols, is a key ingredient of interaction and influences its outcomes. Following the symbolic interactionists, it is true that humans are not oversocialized automatons mechanistically acting out roles by following norms derived from general social values. And it is true that interaction is emergent and situational. But humans are not <u>tabula rasa</u> who must reinvent all of the social world each time interaction arises. They carry with them complex, problematic, and often vague sets of symbols and meanings, supplied by the

society, and mediated by their experience, which provide the raw material for the construction of meaning. To the extent that the situaton is defined as similar to situations confronting the person in the past, these existing elements may strongly suggest themselves and may only be overturned with effort. In arguing for a concept of culture that is defined in terms of shared symbolic experience, Jaeger and Selznick (1964:669) contend:

> To participate in culture is to be implicated in a system of symbolic meanings. The content of that system, and its quality, obviously make a difference for the way men think and behave. The symbolic meanings of culture become part of mind and self and this is the chief source of culture-boundedness.

One of the most important formative aspects of culture as it affects interaction is language. Words have a powerful ability to evoke complex sets of meanings and images. Writing and speech are perhaps the most economical and efficient methods of making gestures that will evoke a highly predictable response in their audiences. The ability to control discourse and to disseminate certan linguistic cues is directly related to the ability to control emerging definitions of situations.

Summarizing, this study is interested not only in the symbols and meanings that emerge from interaction as definitions of the situation are constructed. It is also interested in pre-existing symbols and meanings existing in the culture of segments of the society and which constitute

raw material for symbolic interaction and the definition of situations.

Before leaving the concept of culture several additional points should be made. In using the concept of culture we must be aware that we are discussing with reference to Hawaii an extremely heterogenous population with portions of the population being Polynesian, Anglo-America, or Asian. It will not do to discuss "the culture" of Hawaii. Rather it must be kept in mind that culture has meaning only in reference to specific groups. The opportunities for groups to express their cultures, in ways that must be taken into account by other groups depends on their location in the social structure. Certainly the dominant group in Hawaii from the mid-1840's until at least the late 1950's with respect to shaping the political and legal culture has been the Anglo-American group. But even within groups there may not be consensus on important aspects of culture. As will be shown in succeeding pages there were from time to time important conflicts within groups over the evaluations of behavior.

One important division that may occur among members of a group over evaluations of conduct is between what Taylor et al. (1973) call "lay ideologies" and those ideas that purport to be scientific or which represent the most "advanced" social thinking of the period. The former, of course, are the cultural constructs of the "public at large"

while the latter represent the thinking of specialized, usually elite, groups. There may, of course, be more than one lay ideology and more than one school of advanced social thinking contending for hegemony at a given time.

Additionally, under the general rubric of culture, attention must be given to culture of law and culture about law. The former are those cultural elements that are internal to the legal system and which are used by or apply to official legal actors. The culture about law consists of the orientations and practices of the rest of the society, persons who are not official legal actors, as they pertain to the legal system. Here would enter such things as attributions of legitimacy, knowledge and beliefs about the nature of the efficacy and the fairness of legal procedures, agreement with the substantive content of law, etc. Although this is a useful analytical distinction it may blur in such activities as voting and jury duty. In voting, the culture about law presumably becomes directly or indirectly converted to the culture of law. In jury duty this is also somewhat the case, however, at the same time jurors receive a powerful dose of socialization into the culture of law. The culture of law and the culture about law are not identical and there is often tension between the two such that the analytical distinction is useful.

1.8 THE RELATIONSHIP BETWEEN THE INTERNAL AND EXTERNAL COMMUNITIES

Hawaii is the most geographically isolated major group of islands in the world. Despite increasing ease of communication and transportation, it has always been and continues to be somewhat cut off from the rest of the world. Hawaii is an island community with its own set of ongoing public and private institutions and its own dynamic. It has been an arena in which individuals and ethnic groups have vigorously competed for social, political, and economic advantage. Because of the geography and the composition of the population some aspects of this process have been unlike any other place in the world.

Nevertheless, Hawaii has been strongly influenced by external forces. Ever since Western contact the activities, expectations, and interests of external actors have had a strong influence on life in Hawaii, be it the American Board of Commissioners of Foreign Missions in the 1820's, the imperialistic interests of Britain, France, and the United States in the 1840's, the national security interests of the United States in the 1930's and 40's, the world price of sugar since 1850, or the disposable income in potential tourists in the U.S. and Japan in the 1970's and 80's.

Throughout the post-contact history of Hawaii segments of the community have had at various times much to lose or much to gain dependent on the activities of external actors. These actors have had actual or potential military power

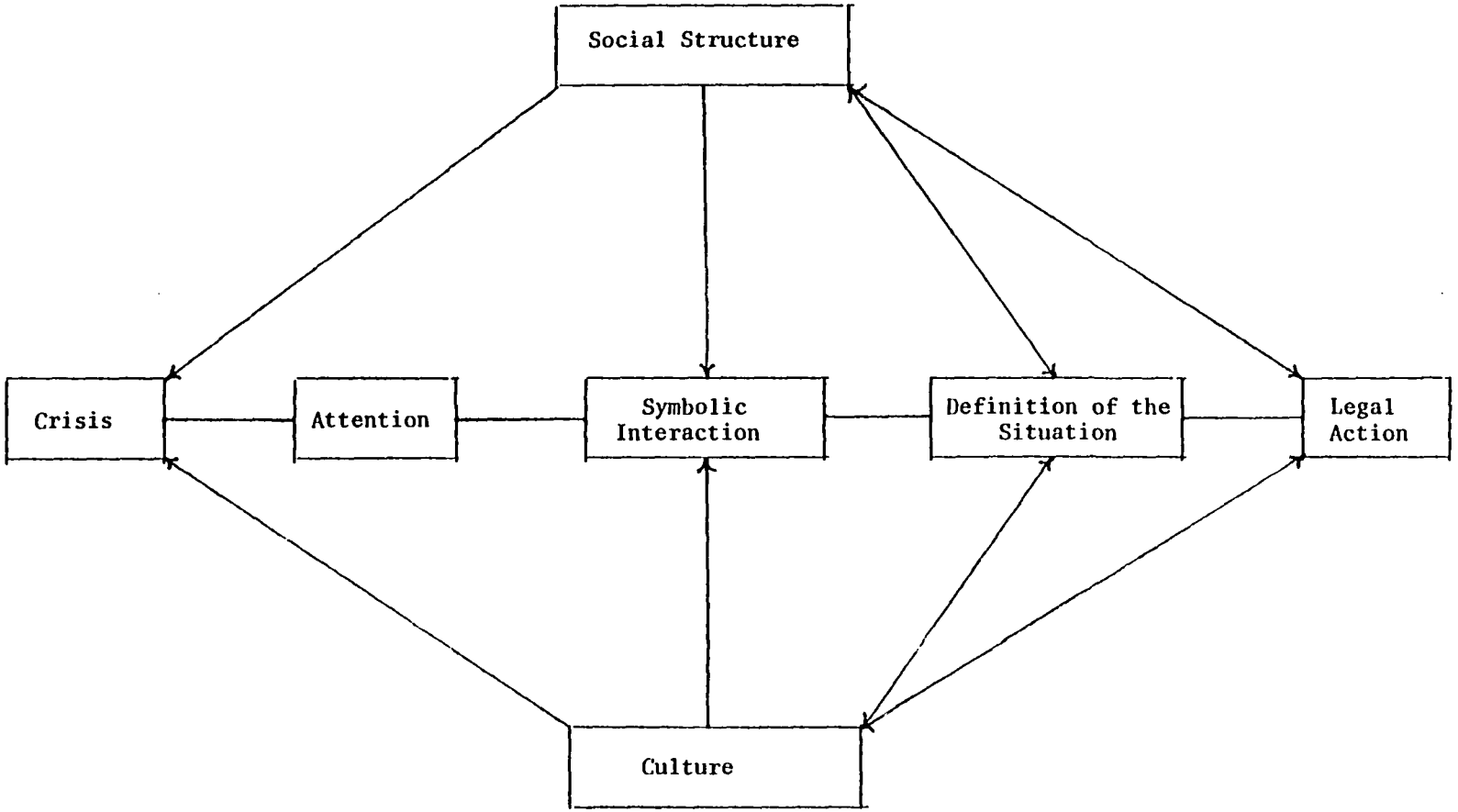
over the Islands, legal power at times, political power at times, and almost continuous strong economic influence. As one important method of manipulating this power, or directing it to serve certain interests in the community, great pains have been taken to manage impressions and to control the images of Hawaii received and held by external actors. Segments of the community in Hawaii have from time to time, either at their own initiative or in response to particular events, embarked on long campaigns of communication with external audiences in order to construct for them a definition of the situation in Hawaii that would form the basis of action beneficial or not detrimental to local elites. Law making and law enforcement activities have been one important type of symbolic gesture made to external audiences. If one wishes to understand the history of rape law in Hawaii one must give some attention to its place in the conversations of interests and gestures that occur between segments of local community and external audiences.

1.9 SUMMARY: AN ANALYTICAL FRAMEWORK

Thus far the major concepts for the forthcoming analysis have been discursively presented. It is proposed that law is action and must therefore be preceded by a definition of the situation. The definition of the situation is constructed through symbolic interaction which is the

response to "crisis," the disruption of smooth patterns of behavior. The definitions of the situation are influenced by both social structure and culture (which influence each other). Both the definition of the situation developed and the legal action taken may either change or reinforce the structural and cultural characteristics of the society. The model is portrayed in the accompanying figure.

Model for the Analysis of "Sex Crime Waves"



Chapter II

ANCIENT HAWAIIAN SOCIETY AND THE CONSEQUENCES OF FOREIGN CONTACT

As a first step in the examination of social and legal change in Hawaii it will be useful to describe the major characteristics of ancient Hawiian society before contact, particularly focusing on those aspects relating to law and social control, the status of males and females, and norms of sexual regulation. This chapter will also examine some of the major consequences of foreign contact with the Islands beginning with the arrival of Captain James Cook in 1778, and ending with the arrival in the Islands of American Protestant missionaries in 1820.

2.1 ANCIENT HAWAIIAN SOCIETY

2.1.1 Basic Characteristics

Current archeological evidence indicates that the Hawaiian Islands were initially populated by migrants from other, distant Polynesian islands, possibly initially the Marquesas,[16] and later Tahiti, as early as 400-600 AD (Hommon, 1976:179). There was some continued contact with

[16] Emory (1963) proposes the Marquesas as the initial place or origin with later larger scale immigration from Tahiti. The Marquesan link is not universally accepted (Goldman, 1970:210) but the strong influence of Tahitian culture on Hawaii is indisputable (Goldman, 1970:202).

the places of origin until about 1400 when the Hawaian Islands were apparently completely cut off and followed an isolated course of internal development.

During the more than 1,000 years prior to Western contact social organization in Hawaii changed from an aggregation of small, kin-based chiefdoms, absent consolidated political authority and marked stratification, to an aggregation of what Hommon has called primitive states characterized by:

> (1) a government with a monopoly of power
> (2) at least two socio-economic classes
> (3) boundaries maintained and modified by governmental force and authority (Hommon, 1976:4)

Goldman (1970) observes that Hawaii represented the highest development of Polynesian social evolution.

The most important organizational aspect of pre-contact Hawaiian society was its stratification into two distinct classes, the ali'i, (chiefs) and the maka'ainana (commoners).[17] The ali'i were themselves graded into eleven major ranks, the basis of rank being genealogical relationship to the paramount chief (cf. Goldman, 1970:228-29). The maka'ainana were undifferentiated by rank (Hommon, 1976:105). The ali'i provided the administrative hierarchy for socio-political regulation and for economic

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[17] Sahlins (1958) distinguishes three and perhaps four status levels--the ali'i (high chiefs), the konohiki (local stewards who were chiefs of intermediate rank), the maka'ainana (commoners), and the kauwa (a small outcaste class of slaves). Goldman (1970) also regards the lower ali'i as a "functional middle class." Malo (1971:52-62) is a primary source on the ali'i and maka'ainana. There also existed a class of priests, Kahuna.

production. They distibuted land and organized its productive use, waged war, organized public works projects, e.g., building of waterways, agricultural field systems, and temples, and collected and distributed the economic surplus produced by the maka'ainana.

Ali'i status, and rank among the ali'i, were determined by mana, a sanctity or supernatural power received from the gods through one's ancestors, which was quantitatively correlated with rank. The paramount chief had the most mana and held complete power over the lives and activities of all commoners and inferior chiefs.

2.1.2 The Status of Women

The status of women in pre-contact Hawaii was a complex matter. In some respects they approached equality with males and in other respects they were clearly subordinate.

Given the importance of genealogy in Hawaiian culture, perhaps the most significant fact is that descent was bilateral: rank was inherited from both the father's and mother's ancestors (Handy, 1931:7). Although males were preferred for political leadership, primogeniture rather than sex was determinative of rank. There are many instances in Hawaiian history where great political power was held by female chiefs (Goldman, 1970).

While ali'i women enjoyed sanctity, power, and the ability to operate in the public sphere, women were

nevertheless less favored than men. Women were believed to have descended from their own set of female gods but were regarded as profane, while males were sacred. Due to their lack of sacredness they were bound by a set of kapus (taboos) which restricted their freedom of action in order to prevent defilement of men. The most well known of these kapus was the prohibition on women preparing food for males or eating with them.

Goldman (1970) believes that the status of women in ancient Hawaiian society was dynamic due to the contradiction between ali'i women's mana, from primogeniture and bilateral descent, and the restrictiveness of the kapus. In the late pre-contact period, bilaterialism, and ritual and social equality were forces in raising the status of women. By the early nineteenth century, Goldman (1970:215) contends, there was "an irresistible movement toward sexual equality."

Most important to note for purposes of this study is the fact that the social status of a woman was not dependent on or affected by the status of the man she married. For the maka'ainana there were no ranks within class; for the ali'i a woman's status was independently derived from her genealogy and not the status of her husband. The trend in Hawaiian society prior to Western contact was toward greater sexual equality.

2.1.3 Ancient Law

All aspects of law and social control operated within the context of the Hawaiian status system. Higher chiefs directed the activities of lower chiefs, and all chiefs held power over the commoners. Failure to follow rules or directives could result in confiscation of all of the offender's property, dispossession of land, or even death.

Ali'i control over land tenure was a major means of social control. Authority over land resided in the paramount chief and use rights devolved down the chiefly hierarchy to the commoners. Failure to provide the goods and services expected by a higher chief could result in dispossession of control or use of the land or other sanctions (Malo, 1971:53, 61).

Another major institution of direct social control was the system of kapus. Handy (1931:3) says "The principle of kapu was the keystone of the arch that supported the traditonal culture of old Hawaii." The principle of kapu defined that which was restricted or prohibited, either because it was sacred or defiling. The kapus were an elaborate set of rules that defined patterns of deference and obeisance among status unequals, the sexes, and also, when promulgated by the high chiefs, were practical rules for the conservation and allocation of such fundamental natural resources as particular fish species and fishing grounds. Since kapus were rules issued and maintained by

legitimate political authority and since their enforcement was carried out by persons in specialized roles (often executioners), violation of kapus could well be conceptualized as public wrongs or crimes.

If kapu violations would currently be conceptualized as crimes, the many personal wrongs that might occur, usually among persons of equal or nearly equal status, could be viewed as torts, that is private wrongs wherein the burden of proceeding and gaining satisfactory redress falls to the victim or his or her kin group.

Immediate retaliation, often death, was the prevalent response for wrongs in which the offender was caught in the act. If he could safely make his way to a "place of refuge" a process of negotiation might take place between the persons wronged and the family of the offender such that compensation may be paid and the breach in relations healed.

There is disagreement among various commentators over the extent to which chiefs would involve themselves in disputes among the commoners. Malo (1971:58) comments on the absence of judges or courts of justice but points out that a suitable gift to a chief might induce him to use his power and authority on one's behalf. Sahlins (1958:19) points out that Ellis contended that the hierarchy of chiefs formed a structure of courts of appeal to adjudicate disputes. Frear (1894) contends that chiefly authority was restricted to occasions when the offender was of superior rank to the victim or if the wrongdoer belonged to another chief.

Frear, writing from the perspective of a Western lawyer of the late nineteenth century, characterized chiefly intervention as extremely arbitrary and often severe by contemporary standards:

> Much depended not only upon the character and enormity of the offense but often also upon the personal disposition of the chief or the favor or disfavor in which he held the respective parties, or upon the intervention of friends who had influence with him. There was no distinction between public and private wrongs. The relief granted might be legal or equitable, restorative, compensatory or punitive. In case of theft, restoration of the stolen property and payment of damages in the nature of a fine was often adjudged, but if the theft was from a high chief the culprit might be bound hand and foot and set adrift far out at sea in an old canoe. The remedy for disturbance of a water right was restoration of that right. Adultery among the higher ranks was sometimes punished by decapitation. Banishment to another island was not uncommonly imposed for various offenses. The penalty for breach of etiquette by a tenant toward his lord was often extremely severe, the eyes might be scooped out or the limbs broken, and after several days of torture the victim might be finally put to death by burning, strangling, clubbing, or in some other way. (Frear, 1894:3-4)

2.1.4 Norms of Sexual Regulation

James S. Coleman (1966) has proposed that explanations for strictness of premarital sex codes and rigidity of standards of sexual morality should be sought not in other normative phenomena such as socialization, but ultimately in the structure of social interactions. He suggests that "rigidity of premarital sexual codes varies inversely with female dominance in the determination of family

status."(Coleman, 1966:217) He reasons that in societies in which the female is dependent on the male for status, achieved through marriage to him, she will be motivated to carefully guard and conserve her sexual activity and access, her only "good-in-exchange," by which she can achieve status. Having received this valuable commodity, exclusive sexual access, the male will be inclined to view the woman as his sexual property and be motivated to protect such property from those who would deprive him of it. Conversely, when a female's status is independently achieved she need not use sexual access as a scarce and valued commodity by which social status is achieved and may enjoy sexual activity for its own sake. Societies or groups in which a woman's status is independently determined will exhibit looser norms of sexual regulation.

Coleman's proposition is appealing for its logic and its consistency with the data on norms of sexual regulation in pre-contact Hawaii. As was discussed above, Hawaiian women did not gain rank or status through marriage. The maka'ainana were unranked, and ali'i women obtained their status through their geneologies, not their mates. Thus, according to Coleman we would expect to find a sexual code that was not strict.

In fact, available data are consistent with Coleman's proposition. The sexual code of the Hawaiians, typical of Polynesia, permitted a variety of opportunities for sexual

contact outside of a monogamous marriage relationship. Handy (1931) states that "fluidity" was the principal rule in both pre-marital and post-marital relationships between men and women and that personal affection was the primary determinant of mating. The virginity of daughters of ali'i class was closely guarded until marriage and the passing of her genealogy to her first born. But after the first born even ali'i women could take other lovers (Pukui, et al., 1972:89). For young, unmarried persons "freedom of choice and spontaneous, casual, or passionate attachment were the sanctioned prelude to unions which became more permanent." (Handy and Pukui, 1972:161). Burrows (1947:30-31) states that a number of love affairs among young people was "expected" behavior and that chastity was not valued. Pukui, et al., (1972:95) say that prior to the missionary imposition of concepts of sin and shame associated with sex, "Hawaii's traditional feeling was that sex was good, natural, and a source of profound pleasure."

Although marriage for the Hawaiians was casual and easily dissolved (Campbell, 1967:136; Alexander, 1899:33),[18] it did place constraints on sexual activity. Marriage partners were expected to obtain the permission of their spouses

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[18] Both Campbell (1967:136) and Alexander (1899:33) say marriage could be terminated for cause, but Campbell says that the termination could be initiated by either party while Alexander indicates that the will of the male was determinative. Malo (1971:74-75) points out that changing partners frequently was considered wrong. Pukui et al. (1972:93) say that commoners criticized women who frequently changed partners.

before engaging in sex outside of marriage. Sexual jealousy on the part of males was not uncommon (Campbell, 1967:136).[19] Wife stealing was a serious crime which entitled the victim (the husband) to seize all the property of the offender (Kamakau, 1961:191). However, even for married persons there were mechanisms for access to extramarital sexual partners. The games of ume for the maka'ainana and kilu for the ali'i provided for the institutionalized exchange of partners under non-threatening circumstances.[20] In addition the institution of punalua, the taking of secondary consorts, was practiced by both men and women. Dibble states:

> For husbands to interchange wives, and for wives to interchange husbands was a common act of friendship, and persons who would not do this were not considered on good terms of sociability. For a man or woman to refuse a solicitation for illicit intercourse was considered an act of meanness. (Dibble 1909:107)

Pukui et al. (1972:108) say that rape existed and was "outlaw" behavior, but was not an offense against the gods.[21] As such, it likely fell within the category of

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[19] Kamehameha I became so exasperated with his favorite wife's sexual escapades that he promulgated a law that any man who had intercourse with his wife would be executed. He subsequently executed his favorite nephew for the offense (Kamakau, 1961:194).

[20] See Malo (1971:214-218) for a description of these games.

[21] The existence and wrongfulness of rape can also be inferred from Brown's (1952) findings on the universality or proscriptions against rape and on Malo's (1971:193) statement that one of the duties of the King was to prevent the male members of his court from ravishing the women of the countryside as the court traveled throughout

personal wrongs such as theft and murder; the offender was expected to compensate the victim. But the harm would be conceptualized quite differently than in Western culture. In a culture in which virginity and chastity were not valued, the rape of a woman did not result in a radical transformation of her status to one of spoilage, ruination, and shame, nor was it a psychological trauma greater than that accompanying other assaults. Rather it was a bodily injury to be dealt with as other assaults, by instant retaliation or by compensation to the victim. As one early source says referring to the Hawaiian evaluation of rape:

> There is no disgrace attaching itself to the character of the injured female, either in her own eyes, or that of the native community generally. She is just as much respected as before, and her chances in future life are not at all diminished.[22]

In sum, available information suggests that in indigenous Hawaiian society there existed a system of social control in which personal wrongs were redressed by retaliation or negotiated compensation. There also existed cultural orientations which defined the victim of rape as having undergone a personal harm of an assaultive nature. The two orientations intersect in the belief that a raped woman

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the Kingdom. Further evidence (to be discussed below) exists in the correspondence generated by the Wiley rape case in 1844 in which indigenous orientations were discussed.

[22] This statement appeared as part of an anonymous letter to the editor of the Polynesian newspaper published on November 30, 1844. Editor J.J. Jarves refers to the letter writer as a "source which we highly esteem."

should receive compensation from the offender for the harm he caused to her. But the harm done carried little or none of the symbolic meaning attached to rape in Western societies.

2.2 THE RESULTS OF WESTERN CONTACT (1778-1820)

2.2.1 Political Consolidation

Hommon (1976) has proposed that prior to first Western contact , in 1778, Hawaiian political organization had evolved from a number of chiefdoms to several island-wide "primitive states." With firearms, ships, and assistance provided by foreign visitors, who were arriving in Hawaii in increasing numbers after 1778, the Hawaiian chief, Kamehameha, succeeded in conquering and consolidating under his own authority all the previously autonomous islands and districts.

As part of the process of full state creation Kamehameha reduced the power of the local chiefs and priest class and appointed his own agents as governors of the several districts. He regulated all trade with foreigners. He abolished those kapus which interfered with his own growing authority and brought more closely under his control those behaviors which previously would have been left to private settlement, but which were potentially disruptive to the peace of the community. He promulgated laws against murder, robbery, theft, extortion, and confiscation (Frear, 1906:19,

Kamakau, 1961:191-192). His most famous law, mamalahoa, provided that "the aged, men and women, and little children might lie by the roadside and not be molested" (Frear, 1906:19). It is not known if these laws, in their interpretation, provided the King's guarantee of safety from rape. Nevertheless, they are evidence of the beginning of the creation of a body of criminal law; behaviors that were previously wrongs against private persons and not part of the political-governmental realm, came to be regarded as wrongs aganst the King.

2.2.2 Social Disorganization

If consolidation of the Islands, rationalization of authority, and advancement of the state are seen by many to be positive aspects of Western contact, there were many other consequences of a clearly negative nature. In addition to providing the materials to enable Kamehameha to begin the creation of a modern state, foreigners introduced other elements of biclogical, material, and non-material nature that had profcund consequences for the Hawaiian pecple--and for their norms of sexual regulation.

Reviewers of accounts in ships' logs and journals produced by visitors to Hawaii during the early period have concluded that moral and social conditions worsened drastically as the commercial importance of Hawaii increased, accompanied by rising numbers of visiting seamen

and foreign residents (Handy, 1931; Restarick, 1924:74-87). This conclusion is supported by Kamakau (1961).

Several factors contributed to, or are indices of, the general social and sexual disorganization that occurred after contact: (1) prostitution of native women to seamen in return for iron and Western trinkets, (2) the weakening and eventual abolition of the kapu system, (3) the introduction of alcohol and techniques of distillaton (Dibble, 1909:106), (4) the tremendously disruptive effects of a 50% decrease in the native population between Cook's discovery of the Islands and 1820, due to the effects of diseases to which Hawaiians had no immunity (Lind, 1938:90, 97), and (5) the greater killing effectiveness of foreign weaponry over native fighting methods.

Thus the fragile ecological relationship of the Hawaiians to their physical and social environment was greatly disrupted by the presence of foreigners. The major cosmological system and system of social control were overthrown. The random effects of disease devastated families. It is clear that by the time of the arrival of the missionaries from America in 1820 Hawaiian society was considerably disorganized.

Chapter III

LEGAL TRANSFORMATION AND RAPE LAWS:1820-1850

3.1 THE AMERICAN MISSIONARIES

3.1.1 General Background

As we have seen, Kamehameha, by the time of his death in 1819, had significantly changed the political organization of the Hawaiian Islands and had begun to construct the rudiments of a criminal law system. However, the year 1820 may reasonably be designated the time of the beginning of the interposition of significant elements of foreign political and legal culture into Hawaii. The death of Kamehameha in 1819 and the abolition of the kapus left a void. The growth of commerce, accompanied by increasing numbers of foreign visitors, rendered remaining traditional legal practices inadequate in setting the conditions for commerce and in regulating the behaviors of natives and foreigners vis a vis each other. The influence of the non-missionary traders was indirect, creating conditions , stresses, and strains necessitating changes. Until the mid-1840's direct influence on the form and content of the new laws came largely from the American protestant missionaries, who landed in Hawaii in 1820, spiritual descendents of the New England Puritans.

After some initial opposition to their landing,[23] the missionaries became well-established, and their influence grew rapidly. According to Jarves (1843:235,236), the chiefs increasingly grew to trust them because of the value of the skills they taught the chiefs and because only they, among the population of foreigners, could be trusted to give disinterested advice.[24] The missionary historian Dibble (1909:147) says that "Missionaries ... having gained confidence and esteem, were in a modified sense adopted into the family of chiefs...." The conversion in 1824 of the Queen Regent Kaahumanu, who threw the full weight of her influence behind the missionary program of moral reform, was also of major importance. By 1826, Jarves (1843:266) says, "the powerful chiefs ... were under the religious influence of the missionaries ...."

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[23] The landing of the missionaries met with immediate opposition from an apparently unified, already present foreign population which, correctly as it turned out, feared dilution of its own influence with the chiefs (Jarves, 1843:221; Dibble, 1909:138).

[24] Missionary C.S. Stewart (1970:320) reveals missionary consciousness of the benefits of this chiefly trust in a statement made in his journal in 1824 after missionaries had given advice to the chiefs in putting down a rebellion on Maui.

> The whole result of this commotion promises to be propitious instead of adverse to the cause of Christianity. The chiefs have felt their dependence on the Mission for right counsel in time of anxiety and emergency; here experienced the happy consequences of our instructions in meliorating the horrors of warfare; and have, apparently fixed their confidence and affection upon us with fresh warmth and firmness.

The missionaries viewed all that they beheld in Hawaii as a crisis. They saw the Hawaiians as a biblically fallen people with a history of despotic exploitative rule by the petty chiefs, recently compounded by depredations of greedy foreigners with their appetites for sex and their introduction of alcohol and disease (cf. Bingham, 1848; Dibble, 1909). The Puritan sensibilities of the missionaries were offended by nearly all aspects of native life.

Of particular concern to the missionaries were the sexual activities of the Hawaiians with each other and with the foreign seamen. Endless pages of missionary journals and reminiscences lament the "licentiousness" of the natives (cf. Bingham, 1848; Dibble, 1909). A rather straightforward logic led to the missionaries' preoccupation with the sex lives of the Hawaiians. For the Puritans of the Massachusetts Bay Colony, and their spiritual descendents in Hawaii, the nuclear family, founded on a monogamous marriage relationship, was the fundamental unit of the economic and social order.[25] All other important institutions, political, religious, economic, etc., were based upon it. Thus, in order to build a moral Christian community, the missionary task in Hawaii, one must begin with the family. All threats to the family must be suppressed, including "licentiousness," the scourge of the natives, and, in the

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[25] See Haskins (1960) for a description of the Puritan orientation toward the family.

missionary view, the antithesis of monogamy.[26] Law was an appropriate instrument for this task.

Thus, Puritanism was the standard that defined the culture and behavior of the Hawaiians. The missionaries were not cultural relativists; the extent of deviation from their norms of behavior was the extent of heathen degradation. Public and private behavior was to be judged by absolute standards revealed in the Bible which were binding on all men, Christian or heathen (Haskins, 1960:33).[27] The missionary saw his task as being to educate the heathen to the content of the Puritan moral system and to exhort or coerce his conformity to its behavioral precepts.

3.1.2 The Missionary Program--Education and Law

One of the reasons the missionaries were so successful in Hawaii is the essential compatibility and consistency of many aspects of missionary and Hawaiian expectations about politics and religion and power and morals. It is likely that the missionaries and the Hawaiians were quite comfortable with each other's conception of the proper

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[26] "Licentiousness" was seen as an additional threat to the community because it spread venereal diseases which were a primary cause of the depopulation of the Hawaiians.

[27] The missionaries were consistent with their spritual ancestors in this respect. Haskins (1960:39-40) reports a 1646 Massachusetts statute making blasphemy a capital crime for both Christians and Indians in the jurisdiction. The extension of the law to the Indians was justified by reference to natural law.

relationship of politics and religion. In Hawaiian culture they were highly integrated in the kapu system. A close relationship also existed for the Puritans. According to Haskins' description of Massachusetts Puritanism:

> Because Puritanism was a way of life it had social and political implications of great magnitude. It assumed that its disciples would regulate not only their own conduct but also that of others, so that the world could be refashioned into the society ordained by God in the Bible. Pursuant to this assumption, the Puritans placed great reliance upon religious dogmas as the basis for reforming social and governmental institutions.
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> Thus a zeal to reform both the individual and society is one of the very notable features of Puritanism, which was active rather than contemplative. ... they accepted the principles of contemporary political philosophy which prescribed that religion and politics were one, and that, as a matter of religious duty, men must submit to their governing superiors, who had full powers to lead, to discipline and to coerce. (Haskins, 1960:16-17)

Education was the most important tool of the missionaries and was employed in a most effective manner. One of the first tasks undertaken was the creation of a written Hawaiian language which was then employed in the printing of instructional materials, often of a religious nature. First educational efforts were concentrated on the chiefs, who were eager and able students.[28] Convinced of the value of

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[28] The instruction of the chiefs began almost immediately on the arrival of the missionaries. Always looking far ahead, the missionaries had by the early 1840's perfected a vehicle for the appropriate education and socialization of future chiefs. As one missionary described their plan:

> More fully to secure to the rising generation the advantages of rulers adapted to education to their

education, the chiefs put the force of their authority behind the efforts of the missionaries to educate the rest of the population (Kamakau, 1961:248-249). In 1825 Kaahumanu, after undergoing conversion, announced a law requiring school attendance (Stewart, 1970:318). Kuykendall (1938:109) states that by 1831, "The bulk of the population, certainly more than half, were taught to read, many of them learned to write, and a few acquired the rudiments of arithmetic." The emphasis on education continued, with a strong requirement contained in a law enacted in 1841 that no illiterate man born since the beginning of the reign of Liholiho (1819) could hold office nor could any illiterate person, born in the same time period, marry (Hawaii, 1842:Chap. VII, Sec. 16).

Of particular influence in implementing the missionary program of social change was the Mission Seminary established near Lahaina, Maui in 1831. A survey conducted in 1842 of the 158 living graduates found that 113 were

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> more enlightened desires, the youthful chiefs, embracing their heir-presumptive to the crown, the intended governors of the several islands, and others of both sexes, destined for important offices of state to the number of twelve, were four years since placed in the family of an American missionary, who receives his support from their parents. A large and commodius building was erected for their accomodation. In it, apart from all evil influences to be derived from their own countrymen, they are reared in all the refinements of a civilized and Christian family. The system of education embraces all the branches necessary for the important stations they are expected to fill. (Dibble, 1909:373)

teaching full or part-time and 35 had become officers of the government (Dibble, 1909:279). The graduates of the Lahaina Missionary Seminary clearly became an elite group in Hawaiian society (Kamakau, 1961:304) providing a powerful forum for missionary views.[29]

The missionary emphasis on education did not preclude the use of more direct methods of social control. According to the missionary view, no society could be civilized without a set of laws grounded in divine law. The missionaries exerted their considerable power to secure such.

An analysis of the totality of the missionaries' contribution to the development of substantive law in Hawaii is beyond the scope of this paper; the reader is referred to Bradley (1942) for an excellent summary and discussion on the topic.[30] Many enactments reflect the advice of missionaries on secular matters as well as the more obvious enactments concerning morality. As early as 1823 the local chiefs of Lahaina, Honolulu, Kauai, and Niihau enjoined their subjects from performing unnecessary work on the Sabbath (Bradley, 1942:144). In succeeding years there

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[29] Kuykendall (1938:157) mentions Daniel Ii, Timothy Haalilo, David Malo, and Boaz Mahune as graduates of the seminary who became advisors to the King. Of particular influence were Ii and Malo who participated in the drafting of the Laws of 1842 (Bradley, 1942, 329).

[30] Although the American missionaries were clearly the most influential advisors to the King and chiefs on legal as well as other matters advice was received from other sources. Kuykendall (1938:158-9) points out that many of the ships' captains who visited the island offered some advice about law and government.

followed a spate of laws prohibiting intoxication, gambling, adultery, and prostitution.

During the 1830's the Hawaiian government was increasingly buffeted by foreigners and the demands and problems they brought with them to the Islands. (cf. Kuykendall, 1938:133-152). Indigenous institutions were clearly inadequate tc deal with changing conditions. In 1838 missionary William Richards left the misson to enter the service of the King as instructor on political economy and government. He taught the chiefs such principles as equality before the law (Kamakau, 1961:343) and lectured the chiefs in Hawaiian on principles of government and economics using his translation of Francis Wayland's (1837) Political Economy. These efforts, and Richards' assistance in drafting, (Kuykendall, 1938:160) had nearly immediate results. The King granted a "Declaration of Rights" (Hawaii, 1839) in 1839 and a Constitution (Hawaii, 1840) in 1840, the former defining the rights of the chiefs and people and the latter formally establishing the framework of government, including a legislative bcdy of two houses, trial courts, and an appellate, Supreme Court.

There was by no means consensus among either the population of foreigners or the native Hawaiians regarding the beneficence of the missionary influenced laws. Some of the resident and visiting foreigners, and several of the Hawaiian chiefs viewed the laws as contrary to their

interests and actively opposed them. The anti-prostitution laws in the seaports of Honolulu or Lahaina resulted in great opposition in the form of a series of riots by sailors. Such a riot in 1826 nearly resulted in the death of missionary Hiram Bingham at the hands of angry sailors (Bradley, 1942:179). Kuykendall describes the chiefs in the late 1820's and early 1830's as divided into two factions.

> The larger and more powerful group favored and at times enforced a strict puritanical regime; the other favored a liberal regime which in this unstable community had an incorrigible tendency to run into license and disorder. In the midst of the contending groups the King was an important but uncertain factor. (Kuykendall, 1938:123)

Not only was there conflict among the chiefs over the new laws but also between the traders and the missionaries, the former resentful of the puritanical restrictions on their activities and economic livelihoods.

3.2 THE RAPE LAWS OF 1835 AND 1841

Within a period of fifteen years, 1835-1850, the Kingdom of Hawaii had three distinct written statutes proscribing rape. Although all three statutes reflected the grand transformation of legal culture occurring between 1820 and 1850, the first two enactments, those of 1835 and 1841, reflected largely the concerns of the missionaries as an interest group, and their definition of the problem to be addressed by rape law. The law of 1850, it will be suggested, reflected the concerns of a different, or at

least additional, interest group, with a somewhat different definition of the situation. For purposes of this discussion the first two enactments will be discussed together and the discussion of the rape law of 1850 will follow.

3.2.1 The First Written Rape Law in Hawaii: 1835

The first written Hawaiian rape law was an outgrowth of the missionary program of sexual regulation. It was notice to males that they were prohibited from taking by force (rape) that which they were prohibited from purchasing (prostitution) or receiving for free (fornication, adultery). Like the earlier laws against these latter activities, the rape law arose out of missionary conceptions of harmfulness, sinfulness, and morality, and the concern for establishment of a stable family. In addition, the law was consistent with Hawaiian conceptions of wrongful behavior.

As we will see throughout this discussion of the history of rape law in Hawaii, one of the recurrent elements of the definition of the situation formulated as a basis for legal action is the identification of some segment of the population as constituting the primary threat. This first instance of rape legislation is no exception. It is clear that the perceived threat was from seamen and other

foreigners to native women.[31] As the missionary program to prevent consensual sex outside of marriage progressed, visiting foreigners became increasingly frustrated and prone to take native women by force. In discussing the efficacy of stronger rape penalties in 1844, Secretary of State G.P. Judd said: "For who among us is ignorant of the effects of libidinous conduct in these islands and of the share of the blame attributable to foreigners."[32]

It is doubtful that the rape laws of 1835 and 1841 were in response to a perceived threat to foreign women by native men. By the 1840's there were still only twenty to thirty foreign women in Honolulu,[33] and they were treated with respect. At the time Jarves (1843) was writing, there had been only one incident of apparent attack by a native on a foreign woman, Mrs. Lucy Thurston, a missionary wife, and this was more comical than serious.[34] Writing in 1847, Bingham (1848:125) remarks that, other than the approach to Mrs. Thurston, the women of the mission had received no other "insult" from the natives. According to one source

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[31] See for example Editorial, The Friend, July 31, 1843:36. Stewart (1970:162) also mentions the forcible abduction of native females by foreigners for immoral purposes.

[32] In F.O. and Ex. Judd to Brown, September 14, 1844. Archives of Hawaii

[33] See Wyllie (1844:91).

[34] See her book (Thurston, 1882:49) for an account of the incident. Apparently an intoxicated old Hawaiian priest made aggressive advances to her in her home shortly after her arrival with her husband in 1820.

"During at least a hundred years after the modern discovery of Hawaii, there is, so far as I am aware, no authentic case of a consummated assault by a Hawaiian man upon a white woman" (Judd, 1932:4). And Restarick (1924:85) concluded, based on extensive reading of early accounts, that "white women were sacred to Hawaiian men." The other logical possibility, that the statute was aimed at Hawaiian men raping Hawaiian women, while not ruled out by direct evidence, is not supported by complaints about such events in the writings of the time.

The first rape statute appeared in the little five-part Penal Code of 1835 (Hawaii, 1835) under the section prohibiting "illicit connections" of all types.

> But the man who with a strong arm, employs force upon a woman because his wishes are not assented to by the woman whom he forces, he shall pay fifty dollars to the woman on whom he uses violence; or in want thereof, other property to the value of fifty dollars; or he shall be imprisoned five months, or be condemned to five months labor. When the person guilty of rape pays fifty dollars, fifteen shall be for the judge, and thirty-five for the woman on whom he used violence. This is the punishment for rape. (Hawaii, 1835:Sec. 3)

By current standards the statute is crude; it makes no distinctions in situations, degrees of harm, age of victim, or attempted and completed acts. However, a variety of sanctions are offered to fit the resources of the offender. In order to assess the seriousness of rape relative to other acts defined as criminal, it is instructive to compare the sanction prescribed for rape with others in the same code. See Table 1.

TABLE 1

SCALE OF SANCTIONS IN THE PENAL CODE OF 1835

Act	Sanction
Malicious Murder	Death
Manslaughter	Four years prison
Robbery	Four years prison
Treason	Banishment for life
Theft	Restore twice value of property, prison, labor, or whipping
RAPE	$50 fine or five months prison or labor
Fraud	Restore twice value of property or four months prison or labor
Deception	Four months prison or labor
Adultery	$15 fine
Prostitution/ Fornication	$10 fine
Drunkenness	$6 fine or 24 lashes or one month prison or labor

Judging by the relative severity of the sanction, rape falls toward the low end of the scale of seriousness. It is closer to prostitution that it is to murder or robbery.

It is unknown if the rape statute included in the Penal Code of 1835 was a reaction to some particular act or event. It may be more than coincidence, though, that missionary Levi Chamberlain notes in an entry to his journal for February 25, 1834 that a native girl, one of the members of the congregation, was raped by a foreigner on the way home from a church meeting a few days before (Chamberlain, February 25, 1834).

The rape law, like the other laws in the code, is an attempt by the missionaries, through the King and chiefs, to begin establishing a body of legal norms protective of their values within the boundaries of what could be expected, given patterns of native behavior and the indigenous legal culture. Once they became familiar with Hawaiian legal practices, the missionaries must have been struck by the similarity between these practices and certain aspects of Hebraic law established in the Old Testament. The institutions of private retaliation, restitution, and place of refuge were dominant features of both systems.[35] If the Hawaiians were comfortable with a law of theft with a restitutive component, and this was to be made uniform in the written law, the Old Testament suggested that

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[35] See generally Goldin (1952).

restoration of double the property taken was a suitable standard (Exodus 22:3). And whipping was a Biblical option if the offender could not make restitution (Goldin, 1952:52).

If rape was to be discouraged in Hawaii, but if indigenous legal culture treated it as a relatively minor offense, the Old Testament again suggested a rule that, with modifications, would be appropriate: a fifty dollar fine.[36] However, some flexibility in the use of the Bible as a source of law is indicated by the fact that adultery, which was a capital crime under Biblical law, was not made so by the Hawaii Penal Code of 1835.

So, the restitutive component of indigenous law is clearly expressed in the requirements for compensation to the victim in cases of theft, adultery, rape, fraud, and injury to a person or property by a person while rioting or drunk.

One European visitor to Hawaii in 1836 did not think much of Hawaii's first written rape law. Career diplomat Theodore-Adolphe Barrot on his way to become French consul at the Philippines wrote of the penal code of 1835 in general and of the rape law in particular:

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[36] "If a man find a damsel that is a virgin, that is not betrothed, and he lay hold of her, and lie with her, and they be found; then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife, because he hath humbled her; he may not put her away all his days." (Deuteronomy 22:28-29)

> The Hawaiian code contains ten articles. It is a sort of commentary on the decalogue, or rather the law of nature, amplified and disfigured by civilization. Every crime is punished by imprisonment, for a shorter or longer time, or by involuntary labor, but there is no one who cannot be bought off by a sum of money. Premeditated murder is the only crime that does not admit of an equivalent in money, and is punished with death; yet the premeditation is so easily set aside that the law becomes a nullity. It demands two hundred dollars for the life of a man, and every man who can command fifty dollars may commit a rape. Hence it appears that morality is not fixed at a very high rate. In fine, the part of the code with which civilization had to do, is not the most moral. (Barrot, 1978: 103)

Barrot may have been the first to attribute great symbolic significance to Hawaiian rape law, but this study will show he was not the last.

Of the administration of the rape law of 1835 very little can be said. The law of 1835 remained in force until replaced in 1841 by a new law. During this period crime statistics were collected only for Honolulu and only for the years 1838 and 1839 (Schmitt, 1966:325). No estimate can be made of the number of crimes reported because only convictions for various crimes were reported. During 1838 there were 522 convictions of which 345 (66%) were for sexual transgressions, but none of which were for rape. In 1839, there were 866 convictions of which 452 (52%) were for sexual offenses, but no convictions for rape were reported. Of course, these statistics tell nothing about the incidence of sexual offenses in general or rape in particular during the period covered. They do tell us that the authorities

were active in repressing adultery, fornication, lewdness, and prostitution. The numbers reported are a better indicator of the activities of the police and judges than of the residents and visitors of Honolulu. Apparently officials did not succeed in getting any convictions for rape in Honolulu during this two year period.

One further comment is possible concerning the administration of the rape law of 1835. During this period police officers and judges received a portion of the fines levied for crimes. In the case of rape, the victim received $35 of the $50 fine and the judge $15; in the case of adultery, the spouse of the offender received $10 and the judge the remaining $5. The statute authorizes such a division without qualification. However, the new rape law passed in May of 1841 and a new set of provisions for payment of police and judges passed at the same time changed the situation somewhat. The new rape law provided that:

> But a woman of bad character, even though she suffer violence shall receive no part of the fine of the condemned man. Women of good character and they only shall receive a portion of the fine from the criminals. (Hawaii, 1842:Chap. 43, Sec. 16)

Three days after passing that provision, the Nobles and Representatives passed a "Law Respecting the Pay of Police Officers for Seizing Foreigners." The preamble to the law read as follows:

> At the present time many of the police officers are blamed and spoken evil of; and it is said that they entice people to violate the law and then seize them to obtain their money, and some are seized unguiltily, and consequently much evil

results.[37]

The law provides that no part of the fine from arrest and conviction of foreigners may go directly to the police and judges but rather be held by the governor of the island and paid out at the end of the year to officials based on the amount of business each had done and the "correctness" with which he did it.

The inference is that some constables and magistrates were operating in collusion with certain women of "bad character" to entrap foreigners, especially seamen, by falsely charging the men with adultery or rape and splitting the fine.[38] Thus the administration of the 1835 rape law became itself a problem. The 1835 rape statute, as written,

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[37] The previous October, in anticipation of changes in the law by the chiefs, the official government newspaper, the Polynesian, also commented on the problem:

> The gross abuses growing out of the system of paying judges from fines collected from offending parties has engaged their (the chiefs) serious attention and measures will be taken to put a stop to the infamous species of peculation and extortion which has so long disgraced the petty officers entrusted with the execution of the laws, and produced evils quite as injurious to society as those it was intended to correct.
>
> Much of the previous difficulties, particularly with foreigners can be traced to the officious zeal, or mercenary rapacity of the underlings in office.

[38] Bates (1854:296-297) provides a graphic description of the police practice in regard to adultery.

> A more unprincipled set of fellows than the police at the Sandwich Islands generally -- and

provided a substantial material incentive for native women to falsely claim rape, often in collusion with law enforcement officials. Such activities reduced the legitimacy of existing legal institutions in the eyes of the foreign population. The King and his council responded in 1841 with statutory changes designed to alter the administrative procedures at issue.

3.2.2 The Rape Law of 1841

The simple Penal Code of 1835 rapidly grew obsolete in the face of changing economic and social conditions during the late 1830's.[39] New laws were passed from time to time to meet changing conditions. They were collected and published as the Laws of 1842 (Hawaii, 1842). Translator William L.

> especially at Lahaina -- can not be found. They can be bribed to do any thing but commit murder. Many a time they have gone and laid a snare, not only for foreigners, but for their own unsuspecting ccuntrymen. When the plot has been ripe for development or has just reached its crisis, the base hireling who led him into the coil has gone and brought his posse along with him, and pounced upon him like a wild beast. Like 'Samson' shorn of his locks he has been dragged most brutally tc the fort, while the 'Delilah,' who was employed as the principal bait, skulks away, giggling at her escape from public recognition and lodgings in prison. Of course the crest-fallen vicitim does not wish to be placed in confinement, and yet there is no alterative between that and the payment of $30 to these sagacious bloodhounds, who chuckle over the folly of their victim as they pocket the 'spoils.' In most cases, the female culprit is treated on the same plan.

[39] See Kuykendall (1938) for a discussion of these changes.

Richards noted that:

> Some of the laws ... were first proposed by foreign visitors and commanders of vessels of war, some were proposed by foreign residents, and one or two were written by them; but not so with by far the greatest proportion.[40]

The Laws of 1842 reflect both the increasing economic complexity of Hawaiian society and the ability of the missionaries to have their values embodied in the law. A large number of civil laws were established to define relationships and to regulate commerce.[41] The area of behavior defined as criminal was expanded in the 1842 code.[42] The basic provisions of the Penal Code of 1835 were expanded with prohibited behaviors more closely specified and differentiated. Missionary influence is also evident in the marriage and family laws expressing the Puritan concern for family harmony and stability, correct raising of children and adequate provision for their welfare, and exact specification of the conditions for marriage and divorce.[43]

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[40] See the Preface to the Laws of 1842:viii.

[41] These laws included port and quarantine regulations, tax laws, landlord-tenant rules, labor laws, laws of business partnership, rules of debt settlement, rules for the establishment and management of trusts, procedures for the management of government property, adoption of the Massachusetts standards of weights and measures, specification of the rights and duties of husbands and wives, and marriage and divorce laws.

[42] Among the newly criminalized behaviors were counterfeiting, gambling, forgery, liquor production, carrying a dangerous weapon, disturbing the peace, and vagrancy. Included was also a strong and detailed law requiring observance of the Sabbath.

[43] See Chapters XX and XXI in the Laws of 1842 and compare

The Laws of 1842 contained a greatly expanded chapter on lewdness. Included were prohibitions of adultery, fornication, illegitimacy, prostitution, pimping, bigamy, incest, lewd conversation, seductive language, lascivious conduct, libidinous solicitations, and rape.[44] In addition to the inclusion of more behaviors as criminally lewd, the basic provisions of the Penal Code of 1835 were greatly elaborated to cover various situations, relationships, and degrees of harm. Penalties were made more severe.

The text of the rape law appearing in the Laws of 1842 is as follows:

> 1. If a man commits a rape upon a woman, making use of force upon her, because the woman does not assent to his solicitations, and actually have carnal intercourse with her without the consent of the woman, the fine of that man shall be fifty dollars. But if the man thus committing a rape upon a woman be a man of distinction or a man of property, or if the woman be a person of distinction, and the crime of the man have special aggravations, the judges may increase the punishment of the man thus highly criminal, and if the judges think best they may banish him to another land, there to dwell for four years, or they may put him to hard labor in a prison, at the discretion of the judges.
>
> 2. If a man by violence attempt to commit a rape upon a woman, and the woman by fleeing, or by her strength, or by making an outcry, or by the aid of another escapes, so that the man has no carnal connection with her, he shall in that case be brought to trial, and on conviction thereof,

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with Haskins (1960:80-81) description of the early Puritan orientation toward the family and the role of government in its protection.

[44] The statute was actually passed by the Nobles and Representatives on May 29, 1841 and was to take effect upon notice.

> shall be fined to half the amount of the man who actually consumates the crime. In all cases of punishment for rape one fourth of the fine shall go to the government, and three fourths to the assaulted woman.
>
> 3. If a man go secretly to the place of a woman while she is asleep, for the purpose of having carnal connection with her without her consent, that is the same as rape. A man that does this shall be punished in the same manner as in case of rape mentioned above.
> But a woman of bad character, even though she suffer violence, shall receive nc part of the fine of the condemned man. Women of good character and they only shall receive a portion of the fine from the criminals. (Hawaii, 1842:Chap. 34)

Like the other laws pertaining to lewdness, the rape law of 1841 represents an increase in complexity from the rape law of 1835. As previously discussed the character of the victim explicitly became an issue in the new law. Undoubtedly the problem arose in administering the 1835 law under which only completed, not attempted acts, could be sanctioned. The 1841 statute made attempted rape a crime. A more severe penalty was provided if either the offender or victim was of high status. This was apparently an incorporation of the Hawaiian notion of special protection for high status persons and special expectations concerning their behavior.

3.3 THE WILEY CASE

As the 1840's progressed the Hawaiian Government found itself more and more involved in legal difficulties with foreigners and forced to become involved in disputes between foreigners. As one aspect of its claims to sovereignty, of course, the Hawaiian Government asserted legal jurisdiction over all persons within the kingdom and the bindingness of all criminal laws on all persons. However, foreign residents often did not submit willingly to these claims and, in fact, through the intercession of their home governments forced the Hawaiian Government to make concessions and sacrifice elements of its sovereignty.

No issue was more troublesome than the issue of juries. Were foreigners in Hawaii entitled to trial by jury before any sanction, no matter how small, could be administered? If so, was it to be a jury of foreigners or natives? If not, were foreigners to be subject to the justice of lowly native magistrates?

In 1839 the French had imposed a treaty on the Hawaiian Government, under threat of hostilities, that, among other things, provided that Frenchmen accused of any crime could only be tried by a jury of foreign residents proposed by the French Counsul and accepted by the Hawaiian Government (Kuykendall, 1938:166-67).[45] In 1844 the same privilege was extended to British subjects (Kuykendall, 1938:231).

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[45] The treaty is known as the "La Place Treaty" named after the French frigate captain who imposed it.

The Hawaiian Government attempted to handle the difficult issue of jury composition by enacting a law in 1842 (Hawaii, 1842:Chap 47) which provided for jury trials in all cases in which the fine or damages could amount to at least $100 and which provided for juries of foreigners in cases between foreigners, native juries in cases between natives, and mixed juries in cases with a native on one side and a foreigner on the other. However, the French retained their right to a consul jury in all cases of crimes.

These provisions were crucial in the "Wiley Case" which was the most significant event in the administration of the 1841 rape law and which developed into a crisis for the Hawaiian Government.

John Wiley, an American citizen, was convicted by a native magistrate on August 23, 1844 of having raped Kamaka, a native girl, and was fined $50 for the offense.[46] Subsequent to conviction, Wiley, however, contended that he was entitled to the same treatment as French and British subjects accused of crimes -- that is, trial by a jury of foreigners chosen by the American Counsul.

U.S. Commissioner George Brown interceded on behalf of Wiley and pressed his claim contending that Americans were being subjected to discrimination. There followed a lengthy and acrimonious exchange of letters between Brown and G.P.

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[46] An English translation of the transcript of Wiley's trial is printed in Correspondence Between H.B.M. Secretary of State and the U.S. Commissioner in the Case of John Wiley, An American Citizen. Archives of Hawaii

Judd, Secretary of State for the King. The position of the Hawaiian Government was that rape in Hawaiian law (law of 1841) was only a misdemeanor and therefore not covered under the provision guaranteeing foreign juries in the case of crimes committed by foreigners. Thus, although the controversy was about the composition of juries, a good deal of discussion occurred about the nature of rape as a criminal act. Judd and others taking the government's side were put in the peculiar position of arguing that while it was true that all civilized men knew that rape was an "enormous" crime in all civilized countries, it was "unfortunately" only a misdemeanor presently under Hawaiian law and thus citizen Wiley was out of luck.[47] Typical are the following excerpts from a letter from Hawaiian Foreign Minister R.C. Wyllie to French Counsul Louis Perrin:

> I will say further that Rape, seduction and all outrages upon the weaker sex, I look upon as crimes of the most detestable and horrible kind, but my moral sense of their enormaty (sic) has nothing to do with the shameful, if you will, fact that under the present laws of these Islands ... Rape, except under circumstances of particular aggravation is not a crime, but a simple police offense punishable by fine.... But I am happy to tell you that in the new laws soon to be promulgated Rape is justly placed in this category, and is to be punished as such.
>
> I render you these explanations that you may not retire from the Islands with a belief that I or any foreign officer of this Government view that offence of Rape with anything but feelings of just abhorence.[48]

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[47] See the letter Judd to Brown, September 14, 1844. F.O. and Ex. Archives of Hawaii

The import of the Wiley case with regard to rape law was to make very salient and visible to powerful foreign figures in the Hawaiian government the inconsequence of the act under Hawaiian law and to commit them, by their utterances, to changes in the law to conform with Western conceptions of rape's seriousness.

Outside of the difficulties that arose in connection with the Wiley case, little information exists concerning the administration of the 1841 statute. No crime statistics exist until 1845 when convictions for all of Oahu are shown.[49] No rape convictions are reported.

The next relevant statistics appeared in the Polynesian (January 9, 1847:138) as a "Statement of Offenses Punished January 1st to December 4th 1846," but was limited to Honolulu and for natives only. Two native males were reported to have been punished for rape.

Two native males were convicted during the year April 1, 1846 to March 31, 1847 and were fined a total of $50, or an average of $25 per offense. Although these were reported as convictions for rape they could have been convictions for attempted rape which, under the law of 1841, would have been subject to a maximum fine of $25. These were the only convictions for rape for the islands of Cahu, Maui, Hawaii,

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[48] From Wyllie to Perrin, April 1, 1846: F.O. and Ex. Archives of Hawaii

[49] See the file "Courts - Miscellaneous, 1845" in Archives of Hawaii.

and Kauai during this period (Schmitt, 1966:329-330).

In sum, the few statistics that do exist up to 1850 show that a few natives were being punished for rape or attempted rape under the law of 1841, although in the two cases in which the amount of the fine was reported, the fine was only half of the maximum permitted by the statute. No record was found of any foreigner being convicted of rape under the 1841 statute subsequent to the Wiley case.

3.4 SOCIAL AND LEGAL CHANGES DURING THE MIDDLE AND LATE 1840'S

During the early and middle 1840's the political-legal institutions of the Islands were increasingly unable to cope with changing conditions. The secular interests and conflicts of the growing mercantile class of resident foreigners supplanted the missionary interest in morality as the prime catalyst for political-legal change. As conflicts involving foreigners became more frequent, the Hawaiian government was confronted with crisis after crisis due to the inability of its legal system to contain conflict. The forcible taking of the Kingdom by the British in 1843 was precipitated by complaints of British subjects about their legal treatment by the Hawaiian government. As foreign pressure on the government grew, it became clear that there was an immediate need for legal institutions that foreigners would regard as civilized, authoritative, and legitimate if Hawaii was to have any hope of retaining its sovereignty.

The Hawaiian government had already suffered international embarrassment when the Wiley case revealed that rape in Hawaii merited only a $50 fine.

Subsequent to the Wiley case Attorney General John Ricord warned the chiefs:

> There is almost a total deficiency of laws, suited to the Hawaiian Islands as a recognized nation in reciprocity with others so mighty, so enlightened and so well organized as Great Britain, France, the United States of America, and Belgium. These powers having received His Majesty into fraternity, it will become your duty to prepare his government to concert in some measure with theirs. When you have done so by the adoption of a proper code of laws, there are still other mighty nations whose people have already come hither that will be ready to welcome him into their confraternity.
>
> But in order to bring about such a desirable end, it is indispensable to frame such a code as those nations can understand and appreciate. It is not enough that we understand our laws; they too must understand them and witness in them some civilized conformity to their own. (Ricord, 1845:5)

If the need for such grand symbolic gestures to the family of nations existed in the eyes of the foreigners, the King, and the chiefs, so did the means. It happened that the aforementioned John Ricord was the first trained lawyer in Hawaii upon his arrival in 1844. He was soon appointed attorney general by the King who was anxious to secure for the government Ricord's legal talents.

Ricord suggested a complete new set of organic acts to define the structure of government, and a civil code and a criminal code, the development of all of which was a task

delegated to him by the chiefs (Kuykendall, 1938:262). Ricord is described by Kamakau (1961:402) as having the opinion that the Hawaiians should not adopt the laws of the Bible, of Rome, England, France, or any other country, but should adopt laws adapted to Hawaiian ways of living.[50] Nevertheless, one sees little in the organic acts drafted by Ricord that could be regarded as expressive of the indigenous Hawaiian legal culture.

Ricord's efforts resulted in three major acts: (1) An Act to Organize the Executive Ministry (Hawaii, 1845), (2) An Act to Organize the Executive Departments (Hawaii, 1846), and (3) An Act to Organize the Judiciary (Hawaii, 1847). These acts defined the structure of government and specified many substantive rules of behavior for government officials and for the citizenry.

Of particular substantive importance for this study was the inclusion in the Second Act, the Act to Organize the Executive Departments, of Anglo-American concept of

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[50] Kamakau (1961:399) makes another, more critical comment about the results of Ricord's efforts:

> A learned man had arrived with knowledge of the law, and the foreigners who were holding office in the government hastened to put him forward by saying how clever and learned he was and what good laws he would make for the Hawaiian people. The truth was, they were laws to change the old laws of the natives of the land and cause them to lick ti leaves like the dogs and knaw bones thrown at the feet of strangers, while the strangers became their lords, and the hands and voices of strangers were raised over those of the native race.

coverture to be applied to married women. Asato (1981) has shcwn that this provision, which gives a husband control of his wife's real property and ownership of wife's personal property, was at variance with native Hawaiian customs and that it was a part of the subordination of women that accompanied the Westernization of Hawaii.[51] It, along with other laws, and the missionary moral and educational program, sought to restrict women to the private sphere of wife, child bearer, and homemaker and to take them out of the realm of public life. This law along with the rest of the missionary program pertaining to the family, and the more secular effects of Westernization, subordinated Hawaiian women and deprived them of their independent status.

The new legal structure and types of legal actions established by the Organic Acts, along with the arrival and participation of lawyers, greatly increased the possibility of litigation. Successful pursuit of damages due to breaches of contract and tort actions using established Anglo-American legal concepts became a realistic possibility. It is not surprising, then, given the rather trivial punishment fcr rape established in the 1841 statute, which was in effect until 1850, to find some tort actions arising out of rape cases in the late 1840's. Examination of

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[51] Further erosion of women's status occurred in the Constitution of 1852 (Hawaii, 1852) which formally limited the right to vote for members of the Hawaiian House of Representatives to men.

First Circuit (Oahu) and Supreme Court records shows two tort actions in 1849 arising out of alleged rapes.

These cases are of interest for several reasons: first, actions for damages against rapists are a remedy that seems to have been rarely used in the history of Hawaii, although their incidence may be increasing at the present time; second, their existence may indicate a perceived lack of usefulness of the existing criminal law; and finally, the cases reveal the ongoing transformation of the legal status of women and the institutionalization into the law of the concept of sexual property.

The first case, Oakely vs. Mcduff, was brought by Howard Oakely against James McDuff in April of 1849 in the Superior Court of Law and Equity as a "Trespass on the Case." According to his petition Oakely sued for

> the sum of $3,000, for damages resulting to him for injury done by the said defendant to the property and feelings of the undersigned, Plaintiff, in that the defendant did, on the 28th day of March, 1849, enter upon the premises of the undersigned during his absence from home and maltreat the wife of the undersigned, Mary Ann Oakley, by first abruptly soliciting her to retire to her room with him, defendant, for the purpose of cohabitation, and secondly, upon refusal of the Plaintiff's wife to yield to his, defendant's, request, that he, defendant took hold of Plaintiff's wife and attempted by violence to force her to a compliance with his wishes. All of which acts, were done in contravention of his private rights under the law. (emphasis added).

A jury of twelve foreigners sustained Oakley's claim and awarded damages of $670.18. It is noteworthy that the case

reflects the new status of married women in Hawaii under the coverture concept. The victim of the attempted rape had no role in the case. It was the feelings, property, and private rights of the husband which were injured. The case was brought by him and the award of damages was to him. In fact, the victim did not even testify in the case.[52]

Apparently encouraged by the outcome of the Oakley vs. McDuff case, a similar suit, Coffin vs. Reynolds, was brought by the same lawyer in December of 1849, this time for $8,000 for an alleged completed rape. While worded substantially the same as in the prior case, the petition in this case did mention damage to to the feelings and character of the plaintiff's wife, the victim. While at least acknowledging the victim's feelings, the petition did incorporate the Anglo-American notion that the character of a victim of rape was damaged. In this case the jury of eleven foreigners, all males, found for the defendant.[53]

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[52] There is no explanation in the documents for this case why the victim did not testify, but in the other case of its type, Coffin vs. Reynolds, Judge William L. Lee ruled the testimony of the plaintiff's wife, the victim, inadmissable.

[53] One juror was excused for illness during the trial. The vote was ten to one for the defendant. Juries were not required to be unanimous, a majority of nine being sufficient for a verdict. It should be noted at this point, as a further indicator of the secondary status of women in the new legal system, that women were not allowed on juries. In fact, juries were all male in Hawaii until 1953.

These two cases, revealing as they are, appear to be the only civil prosecutions for rape through at least 1892, although there were some civil suits for "Criminal Conversation" arising out of seduction and adultery. Why no cases were brought for rape after 1849 is at present unknown.

3.5 THE PENAL CODE OF 1850

Ricord did not write civil and criminal codes; these tasks fell to William L. Lee, who arrived in 1846, the second lawyer in Hawaii.[54] Lee completed the penal code in 1850 (Hawaii, 1850a). His comments to the legislature upon its presentation are indicative of his view of his attempt to equip the legal system to respond to demands made upon it by the changing character of Hawaiian society.

> I am greatly indebted to the labors of the commissioners appointed to prepare a penal code for Massachusetts, as given in their report, and also to those of Mr. Livingston in the penal code of Louisiana. From both of these able works, I have borrowed largely.
>
> In this chrysalis state of the nation, I have thought it proper to keep an eye to the future as well as to the present. Accordingly, while I have studied, as far as it consonant with justice, to conform to the ancient laws and usages of the kingdom, I have in the main, adopted the principles of the English common law, as the foundation of the code best adapted to the present and approaching wants and condition of the nation. To prepare a system of laws equally well adapted to the native and foreign portions of our

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[54] Lee did not complete a civil code before his death in 1857 and this task fell to others. A civil code was finally passed in 1859 (Hawaii, 1859).

> community, -- one not too refined for the limited mind of the former and yet enough so to meet the wants and capacity of the latter, it will be evident, is no easy task. -- I have no confidence to believe that I have performed this task successfully. My chief aim has been to be so brief, simple, clear and direct in thought and language, as not to confuse the native, and yet so full as to satisfy his increasing wants, together with those of the naturalized and unnaturalized foreigner.
>
> I have submitted this code to several gentlemen in the profession of the law, -- to the representatives of foreign governments resident in this kingdom, -- to merchants, and missionaries well acquainted with the wants and condition of the natives, requesting them to make such suggestions for its improvement, as their wisdom might dictate. (Hawaii, 1850a:iiv-iv)

It is one of the great ironies of Hawaiian legal history that the "labors of the commissioners appointed to prepare a penal code for Massachusetts" referred to by Lee is the Report of the Penal Code of Massachusetts edited by Willard Phillips and Sauel B. Walcott (1844), which was developed for Massachusetts, but never passed in that state. Hawaii's penal code passed in 1850, however, is almost completely drawn from it in organization, form, and substance.[55] Although no systematic, line by line, comparison has yet been done, most of Lee's modifications appear to have been simplification and deletion of certain portions of the proposed Massachusetts code.

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[55] The proposed Massachusetts code, however, did not specify sanctions. The penalties included in the Hawaii version were presumably supplied by Lee, and, prescribing a fine and/or imprisonment, were consistent with then current Mainland practices.

Although Lee claimed that his code incorporated indigenous principles of law, they are not as clearly apparent as they are in the earlier laws. According to the Penal Code of 1850 all fines went to the government; restitution to victims was abolished except for the crime of receiving stolen goods. Long prison sentences and substantial monetary fines were prescribed for most crimes. The content of the code reflects a strong concern with the security of persons and property. The Penal Code of 1850 was the largest single instance of importation into Hawaii of Anglo-American substantive law.

With respect to sex offenses, what had been in the Laws of 1842 generically regarded as "lewdness" was in the 1850 code differentiated into two sets of acts based on the willingness or unwillingness of the participants. One chapter (Chapter XI) dealt with rape, abduction, and seduction. Another chapter was concerned with polygamy, adultery, fornication, incest, and sodomy.

The penalties prescribed in the code of 1850 indicate that the traditional Hawaiian orientation toward rape was no longer expressed in the law. In 1850 rape became a very serious crime in Hawaii. Rather than a $50 fine, the maximum penalty in the new code for the rape of an adult woman was a $1,000 fine and life imprisonment. If the victim was under 10 years of age, the penalty was death or life at hard labor. Attempted rape was punishable by a

maximum fine of $1,000 and up to five years imprisonment. The law made no provision for compensating the victim. The sections of the chapter pertaining to rape are reproduced below:

> 1. Whoever commits a rape, that is, ravishes or has carnal intercourse with any female, by force and against her will, shall be punished by a fine not exceeding one thousand dollars, and imprisonment at hard labor for life or any number of years.
>
> 2. Whoever ravishes or carnally abuses and knows any female child under the age of ten years, shall suffer the punishment of death, or imprisonment for life at hard labor in the discretion of the court.
>
> 3. Whoever maliciously assaults any female with the intent to commit the crime of rape, or maliciously assaults any female child under the age of ten years, shall be punished by fine not exceeding one thousand dollars, and imprisonment at hard labor for not more than five years.
>
> 7. The female upon whom rape is alleged to have been committed, or who is alleged to have been abducted or seduced, is a competent witness in a prosecution for such rape, seduction or abduction but no person shall be convicted of rape, seduction or abduction, upon the mere testimony of such female uncorroborated by other evidence direct or circumstantial. (Hawaii, 1850a: Chapter XI).

In sum, the transformations taking place in Hawaii in the early and middle 1840's led to a series of crises involving the Hawaiian government and external powers. The Hawaiian chiefs were convinced by foreigners that new laws must be

established in part as symbolic gestures to external audiences. As part of this process Hawaii adopted a foreign penal code which contained a law against rape that was sharply at variance with indigenous conceptions of that offense and its appropriate redress. In Massachusetts, as well as the other states, and England, a woman's status depended upon that of her husband. Premarital virginity and sexual exclusivity were exchanged for this status and were carefully guarded by informal norms and by law. A woman who had her only important property, upon which her social status depended, taken from her through rape was in effect socially murdered. She was viewed as shamed, ruined, spoiled, unmarriageable, and could never hold her head up again. The harm was great and the penalty for the offense was great. However, the law only protected "respectable" women because only they had anything of value to lose.

There was a consistency between the new law against rape in Hawaii and the general transformation of women's status. What autonomy existed for women in the pre-contact culture, especially for alii women, was being systematically eroded. Women were becoming, and were desired to become, dependent on their husbands and they were to be sexually exclusive. The weaker sex was being created.

However, the Anglo-American orientation toward rape had some implications critically affecting its administration and tending to undercut its manifest goal of providing

sexual security for women. First, enforcement of the law in terms of the apprehension and application of sanctions to a man who raped a woman usually depended on the coming forth of the victim as a complainant. But what was the motivation for a woman to come forth and be publicly stigmatized as one who had lost her most valuable possession? The legal system could not restore that which had been lost, as in the case of material property lost through theft, and the victim would be publicly stigmatized. The costs of prosecuting a rapist, then, far outweighed any possible benefits to accrue to the individual rape victim and this accounts for the low percentage of rapes that are reported right up to the present.

Second, the norm of sexual exclusivity that forms the basis of rape law by implication differentiates women into those who have carefully guarded their property and those who have not or who have been careless. The implication being that those in the latter category suffered less harm or even perhaps got what they deserved. Thus, a key issue at any rape trial was to determine which category the victim belonged in, leading to the often-made observation that it was the victim who was on trial.

Third, the extreme sanctions provided for under Anglo-American rape law are always associated with strong no-holds-barred defenses and with low probabilities of sanctions ever being applied at all. Extreme penalties also

lead to institutionalized safeguards in the law to prevent the misapplication of sanctions.[56] Such a safeguard was incorporated in the Hawaii rape law of 1850. The statute provided that the victim of rape was a "competent witness" in a prosecution "but no person shall be convicted of rape, seduction, or abduction, upon the mere testimony of such a female uncorroborated by other evidence direct or circumstantial." Thus, what is currently referred to as "corroboration requirement" was statutorily introduced into Hawaiian law.[57] Like the provision in the rape law of 1841 providing that "no woman of bad character" could collect part of the fine of a man convicted of rape," the corroboration requirement attributes to the crime of rape a particular set of characteristics, that is, that the testimony of a woman alleging a rape is less trustworthy than the testimony of victims of other types of crimes, and that juries are not by themselves competent to decide on the veracity of the female alleging a sex crime. The

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[56] For example, Biblical law required two eyewitnesses' testimony before conviction of a capital crime (Goldin, 1952:43). Drawing on Biblical law early Massachusetts law likewise required the corroboration of at least two witnesses, "or that which is equivalent thereunto," in capital offenses (Farrand, 1929:54).

[57] Where Lee borrowed the corroboration requirement that appears in the Penal Code of 1850 remains a mystery. It did not exist at common law (Yale Law Journal, 1972:1366) nor does it appear in the Massachusetts proposed code which Lee used so liberally, or the Louisiana code. For a modern critical analysis of the justifications of the corroboration requirement see the Yale Law Journal (1972).

corroboration requirement which appeared in the 1850 rape law remained unchanged in the Hawaiian statutes for over eighty years, until in 1932 as an issue in the "Massie case" it became part of a crisis and the focus of national attention.

So, if the manifest goal was to protect women from rape, we see that the rape law of 1850 contained many deficiencies which it shared with Anglo-American rape law generally. It was doomed at the start to fail in its manifest intent, although in its failure it may have fulfilled some significant and interesting latent functions for the community. Much of the following discussion will document and analyze this failure and analyze community response to it.

Chapter IV

RAPE LAW 1851 TO 1892

4.1 INTRODUCTION

The passage of the 1850 rape statute as part of the Penal Code of 1850 ended the initial period of statutory development of rape law which had begun with the first rape statute in 1835. The 1850 statute remained in place, with only minor modifications, for over 120 years until it was replaced with an entirely new statute as part of a general criminal code revision in 1973. The history of rape law in Hawaii subsequent to 1850 is one of attempts to apply the statute, in the context of its underlying cultural conceptions and the social structure of the Islands, to particular cases. In this process these cultural conceptions were disseminated, reinforced, and institutionalized. To the extent that ethnic differences were shown to relate to sexual dangerousness or irresponsibility the developing ethnic stratification system was supported and justified. Usually this was a low visibility process that did not engage public attention. Occasionally, the attention of the public was engaged and strident demands for change in the law as written and administered were made. These demands were usually

unsuccessful or successful only in the short run. They rarely addressed fundamental issues concerning the nature of the value to be protected and the role of women in the society.

After the passage of the rape statute of 1850, law enforcement agencies and the courts began for the first time to generate significant numbers of rape prosecutions. Starting at a very low level after 1850 they increased steadily throughout the nineteenth century. The records of these early cases provide some insight to the patterns and practices of the enforcement of this law. Analysis of these cases reveals how many men were being prosecuted for rape, what the ethnic patterns of rape perpetration and victimization were in prosecuted cases, what the developing law enforcement and court practices were in rape cases, and what sanctions were administered to men convicted of rape. Much of this chapter will use the case material to address these questions.[58]

[58] This study makes no claim that the patterns of rape prosecution revealed in the case records and court statistical reports reveal the actual incidence and characteristics of rapes committed. I subscribe to Wheeler's (1967) and Cicourel and Kitsuse's (1963) contention that official records and statistics are reflective of and should be used to study the proceses of the agencies that produce them and are often not reflective of the incidence or pattern of social phenomena themselves. This is particularly true in the case of rape prosecutions in which events of forced sexual intercourse may or may not be defined by the participants as rape and those events reported to law enforcement authorities may or may not, in their discretion, be recorded and moved into the criminal justice process. There has been historically and still

In addition, this chapter will examine one episode of indignation in a segment of the community over the processing of an alleged case of rape in 1867. This is the first of many such instances that later occur.

This chapter covers the pericd from 1850 through 1892. The latter date is chosen as an end point due to the revolutionary overthrow of the Monarchy in January 1893 which changed major aspects of political and legal authority, and because a statute passed (Hawaii, 1892) in 1892, taking effect in January 1893, made significant changes in the Judiciary.

4.2 POPULATION CHANGES DURING THE MONARCHY

As the nineteenth century progressed, the population of the Islands became more ethnically diverse and ethnically stratified. Through 1853 the population was primarily Hawaiian, with less than 2,000 persons of foreign birth, mostly from England and America (Schmitt, 1968:74-75). In 1852, 293 Chinese contract laborers were imported to work in the budding sugar industry (Kuykendall, 1938:329). From time to time more Chinese were imported, or immigrated as free laborers, the rate greatly increasing in the 1870's,

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is considerable discretion exercised by authorities and such discretion nc doubt systematically biases the enforcement of the rape law. The actual incidence and characteristics of rape in Hawaii during the nineteenth century are unknown and unknowable and it is extremely doubtful that court data are representative.

until there were 15,301 in 1890 (Schmitt, 1968:75).[59] Nearly all the Chinese who immigrated were males and they became favored spouses of Hawaiian women who regarded them as good providers who were kind to their wives (Adams, 1937:95-96). Adams (1937:146-147) estimates that prior to 1900 twelve to fifteen hundred Chinese men had entered into marital relations with Hawaiian women.[60]

In 1868 the first Japanese plantation laborers were imported. This first group was followed by massive importations in the 1880's to the extent that there were 12,360 Japanese in the Islands in 1890 (General Superintendent of the Census, 1891). Unlike the case with the Chinese, a policy of encouraging importation of Japanese women was followed, and although the Japanese sex ratio was also skewed toward males, there were 2,281 Japanese women in 1890 (General Superintendent of the Census, 1891). Japanese persons married out of their ethnic group less than any other ethnic group and the Japanese group became highly organized with strong social control over its members.

From time to time members of other ethnic groups, Portugese, Germans, Spanish, or Norwegians were imported to work in the sugar industry during the last two decades of

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[59] Many Chinese immigrants did not remain in the Islands. Adams estimates that in all about 40,000 Chinese came to the Islands during the nineteenth century but that only about 20,000 remained in 1900 (Adams, 1937:145).

[60] Adams includes in this figure both legal marriages and relationships without legal sanction.

the nineteenth century. Members of these groups tended to come as parts of entire families.[61] Population figures, by sex and ethnicity, are presented in Table 2.

More important than the ethnic and sex distribution of the population in influencing matters of law and law enforcement was the emergence of an ethnic stratification system and the location of members of ethnic groups in that system.

The top of the class structure in Hawaii was shared by haoles and by a small group of Hawaiians, mostly of chiefly descent, who had been able to retain some wealth and power in the new political and economic system. Of course the Monarch was Hawaiian, so considerable nominal power was in the hands of Hawaiians until the Monarchy was overthrown by American businessmen in 1893.

Large scale commercial development was primarily a haole activity, haoles being the leaders in the development of commercial agriculture, trading, and the establishment of wholesale stores. After the negotiation of a treaty with the United States in 1876 providing for reciprocal tariff-free importation of raw agricultural goods and certain other commodities, the sugar industry became so successful that plantations and their associated support services, agents, and banks became the economic base for an emerging haole oligarchy that socially and economically

[61] A brief history of each ethnic to come to the Hawaiian Islands is presented in Lind and Hormann (1982).

TABLE 2

Population Figures by Sex and Ethnicity
for the Kingdom: 1853-1884 (1)

CENSUS YEAR	HAWAIIAN		CHINESE		PORTUGESE		OTHER FOREIGN		TOTAL	
	M	F	M	F	M	F	M	F	M	F
1853	37079	33940	364(2)	0	--	--	1367(3)	338	38810	34278
1860	35379	31705	810(2)	10(4)	--	--	1310(3)	586(3)	37499	32301
1866	31067	26698	1096	110	--	--	2232	756	34395	27564
1872	27355	24176	1831	107	367	28	2097	936	31650	25247
1878	25116	22392	5685	231	378	58	1350	1201	32529	23882
1884	23623	20609	17068	871	5239	4138	5609	3421	51539	29039

(1) The source for these data is The Census of the Hawaiian Islands: 1853, 1860, 1866, 1872, 1884.

(2) The source for this figure is Eleanor C. Nordyke, The Peopling of Hawaii, Honolulu: University of Hawaii Press, 1977.

(3) This figure is derived using the census figure minus the Chinese.

(4) This is an estimated figure.

dominated the Islands into the 1950's.[62] Not all haoles, however, were part of the emerging haole upperclass. As there had been prior to 1850, there was a portion of the haole population comprised of beachcombers, vagabonds, adventurers, alcoholics, and the like, that enjoyed little respect or power.

The Hawaiian population was also sharply differentiated. Some ali'i retained their wealth and prerogatives through their institutionalization in the new legal and political system. But the mass, of commoner descent, held little power. The franchise was extended to commoners by the written constitutions (Hawaii, 1840, 1852, 1864, 1887) but there was a property requirement established in 1887 (Hawaii, 1887). Women formally lost the franchise in 1850 (Hawaii, 1850b) by statute, and in 1852 (Hawaii, 1852) by constitutional provision. The commoner Hawaiian appears to have had little influence in governmental affairs.

Although haoles did not numerically dominate the legislature, they held most of the ministerial positions which were of prime influence in both legislative and executive policymaking and affairs.[63] Haoles also held the most important judicial posts during the Monarchy. Of the seventeen men who were justices of the Supreme Court between

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[62] See generally Daws (1968) and Fuchs (1961) for this history.

[63] Fuchs (1961) states that only about one fourth of the Monarchy cabinet ministers had any Hawaiian blood.

1852[64] and 1892, fifteen were haole, one was Hawaiian and one was Part-Hawaiian.[65]

Chinese immigrants, nearly all males, rapidly moved out of plantation work as their labor contracts expired and became small merchants. Although the size and complexity of their enterprises did not match the haoles, nevertheless many were financially successful and the Chinese prospered as a group, although not socially accepted by the haoles.

Japanese, the other large population group in the Islands at the end of the Monarchy, were late immigrants and in 1892 were still nearly all occupied on the plantations and were not participants in public life.

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[64] Between 1840 and 1852 the King was the chief justice of the Supreme Court and the four associate justices were Hawaiian. In actuality, after the establishment of the Superior Court of Law and Equity with William Lee as Chief Justice in 1848, the all Hawaiian Supreme Court was of symbolic significance only.

[65] In order to assess the importance of this fact it should be remembered that the Supreme Court was not only the highest appellate court but also the trial court for felonies and major civil suits on Oahu and that the Supreme Court justices went individually to the other islands to, in conjunction with the local circuit judges, hold terms of court in these circuits. Thus, individually or collectively, the justices of the Supreme Court presided over the upper level court business in the Islands.

The Hawaiian justice was John Ii, who sat on the Court from 1852 to 1864. The Part-Hawaiian was R.G. Davis who sat from 1864 to 1868.

4.3 THE EMERGING PATTERN OF RACE RELATIONS

Lind (1954:1) has observed that Hawaii was, in the mid-twentieth century, neither a "racial paradise" as touted by some commentators, nor a racial hell as others contended, "but probably holds a little bit of both." He was referring to the complex relations of race in Hawaii which simultaneously exhibited contradictory elements. On the one hand Hawaii featured as an important part of its civic culture a "race doctrine," "code," or set of "race mores," (cf. Adams, 1934) which promoted racial equality and which did not sanction, or negatively sanctioned, the grosser forms of institutional and personal racial discrimination and prejudice that characterized many plural societies. This doctrine, which grew out of specific historical circumstances and social relations, more or less prevented new circumstances and social relations, with more racially antagonistic potential, from solidifying the ethnic stratification structure into a set of immutable castes.

On the other hand, more subtle forms of personal and institutional racism have been rampant in Hawaii. Class exploitation, synonymous with ethnic exploitation at times, has been a major feature of the economic system. Formidable social and ethnic boundaries have at times separated the races and have limited the opportunities of those among the less favored segments.

One of the strengths of the sociology of race relations as it has been developed in Hawaii by scholars of "Chicago School" training (cf. Adams, 1937, 1954; Glick, 1981; Hormann, 1950; Lind, 1938) has been the attempt to locate the sources of patterns of race relations and sources of race ideology in the historical experiences, particularly the economic relations, of the participants.

Adams (1937, 1934) proposed that the aforementioned doctrine of racial equality which has characterized Hawaii had its genesis in the earliest of the contacts of white foreigners with Hawaiians. His thesis was that the circumstances of both the early white traders, explorers, and residents, and the Hawaiians in the first decades after contact led to the establishment of social patterns of mutual respect and tolerance. Adams cites the need and desire of the foreigners for trade, the desire of the Hawaiians for foreign goods, the power over and monopoly on trade held by the Hawaiian King which necessitated the recognition of his status and authority by foreigners, and the desire of the King for the services of foreigners as influences in the development of the racial doctrine. Perhaps most important to Adams was the phenomenon of emancipation from home-country racial conceptions of early hacle men arriving in Hawaii who were cut off from home country social institutions and family. Their frequent marriages to female Hawaiian chiefs, which elevated their

own status, gave them an investment in egalitarian race relations for themselves, their wives, and their children. The number of high status white males with such links, and the interests of their "hapa-haole" (half-white) children strongly militated against the drawing of a strict color line and the complete subjugation of the Hawaiians. It was mutually advantageous for foreigner and Hawaiian alike to adopt a ritual of egalitarian relations. This ritual and its accompanying ideational elements set a fundamental pattern of constraints on ethnic polarization and subjugation in Hawaii, which, despite such innovations as the plantation system and a program of non-white labor importations muted public expressions of racial antagonism.

Adams contended that the arrival of the American missionaries in 1820 posed the first substantial threat to the incipient rituals of race equality. Missionaries brought their wives with them and "established white family life with New England standards." This, along with the haole families being establishd by the haole business men, Adams proposed, presented the possibility of the establishment of a segregated white social group, norms against interracial marriage, and the adoption of the typical American racial code. However, elements of missionary ideology along with other circumstances led to missionary acceptance of incipient racial patterns and indeed they came to support the native order and native

authority against the depredations of some of the more opportunistic haole residents and predatory foreign nations. Adams (1954:151) points out that the typical pattern around the world was for "white exploiters and irresponsible transients" to break down a native order, then cite its breakdown to enlist the assistance of their national governments in taking control. Certainly these forces were at work in Hawaii, but the missionaries resisted such efforts in the 1830's and 40's, in part by promoting a new political legal order which could be locally controlled and which would not give excuse for foreign nations to take control themselves.[66]

The major challenge in the nineteenth century to Hawaii's race doctrine was the emergence of plantation agriculture. This political-economic system of commercial land utilization and labor recruitment and control led the planters of Hawaii "to import numerous non-white labor groups, and then to impose upon them various coercive controls, including a rigid system of occupational and residential segregation." (Lind, 1954:3) Class and race came to be nearly coterminous phenomena. A small haole elite associated with plantation agriculture, many the descendants of missionaries, economically and socially dominated the Islands; a few Hawaiians of ali'i background were socially accepted by this group. The remainder of the population:

[66] This is not to say that the missionaries were not promoting their own interests in so doing.

Hawaiian commoner, Chinese, and Japanese constituted an ethnically differentiated underclass not admitted to polite society.[67]

Nevertheless, the planters were unable to keep their labor force on the plantations, all labor contracts being for a fixed number of years. The Asians, first the Chinese and then the Japanese, left the plantations to move to the cities, often becoming small entrepreneurs, laborers, and craftsmen. This process, beginning in the late nineteenth century and continuing in the early decades of the twentieth century, had its own social consequences and implications for rape law which will be discussed in succeeding chapters.

4.4 RAPE PROSECUTIONS 1850-1892

The procedure by which rape cases entered the courts and were tried by them was invariant over the period 1850-1892 as established by the Act to Organize the Judiciary of 1847 (Hawaii, 1847). The process began with a complaint to a police officer or the sheriff. The accused, if known and apprehended, was taken almost immediately before a District Court or Police Court magistrate for preliminary examination wherein witnesses were called and a determination was made if probable cause existed to believe that, on the evidence

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[67] Some smaller ethnic groups of European ancestry, Portugese, Norwegian, Spanish, and German were in the ambiguous position of not being accepted by the haole elite, yet being regarded by themselves and others as superior to the Asians.

adduced, a jury would convict the accused of the crime charged. (Hawaii, 1847: Art.2, Chap. 2, Sec. 23) If so, the magistrate committed the accused for trial at the next term of the Circuit Court for that island. The notes of the commitment proceedings were retained and forwarded to the attorney general who drew up an indictment against the accused. The indictment was presented to the presiding justice of that term of court who, after reviewing the evidence found either a "True Bill" or "No Bill." If a true bill was found, the case was placed on the criminal calendar for that term of court. At the appointed time the defendant was brought to court and arraigned. He entered his plea, and the trial, if a not guilty plea was entered, began. If the defendant was convicted he could appeal on points of law to the Supreme Court en banc, but of course he would be mindful that the presiding judge at his trial would be one of the three Supreme Court justices making the appellate decision.

The judicial records of the Monarchy period have been kept in amazingly complete and good condition and are held in the Archives of the State of Hawaii. The case files, in varying conditions of completeness, exist for nearly all cases processed above the District and Police Court level.[68] For criminal cases, records of nearly all misdemeanors appealed from the lower courts exist, as well as records of

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[68] These include the records of the "local Circuit Court" which had "at chambers"jurisdiction over certain types of appeals and other matters that could be processed without a jury.

nearly all felonies, such as rape, committed for trial by the lower courts.

The total number of circuit and Supreme Court criminal case files held by the Archives is approximately 6,527, of which 1,665 are for the First Circuit (Oahu), 1,211 are for the Second Circuit (Maui, Molokai, Lanai),[69] 2,420 are for the Third Circuit (Hawaii), and 1,231 are for the Fourth Circuit (Kauai, Niihau). Using existing subject matter codings of these cases, all cases involving a charge of rape, assault with intent to commit rape, and carnal abuse, were identified.[70]

The remainder of this chapter will first examine the statistical characteristics of rape prosecutions during the Monarchy. Second, it will examine how some of the key problematical issues in rape cases were handled, and finally the chapter will examine the second episode of "crisis" over a rape case in Hawaii.

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[69] The records for approximately 450 cases prosecuted on Maui were apparently lost during shipment sometime in the past. The lost cases are not random since the cases were arranged and boxed alphabetically. The last files were of cases wherein the defendant's last name began with the letter "M" or "N." At least three of the rape cases lost here have been recovered by searching the court minute books.

[70] A project funded by the National Endowment for the Humanities (Grant No. RS-0040-79-0573) sponsored by the Judiciary of the State of Hawaii had, during 1979 and 1980, coded the subject matter of these cases for computer retrieval. The author was a research associate in that project. The cases of the First Circuit had previously been coded by Professor Harry V. Ball of the Department of Sociology, University of Hawaii (Manoa).

4.4.1 Characteristics and Patterns of Rape Prosecutions

Two sources exist from which we can draw statistical information concerning the characteristics and patterns of rape prosecutions during the Monarchy. First, from 1853 through the end of the Monarchy, the Chief Justice made reports (annual from 1853-1856 and biennial from 1858 to 1894) to the legislature on business done by the courts.[71] These reports give, from 1849 to 1885, the number of criminal trials and convictions, and from 1886 to 1892 the number of committals, convictions, and acquittals. The number of commitment proceedings in the Police and District Courts are also reported.

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[71] The reports of 1853, 1854, 1855, 1856, and 1858 are titled "Annual Report of the Chief Justice ..." Since the report is to the legislature of the year indicated it covers the court business for the prior calendar year. Even though the report of 1858 is labeled the "Fifth Annual report ...", it covers the years 1856 and 1857. Beginning in 1860, the reports are titled "Biennial Report of the Chief Justice ...". The statistical material for the reports was compiled from reports by the judges of the other circuits. The level of detail varies from time to time, probably representing the interest or lack thereof of the chief justice in statistical material. There are obvious errors in some of the reports. For example, as is evident in comparing Tables 3 and 4, the reports show no rape cases in years in which, based on the existence of a case record, such cases clearly exist. In addition, summary tables in the reports often do not correspond with partial tables. Nevertheless, the data in these reports are presented since they do show the general level of rape prosecutions and they do support the contention that the case records used in this study very nearly approximate the total population of cases in the circuit and supreme courts for the period 1850 to 1892.

The second source of statistical information is the case records themselves. Using the previously discussed indexes along with selective searches of the Circuit Court minute books it was possible to locate 82 cases involving 84 defendants[72] which were committed to the circuit or Supreme Courts in which the charge was rape, assault with intent to ravish, or carnal abuse.[73] Each of these cases was examined and coded regarding its procedural history the characteristics of the victim and defendant, the details of the behavior involved, the disposition, and sentence if any. Analysis of these data provide a rather complete picture of the enforcement by the courts of the rape law of 1850 in the first 42 years after its passage.

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[72] Only one case, King vs. Ahsing, Kinio, and Ahchee, involved multiple defendants.

[73] "Assault with intent to ravish" is the offense defined in Section 3 of Chapter II of the Penal Code of 1850 (Hawaii, 1850), and appears synonomous with "attempted rape" which was occasionally used by law enforcement officials interchangeably with "assault with intent to ravish" or "assault with intent to rape." Since it appears to be the more correct, "assault with intent to ravish" is the term used in the following discussion.

Carnal abuse is intercourse with a girl under ten. It is defined in Section 2 of Chapter II of the Penal Code of 1850 (Hawaii, 1850). In addition, the Penal Code of 1850 defines the crime of "burglary with intent to rape" in Section 1 of Chapter 14 as part of the general burglary statute. Two cases of this charge were discovered throughout the Monarchy period. Since this charge is similar to assault with intent to ravish and since the small number of cases do not merit separate treatment, they are combined with the cases of assault with intent to ravish for statistical purposes.

As a preliminary step, it is useful to compare the enforcement statistics from the chief justice's reports and those from the case files. Such a comparison reveals not only the level of discrepancy between the two sources, but also the distribution of types of cases (rape, assault with intent to ravish, carnal abuse) by time period. Table 3 presents the biennial distribution of cases reported by the chief justice, and their dispositions, for all the Circuit Courts of the Kingdom and the Supreme Court from 1850 to 1892.

The table shows 39 cases in which the charge was rape, 28 in which it was assault with intent to ravish, and one case in which the charge was carnal abuse of a girl under ten. The rate of conviction was 51% for rape and 79% for assault with intent to ravish. The one case of carnal abuse did not result in a conviction.[74] The table also reveals a gradually increasing number of cases in the courts. During the first decade (1850-1859) there were only seven cases brought to

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What is commonly referred to as "statutory rape," that is sexual intercourse with a girl ten or over and under fourteen was criminalized in Hawaii in 1864 (Hawaii, 1864). Statutory rape is not dealt with in this treatment of rape law in Hawaii because, although it legally is a type of rape, defining an age below which a girl may not give consent, in the view of the community it constituted a quite different phenomenon than forcible attacks on women and girls and sex with girls under ten.

[74] The reports of the chief justice do not distinguish between cases that resulted in a decision of acquittal and those for which a "No Bill" or "Nolle Pross" was entered. Thus the reported conviction rate is for all cases committed to the court, not only those resulting in a trial and decision or a guilty plea.

TABLE 3

DISTRIBUTION BY YEAR AND OUTCOME OF CASES OF RAPE, ASSAULT WITH INTENT TO RAVISH, AND CARNAL ABUSE IN THE CIRCUIT COURTS AND SUPREME COURT OF THE KINGDOM: 1850-1892*

Biennium Ending	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81	83	85	87	89	91	92**	Total
OFFENSE TYPE																							
Rape																							
Convictions				2	2		4		1	1		1			1	1	2	1	2			2	20
Acquittals	1	1							3				2		2	1		3	1	3	1	1	19
Total Cases	1	1		2	2		4		4	1		1	2		3	2	2	4	3	3	1	3	39
Asslt W/I Ravish																							
Convictions				1				1		1	2	2	1	1			2	2	1	1	2	5	22
Acquittals									2		1	1									2		6
Total Cases				1				1	2	1	3	3	1	1			2	2	1	1	4	5	28
Carnal Abuse																							
Convictions																							
Acquitals																						1	1
Total Cases																							1
All Types																							
Convictions				3	2		4	1	1	2	2	3	1	1	1	1	4	3	3	1	2	7	42
Acquittals	1	1							5		1	1	2		2	1		3	1	3	3	2	25
Total Cases	1	1		3	2		4	1	6	2	3	4	3	1	3	2	4	6	4	4	5	9	68

*From Biennial Reports of the Chief Justice. The reports of the Chief Justice usually report the statistics by circuit and also a summary table for the whole kingdom. The two sources are often inconsistent in that the partial talbes do not sum to the summary table. This table is a compilation made by the author of the partial tables.

**One year only.

the courts; in the decade 1882-91 there were 24 cases in the courts.

Table 4 presents the same information as Table 3 except that the data were compiled from the individual case records. Comparison of the two tables reveals substantial discrepancies. Table 4 shows 33 cases of rape, 47 cases of assault with intent to ravish, and 4 cases of carnal abuse, or a total of 84 cases compared with the total of 68 cases reported by the chief justice.

The sources of the discrepancies are unknown and unlikely to be discovered since chief justices left no details on how their statistics were compiled. However, the statistics compiled from the actual case records are clearly individually identified. The following analysis will rely on the data compiled from the case records.

The first question we might ask about rape prosecutions during the Monarchy period is whether they were primarily an urban phenomena. If so, we would expect to find most of the prosecutions in the first circuit, the island of Oahu, which includes Honolulu, the only major city. The other three circuits can be fairly characterized as completely rural with only a few villages and towns. The distribution of cases across islands is as follows: First Circuit (Oahu), 29,[75] Second Circuit (Maui, Molokai, Lanai), 14; Third Circuit (Hawaii), 25; and fourth circuit (Kauai, Niihau),

[75] Two of these cases actually came from the Fourth Circuit, one on appeal and one on a change of venue.

TABLE 4

DISTRIBUTION BY YEAR AND OUTCOME OF CASES OF RAPE, ASSAULT WITH INTENT TO RAVISH, AND CARNAL ABUSE IN THE CIRCUIT COURTS AND SUPREME COURT OF THE KINGDOM: 1850-1892*

Biennium Ending	51	53	55	57	59	61	63	65	67	69	71	73	75	77	79	81	83	85	87	89	91	92	Total
OFFENSE TYPE																							
Rape																							
Convictions			1	3	1		2	1	1			1			1	1		1	1				14
Acquittals									2											1	1		4
No Bill/Nolle			1		1	1							2			1		1		1		1	9
Unknown				1	1		2				1		1										6
Other																							
Total			2	4	3	1	4	1	3		1	1	3		2	1	1	1	1	3	1	1	33
Asslt W/I Ravish																							
Convictions							1				1	2	1		1	1	4	3	3		2	6	25
Acquittals	1								1		2	1			1			3		1	1	1	12
No Bill/Nolle							2	1							1				1	1			6
Unknown							1			1						1							3
Other								1**															1
Total	1						4	2	1	1	3	3	1		3	2	4	6	4	2	3	7	47
Carnal Abuse																							
Convictions										1				1					1		1		4
Acquittals																							
No Bill/Nolle																							
Unknown																							
Total										1				1					1		1		4
Alltypes																							
Convictions			1	3	1		3	1	1	1	1	3	1	1	1	2	5	3	5	1	3	6	43
Acquittals	1								3		2	1			1			3		2	2	1	16
No Bill/Nolle			1		1	1	2	1					2		1	1		1	1	2		1	15
Unknown				1	1		3			1	1		1			1							9
Other								1**															1
Total	1		2	4	3	1	8	3	4	2	4	4	4	1	3	4	5	7	6	5	5	8	84

*From case files, Archives of Hawaii **Defendant absconded

16. Although more cases appear on Oahu, it is closely followed by Hawaii which is the largest and was the most rural of the Islands. We see, then, a distribution of cases across all the islands without any single, island having a monopoly on rape prosecutions.[76]

Given the ethnic diversity of the population it is also of interest whether any patterns exist regarding the ethnic diversity of the defendants and of the victims. Table 5 presents frequency of ethnic combinations of defendants and victims. The marginals provide the frequencies of defendants and victims of each ethnicity.

The majority of the defendants, 57.1%, were Hawaiian or Part-Hawaiian, followed by Chinese at 22.6% and haoles at 13.1%. Victims also tended to be Hawaiian or Part-Hawaiian with at least 63.1% belonging to that ethnic group. There were probably more Hawaiian victims among those whose ethnicity could not be determined from the court records. The prevalance of Hawaiian and Part-Hawaiian women as victims no doubt reflects in large part their prevalence among the female population. Table 5 also reveals that the modal ethnic combination of victim and defendant was Hawaiian-Hawaiian, the next combination being Chinese

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[76] Actually it is possible to rather precisely locate the district of origin of each case by reference to the District Court from which it was committed. Inspection of these data reveals wide dispersal of place of origin within each island. These data are not presented since such detailed geographical analysis is not the focus of this research.

TABLE 5

FREQUENCIES OF ETHNIC COMBINATIONS OF DEFENDANTS AND COMPLAINANTS IN RAPE, ASSAULT WITH INTENT TO RAVISH, AND CARNAL ABUSE CASES IN THE CIRCUIT COURTS AND SUPREME COURT OF THE KINGDOM: 1850-1892*

Ethnicity of Complainant	Ethnicity of Defendant						
	Haw'n	Haole	Chinese	Port.	Japse	South Sea Isl.	Total
Haw'n	44.0 (37)	6.0 (6)	13.1 (11)				63.1 (53)
Haole	3.6 (3)	6.0 (5)	1.2 (1)				10.7 (9)
Chinese							0.0 (0)
Japse	1.2 (1)		3.6 (3)				4.8 (4)
Port.	2.4 (2)			2.4 (2)			4.8 (4)
South Sea Isl.						1.2 (1)	1.2 (1)
Unknown	6.0 (5)	1.2 (1)	4.8 (4)	1.2 (1)	1.2 (1)	1.2 (1)	15.5 (13)
Total	57.1 (48)	13.1 (11)	22.6 (19)	3.6 (3)	1.2 (1)	2.4 (2)	100.0 (84)

*From case files, Archives of Hawaii. Cell percentages based on the entire table.

**This figure inclides the case in which three Chinese were charged with the rape of one Hawaiian woman. She is counted as a victim three times.

defendant and Hawaiian victim, and the other numerically significant combination, being haole defendants and Hawaiian victims.

The ethnic combinations revealed are not readily interpretable. Given the long time period under examination, the continuous shifting of the population, and the small number of cases, the calculation of expected frequencies of the appearance of members of different ethnic groups as defendants or victims is probably unjustified. Nevertheless, the small number of cases involving haoles as defendants (only 11 in 43 years) is curious. The many seamen associated with whaling trade up until the mid 1860's alone would suggest that sexual attacks would not be infrequent, particularly as resentment arose over missionary inspired programs to limit the sexual accessibility of Hawaiian women. One explanation, of course, would be discriminatory law enforcement. Haoles, being the dominant group, were less likely to be prosecuted for rapes. This may be true, but on the other hand, it must be recalled that the lower level law enforcement apparatus and courts were predominantly staffed by Hawaiians. Is it reasonable to suppose that these Hawaiian officials, responsible for the entry or non-entry of a case into the criminal justice system, were more lenient toward haoles raping Hawaiian women than they were toward members of their own group? Or is it possible that Hawaiian women were reluctant to

complain against haoles or the matter was settled in some other way such as by the payment of money as compensation, a cultural holdover of the old system? Unfortunately no information has come to light that can answer these questions and explain the pattern.

One further victim characteristic is of note, and that is the age of the victim. It would seem reasonable to assume that attacks upon young girls were more likely to be regarded as serious and thus more likely to be prosecuted. Victim age was not recorded in the majority of cases but it should be noted that at least 18 of the 82 individual victims were under 12 and more information would likely reveal more child victims. The youngest victim for which there is information was three years old.

4.4.2 Case Dispositions

In order to see the varieties of dispositions of rape, assault with intent to ravish, and carnal abuse cases, it is necessary to take a closer look at Table 4. Once committed by District or Police Court there are only three possible dispositions for a case: first, it can result in a conviction by guilty plea or verdict; second, it can result in an acquittal after trial, or third, it can be nolle prossed or a "No Bill" found. Unfortunately, there is one further disposition that must be used and that is "disposition unknown" due to incompleteness of the records.

There are nine defendants among the 84 for whom the disposition is unknown.[77]

The first observation with regard to convictions and acquittals is that plea bargaining, as indicated by a guilty plea to a reduced charge, was not a frequently used method of disposing of cases. Of the 84 defendants only two pled guilty to a lesser offense; one pled to assault with intent to ravish on a carnal abuse charge and one pled to assault with intent to ravish on a rape charge. Two other defendants, both charged with assault with intent to ravish, pled guilty to the original charge.

The most common method of disposition of sexual attack cases was by jury trial. Excluding the four guilty pleas, the fifteen nolle pross's or no bills, the nine cases for which the disposition is unknown, and the one defendant who never came to trial because he absconded, there remain 55 defendants whose fates were decided by jury trial. There were no bench trials. Seventeen defendants were tried for rape resulting in thirteen convictions and four acquittals. Three of the convictions were for lesser offenses.

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[77] One cannot assume that the cases for which the information is incomplete are representative of the population as a whole--that they are a random selection. The likelihood of a record of the disposition being missing is inversely related to the number of stages the case went through. If a case went clear to a jury trial many documents were generated and they were less likely to be lost. If a case was nolle prossed, however, note of that fact may not have been recorded. It is likely that most of the nine cases with incomplete information were terminated early by nolle pross or no bill.

Thirty-five trials were held for assault with intent to ravish, resulting in twenty-three convictions and twelve acquittals. Four trials were held for carnal abuse resulting in one conviction on the original charge and three convictions on the lesser offense of assault with intent to ravish. Of the entire 55 defendants, 72.7% (40) were convicted of the original charge or of a lesser offense.

Of interest is the question of how foreign and native juries responded to sexual attack charges. It should be recalled that Hawaiians and Part-Hawaiians were entitled to juries of natives and that foreigners were entitled to juries of foreigners (which in practice meant haoles). It might be expected that natives would be unlikely to convict each other given the foreign origin of the legal system and the criminal definition at issue. Excluding three "not guilty" verdicts directed by the court, there were 52 defendants for whom a jury decision was made. Twenty-four foreign juries convicted nineteen times for a conviction rate of 79%. Twenty-eight native juries convicted twenty times for a conviction rate of 71%. Thus it appeared the Hawaiians were nearly as likely to convict another Hawaian as the foreigners were a member of their group. But, were the foreigners all of the same group? Not at all. These twenty-four all haole juries convicted four haoles, twelve Chinese, one Portugese, one Japanese, and one South Sea Islander. They acquitted three haoles, one Chinese, and one

South Sea Islander. So, they convicted only four of the seven members of their own group to come before them and convicted fifteen of the seventeen non-haole foreigners.

If anything can be concluded, it is that native jurors were more likely to convict members of their own ethnic group for rape and related crimes than were the haole jurors.

The last statistical item we wish to examine are the sentences. Since, prior to 1850, the sentence for rape was a $50.00 fine and for attempted rape a $25.00 fine, it is of interest to examine the actual sentencing practices under the new 1850 statute, which provided up to life imprisonment for rape, up to five years for assault with intent to ravish, and either death or life in prison for carnal abuse.

Table 6 presents the distribution of sentences on convictions for rape, assault with intent to ravish, and carnal abuse. Calculating the one life sentence for rape at 25 years, the average sentence for rape convictions was 7.7 years with a range of one year to life in prison. The average sentence for assault with intent to ravish was 2 years and 4 months with a range of from one week[78] to 5 years in prison. The only person convicted of carnal abuse received the sentence of life in prison rather than the death penalty.

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[78] This sentence was received by a thirteen and a half year old boy.

TABLE 6

DISTRIBUTION OF SENTENCES ON CONVICTIONS FOR RAPE, ASSAULT WITH INTENT TO RAVISH, AND CARNAL ABUSE: 1850-1892*

Offense					
Rape		Assault W/I Ravish		Carnal Abuse	
Sentence	# Cases	Sentence	# Cases	Sentence	# Cases
Life	1	5	7	Life	1
10	3	3	4		
7	1	2½	1		
5	3	2	4		
3	2	1½	2		
2	1	1	6		
		½	3		
		1 month	1		
		1 week	1		
Total Cases**	11		29		1

*From case files, Archives of Hawaii
**For one case the sentence is unknown.

4.4.3 Qualitative Aspects of Rape Prosecutions During the Monarchy

Thus far we have relied almost exclusively on quantitative analyses of the prosecutions for rape and related sex offenses to show the emerging aspects of rape law enforcement. However, of equal importance to the numbers, especially with respect to later impact was what we labeled in the first chapter the "culture of law" that was being established in the courts as rape cases came to them. It is necessary to discover what kinds of principles and practices were being established by the nineteenth century pioneers of rape law enforcement as they processed cases. These data can only come from a close reading of the case records, and even there data are frustratingly incomplete not only due to the incompleteness of some of the files but also due to the infrequency with which judges, prosecutors, and defense lawyers left explantions of their actions in the records of trial courts. During the entire period being scrutinized in this section, only two defendants, one convicted for rape and one convicted for attempted rape, completed appeals to the Supreme Court en banc resulting in written opinions on points of rape law.[79]

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[79] These two cases were King vs. Heinrichs (3 HAW. 40) in 1867 and King vs. Erickson (5 HAW. 159) in 1884.

Nevertheless, the case records, despite some incompleteness, are a valuable source on emerging rape law as practiced.

The notes of evidence produced by the District or Police Court justice of the commitment proceeding sometimes have been preserved, and often the trial judge's and/or court clerk's notes of witness testimony at trial are contained in the case file. These notes are not, of course, verbatim, but they do provide a rather detailed record of the witness' testimony and the court proceeding in general. The notes record the answers of the witness' but they do not record the questions of the examiner. Nevertheless, one can readily infer from the answers given by the witnesses, both on direct and cross-examination, the kinds of issues and evidentiary points seen by both the prosecution and defense to be important to their cases. So, given the lack of precedent cases, some incompleteness of records, the small number of cases, and the inevitable change of judges and lawyers over the long time period being examined, there is difficulty in determining the case law of rape or even patterns of rulings. But it is possible to rather clearly discuss the kinds of issues and points advanced by the legal actors in cases.

But before examining specific issues in rape cases it is useful to point out in a general way the hegemony of haole personnel and Western precedent in the cases. First, as was

pointed out above, nearly all of the trial court judges were haoles who had either been trained in American, English, or European law schools or who had "read law" under a Western trained lawyer. So, except for John Ii and R.G. Davis, a Part-Hawaiian, all judicial decisions at the trial court level were made by non-Hawaiians. There were both haole and Hawaiian judges at the District and Police Court levels, responsible for commitment proceedings, but the extent to which the Hawaiian judges differed in their conceptions and practices from the haoles is unknown. Likewise, many, if not most, of the lawyers who appear in the case records as involved in rape cases were haoles. Some Hawaiian lawyers do appear as counsel or co-counsel in cases.[80] In addition to the dominance of haoles note must be taken of the complete dominance of males in official roles on rape cases. No woman appears in any rape case in any role other than victim or witness. There were no women judges, lawyers, or jurors. The ability of women to perform in official public roles in the indigenous Hawaiian culture was not incorporated into the new Western legal system.

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[80] See for example, King vs. Nee (1854) in which D. Kaauwai appears as co-prosecutor and Kamaea appears as co-defense counsel. Some other cases in which Hawaiian lawyers appear are King vs. Hume (1858), King vs. Kaaimano (aka Hale) (1862), King vs. Kawaipo (1872), King vs. Kaailaau (1875), King vs. Liwai Kaawa (1887), King vs. Mahiai (1868), King vs. Puahalahua (1870), King vs. Henry Moore (1881), King vs. Waiwaiole (1883), King vs. Naleihaole (1883), King vs. Kaahai (1885), King vs. David Kalamaia (1885), King vs. Manuel Tavares (1891), King vs. Kong Fat (1892), King vs. Ahona (1892).

Besides personnel, haole legal hegemony is demonstrated in the references and cases cited by lawyers and judges in rape trial proceedings. No mention was ever found in any of the case materials of traditional Hawaiian practices for control of rape or indigenous conceptions of the act. Rather, all citations that were made were to English and American treatises and cases.[81]

Given the dominance and predominance of male, haole, Western-trained lawyers and judges in the processing of rape cases, the existence of a legal system designed from Anglo-American models, and a rape statute borrowed from Massachusetts, it is not surprising that the specific issues which animated rape cases were indistinguishable from the issues that arose in cases in the United States. These issues, broadly stated, involved the behavior and social status of the rape victim as they related to credibility and to whether the victim showed that she had due regard for sexual exclusivity and for giving sufficient notice to the male involved of lack of consent by making her utmost resistance to completion of the act. We find, then, that corroboration, resistance, victim reputation, outcry, and prompt complaint were important issues in rape cases between

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[81] For example, see King vs. Ahsing, Kinio, and Ahchee (1855), King vs. Holden (1867), King vs. Heinrichs (1867), and King vs. Erickson (1884). The most frequently cited sources are: Greenleaf, Wharton's Criminal Law, Archibald's Criminal Practice and Pleading, Roscoe's Criminal Evidence, Chitty's Criminal Law, Russell on Crimes, and Blackstone's Commentaries.

1850 and 1892. However, since only two cases resulted in Supreme Court appellate opinions, very little precedential case law was developed.

4.4.3.1 Corroboration

The reader will recall that the 1850 rape statute included the provision that rape victims were competent witnesses but that defendants could not be convicted on a victim's testimony alone, uncorroborated by other evidence. In practice, the corroboration requirement is difficult to apply. On the one hand it can be interpreted so loosely that the slightest independent evidence such as a small bruise or piece of torn clothing, that corroborates the victims story is sufficient. On the other hand it can be interpreted such that each element of the crime must be corroborated. It is unclear just how judges during the Monarchy interpreted the requirement, but it certainly was an issue in the first rape cases prosecuted in the 1850's and it appears to have been rather strictly applied. For example, in King vs. Aono, in 1855, the complainant charged that Aono, who was living in the same house with the complainant and her mother, raped her while she was sleeping. The Police Court evidence consisted of the testimony of the victim, including the fact that she woke up and saw the defendant in her room, the victim's blood-stained petticoat, the testimony of the victim's

mother to whom she complained in the morning, and who saw her bleeding, and the testimony of a physician who had examined the victim and stated that there may have been violence. In addition there was evidence that the defendant ran away when the victim told him she would complain about his crime. Nevertheless, at trial the prosecution nolle prossed the case after the victim presented her testimony on the grounds that there was insufficient evidence and that there was no witness other than the victim. This last reason is an invocation of the corroboration requirement evidently interpreted as the need for a witness to the rape itself before a case could be prosecuted. This is a very high standard and strict interpretation, indeed, of the requirement.

The issue next came up in 1857 in King vs. Ahsing, Kinio, and Ahchee, the rape of a Hawaiian woman by three Chinese. In this case there was eyewitness evidence to at least part of the rape, but whether actual penetration occurred appears to have been in doubt. The defense moved for dismissal on the grounds of no evidence of criminal intercourse, but the judge denied the motion saying there was sufficient evidence for the case to go to the jury. The jury instructions left the issue of corroboration up to the jury with the simple instrucution that by Hawaii's statute no person could be convicted on the testimony of the complainant alone.

The issue of corroboration arose again in 1858 in King vs. Kaianui in which no bill was found due to the fact that there was no other evidence except the testimony of the victim.[82] Similarly, no bill was found in King v. Ahu (1860) in which there definitely was corroborating evidence including extensive medical testimony in the Police Court as to the condition of the victim. Nevertheless, no bill was found, the prosecutor explaining that there was no evidence except that of the victim and that it was contradictory. Undoubtedly many other of the fifteen cases for which no bill was found or which were nolle prossed were so disposed of due to their failure to meet the corroboration requirement. However, such explanations were not recorded.

In King vs. Heinrichs (1867) (3 HAW. 40), one of the cases that went to the Supreme Court on appeal, the defense excepted to the verdict as being "contrary to the law and evidence." In its written opinion, the Court, in overruling the exception, noted the fulfillment of the corroboration requirement, the testimony of the victim concerning the use of force, her testimony about sustaining injuries, and her testimony of prompt complaint all being corroborated by other witnesses.

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[82] It is unclear whether the decision was because the corroboration requirement could not be satisfied, or out of practical concern about the likelihood of getting a conviction.

In King vs. Andrew Fisher (1887) the prosecution tried to use the corroboration requirement to its advantage by requesting the instruction. "If the jury from the evidence believe that the prosecutrix was corroborated by other evidence direct or circumstantial they must convict" (emphasis added). The record doesn't reveal whether the court accepted this clever device to turn the corroboration requirement to prosecution advantage.

4.4.3.2 Resistance

The only factor that differentiates rape from other sexual activities that may or may not be legal is the consent or nonconsent of the woman involved. The primary, but not sole, indicator of lack of consent in rape cases has traditionally been taken to be resistance by the victim. Evidence of resistance is taken to indicate the state of mind of the victim and also the kinds of signals being given to the male aggressor as to the woman's consent or lack thereof. Given the prime value of chastity and sexual exclusivity in Anglo-American society, it was believed that a woman worthy of the protection of the law should and would resist to the utmost, attempts at deprivation of these values. Resistance involved not only the utmost physical resistance but also outcries by the victim if there was any possibility of mobilizing assistance from persons nearby.

Recognizing the dominance of Anglo-American legal culture in Hawaii in the 19th century we would expect to find that here, too, resistance, and outcries, were important, if not the most important issue in rape cases.

Resistance and outcry came up in the very first case to be prosecuted under the 1850 statute. In King vs. John Hatchett (1851) the victim testified in response to questions that she did cry out as the attack was taking place. In King vs. Aono (1855) no doubt one of the major reasons the case was nolle prossed was that the victim did not cry out even though the victim's aunt was in the next room. Resistance was a key element in the case of King vs. Heinrichs (1867), the case against the defendant being strengthened by one witness who testified that he observed the struggle and resistance by the victim prior to the rape. The court notes the resistance and corroboration of it by a witness in its appellate decision on the case.

Resistance and outcries were also major issues in King vs. Erickson (1884) (5 HAW. 159), the other case to result in an appellate opinion. In this case the defendant was charged with attempting to rape an eleven year old girl in the bedroom of his home in which other persons were present. The victim testified that the defendant held her down on the bed and put his hand over her mouth while he tried to have sexual intercourse with her. She did not testify that she resisted. She did not complain of the act until the Tuesday

following the Sunday evening on which it occurred. The defense asked that the jury be instructed:

> --That to convict it must be shown that the prosecutrix made known the assault immediately after it was charged to have been made.
> --That it must be shown that the prosecutrix made outcries if others were in hearing.
> --That by law a female over ten years of age is presumed to consent to an assault unless there is proof of resistance, outcries, and immediate complaint.

The court refused the instructions and on conviction of Erickson the defense appealed to the full court. The prosecution argued that while lack of prompt complaint, lack of outcry, and lack of resistance would presume consent in the case of an adult woman such was not true in the case of young girls who were more likely to submit through fear and confusion. The court agreed with the prosecution, citing the age of the victim as a "strong element" in explaining her actions, and repudiated the defense contention that lack of resistance, outcries, and immediate complaint were conclusively presumptive of consent. But both the prosecution and the court implied that had the woman been an adult, a much different standard would have been applied to her behavior.

4.4.3.3 Victim Chastity and Reputation

Another key issue that traditionally has emerged in rape cases is that of the chastity and reputation of the victim. The behavioral theory underlying this interest is that a

woman who has given consent in the past to premarital or extramarital sexual relations and who has not guarded her sexual exclusivity, is more likely to have given consent in the case where rape is charged. Evidence of this type is also regarded as bearing on the issue of general victim credibility, the belief being that a woman who has in the past engaged in such consensual sexual behavior is more likely to lie than a woman who has scrupulously followed conventional sexual norms.

We again find that the first rape case to be tried under the statute of 1850, King vs. John Hatchett (1851) raises these issues. There is testimony by the victim, a Hawaiian woman, that she was a virgin before the attempted rape. But there is also testimony by a defense witness that the house where the alleged attack took place had been pointed out to him as a "house of ill fame." We do not know how the jury considered this evidence, but it did acquit Mr. Hatchett of the offense. In King vs. Heinrichs (1867) (3 HAW. 40) medical testimony was introduced which indicated that the victim had been a virgin prior to the attack and that the rape was her first sexual intercourse.

Further insight to court practice comes from King vs. Hume (1858). In this case the character of the victim was a major issue. The defense attempted to open up a line of questioning to show that the victim had previously committed adultery. The prosecution objected to the questions on the

grounds that if the defense wished to prove that the victim was an "infamous character" it must be done by "evidence other than herself." The court agreed with the prosecution that if the point was to be made it must be done by other evidence. Similarly, in King vs. Papa (1867) the defense attempted to introduce evidence on the character of the victim and was refused by the court. In a prosecution for assault and battery, King vs. Kealakua (1861), in which the facts clearly indicate attempted rape, the defense was allowed to ask the victim if she had ever committed adultery with the defendant.

To sum up, the findings about the prevalent issues in rape cases, it has been found that rape cases in Hawaii during the Monarchy period after 1850 were concerned with the same kinds of issues that were central in the United States. There was an institutionalized mistrust of the testimony of rape victims in the form of the corroboration requirement. There was concern that the victim demonstrate her nonconsent by resistance, as victim characteristics and circumstances permitted. There was also at issue the question of whether the victim had been sexually exclusive. At the manifest level this went to questions of credibility and likelihood of consent; at the latent level the question was whether this woman had demonstrated by her past conduct that she had observed conventional norms of sexual exclusivity and thus deserved the protection afforded by

rape law.[83]

4.5 THE FIRST CRISIS OF RAPE LAW: PROTECTING NATIVE CHILDREN FROM HAOLE MEN

At the outset of this study an analytical framework was presented for organizing the analyses of critical events in the history of rape law in Hawaii. The model proposes a roughly sequential series of events and processes beginning with a "crisis," or "situation," which is the interruption of the smooth flow of habitual behavior. The crisis leads to attention and focus on the phenomenon. Through symbolic interaction the participants construct a definition of he situation. Demands for legal change are predicated on this definition. Both social structure and culture affect every step in this process by influencing how and what becomes a crisis, whose attention is engaged, what and whose meanings and symbols are manipulated in interaction to define the situation, and the likelihood that "solutions" to the

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[83] In at least one case some judicial sensitivity to the situation of rape victims was revealed. In 1880 Chief Justice C.C. Harris refused to find a true bill on an indictment of fifteen year-old Ida McShane for perjury in the second degree. Miss McShane had unsuccessfully brought charges against J.H. Hare and Walter Pomroy for attempted rape and was charged with perjury after her charges were dismissed in the Police Court of Wailuku (Maui). In refusing the true bill for perjury, the chief justice noted that the case consisted only of the word of the accusers against the accused, the unlikelihood of the girl having made up her story, and the necessity of not deterring a victim from bringing such charges for fear of prosecution for perjury if her story was not believed. The case is King vs. Ida McShane, First Circuit Case No. 957.

situation or crises will be attempted through law.

The first crisis in the administration of the rape law of 1850 occurred in 1867. Although information about the details as they relate to some of the elements in our framework are sparse, it is possible to follow some of the events and to discern the first development of themes and concerns to be reiterated many times in subsequent years.

The crisis of 1867 began with surprise and shock at the outcome of the case of King vs. James Holden. Holden, a businessman from San Francisco, was accused of abduction and assault with intent to ravish on a five year old Hawaiian girl. Despite strong evidence, which included eyewitnesses, the male haole jury acquitted Holden.

In an editorial highly critical of the jury, the Pacific Commercial Advertiser (January 19, 1867:2) announced that the "thinking portion of the community was not a little astonished." The newspaper charged that despite fully corroborated evidence of the accused's guilt, the jury felt that the penalty prescribed by the law was too severe, and refused to convict.

Another newspaper, the Hawaiian Gazette (January 23, 1867) also editorialized on the jury's decision with respect to this act "most vile and shocking." It, too, charged that the jury members had been influenced by "improper considerations," to wit, that the defendant was a foreigner like themselves and the severity of the penalty

for the crime charged. The Gazette pointed out that the jury's verdict had aroused the community.

Given the fact that the newspapers were appealing to their haole readerships to condemn the behavior of members of their own group, a difficult task, the papers asked their readerships to perform the mental experiment of reversing the class and ethnic roles in the crime charged. The Gazette said:

> Reverse the relations of the parties. Suppose the offense to have been committed by a poor Hawaiian upon the child of any juryman who tried the case. The foreign population might have lynched him. At any rate the excitement and indignation would have been overwhelming. (Hawaiian Gazette, January 23, 1867)

The Advertiser attempted to make the issue even more immediate and personal by asking the foreign reader to imagine that the victim was "his favorite little daughter" who had been "subjected to such a beastly ordeal, and threatened with such inhuman outrage" by a native who had been acquitted by a native jury. Both newspapers expressed concern that if it appeared to the native population that it could not receive justice from foreign juries, native juries would refuse to convict natives who committed crimes against foreigners. The legitimacy and credibility of the entire criminal justice system was threatened.

The lesson of the Holden Case and accompanying public criticism was not lost on the jury in the next rape trial on Oahu. Three months later, in April of 1867, one Otto

Heinrichs, identified as German by the Advertiser (April 13, 1867), was tried for the rape of a young girl over ten years of age. The Advertiser commented that although the evidence was "not very full"[84] it took the jury only fifteen minutes of deliberation to determine that the defendant was guilty. The Advertiser congratulated the jurors, saying they "deserve the thanks of the community for the prompt unswerving manner in which they performed their duty." The behavior of the jury in King vs. Heinrichs was clearly a response to the crisis and criticism subsequent to the jury verdict in King vs. Holden. Examination of the records reveals that five men were members of both juries. Here, of course, is an example of response of the legal institution to a community crisis concerning it and criticism of it.

The Advertiser further editorialized on the problem of rape in general:

> It is well known that there is a class of white men in the country - they do not deserve to be called men -- whose natures are so debased and whose minds are so demoralized that they have fallen beneath the veriest savage or even the brute creatures. They not only make it their practice to entice away and outrage children, but they have the shamelessness, some of them, to boast of their exploits. Let them beware, by the results of this trial, of the fate that awaits them if detected. It is said by those who are likely to know, that there are some in this community of Honolulu who are just as guilty and deserve quite as much punishment as the man who was tried last Monday. (Advertiser, April 13,

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[84] Why the evidence was described as "not very full" is not clear. The evidence appears strong and there was one eyewitness to the victim's struggle with the defendant prior to the rape.

1867:3)

Heinrichs appealed his case to the Supreme Court on the grounds of a defective indictment and that the jury convicted "contrary to law and evidence." The Court sustained the conviction, noting the fulfillment of the corroboration requirement (3 HAW. 40), and sentenced Heinrichs to ten years at hard labor. The Advertiser (April, 27, 1867:2) commented:

> The sentence is severe, but the offense of which the prisoner stands convicted is one of the most heinous that humanity is guilty of, and in these islands should be sternly punished, from the fact of the existence of a certain class of unprincipled foreigners here, to whose base practices we recently alluded in connection with this trial.

Although the available information on community reaction is sparse, primarily due to the small size of the newspapers and their tendency in the latter half of the nineteenth century not to focus on crime news, it is possible to discern the elements of the analytical model in the events during the episode. The crisis was the jury verdict in the Holden Case which surprised a portion of the community and was contrary to expectation. Attention was focused on the matter. The newspapers representing "the thinking portion of the community" proposed a definition of the situaton employing appropriate cultural symbols. What had occurred was a "beastly ordeal" and an "inhuman outrage" and the crime was personalized by asking the reader to imagine it had occurred to one of his own group. The breakdown of the

criminal justice system was forecast. Elements of the legal system, the jury in the next rape case, responded to the crisis. After the decision in Heinrichs the Advertiser revealed further of its definition of the situation, that a class of men existed that were a threat to female children, and that a conviction and long prison sentence for one of their number would be an effective deterrent to the others.

From the entire episode it is possible to discern several themes and issues which will be seen to be recurrent in the history of rape law in Hawaii.

First, there is the identification of a problem population, a dangerous class, as the source of the threat; in this case a class of haole men.

Second, there is the identification of a population that is threatened; in this case female native-Hawaiian children, and more generally all female children.

Third, the episode raises for the first time the issue of race or ethnic status as related to rape, and reveals the sensitivity of rape to such matters. If the Advertiser's pronouncements can be taken seriously, it mattered very much to the haole of the 1860's who was raped by whom.

Fourth, in the printed discussions of the cases the frequency with which the act of rape is referred to as "heinous," "revolting," "beastly," etc. reveals the symbolic language and images being used by the socially dominant portion of the community.

Fifth, the printed discussions clearly indicate that the act of rape, particularly the rape of a child, conferred upon a man a special status, of being less than human, akin to an animal.

Sixth, the episode indicates the potential of rape, and the failure of the criminal control system to deal with it adequately, to arouse the moral indignation of the community.

Seventh, the behavior of the Holden jury in refusing to convict, despite strong evidence, illustrates an ambivalence toward rape. The dominant portion of the community wished to make strong statements of hostility to the act in the abstract by prescribing severe penalties in the statutes. Yet, because of the severity of the sanctions, it may decline to apply them in concrete cases, particularly to ingroup members, by refusing to convict.

Finally, the newspapers, as special definers of the situation, took upon themselves the role of guardian of the moral interests of the community, condemning the acquitting jury of the Holden Case, praising the convicting jury in the Heinrichs Case, and alerting the community to the existence of a dangerous, threatening class of potential rapists.

Chapter V

URBANIZATION AND ETHNIC TENSIONS: 1893-1941

In the late 1880's and early 1890's two Hawaiian monarchs, first King Kalakaua, and Queen Liliuokalani, made attempts to reverse the trend of increasing domination of all aspects of island life by foreigners and to reassert monarchical prerogatives. In response, in January 1893, American businessmen, with the support of the military forces of the United States, overthrew the Monarchy. A provisional government was established headed by Sanford B. Dole, a missionary descendant, who left his post as associate justice of the Supreme Court to take the new position. When attempts by the revolutionaries to have the Hawaiian Islands immediately annexed to the United States failed, the "Provisional Government" was dissolved and a "republic" was established firmly under the control of the haole merchants and professional men of Honolulu. Annexationist appeals finally bore fruit in Washington and in 1898 Hawaii was annexed as a territory of the United States. The overthrow of the Monarchy and annexation ushered in a period of haole political, economic, and social domination that lasted for over 50 years.

5.1 POPULATION, STRATIFICATION, URBANIZATION, AND ETHNIC RELATIONS

Beginning in the 1870's the ethnic composition of Hawaii underwent a transformation that, according to Lind (1954:3), "threatened for a time to undermine the established practices of racial equality" and which introduced "the first clearly defined pattern of stratification by race."

The dismantling of the indigenous system of land tenure and the transformation of land into a commodity to be employed in the generation of profit, made possible the plantation system of agricultural economic organization which met the rising demand in the United States for sugar. Planters were unable to fill their needs for laborers from the local population and increasingly sought laborers from outside Hawaii, especially from Asia, who were brought in under a penal contract labor system. During the last decade of the nineteenth century and well into the twentieth, the population of Hawaii continued to undergo rapid growth and change. Table 7 presents the population figures.

Fear about the large number of Chinese immigrants led to restrictions on their importation in the mid-1880's and a decline in the rate of their arrival (Kuykendall, 1967:145-153). The Chinese population of the islands grew only 33%, from 21,616 in 1896 to 28,774 in 1940. However, importation of Japanese laborers increased during the 1890's, and by 1896 there were 24,407 residing in the islands. Their numbers more than doubled, to 61,111, by

TABLE 7

POPULATION OF THE ISLANDS BY ETHNICITY*

	1853	1860	1866	1872†	1878†	1884†	1890†	1896†	1900†	1910	1920	1930	1940	1950	1960
							NUMBER								
Hawaiian	70,038	65,647	57,125	49,044	44,088	40,014	34,436	31,019	29,799	26,041	23,723	22,636	14,375	12,245	10,502
Part-Hawaiian	983	1,337*	1,640	2,487	3,420	4,218	6,186	8,485	9,857	12,506	18,027	28,224	49,935	73,845	91,597
Caucasian	1,687	1,900†	2,400*	2,944	3,748	16,579	15,939	22,438	26,819	39,159‡	49,140‡	73,702‡	103,791‖	114,798‖	202,230‖
Portuguese	87	85*	90	424	486	9,987	12,719	16,191	18,272	22,301	27,002	27,588			
Other Caucasian	1,600	1,815	2,310	2,520	3,262	6,612	6,220	7,247	8,547	16,867	19,708	44,805			
Chinese	364	816	1,206	2,038	6,045	18,254	16,752	21,616	25,767	21,674	23,507	27,179	28,774	32,376	38,119
Japanese						116	12,610	24,407	61,111	79,675	109,274	139,631	157,905	184,598	203,876
Korean										4,533	4,950	6,461	6,851	7,030	
Filipino	5									2,361	21,031	63,052	52,569	61,062	68,641
Puerto Rican										4,890	5,602	6,671	8,296	9,551	
Negro									233	695	348	563	255	2,551	4,943
All Other	62	100*	488	384	684	1,397	1,067	1,055	415	376	310	217	579	1,618	12,864#
TOTAL	73,137	69,800	63,959	56,897	57,988	80,578	89,990	109,020	154,901	191,909	255,912	368,336	423,330	499,769	632,772
							PER CENT OF TOTAL								
Hawaiian	95.8	94.0	90.7	86.2	76.0	49.7	38.2	28.4	19.2	13.6	9.3	6.1	3.4	2.5	1.7
Part-Hawaiian	1.3	1.9	2.6	4.4	5.9	5.2	6.9	7.8	6.1	6.5	7.0	7.7	11.8	14.8	14.5
Caucasian	2.3	2.7	3.8	5.2	6.5	20.6	21.0	20.6	17.3	20.4	19.2	20.0	23.0	23.0	32.0
Portuguese	.1	.1	.1	.7	.8	12.3	14.1	14.9	11.9	11.6	10.6	7.5			
Other Caucasian	2.2	2.6	3.7	4.5	5.7	8.3	6.9	6.7	5.4	7.7	7.7	12.2			
Chinese	.5	1.2	2.0	3.6	10.4	22.6	18.6	19.8	16.7	11.3	9.2	7.4	6.8	6.5	6.0
Japanese						.1	14.0	22.3	39.7	41.5	42.7	37.9	37.3	36.9	32.2
Korean										2.4	1.9	1.8	1.6	1.4	
Filipino										1.2	8.2	17.1	12.4	12.2	10.8
Puerto Rican										2.5	2.2	1.8	2.0	1.9	
Negro									.2	.4	.1	.2	.1	.5	.8
All Other	.1	.1	.8	.7	1.2	1.7	1.2	1.0	.8	.2	.1	.1	.1	.3	2.0

*Estimate. †Based on Romanzo Adams, *The Peoples of Hawaii* (Honolulu: The Institute of Pacific Relations, 1933), pp. 8-9. ‡Includes Spanish, not separately listed. §Includes Spanish and Portuguese, n.e.l. ‖Includes Spanish, Portuguese, and Puerto Ricans, n.e.l. #Includes Koreans, Samoans, Micronesians, n.e.l.

**Source Lind(1967)

1900 and hit 157,905, or 33.3% of the population by 1940. Filipinos, almost exclusively male, immigrated in large numbers beginning in 1906, and numbered 52,569 in 1940. The number of non-Portugese Caucasians increased from 7,247 in 1896 to 44,895 in 1930. Smaller numbers of Portugese, Koreans, Blacks, Puerto Ricans, and other nationalities also immigrated.[85]

The only population group to decrease up to 1940 was the full-blooded Hawaiians whose numbers declined from 31,019 in 1896 to 14,375 in 1940. Their decline was somewhat compensated for by the increase in the number of Part-Hawaiians, from 8,485 in 1896 to 49,935 in 1940.

Through the use of this imported labor sugar and pineapple plantations were fantastically successful and provided the economic base for a distinct haole social class that emerged in the late nineteenth century and matured in the early twentieth century. At the core of this class were many of the descendants of the early Protestant missionaries. Many of the members of the class attended exclusive, private Punahou School together, belonged to the same private clubs and associations, supported the same charities, intermarried, belonged to the same political party (Republican), and sat on the same boards of directors of local corporations and financial institutions.[86] By

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[85] See Lind and Hormann (1982) for a brief history of each of these groups.

[86] See Richardson (1932a) Exhibit 6 for a chart of the

co-opting popular Hawaiian leaders and permitting large numbers of appointments of Hawaiians to patronage positions in government the haole elite was able in large measure to control territorial politics despite numerical inferiority at the polls.[87] There was no danger of the executive and judicial branches slipping from haole control, as the governor, the judges of the Circuit Courts, and the justices of the Supreme Court were appointed by the president of the United States under the provisions of the organic act incorporating Hawaii as a territory.

The class at the bottom was, of course, a highly differentiated aggregate of the commoner remnants of the indigenous Hawaiian population and the members of the several Asian groups who had been imported as contract laborers or had immigrated as free labor.

Ethnic relations in Hawaii deteriorated during the first three decades of the twentieth century. Ethnic prejudice was exacerbated during this period by the changing class structure, urbanization and its consequences, and the diffusion of Mainland, especially Southern, racial attitudes to Hawaii.

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interconnections of persons and businesses that comprised Hawaii's business community in the early 1920's.

[87] The foregoing description of the haole elite is based primarily on Fuchs (1961).

Stressing the structural factors, Hormann (1950) designates the 1920's as the period of the formation of a definite middle-class in Hawaii comprised of recent haole immigrants engaged in small business, the professions, and skilled labor. Unlike earlier haole immigrants, these newcomers did not gain automatic admission into the established haole elite, which was more secure in its dominance and was more paternalistically oriented to the non-whites. Rather, these haoles constituted a new class, insecure in its position, and subject to status anxiety. Hormann (1950:48) attributes to these people "aggressiveness, snobbishness, self-advertising, and conspicuous consumption." He says, "Among such people strong prejudices, often in the form of race prejudices, make their appearance." More generally, Shibutani and Kwan (1965:401) point out that as long as the ethnic stratification system remains stable, little racial tension occurs. Tension and conflict are symptomatic of societies undergoing change in which there is likely ethnic rivalry for social position. Similarly, Robin Williams (1947:57-58) offers the proposition "Hostility is a function of 'insecurity,' the greater the insecurity, within limits, the more the hostility."

Actually, some of the conditions Hormann observed in the 1920's had a history that went as far back as the 1860's. Lind (1938) traces the rise of "race consciousness"

beginning with the complaints in 1869 of white and native "mechanics" about competition from Chinese newly liberated from the plantations. The 1884 census pointedly revealed to the inhabitants that the Chinese were not staying on the plantations but were moving to the city to compete for opportunities (Lind, 1938:269). Glick (1981:209-236) outlines the extensive efforts by the haoles and Hawaiians in the mid-1880's, including discriminatory legislation, to inhibit the progress of the Chinese.

As Japanese moved from the plantations into the city they similarly were the object of criticism for the same reasons and there were many complaints from skilled workers and shop owners about Japanese competition the first decade after the turn of the century (Lind, 1938:270). Serious plantation strikes, by the Japanese in 1909, by Japanese and Filipinos in 1920, and by Filipinos in 1924 all focused attention on the Asians (Lind, 1938:272) and raised questions about controlling them. Fuchs (1961:49-50) contends that the attitudes of the majority of haoles toward Asians had two phases: first, up until about 1920, there was a firm belief in white superiority and Asian inferiority. But as considerable Asian success was observed and through the writings of University of Hawaii psychologist Stanley Porteus suggesting that Japanese may even be a superior race, "many leading haoles agreed that stern measures might be needed to curb the unfair 'racial superiority' of the Japanese."

Much of the class conflict just described came about because of, or at least was exacerbated by, the increasing concentration of the population, particularly of non-whites, in Honolulu. Many workers, mostly Asians, left the plantations as soon as their contracts expired, for the opportunities and excitement of Hawaii's only major city. From 1900 to 1940 the population of Honolulu increased from 39,306 to 179,358, an increase of 356%. All of Oahu's population increased 340%, from 58,504 to 257,696 during the same period. The population of all the other islands combined only increased 73% from 95,497 to 165,074. By 1940 61% of the population of the islands lived on Oahu (Schmitt, 1966:116). Robin Williams (1947:57-58) again offers an apt proposition: "Migration of a visibly different group into a given area increases the likelihood of conflicts, the probability of conflict is the greater (a) the larger the ratio of the incoming minority to the resident population and (b) the more rapid the influx."

As a consequence of urbanization, Honolulu took on more of the characteristics of large cities on the Mainland.[88] Immigrant groups became segregated into a few districts on the periphery of the downtown business and financial center. These districts were characterized by low rents, congestion, poor housing, and what was called at the time "social disorganization" (Lind, 1930). The haole elite gravitated

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[88] As an international port city Honolulu always had some of the characteristics of large cities elsewhere.

to such outlying districts as Manoa, Nuuanu, Makiki, and Waikiki, which became haole strongholds.

Finally, Fuchs (1961:67) maintains that the importation of racial attitudes from the Mainland associated with the growth of the military affected the temper of ethnic relations. Between 1910 and 1930 the number of servicemen in Hawaii rose from 1,608 to 16,291, a 913% increase. Between 1930 and 1940 the number nearly doubled again to 27,000 (Schmitt, 1968:127). Many of the military men were of Southern background.[89]

In sum, the city of Honolulu underwent major changes in the early decades of the twentieth century. Changes in the class structure, urbanization, and the increasing influence of Mainland racial attitudes increased class and ethnic tensions. These tensions expressed themselves in a variety of ways, the most relevant of which, for our purposes, was concern about sex crimes.

The next five sections of this chapter will examine in detail five episodes of concern and activity among haoles about sex crimes, the episodes being interpreted as reflecting the ethnic, class, and urban tensions existing in Honolulu in the first four decades of the twentieth century.

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[89] Fuchs' point is supported by a statement by former Territorial Governor Walter Frear that much of the racial antagonism that existed in Hawaii in 1932 could be traced to Southerners in the military, who regarded Hawaiians as Negroes, and to newcomers to the Islands generally (Frear, 1932:92-93).

5.2 1910–1911: THE CREATION OF "INDECENT ASSAULT"

In 1911 the territorial legislature created a new crime, "indecent assault," to be used to address problems that had arisen in prior attempts to enforce the statute on "assault with intent to ravish" as it applied to assaults on young girls. The bill, House Bill No. 260 (1911), passed the House and the Senate unanimously. Its purpose, according to the committee reports, was to remedy defects revealed by recent cases (Senate Journal, 1911:894). The intent was further revealed in a subsequent territorial Supreme Court case involving the new statute; the court remarked:

> The statute ... was intended, as we believe, to meet a class of cases involving young girls in which the charge usually made was assault with intent to commit rape and where, owing to the difficulty of proving the specific intent, and the absence of statutory authority for a conviction of assault without such intent, under such an indictment, acquittals were often the result. Ter. v. Tan Yick (22 HAW 776)

The court noted that the penalty for the offense of indecent assault was the same as for assault with intent to ravish and that the legislature apparently intended to prescribe this sanction for those cases in which liberties had been taken but intent to ravish could not be proved.

The text of the new statute read as follows.

> Indecent Assault: Punishment. Whoever takes indecent and improper liberties with the person of a female child under the age of twelve years without committing or intending to commit the crime of rape shall be deemed guilty of indecent assault and on a conviction thereof shall be punished by a fine not exceeding one thousand dollars or imprisonment at hard labor for not more than five years or both. (Act 128, 1911)

On examining this action of the legislature in establishing this new offense we would expect to find, following the model proposed in Chapter I, a sequence of events beginning with a crisis or disruption of the smooth flow of habitual actions attendant to the normal prosecution of sexual offenses. Indeed this is the case. We find, looking back at the months preceding the passage of the new statute a case which got the attention of the newspapers and other members of the community. Powerful members of the community advanced and manipulated a set of symbols, many already existing in their culture which constructed meaning for both themselves and others and which congealed into a definition of the situation on which legal action could be based.

In tracing and explicating these events we will begin with the crisis.

The first sex crime "wave" in Hawaii in the twentieth century began in June of 1910 when the Honolulu Advertiser (June 25, 1910:1) publicized the case of Territory v. Edward Lane who was charged with assault with intent to ravish a nine year old girl.[90] According to the Advertiser the deputy city and county attorney prosecuting the case entered a nolle prosequi to the charge at the preliminary hearing in

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[90] The case of Edward Lane can be followed through articles and editorials published by the Honolulu Advertiser on June 25, 26, July 1, 2, 29, August 24, 26, October 18, December 9, 15, 16, 17, 20, 22, 23, 24, 28 of 1910. Also January 10 and March 9 of 1911.

the District Court and entered a charge of vagrancy instead, to which Lane pled guilty and was sentenced to one year in jail. The reason given for the reduction in charge was that the prosecutor believed that a conviction could not be obtained on the original charge of assault with intent to ravish.

Displeased with the outcome of the case, the police and a private lawyer retained by the victim's father took the case to the attorney general of the territory and the grand jury. Lane was indicted for assault with intent to ravish by what the Advertiser called the "fighting grand jury" despite the opposition of City Attorney John W. Cathcart. Cathcart who had apparently long been at odds with the attorney general, again tried to enter a nolle prosequi to the case but was denied by the Circuit Court judge who ruled that the attorney general now had jurisdiction. Cathcart thereupon announced that he would prosecute no more cases in the Circuit Court because of the attorney general's interference. In response the attorney general began to draw up impeachment papers for City Attorney Cathcart. This action along with the circuit judge's refusal to allow the city attorney to withdraw from cases, caused Cathcart to reconsider and to resume the prosecution of cases. The Advertiser was gleeful that the city attorney was forced to eat "humble pie." Nevertheless, despite the attempt by the attorney general to prosecute Lane, the case collapsed when

the Circuit Court sustained a demurrer against the grand jury indictment. Lane returned to jail to finish his term on the vagrancy conviction.

The difficulties of the Lane case and the nine months of publicity and criticism by the Advertiser of its handling by the prosecutor, provided the impetus and context for a wave of sex crime stories by the Advertiser, mostly about alleged attacks on young girls. On October 31, 1910 the Advertiser editorially announced that there had been in the past few months fifteen cases of rape or attempted rape which constituted a "horrible record for a city like Honolulu."[91] There was no doubt in the minds of the editors of the Advertiser that the cases were linked, and the link was a lack of deterrence brought on by the faulty prosecution of cases by the city attorney and an excessive concern with technicalities. In an editorial on July 29, 1910 about the offenses the Advertiser contended "if the first beast (Edward Lane) had been treated as he deserved the example of his punishment would have deterred the beasts that followed him."

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[91] It is difficult to follow the Advertiser's counting procedures through the sequence of news articles and editorials. Sometimes it seemed to refer to the number of events, sometimes to the number of victims, and sometimes to the number of offenders. The Advertiser apparently reached the number fifteen by multiplying the number of defendants in the latest case, three, by the number of victims, two, to reach a product of six cases, which it added to the previous nine cases it had announced.

When Ramon Camachc, a Puerto Rican, was sentenced to life imprisonment on conviction for carnal abuse of a girl under ten, the Advertiser editorialized:

> The life sentence the brute Ramon Camacho commenced to serve last night for a beastly assault upon a little girl not only places him out of the way, but serves as a warning to others of his kind who may be abroad. A few salutary lessons of this kind -- provided the technicalities cf the law do not let him escape -- and Honolulu will be saved a return of the wave of unnatural crime that swept through the community a short while ago, an outbreak of filthiness which the prosecuting authorities encouraged by lack of prosecution, fcr some reason best known to themselves. (Advertiser, July 20, 1910:4)

Citing the recent prevalence of attacks on young girls the Advertiser (August 6, 1910:4) advocated death or whipping and imprisonment as penalties appropriate to the crime and necessary to stem the crime wave.

If the sex crime wave in Honclulu against girls was not encugh to galvanize its citizens to action the Advertiser (November 17, 1910:8) reported that Filipinos had created "a reign of terror" on Kauai, attacking several women on the roads in the Koloa area in broad daylight.[92] It commented that

> There is talk of not waiting for the matter to be drawn out by trial and grand juries, if these assaults continue, but of having recourse to the more speedy and satisfactory attainment of the ends of justice that Judge Lynch brings about. (Advertiser, November 17, 1910:8)

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[92] The complaint about Filipino men was reported by the Advertiser on January 20, 1910.

In fact the specter and possibility of lynching was frequently advanced by the Advertiser as the natural and justifiable reaction to sexual assaults if they were not handled satisfactorily by the prosecuting authorities. During the episode one letter to the editor stated that the punishment in Kansas City for such offenses as were occurring in Honolulu was hanging and asked if popular feeling could not be aroused to pass such a law in Hawaii or "will it be necessary to have a lynching or two first." (Advertiser, August 25, 1910:4). Editorially the Advertiser said the question was "well put" and expressed the need for legislation to "make an attempted dastardly assault upon a woman what it is elsewhere."

The concept of lynching as a natural reaction to sexual assaults was raised again by the Advertiser (August 30, 1910:5) a few days later in a report of a case in the Portugese community on Punchbowl. The incident was interrupted by the arrival of police officers and the Advertiser stated that if they had arrived a few minutes later there would have been a lynching because most of the victims of recent assaults had been Portugese. In reporting the case of Francisco Oliveira, only three days later, the Advertiser invoked norms contended to prevail in the southern states at the time.

> If he had committed the same offense in Alabama or Texas the jailer would not have had the trouble of giving him breakfast this morning, but somebody would have purchased last night a piece of half-inch rope of liberal length and today the

> city would have been compelled to invest in a cheap pine box about six feet long. (Advertiser, September 2, 1910:1)

A couple of months later the Advertiser again raised the issue of lynching in an editorial accompanying the report of another case; it commented, "If there were less respect for law in Honolulu, or if this city were one of hot headed people, there would have been a double lynching yesterday (Honolulu Advertiser, October 31, 1910:4).

Race was not directly raised as an issue during the 1910 episode of concern about sex crises. The defendants in the cases publicized by the Advertiser were a heterogenous lot, with at least as many haoles as members of other ethnic groups. Haoles were not identified as such in the newspaper articles but the non-haoles were variously identified as "a Chinaman," "a Portugese," "a Puerto Rican," and "a Negro," as appropriate. The only ethnic generalization made about sex offenders was the previously cited claim that Filipinos were responsible for a reign of terror on Kauai.

None of the victims in the publicized cases were identified as haole. Portugese and Hawaiian girls were most frequently identified as the victims in these cases.

But there is evidence that the changing nature of the city was an underlying factor in the concern about sex crimes in the segment of the community represented by the Advertiser. Throughout the episode there were newspaper articles concerning the threat posed to the city and to

women by the youth gangs that had grown up in the poor neighborhoods of the city. The "Hotel Street Gang" was charged with harrassing women passersby and a call for more police control of gangs was made by the Advertiser (July 29, 1910:1). On July 26, 1910 the Advertiser reported a police war on "tough gangs" and that "Nuuanu Gang" members had been arrested. On July 22, 1910 the "Vineyard (Street) Gang" was reported to have beaten a soldier the members had been trying to rob. And on October 7, 1910 the Advertiser reported the arrest of members of the "Aala Gang" for harrassment of passersby. As will be seen below, the existence of these youth gangs in the immigrant neighborhoods later, especially in the 1920's and 30's, became more directly linked to fear about sex crimes.

The last aspect of this 1910 episode leading to the creation of the crime of indecent assault that we wish to examine is the language used during the episode -- the creation of new, and the use of existing, linguistic symbols and images employed and manipulated by certain members of the community to assist in defining the situation for themselves and others.

Examination of the news articles and editorials during the episode reveals that a vocabulary and set of images was used that pertained to the three components of the incidents: the actor, the act, and the victim. The most comprehensive set of images was presented by the Advertiser

in its July 29, 1910 editorial on the cases. The perpetrators of the crimes were referred to as "brutes" and "beasts." "Brute" was a favorite characterization and was used again in articles on September 20th and November 4th. For the Advertiser the man who engaged in such behavior lowered himself to, or revealed his essential, subhuman characteristics.

The most frequent term used to refer to the acts themselves throughout the episode by the Advertiser was "criminal assault." This term was used indiscriminately to refer to carnal abuse, assault with intent to ravish, and statutory rape (sexual intercourse with a girl under fourteen). But often the Advertiser used more provocative terms and imagery. The case involving the "Chinaman" was "the dirtiest of the many which have come to the attention of the police." (Advertiser, July 28, 1910:5). The July 29th editorial characterized the cases as "lustful attacks" in which "circumstances have been too revolting for publicity" and that the cases were "reeking with bestiality."

Most importantly, the Advertiser made a few comments concerning the victims. Most frequently they were referred to as "girls" or "little girls," and given their ages, these were accurate enough characterizations. The July 29th editorial states that they were "ruined and diseased" as a result of the attacks upon them. In a later editorial the

Advertiser claimed that the "honor of womanhood and the sanctity of virtue" was at stake in the issue of repressing the wave of attacks (Advertiser, August 24, 1910:4). These concepts of ruination, honor of womanhood, and virtue, as they apply to sexual offenses and the consequences of them for victims, we have already seen are deeply ingrained in Anglo-American cultural conceptions about gender and sex roles, and are of paramount importance in understanding rape law.

5.2.1 Summary and Conclusion: 1910 Episode

The foregoing description and analysis enables the summarizing of the 1910 episode with respect to the elements of the model. First, the outcome of the Lane case was regarded as unsatisfactory by several parties, including the victim's parents; the Honolulu Advertiser gave the case great publicity and took sides against the city attorney. Attention was drawn to, and focused on, that case. Other cases, not unusual in quantity or nature, came to be defined as linked, as part of a pattern or crime wave, due in part to the unsatisfactory outcome of the Lane case. The sex offense statutes came to be regarded as defective due to the necessity of proving intent to ravish in sexual assaults. Virtue and womanhood were defined as under attack from beasts and brutes. A new statute was passed creating the crime of indecent assault which provided for the same

penalty as a conviction for assault with intent to ravish without the necessity of proving such intent.

5.3 1912-1913 EPISODE: PROTECTION OF GIRLS FROM ASIAN MEN

The creation of the crime of indecent assault and the criticism of the city attorney for alleged lax prosecution of sex offense cases did not for long solve the perceived problem of a sex crime wave, nor did it, of course, change the underlying tensions generated by the compositional changes in the city. Late 1912 and early 1913 brought another episode of concern about sex crimes among a segment of the population of Honolulu that considerably surpassed in complexity and intensity the episode of 1910. Like the earlier episode, the crisis in 1912 was triggered by "several brutal attacks upon young girls" of Honolulu (Goodhue, 1913:Note). These events drew the attention of Episcopal Bishop Henry B. Restarick who brought them before the Inter-Church Federation, a group of lay persons and clergy over which he presided. Restarick and the Federation organized a "mass meeting" of concerned citizens at the local theater and sent a letter to prominent citizens urging their attendance. According to Restarick's letter (Advertiser, November 26, 1912:9), "The time is come when this community must be aroused to a sense of the enormity of the crimes committed against girls of tender age and even baby girls. If we delay we are going to have Judge Lynch

appear here." Continuing, the Bishop offered a definition of the nature of the threat as he saw it.

> Up to the present time these outrages have been confined to a part of the city or to Hawaiians, Chinese, or Japanese girls, and the community has heretofore talked and done nothing. Let one case occur among white children, say in the Punahou district and there would be action which would shake the city to its depths and lead to results fearful to contemplate, and disgrace the Islands. But this attitude is neither wise nor right -- not wise because no one knows at what point outrages will cease, and to the question, 'Am I my brother's keeper,' comes the answer: 'Yes, you are, and if you neglect your brother the scourge of plague or of outrage will surely touch you sooner or later.' (Advertiser, November 26, 1912:9)

Restarick told the recipients of his letter that the council of the Inter-Church Federation had considered the matter at two meetings before issuing the call for a mass meeting and "Its members are thrilled with horror at the facts which they told each other." (Advertiser, November 26, 1912:9). Restarick also mentioned the growing feeling among some members of the community that if the law enforcement authorities could not deal with the problem the citizens must take action on their own.

In announcing the "mass meeting" the Advertiser (November 23, 1912:4) editorially observed that "public opinion appears to be very much aroused by the recent frequent cases of criminal assault upon women and girls and by the fact that the public streets, once safe to any respectable woman, day or night, are safe no longer." It went on to say, "It

is well that such a meeting is to be called. The time has come when a check must be placed upon unbridled lust in this city. If the authorities cannot protect womanhood here, perhaps the formation of a vigilance committee will help."

Thus, Bishop Restarick and the Inter-Church Federation, through their letter and accompanying news stories and editorials, made a strong initial contribution to the defning of the situation: the prevalence of shocking crimes, now limited to non-haoles but threatening all of "womanhood," the indifferent and ineffective activities of law enforcement authorities, anger and indignation among a segment of the community along with the possibility of vigilante action or lynching, and the need for mass action to clean up deteriorating conditions in the city.

The mass meeting was a great success with some 1,400 men and women in attendance (Advertiser, December 2, 1912:1). Speakers told horror stories about sex crime cases they knew of in which justice had not been done. There was pointed criticism of the actions of law enforcement officials and the courts in prosecuting and punishing offenders.

J.R. Galt, a prominent businessman and the president of Palama Settlement, a settlement house in one of the immigrant districts modeled after Mainland big city settlement houses, presented to the audience some crime statistics he had gathered. Galt's statistics for Honolulu for the preceding twenty-two month period showed 38

"disposed of" sex cases, with three additional that were not on the records. During this period there had been nine cases of assault with intent to ravish children under ten. Seven of the persons charged for the crimes were Americans and in the majority of the cases the charge had been reduced to assault and battery. Galt's data showed, for the total number of crimes, the following ethnic distribution of defendants:

Americans	10
Hawaiian, Part-Hawaiian	4
Chinese	6
Japanese	5
Others	13
TOTAL	38

Galt said that the total did not seem large but that it compared unfavorably with cities in England and France (Advertiser, December 2, 1912:1). The Advertiser commented on the statistics that

> contrary to the general belief these showed that the majority of the crimes against girls under the age of ten years were charged against Americans and not Orientals, and that most of these had escaped lightly as compared with men of other races. (Advertiser, December 2, 1912:1)

The outcome of the meeting was a plan to put pressure on those officials involved in the enforcement of the sex laws. The audience unanimously adopted the following resolution:

> WHEREAS, Crimes of violence against women and girls have been for some time past on an alarming increase in this community, and
>
> WHEREAS, The conditions in this regard are now intolerable and a disgrace to our Christian civilization, and

> WHEREAS, The public at large have heretofore shown naught but indifference to the enormity of the evil existing in our midst, and
>
> WHEREAS, It is charged that our elective officers, judges, and trial jurors, have been and are remiss in their duties in relation to the detection, arrest, prosecution, and conviction of persons charged with these offenses,
>
> NOW AND THEREFORE, BE IT RESOLVED, That a committee of citizens be appointed at this meeting to cooperate with our officers of the law and others to devise means whereby our laws shall be more adequately enforced, and to arouse within this community a sense of its duty and responsibility for the protection of our women and girls. (Advertiser, December 2, 1912:1)

Following the adoption of the resolution, Restarick appointed a twelve member committee, named the Citizens' Protective Committee, which under his leadership was to concern itself with the enforcement of the laws regarding sex crimes. Any doubt that this operation was by and for the haole community of Honolulu is dispelled by examination of the committee's composition. The committee was composed of haole business elite of Honolulu and strategically included the editors of both of the major English language news dailies.[93]

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[93] The original members of the committee were: Bishop Restarick, A.C. Lewis, A. Gartley, L. Tenny Peck, Dr. W.C. Hobdy, F.C. Atherton, W.E. Brown, R.O. Matheson, R.H. Allen, J.P. Cooke, Mrs. J.R. Galt, Miss Pope.

The ethnic homogeneity of committee did not go unnoticed and was publicly protested by a Hawaiian District Court Judge who had attended the mass meeting (Star-Bulletin, December 2, 1912:1). He contended some Hawaians should be on the committee. However, his protest was to little avail. At a subsequent meeting at which the committee doubled its membership, one William Kwai Fong was the only non-haole included (Advertiser, December 18,

The Citizen's Protective Committee organized itself into three subcommittees to cover all points of attack on the problem: a law enforcement subcommittee, a legislative subcommittee, and a publicity subcommittee (Advertiser, December 18, 1912:5). In addition to the activities of these subcommittees, the Citizen's Protective Committee supplied its own lawyers for the prosecution of sex offenses (Advertiser, December 18, 1912:5; January 4, 1913:8; February 5, 1913:1; February 13, 1913:2).

The enthusiasm generated at the mass meeting for reforming the administration of the sex laws could not wait for the Citizen's Protective Committee to get organized. Two days after the meeting prominent citizens began attending court trials of accused sex offenders to demonstrate their concern. In one case "A score or so of ministers of the gospel, teachers, and other persons interested in the case" caught the city prosecutor in the process of plea bargaining a sex offense case (Advertiser, December 5, 1912:2). The prosecutor was accused of ignoring the aroused community sentiments by the persons present. The Advertiser roasted the prosecutor both in its articles reporting the event (Advertiser, December 4, 1912:9; December 5, 1912:2) and editorially (Advertiser, December 5, 1912:4) contending that the offender should have been made an example and that the prosecutor was insensitive to the

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1912:5).

public interest. The Star-Bulletin (December 4, 1912:4) editorially approved the citizens' activities in the courtroom and said

> The newspapers of Honolulu, which have endeavored to stir this community to action for so many years ... will take new courage.

The next day the group appeared in court again in connection with another case, an event which was headlined by the Advertiser (December 6, 1912:5) as follows:

> SOCIETY WOMEN IN COURT DURING TRIAL
>
> ATTEND TO VOICE MUTE PROTEST AGAINST
>
> CRIME OF RAPE -- GIRLS TO TESTIFY
>
> Determined to show by their presence that the good women of Honolulu are interested in the prosecution of those charged with crimes against their sex, a dozen women sat in Judge Robinson's court yesterday and listened to the evidence in the case of Hee Park, charged with ravishing a Hawaiian girl under ten years old.

The women must have been gratified by the outcome of the case. The "Chinaman" was convicted and sentenced to life imprisonment, the jury having deliberated three minutes (Advertiser, December 7, 1912:4).

5.3.1 The Symbols and Imagery of Rape and Theories of Sex Crime

Because of the extensive newspaper reporting and discussion, the 1912-13 episode provides an excellent opportunity to examine in more depth than did prior episodes, the symbolic aspects of rape and the associated images of act, actor, and victim which were combined in two

major theories of sex crimes subscribed to by factions of the community and which constituted major components of the definition of the situation on which legal action was based.

As seen by the concerned citizens of 1913, one of the major dimensions of the problem of sex crimes was lack of enforcement by prosecuting officials. The citizens wanted offenders charged with offenses that accurately reflected the behavior that took place and they did not want reductions in charge for ease of conviction. Steps were taken to pressure officials to enforce the statutes more strictly. But in the course of the episcde a major conflict emerged over what were to be the controlling images of men who committed sex offenses. The nature of the controlling images was crucial since from them would flow the proposals for legal change. As was done for the 1910 episode we will examine the imagery cf the act, the victim, and of the actor.

5.3.1.1 Imagery of the Act

There was apparently no disagreement among the haole citizens of Honolulu who wrote letters to the editor, wrote editorials and news articles, and whose public statements were recorded in the newspapers about the nature of the act. Recurrent words and phrases indicate the publicly articulated evaluation of sex crimes as indignation and revulsion. Some examples are listed below:

"fiendish outrages" (Advertiser, November 23, 1912:9)

"the most horrible crime known to a civilized nation" (Advertiser, December 10, 1910:1)

"outrageous assault" (Advertiser, January 2, 1913:4)

"horrible rape" (Advertiser, March 10, 1913:4)

"heinous crimes" (Advertiser, March 10, 1913:4)

"unspeakable crime" (Star-Bulletin, December 12, 1912:1)

"one of the vilest cases" (Advertiser, April 2, 1913:9)

5.3.1.2 Imagery of the Victim

Like the 1910 episode the sex crime episode of 1912-13 primarily involved a focus on sexual encounters between males and young girls. These victims were regarded as ipso facto innocents and the grievous harm that had befallen them was understood by all; there was no conflict or debate about it. Consequently, the newspapers, the only existing source, provide little in the way of the imagery or language used to refer to the nature of the harm done the victims. Beyond the closely related terminology discussed above referring to the act itself, only the terms "debauched body and soul" (Advertiser, December 2, 1912:1) and "barbarously assaulted" (Advertiser, March 10, 1913:6) were found that related to the harm done to the victim.

But while there was little comment on the harm to individual victims there was more extensive comment on the more generalized value regarded to be threatened -- "womanhood." Womanhood was an abstraction that condensed and symbolized all the "best" qualities, consequences, and

ideals of the monogamous Anglo-American marriage system, premarital chastity, purity, honor, and marital fidelity. And womanhood was under the protection of manhood. As the Advertiser (December 28, 1912:4) said in an editorial in favor of whipping for rapists, "Manhood's first obligation is to defend the honor of womanhood ...." In an article on proposed legislative changes the Advertiser (February 14, 1913:10) announced "More stringent laws for the protection of womanhood are being planned...." In another editorial favoring whipping the Advertiser (April 7, 1913:4) said such a law would show the value Hawaii places on "chastity and protection of her women and girls."

5.3.1.3 Imagery of the Offender

The most debate and discussion during the 1912-13 episode centered around what would be the controlling image of the offender and the consequences that would flow from it. While there was consensus among the haole community concerning the outrageous nature of sex crimes and the nature of the harm done to the victim, there were sharply conflicting opinions regarding the nature of the offender. Two views, based on different theories of criminality, emerged. Adherents of each view battled to have their view define the situation and determine the nature of the corrective legislation.

The tension existed between two of what Glaser (1956:434) calls "monistic" theories of criminal behavior. Monistic theories are based upon a single behavioral image as an explanation of criminal behavior, and monistic theories of the same phenomenon are mutually exclusive. Glaser describes the monistic theories of "spontaneity" and "possession," the former based on a behavioral image involving free will and choice, and the latter based on an "image of a prepotent force resident in the person and determining his behavior."

The conventional knowledge of 1913 incorporated a behavioral image of free will or spontaneity and the consequent responsibility of the offender for his actions. The most advanced scientific thinking of the period, of which the medical profession was the principal repository, was based on a deterministic paradigm of genetic defectiveness.

5.3.1.4 The Conventional Image of the Offender

If the act was viewed by the haole of 1913 as a "fiendish outrage," it followed that one who committed such an offense was a fiend. The rhetoric of the day indicated that the offender was viewed as of a nature apart, not human.[94] The

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[94] At first glance the attribution of "fiendishness" would seem more consistent with the deterministic perspective. However, it is clear that such attributions did not indicate the conventional view was outside the free-will paradigm, as will become apparent below in the discussion of proposed legislation.

two most frequent terms used to refer to persons accused or convicted of sex crimes were "brute" and "fiend."[95] They were particularly likely to be applied if the victim was a child. Numerous examples can be cited:

> CHILD ASSAULTED BY BRUTE: IDENTIFIES HER ASSAILANT
> (Advertiser, February 10, 1913:8)
>
> "... two brutes responsible ..."
> (Advertiser, February 13, 1913:4)
>
> CHILD VICTIMS OF FIENDS IN HOSPITAL
> (Advertiser, February 13, 1913:8)
>
> "vile offender"
> "beast"
> "depraved criminal"
> "devils incarnate" (Advertiser, March 10, 1913:6)
>
> MAY URGE DEATH FOR ALLEGED HUMAN BRUTE
> (Advertiser, April 25, 1913:7)
>
> ALLEGED BRUTE IS SENT TO PRISON
> (Advertiser, May 7, 1913:5)
>
> ANGERED POPULACE IN SEARCH FOR FIEND
> (Advertiser, May 21, 1913:1)
>
> FREEDOM FOR CHINESE BRUTE ATTEMPTED
> (Star-Bulletin, November 21, 1913:3)

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[95] The prevalence of the terms "brute" and "fiend" in news article captions raises the question of the significance of the fact that these are very convenient short words for use by caption writers. It is reasonable to propose that these particular words were used frequently because of convenience, but that they then took on a powerful formative influence in defining the situation for the people that used them and the people that read them.

5.3.2 Proposed Legislation: The Retributive Solution

For most of the white citizens of Honolulu, a theory of punishment flowed directly from the imagery of the offender. Although the sex offender was viewed to be responsible for his acts, he needed and deserved a special kind of sanction. Whipping was proposed as the sanction particularly appropriate for sex offenders. The Advertiser (December 13, 1912:4) made the link between the imagery of the offender and the appropriate punishment in an editorial entitled "The Lash A Powerful Deterrent."

> The man who will force a woman to submit to the gratification of his lust is a brute and must be punished as one. To him the lash affords the degree of punishment commensurate with his crime and provides a powerful reason to him why he should not become a transgressor.

The Advertiser (January 24, 1913:4) reiterated this notion in a later editorial:

> it is a pity that men found guilty of rape or of 'pimping' cannot be treated as their brute nature requires, with the lash ...

The Advertiser was not alone in making the connection between the type of offender and the type of punishment considered appropriate. One writer of a letter to the editor wrote in reference to sex offenses:

> What does such a character care for more imprisonment? It is no punishment to him! He has no honor, he has no shame .... If such a beast does not receive the capital punishment he so richly deserves, he should first be very severely beaten, to properly punish him for his crime, for physical pain is the only argument to which he is amenable, and then he should be emasculated to make assurance doubly sure that he will never commit one of the most revolting and hellish

> crimes known to man. (Advertiser, March 10, 1913:6)

If whipping was the appropriate punishment for rape, the Advertiser was the agent of change. Throughout the 1912-13 episode of strong public agitation about sex crimes, the Advertiser carried on a campaign to have whipping become the prescribed sanction for certain sex offenses. It kicked off its campaign with an article (November 27, 1912:2) lauding the fact that the British had instituted this penalty for offenses connected with the "white slave" traffic of the period.[96] The Advertiser editorialized:

> We are heartily in favor of the lash for those found guilty of rape, indecent assault, procuring or pimping. (November 27, 1912:4)

The Advertiser's stand set off a pro-whipping movement which it reported and nurtured. Fifty male members of the Church Club of St. Andrew's Cathedral unanimously adopted a resolution calling for the use of the "whipping post" in Honolulu (Star-Bulletin, December 12, 1912:1). The Bulletin reported that "there's a rapidly growing movement among church men in Honolulu of several denominations to secure the passage of a law by the next legislature that will allow the sentencing to be whipping of men convicted of assaulting minors or girls of immature age." The Bulletin (December 12, 1912:4) editorially reserved judgment on the efficacy of whipping.

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[96] At his mass meeting Bishop Restarick took approving note of England's measure.

The Advertiser carried strong pro-whipping editorials on seven occasions during late 1912 and the first four months of 1913 (November 27, 1912:4; December 13, 1912:4; December 28, 1912:4; January 2, 1913:4; January 24, 1913:4; February 12, 1913:4; April 7, 1913:4), announcing in the last one that it "would infinitely rather have twenty human fiends lashed to ribbons than to have one little girl raped or one young woman forced into prostitution." The Advertiser cited Bernard Shaw (December 31, 1912:4), the laws of Canada and England (December 13, 1912:4), and the laws of Kamehameha III (January 26, 1913:5) in justification of its position. It published many letters on both sides of the issue, and also the opinions of legal authorities regarding the constitutionality of the punishment (January 8, 1913:8; February 14, 1913:9).

By the middle of April 1913, the issue of whipping was dropped by the Advertiser. The Advertiser's efforts notwithstanding, no bill was introduced into the 1913 legislature to prescribe whipping as the penalty for rape.

5.3.3 Proposed Legislation: The Scientific-Humanitarian Solution

Just as the proposal for whipping grew from a theory of criminal behavior that emphasized free will, another theory of crime brought forth a set of alternative legislative proposals. Whipping was the proposal of the common man. The emerging scientific and intellectual elite of Hawaii in

1913, influenced by advanced thinking on the Mainland, espoused a theory of biological determinism and sterilization for the prevention of anti-social behavior.

Fink's (1938) study of the history of biological theories of the causes of criminal behavior indicates that belief that criminality was heritable was widespread among physicians and biological scientists at least as far back as 1870 in the United States. Dugdale's (1877) famous study of generations of criminality among the members of the Jukes family, along with a number of subsequent similar studies, made theories of criminal inheritance the scientific wisdom of the late nineteenth and early twentieth century. A perhaps inevitable consequence of the belief that criminals and other types of "degenerates" were born and not made, was the attempt to prevent them from being born. To prevent criminals from being born, indeed to eliminate criminals altogether, it was only necessary to prevent existing criminals from procreating.

Elites in Hawaii had a long tradition of interest in human heredity and eugenics. As early as 1886 an essay was read to the Social Science Association of Honolulu speculating on the possibility of inheritance of moral qualities. Heredity and eugenics were relatively common topics of discussion for the Association for several decades (cf. Porteus, 1962:214-231).

In 1911 Dr. John T. McDonald addressed the annual meeting of the Medical Society of Hawaii on "The New Science of Eugenics" (McDonald, 1911). McDonald described to his audience of physicians the benefits of eugenic practices in improving the race. He stressed the role of education and public opinion in persuading the unfit not to procreate, but noted that "there will still remain a small class utterly incorrigible and unresponsive to all considerations of the well-being or improvement of their progeny" that would have to be restrained by coercive means. He noted approvingly the spread of sterilization laws throughout the states and suggested their extension beyond "confirmed and habitual criminals" to "incurable drunkards," "the feeble-minded," and "degenerates of all kinds" (McDonald, 1911:87).

Eugenics as a social movement was organized in Honolulu in 1912 at a conference at which numerous papers on the subject were delivered and a committee of five persons was appointed "to campaign for the advancement of eugenics in the Hawaiian Islands" (Advertiser, December 19, 1912:10). Those pushing the issue in Honolulu were not crackpots. Like the Citizen's Protective Committee, which included many persons supportive of eugenics, the movement drew its support from the haole elite and included such powerful figures as Governor Walter Frear, his wife, and Judge Sanford B. Dole (Star-Bulletin, November 19, 1913:8).

One of the principal spokesmen for the eugenicists was a prominent physician, Edward Goodhue. His writings provide insight into the imagery held by persons of his persuasion. No sooner had the Advertiser launched its whipping campaign than Goodhue wrote a long reply (Advertiser, January 1, 1913:14). He criticized the advocates of whipping as being brutes themselves, emotionally unstable, and intellectually unresourceful, and characterized that measure as being unchristian, backward and ineffective.

> For fifty years we have fought our way out of sheer brutality towards a better understanding and treatment of those who form our criminal class. During these years scientists, sociologists and physicians especially, have made a careful study of crime, and through their influence and that of broad, sympathetic, humane men and women we have learned that all our more brutal methods of treating crime have largely failed to be either preventive or corrective.

The key words to the eugenists were "defective" and "degenerate." Goodhue said that the men who commit rape "are not normal men." (Advertiser, January 1, 1913:14). Defectiveness and degeneracy were inborn and immutable. The behavior of these types was beyond their control. Goodhue expressed this view in a later letter he wrote to the Advertiser (March 5, 1913:4).

> I do not grant that the man who commits it (rape) is mentally, morally, and legally responsible. He may be as innocent of the crime he commits as the victim; he may be insane. But it is more likely that he is only defective, inherently and incurably weak on one point, when his arrest becomes necessary as well as his proper treatment by those who have no tendency to commit similar horrid crimes.

While vasectomy was appropriate for the common degenerate, the rapist called for more severe measures. He involved not only the problem of preventing reproduction, but of decreasing the sex drive. Even the humanitarian Dr. Goodhue argued that castration was the appropriate cure for the rapist (Advertiser, March 16, 1913:4).

Initially, whipping and sterilization were defined to be mutually exclusive solutions to the sex crime problem and drew support from different segments of the community. The traditionalists favored whipping while the intellectuals and social welfare types were excited about the prospects of eugenics for eradicating social problems.[97] The Advertiser, having adopted an early pro-whipping stance, was editorially critical of the eugenic approach (December 8, 1912:4; December 15, 1912:4; January 2, 1913:4). Later, the Advertiser changed its stance on eugenics and printed articles and editorials favorable to the movement (March 5, 1913:4; March 20, 1913:6; March 25, 1913:4; April 6, 1913:4). Throughout the latter part of this episode the Advertiser advocated both whipping and sterilization for sex offenders.

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[97] Actually the controversy was more complex. The sterilizers objected to whipping on humanitarian grounds and due to presumed ineffectiveness. The whippers were not adverse to whipping and sterilization but given the choice of one or the other -- they preferred the former.

Two eugenics bills were introduced into the 1913 legislature by Representative Archer Irwin, a physician. The first, which is not of prime concern here, would have required persons wishing to marry to submit a certification of freedom from venereal disease. The other (House Bill No. 192, 1913) grew directly out of the then current sex crime concern. Modeled after a law passed by New Jersey in 1910-11, the bill provided for sterilization of "feeble-minded persons, epileptics, rapists, certain criminals and other defectives convicted of crimes" (Advertiser, March 20, 1913:6). The bill was publicized as being particularly aimed at rapists (Advertiser, March 20, 1913:6). Despite support from some oganized groups in the community and Governor Frear (Advertiser, February 20, 1913:11; March 27, 1913:8), it failed to pass in the House.

With a prescience about the likely target group of eugenic schemes, Hawaiian representatives opposed the bill, with only one Hawaiian voting for it (Advertiser, April 2, 1913:8).

5.3.4 Other Legislation

The Citizen's Protective Committee and other civic organizations put their muscle behind two other bills introduced in the 1913 legislature. Senate Bill No. 24 (1913) provided for raising the age under the carnal abuse statute from twelve years of age to sixteen years. A second

section of the bill raised to sixteen the age below which consent of a female was void and abduction was presumed to be by force. Senate Bill No. 39 (1913) raised the age for attempted rape and for indecent assault.

Despite a strong campaign by the Advertiser and the Citizen's Protective Committee, the bills were tabled. The judiciary committee recommended against their passage noting:

> It is believed that to raise the age limit to sixteen years would in many instances cause a miscarriage of justice when the matter is viewed in the light of experience in the past. Juries would be unwilling to convict in cases where the child was fourteen or fifteen years old, and the punishment as much as death or imprisonment for life.

A compromise bill (Senate Bill No. 60, 1913) was drafted which left the carnal abuse statute untouched, but raised the age for statutory rape from fourteen to fifteen years and increased the penalties. Under the new statutory rape law there was a three year minimum sentence replacing the old provision of no minimum. The maximum sentence was raised from five to ten years. The Advertiser (March 8, 1913:6) called the new bill a "halfway bill." The matter was then dropped by the newspaper.

5.3.5 A Final Note: Crime Reporting

One of the general criticisms of American newspapers in relation to crime reporting is that they have often created a public hysteria which makes the deliberative operation of

legal institutions difficult. Occasionally beneficial reforms result from aroused public concern, but often the consequence is public pressure on the legislature to prescribe more severe punishments for the criminal act, and the issue is soon forgotten (Sutherland and Cressey, 1970:245).

According to Sutherland and Cressey (1970:246), "most 'crime waves' are fabrications of the press." Davis (1952) found that the amount of crime news in Colorado newspapers and the crime rate for a given period were not related.[98] Wiseheart (1922) long ago reported the effects of newspaper crime campaigns on the administration of the criminal law. He found that newspapers in Cleveland vastly increased the space devoted to crime news once a "crime wave" had been defined, and that the effects of such newspaper campaigns were felt at all levels of the criminal justice system.

Sutherland (1950a) has shown the role of the press in arousing the nationwide public concern that led to the passage in many states of the "sexual psychopath" laws in the 1930's and 1940's. Sex crime is the material for crime waves <u>par excellence</u>. It excites the collective imagination and calls forth latent anxieties and fascination with the forbidden. Sutherland contends that the incomprehensibility to the average person of attacks upon children exacerbates

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[98] His data were inconclusive with respect to the proposition that public opinion reflected trends in crime news rather than trends in actual rates.

these fears.

According to Sutherland, sex crime waves typically follow a sequence of phases: a few spectacular or particularly brutal sex crimes in succession get the attention of the media; the media begin extensive reporting and description of sex attacks and "every real or imagined sex attack from near or far, is given prominence;" agitation of the community follows and is accompanied by calls for action; a committee is appointed to study the problem; revised laws, often prescribing harsher penalties may result.

The role of the Honolulu newspapers in the 1912-13 "crime wave" is not entirely consistent with Sutherland's observations, at least with regard to precipitating incidents. Examination of the newspapers for several months prior to the December 1912 mass meeting reveals no particular concern about sex crimes nor the reporting of any spectacular incidents. Press attention commenced only with Bishop Restarick's announcement of the mass meeting. Restarick's comments about the possibility of vigilante action and lynching indicate that in some circles public concern preceded concentrated media reportage.[99]

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[99] That this should be the sequence in the small, tightly knit haole community in Honolulu in this period is comprehensible. Reference was made to the many known crimes not reported to the police and thus not officially available to the press. Yet many of these might come to the attention of individual members of the community.

Once the mass meeting was announced by Bishop Restarick, the press reporting followed the pattern described by Sutherland. The Advertiser's approximately 110 articles, letters, and editorials during the six-month period of the scare would indeed give the impression of a wave of sex crimes. The Advertiser followed every case from the initial report to the final disposition, often adding editorial comments. The language of the news items frequently implied a crisis situation, as illustrated by the following headlines and excerpts:

> criminal assaults upon women and fiendish outrages against infants and young girls are becoming so frequent as to be a matter of public shame. (Advertiser, December 6, 1912:9)
>
> ANOTHER HORRIBLE RAPE CASE IS REPORTED -- VICTIM IS THREE YEARS OLD
> "the worst of the whole series" (Advertiser, February 11, 1913:4)
>
> "recent frequent cases of criminal assaults" (Advertiser, November 23, 1912:4)

In addition to the local reports, the Advertiser reported sexual molestations and sex crime related activities from the other islands.

5.3.6 Summary and Conclusion: 1912:13 Episode

In the episode of 1912-13, perceived increasing numbers of shocking crimes fomented a crisis among a segment of the hacle community. Members of the community (the Inter-Church Federation) met and were "thrilled with horror" at the stories they told each other. They constructed a

preliminary definition of the situation, the major elements of which were the increasing prevalence of shocking crimes, now limited to non-haoles but threatening all womanhood; the indifferent and ineffective efforts of legal officials; anger and indignation among a segment of the community, with the possibility of vigilante action or lynching; and the need for mass action to clean up the city. The mass meeting called by the Inter-Church Federation reinforced and further elaborated this definition and resulted in an organized action program to influence legal officials, e.g., court watching, to propose and lobby for new laws, and to keep the issue on the public agenda. However, the strongest effort to get new legislation providing for corporal punishment of sexual offenders foundered when a competing and contradictory imagery of the offender was advanced and forcefully advocated by a new segment of the haole community -- a segment which did not disagree with the definitions of the act and the nature of the harm done the victim, but which embraced the most advanced scientific theories of criminality of the time of inherited criminality and defectiveness. The overall effort at statutory change was weakened by the divisiveness and the inability to develop consensus. Both the eugenics proposals and the whipping proposals failed to become law. The only legislative change made raised by one year the age for statutory rape.

The English language newspapers, particularly the Advertiser, played a major role in defining the situation, putting forth the appropriate language and images, and in legitimizing and encouraging the activities of the citizens concerned about sex crimes.

In the long run, it is doubtful that any lasting legal change emerged from the activities and indignation generated over sex crimes in 1912-13.

5.4 1923: SUPRESSING THE GANGS: THE RISE OF SOCIAL WORK AND SOCIAL ENVIRONMENTALISM

After the close of the 1912-13 episode, sex crimes did not receive concentrated attention in Honolulu until early in 1923 when the Honolulu Advertiser (January 26, 1923:1) announced that nine members of the "Kakaako Gang" had been arrested and charged "with one of the most dastardly assault cases in the annals of local crime." The reaction to this news among the haole community followed the pattern that is now becoming familiar in this study and which, for the 1923 episode, will again be elaborated below.

But this episode and two very similar ones that followed it in 1929 and 1931 were distinguished in three important respects from the episodes examined so far. First, the identified threat was to mature girls and women, not little girls. Second, the source of the threat was the "gangs" of the poor districts of the city, not individuals or occasional pairs as had been the case in earlier episodes.

And third, the 1923 episode is the first in which women played any visible role in the defining of the situation and the attempts at reform. These changes are important for several reasons. The focus on the non-haole gangs from the poor districts provides additional support for the contention that ethnic and class tensions were important underlying factors in community reaction. The change in publicly articulated concern from a focus in little girls as victims to mature girls and women raised a new dimension for analysis. And the participation of women, much of it in organized groups, raises interesting questions about how this phenomenon may change the images used, the definitions developed, the issues raised, and the types of reforms attempted. Do the women behave the same as the men or do they make different claims? Do we see in this phenomenon the seeds of change pointing to a time when women take sex crimes as an issue completely over and away from men?

With respect to the change in focus on mature women these episodes provide new insight into the topography of respectability and the question of who is regarded as having a claim to be protected by the criminal law from sexual attacks. It is only a slight oversimplification to say that the dominant cultural conceptions in the community, institutionalized in legal practice, defined two kinds of women, the respectable women who observed conventional sexual norms and thus deserved the protection of the

community and the criminal law, and the other category of women who had compromised themselves, either as a pattern of their lives, or by their behavior in a particular instance and had thus forfeited the right to protection by the criminal law from rape. The highly publicized episodes of 1923, 1929, and 1931 provide an opportunity for analysis of these aspects of community definition and reaction that is much more difficult to determine in low visibility individual legal cases.

According to the newspaper reports the basic facts of the "Kakaako Case" are as follows.[100] On January 13th of 1923 a seventeen year old girl (presumable of Portugese ancestry judging from her name), a resident of the Kakaako district, went on an evening errand near her home. While enroute she met a soldier who was an acquaintance, who then accompanied her. When a rainstorm began, the two took refuge in a nearby schoolhouse wherein they encountered the members of the "Kakaako Gang" who beat the soldier and chased him away, whereupon some or all of them raped the girl. A lengthy police investigation led to the indictment of nine members of the gang on charges of rape.[101] While in police custody

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[100] The Kakaako Case may be followed through articles and editorials in the Advertiser on the following dates: January 26, 28, February 1, 2, 6, 10, 11, 13, 14., 15, 17, 20, 22, 27, 28, March 1, 2, 7, 8, 13, 14, 18, 20, 21, of 1923.

[101] The ethnicities of the defendants was not reported in the newspapers but their names were. A group photo that appeared on the front page of the Advertiser revealed all the defendants to be non-haoles.

several of the defendants signed confessions and later entered guilty pleas in court. Subsequently they were allowed by the court to withdraw their guilty pleas and to plead not guilty on the grounds that they had not understood the charges when they pled guilty. They were tried by a jury in mid-February of 1923. At trial the defense sharply questioned the victim about her activities on the evening of the incident with her escort. The defense contended that the rape charge was a coverup for her sexual activities with her escort. Over the objections of the defense the confessions were admitted as evidence. The defendants were convicted of rape by the jury and sentenced to a minimum of 5 years in prison and a maximum of 50 years. At sentencing the judge expressed regret that he could not set a longer minimum. The elapsed time from the first news report of the case on January 26, 1923 until the report on March 18, 1923 of the sentencing of the defendants was a little less than two months.

The two major English-language dailies in Honolulu printed daily accounts of developments in and out of court in the Kakaako Case. In addition, two other alleged attacks were publicized. The Japanese servant girl of a well known Honolulu businessman was reported to have fought off assailants who attacked her in Nuuanu (an upperclass district). The woman's employer complained that the residential districts must be better protected and that

"This section of the city is being visited far too much by wandering young rowdies." (Star-Bulletin, February 7, 1923:1). On March 5, 1923 the Advertiser reported a kidnap attack on another woman which, it said, coming on top of the Kakaako Case, "created a furor throughout the community yesterday."[102]

As usual the Kakaako Case and its publicity generated a spate of letters to the editor of the newspapers. The predominant view advanced by the writers was that the city was "infested" with gangs, that these gangs constituted a serious threat to women and that gangs should be vigorously suppressed by police action. Whipping was the most commonly suggested punishment for gang members who assaulted women.

But again, as in 1913, the punitive sentiment expressed by those who wrote letters to the editor was opposed by an elite expressing the views of social work, psychiatry, and sociology. The Advertiser in an uncharacteristic outpouring of liberal humanitarian spirit suggested editorially a few days after news of the Kakaako Case broke that "Crime Prevention (is) Better Than Punishment." It discussed the prevalence of gangs in the city and suggested that it was from them that the criminal class was recruited. It went on to propound a remarkable theory of the etiology of

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[102] The defendants in this case, identified as "sailors," were indicted for rape, but a nolle prosequi was later entered because the victim no longer resisted once she was overpowered and because she was reluctant to give the details of the attack in open court. See case file of Territory v. R.J. Bogart and Elwood F. Bash.

criminality.

> A good many of these criminals are what they are because they have never been taught the code of manly ethics, honor, sacrifice and personal service which is the foundation of the Boy Scout movement. They are not "good sports." They do not know that boy, youth or man gets the most out of life when he "plays square."
>
> Playgrounds and parks, open air entertainments, music, swimming, dancing, in a word -- community help, interest and fellowship -- are means to be freely used for the prevention of crime, and in the long run the dollar cost to the entire community of such social welfare work cannot help but result in a material reduction in the cost of punishing crime and criminals.
>
> These curative processes are slow but certain. Decent citizens are horrified by outbreaks of bestial primitive criminality which society might have prevented were there less selfishness among those whose environment has always preserved them from contamination.
>
> It is not only a privilege but a moral and civic duty of citizens to make the social conditions surrounding all children such that they will not grow up to become criminals. Crime has got to be eradicated at the source, through permanent prevention. The only time that can be done is in childhood. (Advertiser, February 2, 1923:2)

The Advertiser's editorial was followed later in the month with a long column by Albert W. Palmer, pastor of the elite Central Union Church. Palmer conceded that gangs "terrorize certain sections of Honolulu" and were a menace to women and girls. But he contended that whipping was counter productive and jailing offenders was difficult due to rules of evidence, legal technicalities, and the court ordeals of victims of sexual assaults. Palmer argued that the whole

community was on trial and that the community's suffering with the gangs was simply the consequence of "its own sins of greed, negligence, and stupidity." Gangs would exist as long as the conditions which produced them existed. He suggested as the causes of gang formation five factors:

> (1) The Gang Spirit, which we all possess. Every man who "belongs" has his gang.
> (2) Idleness, due to lack of that vocational training which would awaken the ideals of industry.
> (3) Love of adventure, not directed into legitimate channels but allowed to run wild.
> (4) Moral illiteracy, due to lack of moral and religious training.
> (5) A morbid sex life, stimulated by indecent shows, literature and idle talk, and uncorrected by exercise and competition of nobler and more wholesome interests. (Advertiser, February 26, 1923:1)

Palmer went on to suggest that the community should attack its social problems with the same "scientific interest" it had used in the growing of good quality sugar cane. As a first step mental tests should be administered to the gang members and those who proved to be feeble-minded should be segregated and sterilized. The others were creatures of their environment, for which the whole community was responsible. Churches and affiliated social agencies, e.g., YMCA and YWCA, public schools, and playgrounds should mount a program of moral education, vocational training, and recreation to improve community conditions.

In an accompanying editorial Advertiser publisher Lorrin A. Thurston characterized Palmer's analysis as "A Clarion

Call to Duty" and called upon all agencies and individuals to assist in "the reclamation of flesh and blood and diversion of our boys and girls to lives of joy and usefulness instead of to sorrow and destruction." (Advertiser, February 26, 1923:10) Palmer's views were supported by two letters to the editor published subsequently by the Advertiser (March 6, 1923; March 8, 1923).

Because of the disagreements between the members of the community who developed a definition of the situation incorporating social welfare conceptions of the nature of the problem, and those who believed punishment by whipping was the correct approach to the situation, an adequate constituency for a program of legislative reform could not be constructed. A petition requesting flogging rather than "asexualization" for rapists was presented to the Territorial Senate by the members of the Good Government League of the Mothers of Hawaii, but no whipping bill was introduced into the 1923 territorial legislature. (Advertiser, March 16, 1923:2). A measure was introduced into the House (House Bill 227, 1923) to raise the minimum sentence to 20 years for a conviction on rape, but the bill failed when the House Judiciary Committee reported that the statutory change, if passed, would be counterproductive because such a long minimum sentence would only make getting convictions more difficult (House Standing Committee Report

No. 202 , 1923). A resolution introduced in the Senate at the request of the Hawaiian Republican Women's Auxiliary Clubs providing for the "unsexing" of rapists by a surgeon failed to win approval due to the belief of senate members that the sanctions would constitute cruel and unusual punishment (Star-Bulletin, March 1, 1923:7). Although it cannot be determined if the liberal humanitarians were successful in persuading Honolulu's schools, churches, social agencies, and playgrounds to address the gang problem, it is clear that the 1923 episode did not result in any legislation altering the rape law.

As in previous episodes we will turn briefly now to a more focused look at the imagery of the act, actor, and victim involved in rape cases.

5.4.1 Imagery of the Act

There does not appear to be any substantial change reflected in the 1923 episode in the language and imagery of the act of rape. It was still regarded with the most hostility of any crime that could be committed. As one female writer to the editor of the Advertiser (February 15, 1923:14) said, "I'd prefer death myself," when referring to the ordeal of the victim in the Kakaako Case. A few other examples of frequently used terms are listed below:

"dastardly assault" (Advertiser, January 26, 1923:1)

"heinous crimes" (Advertiser, January 31, 1923:14)

"outrage" (Advertiser, March 5, 1923:1)

"atrocious kidnapping case" (Advertiser, March 6, 1923:1)

"revolting circumstances" (Advertiser, March 6, 1923:1)

"brutal attack" (Star-Bulletin, January 26, 1923:1)

"bestial, primitive, criminality" (Advertiser, February 2, 1923:12)

5.4.2 Imagery of the Actor

Unlike the imagery of the act the imagery of the nature of the actor, the man who commits rapes and sexual assaults, appears to have changed in the period between 1912-13 and 1923, although this may reflect as much a change in the nature of the perceived threatening group -- youthful gangs as opposed to solitary individuals, often of mature age -- as it does any fundamental change of underlying cultural conceptions. As was indicated above, the haole community was quite disturbed about "gangsters," but the influences of psychiatry, social work and sociology had largely replaced eugenic thought as the advanced thinking of the period. While the sentiments of the liberal humanitarians could hardly be described as tolerant, they could be described as understanding. With the exception of a few "feeble-minded" who should be sterilized, the "gangsters" were normal youth whose energies were misdirected and whose activities were unchanneled by constructive social forces. They were victims of their environments and products of the disorganizing forces of the city -- forces for which the entire community was responsible. These individuals were

most commonly referred to as "youths," "boys," "ruffians," "hoodlums," and "thugs." While most of these are hardly neutral terms the imagery is quite different and less hostile than the "brute" and "fiend" that had previously been used.

5.4.3 Imagery of the Victim

It is doubtful that the imagery of the victim of rape had changed much for the haole community prior to or during the 1923 episode. Rape was still regarded as the worst event that could befall a woman, one that transformed her very being, a fate worse than death. One author of a letter to the editor was probably engaging in only slight hyperbole and expressed the perception of the haoles when she wrote in reference to the Kakaako victim, "Her whole life has now been changed and all the 'air-castles' of a happy home and family may be shattered." (Star-Bulletin, January 27, 1923:6).

What this episode does afford is insight into the differentiation of women rape complainants into those who were "respectable" and those who were not. The critical importance of this assignment to a category of complainants is indicated by its appearance in initial newspaper reports of both of the major cases to get publicity during the 1923 episode. The initial news report of the Kakaako Case in the Advertiser (January 27, 1923:1) identified the victim as "of

respectable parentage." In the initial report of the kidnap-assault by the two sailors, the Advertiser (March 5, 1923:1) reported that the woman's character was "said to be of the best." In a follow-up article the next day (Advertiser, March 6, 1923:1) the victim was identified as a "respectable married woman." In a general editorial on attacks on women in Honolulu, Advertiser publisher Lorrin A. Thurston described assaults on "reputable white women" by native Hawaiians (Advertiser, May 30, 1923:16).

Of course, the status and prior behavior of the alleged rape victims were the key issues in the trial of the Kakaako Case. Was she claiming rape tc avoid punishment for intercourse with her male escort or was she the innocent victim of a surprise attack by a gang of strangers? This was the issue for the jury to decide. Interestingly, because of the publicity of the Kakaako Case, this common defense, attacking the character of the victim, was itself severely attacked. Albert Palmer publicly criticized one of the defense attorneys for his cross-examination of the Kakaako victim and announced his opposition to the attorney's proposed appointment to the federal bench. (Advertiser, March 20, 1923:1). Palmer saw the attorney's behavior to the victim as precisely the kind of ordeal which discouraged women from complaining of crimes committed against them (Advertiser, March 21, 1923:1). In addition to organized opposition by women interested in the case to the

attorney's judicial appointment (March 23, 1923:1), a debate on legal ethics was touched off that led to serious proposals of a bar committee to examine the ethical issues involved (Advertiser, March 21, 1923:1; March 25, 1923:18; March 27, 1923:14; March 28, 1923:15; March 29, 1923;14).

5.4.4 Summary and Conclusion: 1923 Episode

Based on the foregoing we are now able to explicitly employ the model. The "Kakaako Case" was of course the crisis that generated attention by the haole community. The very nature of the case -- the gang connection of the defendants -- and the increasing concern with the non-haole gangs in the poor districts, were major components of the emerging definition of the situation. The imagery of the act had been stable, but the imagery of offenders had changed to more of a paternalistic concern with the youth of the city, rather than dismissal as "brutes" or "fiends." The punitive-whipping orientation made a strong drive for having that sanction defined as the appropriate solution. But its adherents were outclassed by the environmentalists and social workers whose recommendations were diffuse and dissipating of energy. For the first time women, organized in groups, participated in the definition of the situation, focusing on the treatment of the victim in court and raising questions about the lack of participation of women in the legal system. In the end, neither the punitive nor the

humanitarian orientations were able to achieve sufficient hegemony to result in specific legislation.

But gangs were still regarded as a problem and next surfaced in relation to sex crimes in 1929.

5.5 1929: THE TRIUMPH OF PUNISHMENT

If any social service measures were taken subsequent to 1923 to address the gang problem, they failed to solve the problem in the view of much of the haole community because in 1929 another case of a gang attack on a young woman occurred, the reaction to which paralleled in many ways the events of the 1923 episode. But the 1929 case took place in a haole community much changed from 1923. In 1923 there was a strong benign-paternalistic orientation among some powerful members of the haole community, most notably the Advertiser and its publisher Lorrin A. Thurston, toward the youthful gangs. While there was uniform concern about the gangs and the belief that these gang members who committed serious crimes should be punished, the punitive sentiment was muted and whipping did not receive serious legislative attention. However, in 1929 a whipping proposal passed both houses of the territorial legislature, the images employed and language used were much more harsh, and sentiments were strongly punitive. Why the change?

In addition to the social changes already outlined -- urbanization, class and ethnic competition, and the growth of poor immigrant districts -- in 1928 there occurred an

incident in Honolulu, which, while not involving a sex crime, profoundly shocked the haole community and impressed upon its members the dangerousness of some of the non-haole residents of the city. The consequence was an increased concern about safety from and control of the lower classes and a more repressive attitude toward crime.

The incident involved the kidnap for ransom and murder of a young upperclass haole boy by a Japanese youth, Myles Fukunaga, presumably for a believed injustice done to the Japanese youth's family by the company which employed the victim's father. Lind (1982:141) says the events associated with the crime, news of it, the search for and apprehension of Fukunaga, "moved the entire community for nearly a week to a state of intense emotional excitement and distress, which in a Mainland setting could easily have precipitated a race riot."[103] Fukunaga was quickly tried and convicted. Despite arguments that he was insane, he was eventually executed. The crime was the quintessential symbolic viclation of ethnic and class boundaries.

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[103] Lind (1982:141) uses the Fukunaga Case to "illustrate how delicately balanced the public attitude of racial toleration actually was, and how easily it could be disturbed, and as readily restored." While agreeing with Lind's first two points, my thesis, however, is that the pre-Fukunaga ethnic situation was not fully restored after the event and in fact it left a residue of fear among a portion of the haole population. This fear I regard as an important element in explaining the harsher attitudes among the haoles exhibited during the 1929 "sex crime wave."

Like the 1923 Kakaako Case, the 1929 wave of concern about rape began with a precipitating incident involving the attack on a seventeen year old Chinese girl by thirteen members of the "Vineyard Street Gang." The case came to be known as the "Kauluwela School Case" in reference to the site of the attack. Indicating a much different orientation than it held in 1923, the Advertiser (March 23, 1929:18) editorialized:

> Degrading crimes such as these laid at the door of the 'Vineyard Street Gang' deserve swift punishment for the guilty.
>
> * * *
>
> 'Gangs' should be suppressed, ruthlessly and by force, if it takes the entire police force backed by every decent man in Honolulu to do it.

With this statement the Advertiser laid out the two major issues to occupy the haole citizens of Honolulu for several weeks: the suppression of youth gangs and the appropriate punishment for rape.

The Advertiser's editorial conveniently appeared just before the alleged assailants' trial on rape charges began on April 3, 1929. On April 5 it was announced (Advertiser, April 5, 1929:1) that as a result of the alleged sex attack, "prominent women of the city" had called an open meeting to which all the women of the city were invited to discuss possible courses of action. At the meeting, the women engaged in "Deliberate but firm discussion of the present gangster situation ... in which corporal punishment was largely favored ...." (Advertiser, April 7, 1929:1). The

women also appointed a committee of four[104] to visit the Territorial Senate to indicate their support for a bill (House Bill 49, 1929) that would make a ten year minimum sentence for a rape conviction mandatory.[105]

Focusing on the administrative apparatus, one speaker strongly criticized investigative and court procedures, noting that police, physicians, prosecutors, defense attorneys, judges, and juries were all male and that the courts applied the resistance standard to the point that it was nearly impossible to obtain convictions.

The women's ire concerning the situation was not wasted on the legislature. The House of Representatives adopted a resolution (House Resolution No. 99, 1929) requesting the Territorial Attorney General to collect statistics concerning the incidence of sex crimes, and some legislators positively responded to the suggestion that whipping be made a penalty for rape. The Advertiser announced its support for the activities of the women and suggested the inclusion of women on juries as one solution to the problem (Advertiser, April 10, 1929:1).

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[104] The women were Mrs. Henry Damon, Mrs. A.N. Campbell, Mrs. George P. Straub, and Mrs. George P. Cooke, all wives of business and professional men of Honolulu.

[105] House Bill 49, (1929) had been introduced by Representative O'Brien (who had been the presiding judge in the 1923 Kakaako Case) out of his dissatification with the defendants' quick paroles. The bill passed the House 28 to 1 but failed in the Senate.

By April 11th, the crime wave and associated activities were in full swing. The Advertiser had picked up and was giving detailed coverage to a case of child molesting (Advertiser, April 10, 1929:1) and the alleged rape of a white girl was reported as "ANOTHER GIRL ASSAULTED BY BURLY BRUTE" (Advertiser, April 11, 1929:1). Indignant letters began to pour into the Advertiser (April 9, 1929:14; April 10, 1929:14) demanding whipping for sex criminals. The women's committee met again and reached a consensus that whipping was to be pushed as the penalty for rape. At the request of the Maui Women's Club, a bill was introduced in the legislature to raise the penalties for indecent assault and to raise the protected age category from twelve to eighteen (House bill 362, 1929).[106] On the theory that "lascivious books and cheap magazines" were contributing to the crime wave by holding "the criminal up as a daring hero," one senator introduced a bill (Senate Bill 64, 1929) to bring them under the nuisance statute (Advertiser, April 12, 1929:4).[107] A subcommittee of the women's group visited Judge W.F. Frear to discuss reform of sentencing and parole policies for those convicted of sex crimes (Advertiser, April 13, 1929:1).[108]

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[106] House Bill No. 362, (1929) failed to pass the House. An identical bill introduced into the Senate (Senate Bill No. 208, 1929) passed the Senate but also failed in the House.

[107] Senate Bill No. 64 (1929) passed both houses and was signed into law by the governor (Act 221, 1929).

Despite the introduction of other bills, the major event was the introduction into the House of Representatives, by the powerful O.P. Soares, of a bill (previously approved by the women's group) prescribing the addition of a mandatory five to twenty-five lashes with a "cat-o-nine tails" to existing penalties for rape, attempted rape, carnal abuse, and indecent assault (House Bill No. 403, 1929). The whipping bill became the major focus and rallying point of the women's committee. However, the haole community was not united behind it. Just as in 1913, the haole community was seriously split concerning the solution to the sex crime problem. Again, the split was between those adhering to the conventional belief in the efficacy of severe punishment, and a scientific-humanitarian elite which viewed the punitive response as brutal and ineffective.

5.5.1 The Scientific-Humanitarian Solution Versus Retribution

By 1929 the eugenics movement in Hawaii was quiescent. Sterilization was no longer viewed as the enlightened solution to criminal behavior and related social problems. The medical profession, with its biological explanations of behavior, had lost its hegemony in such matters to the emerging perspectives of sociology, social work, and psychiatry. Adherents of this perspective, while perhaps

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[108] They noted that there was no woman on the parole board and that one was needed.

somewhat less deterministic than eugenicists, nevertheless denied the efficacy of corporal punishment, and explained crime in terms of poverty, family and neighborhood disorganization, and alcoholism. Suspicious of simple solutions, this group characteristically suggested better education and recreation along with more study of the problem.

The introduction of the whipping bill into the legislature resulted in a major confrontation between the social work and the punitive perspective during two evenings of open legislative hearings on the bill.[109] Proponents of the whipping bill did not object to suggestions for more study, but insisted that whipping was needed immediately to meet the crisis. While conceding that social work offered no immediate solution, proponents of that view criticized the brutality and inefficacy of whipping (Advertiser, April 16-17, 1929:1). Supporters of the whipping bill countered that whipping was the only punishment that the beasts who attacked women and girls would understand. Taking this view, one speaker said:

> It (rape) is the lowest form of crime known to man for it strikes at the foundation of life itself. Men involved cannot be reached through

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[109] The leaders of the "social work" camp opposing the bill were: Miss Mary Catton, Queen's Hospital social worker; George F. Hamilton, Secretary of United Welfare; L.R. Killam, Honolulu School of Religion; Andrew W. Lind, University of Hawaii Department of Sociology; Merle Scott, YMCA; Galen Weaver, Pastor of Church of the Crossroads. Those supporting whipping were a larger and more diffuse group.

> intelligence or soul, only through sensory nerves can they be reached and the whipping post would touch those nerves. (Advertiser, April 27, 1929:2)

Two adherents of the whipping bill spoke of the uniqueness of Hawaii's "mixed" population and the special measures necesary to control it. Other suggestions ranged from use of the ball and chain to better lighting fcr playgrounds. Sociologist Andrew Lind, according to the Advertiser

> referred to the 'sweeping emotional pent-up energy in the minds of a great many of the community,' and said that 'experience has shown that whipping does not actually deter' .... Lind said it was a 'pernicious measure,' and referred to books and reports.
>
> * * *
>
> 'I don't believe anyone here is competent to say what ought to be done, but I don't think whipping will improve the situation.'
> (Advertiser, April 16, 1929:1)

The hearings polarized the community and set off a wave of letters to the newspapers. The Advertiser (April 17, 1929:16), immediately made its position known in an editorial titled "Whipping Post or Soft Gloves?" which clearly reveals its definition cf the of the situation and the alternative approaches to it. It reads in part as follows:

> A desperate situation faces Honolulu.
>
> * * *
>
> What are we the people of Honolulu going to do about it?
>
> * * *

A review of the conditions reveals two radically different lines of treatment proposed.

On the one hand is the modern 'soft glove' procedure. This is courageously advocated by Margaret M.L. Catton, a social worker in the Honolulu field.

In a letter to the Advertiser last Saturday morning she deprecates punishment by force, and advocates 'a survey to determine the source of evil in Honolulu,' and the treatment of the evil found by 'Scientific individualization by means of psychology, psychiatry and social service.'

She further refers to the people needing treatment as 'socially sick.'

* * *

The 'soft glove system' has brought Honolulu to the 284 arrests for rape and kindred offenses in 4 years.[110]

Heretofore the offenses have been committed chiefly against poor Hawaiian, Filipino, Chinese and Japanese girls, and the community has listened to the almost incredible details with an incredulous stare, but the situation is not standing still.

The ravishing of defenseless women and girls is not going to be confined to Kakaako and Tin Pan Alley.

It is going to extend to Waikiki; to Manoa; to Pacific Heights; and the aristocratic circles of Nuuanu Valley.

It is going to invade the homes of leaders of business and society and to families of members of the legislature.

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[110] Reference here is to some much publicized statistics on sex offenses produced by the Territorial Attorney General. Nearly all of the offenses were for violation of the statutory rape statute and did not involve violent attack. Nevertheless, the haole community was much concerned about the figures and frequently cited them as evidence of the danger to the women of the community.

> What are we going to do about it?
>
> Are we going to confine our efforts to 'social surveys and psychiatry' and 'minimum sentence parole' or what?
>
> * * *
>
> As opposed to the 'soft glove theory' the unanimous opinion of the responsible women's committee has been that what is required is that 'something be done.' And that 'something' shall be whipping delivered upon the bare back of the offenders.
>
> * * *
>
> If something is not done, and that promptly and drastically, to remedy the situation, Honolulu is certainly going to see a revulsion of feeling in the community which will gravitate into lynch law and killing.
>
> The writer of this recently conversed with the father of a decent white girl who had been raped in Honolulu. The man stated that he had been practicing daily with a six-shooter with the intent to kill, on sight, the ravishers of his daughter when discovered.

Thus, the Advertiser gave strong editorial support to the portion of the haole community that was pushing the whipping bill. And, as in the past, it pointed out that the elite did not view all rapes as being of the same quality. If the haole community did not act to protect itself, rapists would be invading its homes. Again the spectre of lynching was raised in connection with the rape of a white woman.

5.5.2 Other Activities

In addition to its whipping bill, the women's committee made plans to put pressure directly on the organs of legal administration by appearing *en masse* at the trial of the boys charged in the Kauluwela School Case. These plans brought an outraged response printed in the *Advertiser* (April 15, 1929:1) by E.J. Botts, the attorney of one of the defendants. Botts charged the women with an action which was the "first cousin of mob-rule," which was disrespectful to law and the courts, and which would deny his client a fair trial. He went on to say that although it is doubtful such tactics could be condoned in any case, they were certainly not justified in the present case because the victim was an "over-sexed young woman with nymphomania tendencies (who) chooses, after several days reflection, to call an experience in which she eagerly participated, a ravishment, in order doubtless to deflect the reproach of her relatives ...." (*Advertiser*, April 15, 1929:1).

Botts' statement brought a storm of protest in the *Advertiser* in the form of letters affirming the right of women to demonstrate and criticizing Botts' judgment of the victim's character (April 16, 1929:15; April 17, 1929:15; April 18, 1929:18; April 20, 1929:15). The president of the *Advertiser* publishing company, Lorrin A. Thurston, wrote a rambling editorial charging that if Botts thought the women's action was the "first cousin of mob-rule," then

Botts, himself, was a "full brother to the most dastardly crime which disgraces civilization" (Advertiser, April 17, 1929:1).

Meanwhile, despite an active dialogue among letter writing proponents and opponents of whipping in the pages of the Advertiser, things were going badly in the Territorial House of Representatives for Soares' whipping bill.[111] On April 19th, the Advertiser, announced that the bill had only a "slim chance" of passage, with Soares its "sole champion." Soares gave a "fiery speech" on the floor of the House criticizing those opposing the bill, describing them as nearly rapists themselves (Advertiser, April 19, 1929:1). He mentioned "conditions peculiar to Hawaii" that made the passage of the whipping bill necessary.

The women's committee was not easily discouraged. A "mass meeting" was called for April 21st in Emma Square (Advertiser, April 21, 1929:1) which was attended by several hundred persons, a large proportion of which were Caucasian women (Advertiser, April 22, 1929:1). Speeches were made in favor of the bill and its opponents were criticized.[112] A

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[111] Between April 10, 1929 and May 1, 1929 the Advertiser printed some thirty-two letters from the public on the issue of punishment for sex offenders. Nineteen of these supported whipping, seven were against, and six suggested whipping and/or castration. One long pro-whipping letter was authored by Henry B. Restarick, the leader of the whipping movement in 1913.

[112] One speaker in favor of whipping was Lorrin A. Thurston who was noted for his moderate attitude toward the gang problem in 1923. The marked change in his attitude between 1923 and 1929 represents that of much of the

petition for presentation to the legislature in favor of the whipping bill received 435 signatures.

The Emma Square mass meeting apparently had a powerful effect on legislators. On April 23, 1929, two days after the mass meeting, an amended whipping bill[113] passed the House and was assured of favorable treatment in the Senate. The Advertiser excitedly reported:

> HOUSE VOTES WHIPPING FOR DEGENERATES
>
> BILL AMENDED TO MAKE LASH OPTIONAL WITH JUDGE
>
> EXPECT SENATE TO FOLLOW LEAD
>
> ACTION IS REVERSAL OF FORMER ATTITUDE: WOMEN CREDITED
>
> Softened by amendments that amounted to a substitute bill, Representative C.P. Soares' whipping post measure passed the House yesterday 27-3, during a session tense with excitement, vibrant with emotion and punctuated with applause from a gallery of women who packed every square foot of standing room and overflowed onto the lanais.
>
> (Advertiser, April 23, 1929:1)

The bill also overwhelmingly passed in the Senate under the watchful eyes of a full gallery of women but not without some controversy which resulted in "the stormiest session of the 1929 legislature" (Advertiser, April 25, 1929:1). One senator in opposition to the bill called it the "child of hysteria and barbaric" (Advertiser, April 27, 1929:1).

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haole community.

[113] The "amended" bill was actually a substitute bill which modified the original by making the maximum number of lashes 20 rather than 25 and made imposition of this additional punishment discretionary with the judge rather than mandatory.

The women leaders of the whipping movement were gratified by the passage of the bill, but collectively and publicly expressed their regret that the bill had been amended such that whipping was no longer mandatory upon conviction (Advertiser, April 26, 1929:1).

Just a couple of days after the whipping bill passed the legislature the trial of the defendants in the Kauluwela School Case concluded. The jury convicted the defendants of attempted rape, recommending leniency due to the circumstances of the case. The judge sentenced them four months to fifteen years in prison with the recommendation that the parole board grant parole after the minimum sentence had been served. The judge also took the opportunity to level a bitter blast at the Honolulu newspapers for their coverage of the case and the manner in which it was used to arouse a portion of the community. According to the judge:

> What was rotten in this trial was the way the thing was handled by the newspapers before it got to court. A hysteria was worked up over a case that was rotten, dirty, and disgusting, but not the crime it was played up to be. (Advertiser, April 28, 1929:1)

The next day the Advertiser responded editorially that the judge's remarks were "unjust criticism" since the Advertiser had only printed the facts of the case and that it was the facts that aroused the women (Advertiser, April 29, 1929:12).

Meanwhile, the whipping bill was awaiting the signature into law of Governor Farrington. The Advertiser (May 8, 1929:1) reported that a "steady string of visitors to his office have argued the merits and demerits of the measure." Apparently the opponents of the whipping measure carried the day. Governor Farrington eventually vetoed the whipping law commenting:

> Law observance and law enforcement are of more vital importance than more law. I believe that this bill is the product of a spur-of-the-moment desire to do something radical to correct an evil situation. I believe in being radical if the radicalism is effective and may not accomplish more harm than good. (Advertiser, May 9, 1929:1)

Getting the last word, the Advertiser (May 14, 1929:14), in a rather hysterical editorial, bitterly criticized the legislature for amending the whipping bill and the Governor for vetoing it.

Review of the newspapers for two months after the veto of the whipping bill revealed no particular further indignation concerning the governor's action and no concern about rape. The mere passage of the whipping bill seems to have satisfied the impulses of that portion of the haole community that was most concerned about sex crimes. But, again as we shall see, social conditions in the community were unchanged and the people of Honolulu were soon to hear much more about rape.

5.5.3 Community Response to the Crime Wave: The Governor's Advisory Committee on Crime

As a consequence of the growing perception of a crime wave in the territory, in part due to the heavily publicized Fukunaga case and the 1929 Kauluwela School Case, the governor of the territory in January of 1929, appointed an advisory committee to make a study of delinquency, crime, and punishment in the territory. The eleven member committee (eight haoles, one Chinese-Hawaiian, one Japanese, and one Portuguese)[114] conducted a wide ranging inquiry into the causes of crime, criminal statistics, the detection and apprehension of criminals and persons accused of crimes, sentencing, corrections and penal institutions, and juvenile delinquency. Its final report (Governor's Advisory Committee on Crime, 1931) made 55 specific recommendations for reform of various aspects of the criminal justice system. They ranged in scope from a recommendation for an appointive police commissioner to oversee the police department and appoint its chief, tc a recommendation that one of the country jails be repaired to prevent water seepage.

The analyses and recommendations of the committee reflected the influence of psychological, sociological, and social work thinking. Indeed, University of Hawaii psychologist Stanley Porteus was on the committee as was

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[114] The members were Roy A. Vitousek, W.F. Frear, A.G.M. Robertson, Gertrude M. Damon, Bernice P. Irwin, Margaret Bergen, W.H. Heen, Harry I. Kurisaki, Francis K. Sylva, Stanley D. Porteus, and H.R. Hewitt.

community social worker Margaret Bergen. The committee's analysis of juvenile delinquency drew on the work of University of Hawaii sociologists Romanzo Adams and Andrew Lind.[115]

With respect to the causes of crime, the committee, reflecting the orientations of its membership, focused on three underlying factors: (1) those pertaining to the individual -- personality and intelligence (the psychological perspective); (2) those pertaining to the family, broken homes and parental discord (the social work perspective); and (3) those pertaining to general social conditions -- the criminal justice system, informal social control, and character moulding (the sociological perspective). Committee recommendations addressed each of these areas.

The committee's penological proposals were also reflective of the advanced social thinking of the period. They rejected "the old theories of revenge, retaliation, retribution and expiation (the eye-for-an-eye, tooth-for a-tooth, penalty should fit the crime theories)" for the "never theories of prevention, deterrence, and reformation or rehabilitation." (Governor's Advisory Committee on Crime, 1931:48). The committee favored scientific individualization and used a medical analogy to illustrate its point.

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[115] Adams (1931) and Lind (1931) are included as appendices 6 and 8 respectively in the committee's report.

> Punishment and treatment should fit not the crime, but the criminal. Hence, the foremost postulate, that treatment should be, not en masse but individual and appropriate to the case as far as may be and for as long or as short a period as required -- as much so with respect to criminals, whether in or out of prison, as with respect to those who are ill, whether in or out of a hospital. Wholesale treatment by arbitrary uniform methods has no place in this scientific age. (Governor's Advisory Committee on Crime, 1931:49-50)

However, the committee emphasized that this orientation arose not out of sentiment for the wrongdoer. In fact, the committee said, such feelings were the greatest danger of this approach. Concern should be for the welfare of society. The remedy or treatment should be tailored to community interests and "in all cases the punishment and treatment should be designed as far as possible to operate as deterrent both to the criminal and to others against future crimes." Consistent with the committee's interest in scientific individualization, one of its recommendations was that the statutes be amended to remove from the court the power to set minimum sentences and that they should be set by the parole board after a period of examination of the offender and a complete consideration of his characteristics. The committee's report was probably the first major official statement of the rehabilitative model which was to become a powerful cultural force during the 50's and 60's, until it began to disintegrate in the 70's.

Two of the principal interests of the committee concerned the question of whether or not there was a crime wave in the territory and also the relative levels of criminality of the various ethnic groups. The committee concluded that existing crime statistics did not permit "exact findings" on the subject but that what statistical evidence could be adduced showed that such increases in crime as did exist were not out of proportion to the population increase. It laid the matter to rest with a strong statement.

> The evidence before this commission consisting of the unanimous opinions of judges, prosecuting officials, police officials and juvenile court officials and also the records of the courts would indicate that there is no crime wave in this Territory. (Governor's Advisory Committee on Crime, 1931:7-8)

The committee provided statistical evidence to support its conclusion, examining conviction rates for the several ethnic groups for each of seven categories of serious crime: aggravated assault, sex crimes, homicide, auto theft and malicious conversion, larceny, burglary, and robbery. In examining the trend it compared two periods, 1917-22 and 1923-28. Differentiating the seven categories of crime into crimes of violence (the first three types), and crimes against property (the last four types), the committee found "nc marked tendency" toward an increase in crimes of violence in the latter period as compared to the first. It did find, however, that among the "crimes against property" that larceny convictions had increased along with auto theft. Burglary and robbery had decreased.

One of the prime concerns of the committee was the differential ethnic tendencies toward crime. It constructed a composite index for each ethnic group across the seven categories of crime and developed a ranking of ethnic groups to give "an approximate measure of racial crime tendencies." For the period 1923-28 the ordering of ethnic groups by prevalence of convictions was as follows: Puerto Rican, Other (mostly Koreans), Hawaiian and Part-Hawaiian, Caucasian(including Portuguese) and Filipinos (tied for 4th place), Chinese, and Japanese. (Governor's Advisory Committee on Crime, 1931:16)

The committee also produced rankings by ethnic group for each of the seven categories of crime. The rankings for sex crimes (assault with intent to ravish, attempted rape, carnal abuse of a female under twelve, and rape) are presented in Table 8.

In addition to these statistics on sex crime conviction trends, rape and other sex crimes received additional attention from the committee. On whipping, either as a sentence or as a prison discipline measure, the committee as a whole refrained from expressing an opinion. However, psychologist Stanley Porteus, as part of a special report which contained some recommendations on sentencing, recommended that whipping be provided for in the "worst cases" of rape and for cases of carnal abuse involving "brutal offenders."

TABLE 8

CONVICTIONS FOR SEX CRIMES IN THE TERRITORY OF HAWAII OVER TWO SIX YEAR PERIODS, 1917-1922 AND 1923-1928, PER 100,000 POPULATION*

1917-22	Ratio**	1923-28	Ratio**
1.Porto Rican	1.11	1.Others***	.46
2.Filipino	.47	2.Porto Rican	.46
3.Hawaiian & P-H	.17	3.Filipino	.45
4.Others***	.17	4.Hawaiian & P-H	.22
5.Caucasian	.09	5.Chinese	.08
6.Chinese	.04	6.Caucasian	.06
7.Japanese	.01	7.Japanese	.03

*Source: Governor's Advisory Committee on Crime (1931:17)
**This ratio was calculated by the committee by dividing the total number of convictions for the group during the period by the average annual population of the group during the period.
***Mostly Koreans

Porteus did an analysis of the population of 434 prisoners in the territorial prison. He found 33 rapists in the population with an average age of 28.5 years. Their average minimum sentence was 4.7 years and the average maximum was 20.4 years (calculating a life sentence at 30 years). Porteus also noted that one-third of rapes were committed by aliens and one-third by Filipinos. Hawaiians were overrepresented and Japanese were underrepresented.[116] Porteus also proposed, upon examination of sentences, that there was an excessive differential between the maximum and minimum sentences given. In one case the minimum was two years and the maximum was life.

Porteus also found fifteen men convicted of carnal abuse in the prison population. Their average age was 34.5 years and their average minimum sentence was 25.4 years (all maximums were set at life). He noted that 50% of the crimes were committed by Filipinos with Portuguese and Puerto Ricans also overrepresented. He noted that the sentences for carnal abuse were more severe than those for murder (average minimum 20.4 years) and that this fact belied the complaint by some critics that sex crimes were insufficiently punished.[117]

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[116] Porteus was, of course, erroneously making inferences about the characteristics of rapists generally, based on observation of imprisoned rapists.

[117] Porteus also reported on another category he called "Other Sex Crimes" but he combined cases of indecent assault and sexual intercourse with a girl under sixteen. Since these are quite dissimilar offenses and

In addition to his recommendation of whipping as punishment for certain cases of rape and carnal abuse, Porteus made other sentencing recommendations with respect to sex offense convictions. For rape he suggested increasing the minimum and decreasing the maximum. He suggested generally raising sentences for vicious assaults but decreasing terms for carnal abuse. He recommended consideration in sentencing of the race and "social usage" of persons convicted of carnal abuse on the grounds that sex with girls was not proscribed in some cultures.

The report of the committee contained one other significant comment on rape. In a letter to the committee, published in the report, Antonic Perry, chief justice of the territorial Supreme Court, suggested that the penalty for the rape of a woman, regardless of her age, should be death or life in prison, at the court's discretion. He also suggested more severe penalties for assault with intent to commit rape.

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there is no way of differentiating them, Porteus' analysis is not useful.

5.6 THE MASSIE CASE: AFFIRMING SOCIAL BOUNDARIES AND THE RETURN TO PRIVATE RETALIATION

As discussed in the early pages of this work one of the features of the indigenous Hawaiian legal system was retaliation against transgressors of social norms if they were caught in the act. The creation of a Western government-legal system in the mid-nineteenth century preempted for the state the legitimate use of force and associated sanctioning powers. Nevertheless, as early as 1867 as we have seen, the very persons who created this system, the haoles, began hinting darkly that extra-legal means, lynching, would be resorted to if the official aparatus did not meet their standards of efficiency. As we have also seen, lynching as a threat or prediction was a subterranean theme in all the episodes of community concern about sex crimes. And the spectre of lynching was always raised in connection with comments and imaginings about the rape of a white woman or girl by a non-white.

We have also traced the increasing class and ethnic tensions during the first three decades of the twentieth century brought about by the changes in the territory and its population, changes which were most sharply focused in the city of Honolulu.

We now turn to the most famous rape case and episode of concern about rape in the history of Hawaii -- a complex series of events, actions, and reactions popularly referred to as the "Massie Case."

The Massie Case is similar in many ways to the episodes of sex crime that went before it, particularly those of 1923 and 1929. The confluence of stresses and strains in the social structure with a precipitating event resulted in a crisis. The attention of a segment of the community was rapidly focused and, through the participation of the newspapers, mass meetings, and the like, definitions of the situation were constructed. These interactions drew upon existing cultural images and meanings as well as producing their own emergent symbols. Competing emergent definitions of the situation were strongly influenced if not controlled by the particulars of the class and ethnic segmentation that characterized Honolulu. Based on the definition constructed by the dominant portion of the population, the haoles, demands for legal change were made.

The Massie Case, however, is distinguished by several crucial elements not present in earlier episodes. It is the only episode since the Wiley case in 1844 to involve the external community -- the world outside of Hawaii. Thus, not only did the interactions that took place occur between local residents, but among local residents and outsiders -- officials and residents of the rest of the United States, some of whom had the power to affect the interests of segments of the local population. This expansion of the sphere of interaction, coming suddenly, as it did, reorganized interests as they related to the emerging

definition of of the situation and led to a scramble by the local elite to retract and neutralize some of the images it had been promoting. It also resulted in an interesting instance of the passage of legislation by the territorial legislature to symbolically demonstrate to the United States government that the local elite was committed to, and capable of, responsible remedial action.

The Massie Case was also the only episode up to that point involving a hacle alleged victim. While the violation of ethnic and class boundaries had been an underlying issue in earlier episodes, the Massie Case put the issue directly to the community and raised the salience for some segments of the community of all aspects of rape law and its administration, and indeed, all aspects of law enforcement in Hawaii.

These factors, the influence of external forces, and the nature of the victim and her alleged attackers, along with the specific events that occurred during the case, made the Massie Case the most notorious rape case in the history of Hawaii and one of the most notorious rape cases in the history of the United States.[118]

On a personal scale it resulted, in the words of one of the participants, in "blasted careers, ruined lives, tragedy, and death." (Judd, 1971:166) On a broader scale it had profound implications for the territory, perhaps

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[118] It was one of the top ten news stories in the U.S. in 1932 (Star-Bulletin, January 2, 1933:1).

contributing to a delay of statehood,[119] nearly resulting in the loss of self-government for the territory, leading to the reorganization of much of the apparatus of criminal justice administration, causing the facade of racial harmony to come under international scrutiny and criticism, and causing long-lasting and serious strain among the ethnic groups of the Islands.

The events of the Massie Case occurred in a highly complex context of personal idiosyncracies, personal and group tensions, and seemingly unique situations and opportunities. And yet, despite its apparent uniqueness, one finds the expression of stresses, strains, and collective orientations that seem to have made the events predictable, if not inevitable.

As we have seen, rapes had occurred before in Hawaii, even rapes of white women, but never had the community become so aroused and divided. In another set of circumstances the incident would have been hardly noticed. There was nothing inherent in the alleged act itself that led to the subsequent community conflict and hysteria. As should be clear by now, the incident was given its meaning by existing tensions that had their roots in Hawaiian history at least as far back as the arrival of the missionaries. The Massie Case itself was as much conseguence

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[119] Theon Wright (1966:9) contends that the case delayed statehood for twenty years. But it seems imprudent to explain a matter as complex as a delay of statehood by reference to a single set of events.

of antecedent events as a cause of subsequent events.

5.6.1 An Outline of the Major Events of the Case

On Saturday evening September 12, 1931 Navy Lieutenant Thomas H. Massie, a Southerner from Kentucky, and his twenty year old wife, Thalia, from a prominent East coast family, attended a party of Navy personnel at a restaurant near Waikiki in Honolulu.[120] Sometime near midnight Mrs. Massie left the restaurant, apparently alone, to take a walk along nearby streets. She was next seen at about 1:00 AM when she stumbled out of some bushes some distance away, hailed a passing car, and asked the occupants to take her home. She told the occupants of the car that she had been abducted and beaten by a group of Hawaiian youths. She refused to be taken to the hospital or the police.

When her husband called home sometime later looking for her, she told him to return home immediately, "Something terrible has happened." Upon returning home and being told by her that she had been raped, he notified the police and an investigation was begun. Within a few hours five non-haole[121] youths were arrested, identified by Mrs.

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[120] Unlike previous episodes analyzed in this study, the Massie Case has already received considerable attention; three reasonably good accounts by journalists have been published (Packer and Thomas, 1966; Van Slingerland, 1966; Wright, 1966). The following discussion draws in part on those sources.

[121] The ethnicities of the defendants were two Hawaiians, two Japanese, and one Chinese-Hawaiian (Richardson, 1932a:220)

Massie,[122] and charged with rape.

The Advertiser, as usual a spokesman for haole elite interests, offered an initial definition of the situation in its first report of the incident. The assignment of an alleged rape victim to the proper category regarding respectability always being a critical element in defining the situation, the Advertiser (September 14, 1931:1) cued its mostly haole readers by stating that the alleged victim was "a young married woman of the highest character... a white woman of refinement and culture." Nearly as quickly as the first news reports went out, the community began to divide along class and ethnic lines.

The first segment of the community to take action was the Navy. By Monday morning news of the rape had reached Rear Admiral Yates Stirling, another Southerner, the commander of Pearl Harbor. Stirling told the bearer of the information, the captain of the submarine base, that "our first inclination is to seize the brutes and string them up in trees. But we must give the authorities a chance to carry out the law and not interfere." (Stirling, 1939:245) Not entirely in the spirit of this pronouncement, Stirling immediately went to visit the mayor of Honolulu, the acting

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[122] The identification of the suspects was less than perfect. When Mrs. Massie made the first report to police she said she could not identify her attackers. Later when the suspects were taken before her, not in a lineup, she began to identify them. As time went on she identified more of them and became more certain of her identification.

governor, and the prosecutor's office, to express the Navy's interest in the case. Stirling, long concerned about the racial situation in Hawaii, saw the alleged attack as a direct symbolic challenge to the social boundaries of society in the Islands. He later reported that "Quick action in my opinion, was necessary if the prestige of the whites in Hawaii was to be preserved." (Stirling, 1939:248) The governor of the territory, on a trip to another island, was informed of the case, and its implications, by telephone by one of his aides, "This case has ramifications. The girl's mother is a niece of Alexander Graham Bell, and very social. Her father was a military aide to Theodore Roosevelt. No names have been printed but the newspapers know that this is no ordinary crime." (Judd, 1971:169) Governor Judd promised the Navy the full resources of the community in handling the case.

Initially, at least, there was another segment of the community sympathetic to the Navy and to Mrs. Massie. This segment was the haole social and economic elite of Honolulu, which was represented and personified by industrialist Walter F. Dillingham. Dillingham was a missionary descendant on his mother's side, and his firm, Hawaiian Dredging Company, had lucrative contracts with the Navy for dredging at Pearl Harbor. Dillingham was the dominant figure in the Chamber of Commerce, president of twelve companies, vice-president of eight companies, and on the board of

directors of three companies (Van Slingerland, 1966:64).[123] As Van Slingerland describes the situation, the Massie Case presented Dillingham with a considerable dilemma. On the one hand he was motivated to press for the most expeditious possible handling of the assault case because of the necessity of keeping the goodwill for Hawaii of Southern congressmen upon whom legislation ensuring Hawaii's sugar profits depended, the fact that the Navy was his own and Hawaii's largest customer, and the fact that the budding tourism industry would be threatened by reports that women were not safe in Hawaii.[124] On the other hand, Dillingham believed that if it appeared that the defendants were being railroaded in the view of the Hawaiians in the territory, they might abandon the tenuous alliance that existed between themselves and the haoles which had up to that point ensured haole political and economic control against an expanding and increasingly militant Asian population. Subsequent events showed that Dillingham erred on the side of the Navy and short-term business interests at the expense of relations with the Hawaiians.

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[123] Wallace R. Farrington, former governor of Hawaii, and publisher of the Star-Bulletin described Dillingham as having "Somewhat of a superiority complex." (Farrington, 1932:58)

[124] Matson Navigation Co. had built the Royal Hawaiian Hotel on Waikiki Beach in 1926 and tourism as a serious and profitable industry was just beginning in the late 20's and early 30's.

If Dillingham and the Chamber of Commerce represented the old haole elite whose power was exercised quietly and behind the scenes, there was a noisier group that emerged during the Massie Case, the Citizens' Organization for Good Government, expressing the sentiments of the more newly arrived haoles, people devoted to the old tried and true mass-meeting approach to community problems, and who were more confrontational, and in the view of the older elite, more reckless.

Differentiated from all these haole forces, new and old, internal and external, were the non-haoles, primarily the Hawaiians, under the nominal leadership of Princess Abigail Kawananakoa. While many haoles were demanding swift justice, perhaps without even benefit of a trial, many Hawaiians were less certain about the guilt of the five youths, two of whom were Hawaiian. Through the efforts of Princess Kawananakoa two of the foremost criminal lawyers of Honolulu were secured to defend the boys against the rape charge.

Because of the class and ethnic segmentation of the community, both communication of information and its interpretation were so structured that two major competing definitions of the situation began to emerge.

Theon Wright, a journalist who covered the Massie Case, and who later wrote a book about it (Wright, 1966), observed that part of the reason for conflict about the case was that different segments of the community were getting information

about the case from different sources. The major English language newspapers, read by most haoles, proceeded on the assumption that the five defendants were guilty and reported only those facts that tended to support that conclusion. To the readers of these newspapers it looked like a clear case. And to many haoles the word of an upperclass white woman that she had been raped by a gang of locals was inherently believable and should have been accepted on its face. After all, had not they been warning about just such a thing for decades? On the other hand, as the investigation of the case progressed it became clear that there were serious problems with evidence and serious problems substantiating Mrs. Massie's story.[125] This evidence was revealed to the Hawaiian portion of the community by the many Hawaiian police officers in the police department and by the Hawaii Hochi, a Japanese and English language newspaper that often opposed the haole elite (Wright, 1966:120)

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[125] Although there was no doubt that Mrs. Massie had been beaten (she had a broken jaw), no evidence could be found that she had been raped or that she had had any contact with the defendants. She said she had douched upon arriving home, so no semen could be recovered from her body. Neither her genitals or other parts of her body, except her jaw, showed any trauma consistent with her claim that she had been raped by five men. No seminal stains were found on her clothing nor on the clothing of the defendants, despite the fact they were arrested within hours after the alleged attack. The five defendants had alibi witnesses whose testimony made it extremely unlikely that they could have been at the scene of the crime at the time it was supposed to have occurred.

The haoles saw problems with the evidence as being the police department's fault. Indeed, it was believed there was a faction in the police department that was subverting the prosecution by feeding information to the defense. As Dillingham (1932:4) later said, "the prosecution was pitifully handicapped through the attitude of the Police Department and its failure to produce evidence."[126] Also seen as part of the problem was the fact the elected prosecutor was a glad-handing Part-Hawaiian politician who was partially deaf and who did not try cases. The case was assigned to an inexperienced junior.

Many Hawaiians, however, doubted the guilt of the defendants and saw the machinations of the haoles as one more in a long history of wrongs done to Hawaiians by haoles.

The Advertiser dutifully created a sex crime wave. It gave front page coverage to thirteen alleged sexual assault cases between the time of the alleged attack on Mrs. Massie on September 12, 1931 and the end of April, 1932.[127] On

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[126] There was some justification for accusations of bungling. For example, when detectives went to the scene of the crime to look for incriminating tire tracks they took the defendants' automobile. After they had criss-crossed the area several times in the car they became mystified as to which tracks they had just made and which might have been there before. Thus, a critical piece of evidence which may have definitively placed the defendants at the scene of the crime, or shown that they had not been there, was lost.

[127] See the Advertiser September 28; October 12; November 12, 20, 26; December 28, 1931. Also January 2, 21; February 6, 39; March 9, 14; April 19, 1932.

September 29, 1931 the Advertiser reported that "Honolulu must now decide between gang control and decency." Citing two recent "known outrages" to women, the Advertiser criticized the police for not controlling the hoodlum element. It reported that women were planning to arm themselves and that influential citizens were meeting privately to discuss possible action. It pointed out that many crimes never received publicity and that Japanese women in particular did not report offenses because of the humiliation. It also observed that "not the least of the harm done Hawaii by such conditions" were the tales told by tourists returning home that Hawaii was not safe for women. Under the heading "Something Must Be Done" the Advertiser on the same day editorialized that the public was "outraged" by the assaults on women, that the good name of Honolulu was shamed, the community was "virtually at the mercy of gangsters," the police were ineffective, and the state of affairs was "unendurable." Pressure must be brought to bear on the police "by the best men and women of the city" to protect Honolulu's women, even if it meant "swearing in a small army of deputy sheriffs."

But the continuing events of the Massie Case were to overtake and to overshadow the routine promoting and processing by the newspapers of a sex crime wave. In mid-November the trial of the five youths charged with raping Mrs. Massie began. But after more than two weeks of

testimony and 97 hours of deliberation, the jury of five haoles and seven non-haoles was unable to agree on a verdict and a mistrial was declared.[128]

After the mistrial the situation in Honolulu deteriorated rapidly for the remaining three weeks in December. Feelings ran high between Navy enlisted men and Hawaiian youth in Honolulu. There were sporadic clashes between sailors and local boys on the city's streets. On one occasion a group of Navy men kidnapped Horace Ida, one of the defendants, and attempted to beat a confession out of him.

The reaction of Navy officials to the verdict was less direct but more strategic. Admiral Stirling, writing later in his memoirs, revealed what his view had been; "The criminal assault of a white woman by five dark-skinned citizens of the Territory, the victim being the wife of an officer of the defense forces of the United States, had gone unpunished in the courts." (Stirling, 1939:252) Stirling blamed government authorities for the miscarriage of justice and believed that the territorial government should have "shown more inclination to sympathize with my insistence upon the necessity of a conviction. I feel that a stronger will to convict those guilty would surely have brought

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[128] Circuit Court Judge Alva E. Steadman, who presided at the trial, later stated to investigators from the United States Attorney General's Office that he would have convicted the defendants, and that the reason he kept the jury deliberating so long without declaring a mistrial was that he was hoping for a guilty verdict. (Steadman, 1932:401-402)

justice." (Stirling, 1939:250)

Navy officials had considerable opportunity to harrass territorial authorities and to demonstrate Navy displeasure at the situation. Rumors were circulated that a scheduled visit of the fleet to Honolulu would be cancelled. A Navy official advised his Washington superiors not to allow Navy dependents to visit Honolulu when the fleet came in on the grounds that Honolulu was unsafe for Navy wives. (Star-Bulletin, December 11, 1931:1) Not only would any cancellation of fleet activities involve great financial loss to local businesses, but such statements to the Mainland were a threat to the general tourist trade. Because of these statements, the case began to get Mainland news media attention of an unflattering type. Time Magazine (December 28,1931:11), for example, in an article entitled "Lust in Paradise," reported that "Yellow men's lust for white women had broken bounds." It also reported the announcement by Navy officials that Honolulu was unsafe for Navy wives.

The aggressiveness of the Navy after the mistrial, and the expansion of the arena of interaction to the Mainland, began to cause a shift in the haole elite's definition of the situation. Whereas previously it had been sex crimes and the behavior of local law enforcement officials that had been defined as the problem, a problem that could be dealt with as it had in the past, by much public moralizing and

statements of consternation about conditions, along with some legislative proposals. Now, more and more, the problem was the Navy and the fact that economic interests were being threatened by the reaction of outsiders to the case. Officials and business leaders came to define their task as one of demonstrating to the Navy that Honolulu was sensitive to their complaints and solicitous of their good will.

Several initial steps were taken to demonstrate an intention to reform. Upon announcement of the mistrial the Chamber of Commerce announced that it planned a full investigation of the case (Star-Bulletin, December 8, 1931:1). A reward fund was established for new evidence leading to the conviction of the assaulters of Mrs. Massie. The Chamber of Commerce, under Dillingham, pledged $5,000, and other contributions were made by such organizations as the American Legion and the I.O.O.F., as well as individuals (Advertiser, December 9, 12, 14, 16, 18, 1931). A "Law Enforcement Committee" of the Chamber of Commerce proposed a reorganization and reform of the prosecutor's office and the police department and promised to pressure the governor to call a special session of the legislature to pass such measures.[129]

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[129] It may be recalled that administrative reorganization of the police department was one of the recommendations of the Governor's Advisory Committee on Crime (1931).

But again, before much action could be taken events overtook the situation. On New Year's Eve two Part-Hawaiian inmates at the territorial prison escaped, and on January 2nd one of them broke into the home of a haole woman and raped her. He was apprehended the same day and on January 6th he was indicted, arraigned, pled guilty, and was sentenced to life imprisonment.[130] The governor established a new, territorial police force to track down the other escapee. The authorities had no desire to leave themselves open to charges of inefficiency or lack of commitment in another case. But, of course, this new event supported the definition of the situation held by some members of the community that the community was out of control and that white women were the prey of Hawaiians. For some haoles the issue came to be defined in symbolic terms as one of whether American institutions would prevail in Hawaii. A white woman (Mrs. Massie), had, they believed, been raped by non-whites and justice had not been done. A "Citizens' Organization for Good Government" was formed to demand changes in the conditions believed to have led to the attack on Mrs. Massie and the conditions believed to have resulted in the failure to convict the defendants (Star-Bulletin, January 7, 1932:1). A "mass meeting" was held at which the chairwoman of the new group, Mrs. Anne Kluegel, declared:

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[130] See case of Territory vs. Lui Kaikapu.

> The American flag must not fly on any building in a place where American institutions do not prevail. If they cannot be made to prevail here, let us tear down the flag from our government buildings. (Star-Bulletin, January 7, 1932:1)

The citizens of Pacific Heights, a haole neighborhood, organized a vigilance committee to patrol their neighborhood and to protect their women (Advertiser, January 5, 1932:1). And the Advertiser (January 7, 1932:14), in an editorial titled "Hysteria in Favor of Law Observance is Wholesome," discussed the benefits of "hysteria" in support of law and order and demanded the death penalty or "emasculation" for rapists. Many haole women armed themselves with pistols. Vastly more important than all these fulminations was an event that was still to come, a crime that occurred on January 8th.

Shortly after the first report on September 14th of the rape of Mrs. Massie, rumors began to circulate about her character. While the haoles seemed to have a need to attribute to her only positive characteristics and the newspapers described her as being of the highest character, those more sympathetic to the defendants seemed to have a need to assign her to a less respectable characterological category. Rumors started that Mrs. Massie had had an illicit relationship with one of the defendants and that things had gone awry one night, or that she had been on the way to meet someone when she was beaten and robbed, or that Lt. Massie

had found his wife in flagrante delicto with another Navy man and had himself beaten her, or that Mrs. Massie had been beaten by several of Lt. Massie's colleagues as punishment for infidelities, or that Mrs. Massie simply claimed the rape to gain publicity (Van Slingerland, 1966:81). Admiral Stirling regarded the rumors as a "well organized whispering campaign," and that "It appeared almost that Mrs. Massie was the one on trial and not the five defendants." (Stirling, 193:251) The rumors brought angry responses from the Advertiser (October 15, 1931:5).

The attacks on Mrs. Massie's character, along with the failure of the authorities to obtain a conviction of the defendants, and thus vindicate her, weighed heavily on Lt. Massie. His wife's honor was called into question -- a crisis for a Southern gentleman. He became obsessed with proving his wife's honor and thereby his own dignity. His sentiments were shared by Mrs. Grace Fortescue, Mrs. Massie's mother, who had traveled to Hawaii when she learned of her daughter's problems. Lt. Massie and his mother-in-law came to believe that the only way to vindicate Mrs. Massie was to obtain a confession from the defendants. They developed a plan to kidnap one of the defendants and to force him to confess. With the assistance of two Navy enlisted men that Massie had recruited for the occasion, Joseph Kahahawai, one of the Hawaiian defendants was abducted. In the process of trying to extract a confession

out of him, he was shot to death. On the way to dispose of the body by dumping it in the sea, Lt. Massie, Mrs. Fortescue, and one of the Navy men were apprehended and arrested.

The killing of Kahahawai stunned the residents of the territory, Navy personnel and officials, the Mainland newspapers, and U.S. government officials. Of course, the non-haole residents who suspected the defendants were being railroaded in the first place believed their suspicions confirmed, and there was tremendous resentment over the killing. The haole community was split and in confusion. While there had been among most haoles a good deal of sympathy for the Massies, many could not abide the lynching and the complete abandonment of law. For example, the Inter-Church Federation issued a statement signed by 39 ministers and religious workers condemning the lynching (Star-Bulletin, January 9,1932:3). A number of persons wrote letters to the editors of the newspapers also condemning the murder.[131] Other haoles refused to condemn and even supported the lynching. Many letters to the editors of the newspapers in some way excused or even supported the lynching. Typical were letters by Harry F. Lucas and Elsa

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[131] See for example letters in the Star-Bulletin by Robertson (January 11, 1932:6 and January 12, 1932:6), Colvin (January 12, 1932:6), "A Deeply Interested Citizen and Mother" (January 16, 1932:7), "Law Abiding" (January 18, 1932:6), Lovejoy (January 18, 1932:6), "A Believer" (January 20, 1932:6), McMahon (January 22, 1932:6), and "Against Lynch Law" (January 30, 1932:6).

Cross published in the Star-Bulletin (January 13, 1932:6) which said the lynching was justified because law enforcement authorities failed to act efficaciously. J.P.G. Stokes wrote (Star-Bulletin, January 14, 1932:6) that the lynching was simply obedience to the "unwritten law" that men must protect and avenge their women. Governor Judd, on the other hand, was upset at a Navy killing of one of his citizens and dressed down Admiral Stirling. He accused the Navy of being partially responsible, having encouraged a disregard of territorial laws (Stirling, 1939:256).[132] Dillingham, in his famous private memorandum to inform friends on the Mainland about events in Hawaii, took a pragmatic view.

> Unless one has lived in this community one cannot appreciate the importance of the example to the people that they have no right to take the law into their own hands. While this may be condoned under conditions which prevail where whites are in the majority, it would be a hazardous thing to give any such recognition of lynch law in our community where it is vital to stress the necessity of abiding by the laws of the country. (Dillingham, 1932:9)

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[132] Judd reiterated his belief of Navy responsibility for events in a letter to Secretary of the Interior R.L. Wilbur (Judd to Wilbur, May 17, 1932 in Judd, Miscellaneous Ala Moana papers, Archives of Hawaii) in which he accused the Navy of sending false information to Washington, of having indirectly influenced Massie to kill Kahahawai, and of generally having bad racial attitudes. Judd quoted Stirling as himself saying that nearly all Southern Navy officers equated Hawaiians with Negroes, a comparison Judd said any open-minded person could see was false. Judd asked that Stirling and another officer be reassigned and that the Navy not send any more officers with such attitudes.

Not to let the flow of events sweep past, the Citizens' Organization for Good Government met again three days after the murder, on January 11th. Eight hundred to 1,000 mostly hacle residents attended. Chairwoman Anne Kleugel opened the meeting by announcing that "wcmanhood has been ravished, Christian principles outraged, and American governmental practices debased, tc the end that we are set forth as a disorderly community." (Star-Bulletin, January 12, 1932:2) Participants at the meeting adcpted a constitution committing the organization to governmental reform and asking for a special legislative session to adopt new laws. One of the primary speakers at the meeting advocated martial law if reforms were not made.

Navy officials, despite the fact that the Navy was deeply implicated in the murder, also remained on the offensive, even blaming local officials for the lynching because they had released the defendants on bail after the mistrial against Navy wishes. Admiral Pratt, chief cf naval operations in Washingtcn, reiterated a statement he had made prior to the lynching:

> American men will not stand for violation of their women under any circumstances. For this they have taken the matter into their own hands repeatedly when they have felt that the law failed to do justice. (Star-Bulletin, January 11, 1932:1)[133]

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[133] It was to this statement that Governor Judd was referring when he accused the Navy of having encouraged the lynching.

The Reverend Galen Weaver, analyzing Navy statements and activities, summarized the definition of the situation that the Navy was promoting as follows:

> first, the claim that naval wives are objects of special attack; second, the claim that jurors of mixed blood will not convict for sex crimes, even for rape; third the claim that civil government has radically broken down and that white men must take the law into their own hands in order to protect their women. (Weaver, 1932:323)

Expanding the arena of interaction, Weaver's statement of the Navy's view and his own point by point rebuttal to it was published in the "Christian Century" (February 3, 1932) on the Mainland.

Mainland newspapers had also begun featuring the case, it having all the ingredients to titillate their readers. The Hearst newspapers were the most frantic, editorializing after the murder:

> The situation in Hawaii is deplorable. It is becoming or has become an unsafe place for white women. Outside the cities or small towns the roads go through jungles and in these remote places bands of degenerate natives or half-whites lie in wait for white women driving by. At least forty cases of such outrages have occurred and nobody has been punished.
>
> In the most recent case a white woman was attacked by five natives, knocked down, her jaw broken, terribly outraged and injured. The perpetrators of this crime against pure womanhood, against society, against civilization, were freed on bail after a disagreement of a jury of their kind. The husband of the abused and violated woman took the law into his own hands, since there was no other administration of either law or justice,

> and stands accused of killing one of the assailants.
>
> Truly the situation in Hawaii is deplorable, and the most delorable thing about it is that the perpetrators of the other forty outrages on virtuous white women were not duly executed. Lt. Massie is wrong in not having his case submitted to a naval court. The whole island should be promptly put under martial law and the perpetrators of outrages on women promptly tried by court martial and executed. Until such drastic measures are taken, Hawaii is not a safe place for decent white women and not a very good place for self-respecting civilized men. (quoted in Van Slingerland, 1966:167-168)

Time Magazine (January 18, 1932:12) in an article titled "Murder in Paradise," followed up its earlier "Lust in Paradise" effort with a long description of events and the situation in Hawaii. It commented that "The killing of Kahahawai climaxed a long chain of ugly events on the island of Oahu growing out of the lust of mixed breeds for white women."

The statements of the Navy, of the members of the Citizens' Organization for Good Government, and of the Mainland press were the least of the worries of the territorial officials at this point. Conditions in the territory had become an item of debate in the U.S. Congress and on January 11th the Senate unanimously adopted a resolution asking the attorney general to conduct a broad investigation into conditions in Hawaii. The House held its own hearings and President Hoover made inquiries about events (Van Slingerland, 1966:171-177).

Local leaders became convinced that they must move quickly to forestall external usurpation of local control and prerogatives. Dillingham reveals the emerging definition of the situation among the elite:

> Grave as had been considered the situation by many of our leading citizens, the full purport of the chain of events was only brought home when cables carried the stories and editorial comments on the tragedy as viewed by people on the Mainland. The day after the news was flashed to the Mainland of the killing of Kahahawai, newspapers here began to receive samples of what was being said of conditions in the islands, including comments on the attitude of the people of Hawaii, and threats of Congressional action to control our affairs. (Dillingham, 1932:6)

Dillingham further relates that the directors of the Chamber of Commerce, along with other "leading citizens," met to consider the reports of Mainland reaction and decided that a committee of them should meet with the governor to demand a special session of the legislature for the purpose of passing legislation "which would take out of politics the police department and the prosecuting attorney's department."

The governor, who had already been planning such a session, acceded to the demands of the Chamber of Commerce Committee and called the legislature to meet on January 18th, just ten days after the killing of Kahahawai.

The objective of the leading citizens and business leaders was to make a series of gestures to Mainland

audiences that would undercut the demands that Hawaii be put under military or "commission" rule, two much discussed proposals in the days after the murder. The last thing that the haole elite wanted was a bunch of carpetbaggers coming into the territory and disrupting the structure of power, wealth, and privilege. So, for the haole elite, the definition of the situation had slightly shifted again. As Congress began to take an interest in the affairs of Hawaii, dealing with the Navy became secondary; the problem now was how to placate Congress and avoid external control.

While this was certainly the view of the established elite, it was not unanimously subscribed to by some of the newcomers. Mrs. Kluegel's organization was supportive of commission government and she continued her agitation. She so annoyed the haole elite with her activities that Governor Judd threatened to fire her husband, who was a territorial official, if he did not control his wife (Van Slingerland, 1966:182). A close associate of Mrs. Kluegel's was J.F.G. Stokes, an immigrant from Australia, noted for his racial phobias, who advocated at the January 11th meeting of the organization "a military commission for perhaps 10 years, during which time administration would be so rigid that everyone would learn to obey and enforce the laws, and at the end of this period, Hawaii might again be ready to take up the electorate." The sex crime problem, according to Stokes, stemmed from the fact that the non-haole residents

of Hawaii had not had the opportunity to learn the standards of American family and home life. (Star-Bulletin, January 12, 1932:2)

Of course, as part of the reform effort law enforcement officials began to pay close attention to sexual attack cases. If police and prosecutorial laxity under the old system was seen to be a major part of the problem, the reformed organizations under the new police chief and public prosecutor (to be described below) were anxious to demonstrate all their new cababilities. The case of Ter. v John Fernandez illustrates the level of administrative commitment and the capacity for the mobilization of all parts of the criminal justice system.[134]

Fernandez attacked and raped a 33 year old Japanese woman, the wife of a steward at the residence of one of the old haole families of Hawaii, near Kailua on the windward side of Oahu between 7:30 and 8:30 AM on the morning of March 1, 1932. A force of 500 men, including the military police and shore patrol were moblilzed to hunt for the assailant. He was arrested at 11:30 AM. He was in Honolulu making a confession at 1:00 PM, followed by a special convening of the grand jury at 3:10 PM and an indictment for rape at 4:10 PM. He was arraigned and entered a plea of guilty at 4:55 PM and was sentenced to life imprisonment at

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[134] Reports of the Fernandez case appear in the Advertiser (March 1, 1932:1; March 2, 1932:1) and the Star-Bulletin (March 1, 1932:1; March 2, 1932:6).

5:05 PM. He was incarcerated at Oahu prison at 5:30 PM. From the time of the commission of the crime to the time of incarceration for life, only about ten hours had elapsed. The Advertiser (March 2, 1932:1) said that the operation of the processes of the law in the Fernandez case were without parallel in the history of the Hawaiian courts for speed and precision in a major criminal case. The Star-Bulletin (March 2, 1932:6) was equally ecstatic, editorializing:

> The rapidity and spirit with which the entire police force, assisted by volunteers which brought the number of actively engaged in the search up to about 500, went into action is most gratifying to all of Honolulu.
>
> It will do much to establish public confidence in the capacity of the force to protect the homes of Honolulu.
>
> It will be an effective and timely warning to persons of criminal intent.

5.6.2 Reform Legislation

Since much of the definition of the situation developed by all parties, except the non-haoles, concerned problems with the organs of administration of the criminal law, they emerged as the foci of reform at the special legislative session. The special legislature passed a bill reorganizing the police department by setting up a five member police commission appointed by the governor, which in turn appointed the chief of police (Act No. 1, 1932 First Special Session).[135] In a direct assertion of hacle control, the

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[135] The commission members were: Frederick D. Lowrey

commission appointed by Judd consisted of five prominent business executives, who subsequently appointed Charles Weeber, Walter Dillingham's longtime "confidential man and secretary" as chief of police (Dillingham, 1932:6).

The legislature also reorganized the city and county prosecutor's office. Because the office was elective it was criticized as being ridden with "politics" and ineptitude. The measure passed at the special session (Act No. 13, 1932 First Special Session) provided for appointment of the city prosecutor by the mayor of Honolulu with approval by the county board of supervisors. The original bill (Senate Bill No. 2, 1932 First Special Session) provided for appointment by the territorial attorney general with the governor's approval, thus assuring elite control. However, as Dillingham explained:

> Politics developed in the appointive prosecutor bill and halfway measures were finally adopted which provide for the appointment of the prosecutor, not by the Governor, the Attorney General, or a college of Judges, but by an elective officer, the Mayor. (Dillingham, 1932:6)

Two measures were passed concerned with the composition of Circuit Court juries. The first (Act No. 18, 1932 First Special Session), ostensibly to raise the "quality" of trial

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(haole), Vice-President of Lewers and Cooke; Antonio Castro (Portuguese), president of Union Trust Co.; Edward E. Bodge (haole), Vice-president of Von Hamm Young, Ltd.; George I. Brown, (Part-Hawaian), Manager of John I. Brown Estate; and Ernest E. Greene (haole), Manager of Oahu Sugar Co.

juries, actually was designed to ensure that more haoles appeared on jury panels. In addition to changing the statute on juror qualifications from the prescription that jurors be "reasonably intelligent" to a requirement that they be "intelligent and of good character," the act also decreased the number of occupations exempt from jury duty. The ethnic composition of juries was altered by deleting the requirement that jurors be selected by precinct proportional to the number of registered voters in the precinct. The consequence of this provision had been, that since non-haole voters predominated in most precincts, juries which were largely non-haole were drawn.[136]

The second modification with respect to juries was the equalization in all criminal cases of the number of peremptory challenges available to both the prosecution and the defense, regardless of the number of defendants (Act No. 11, 1932 First Special Session). This ammendment was made to the existing statute[137] because in the trial of the rape case the prosecution had only fifteen challenges while the defense had thirty, making it possible for the defense to eliminate the entire jury after the prosecution had exhausted its challenges.

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[136] Assistant U.S. Attorney General Richardson's (1932a:22) enigmatic comment on this point was: "We found the juries drawn proportionately from all precincts with the result that from many precincts, chiefly racial, only jurors from such races were drawn."

[137] Sec. 2419. Revised Laws of Hawaii, 1925

The legislature also reorganized the administration of the prison which had come to the attention of the community when the two inmates escaped and one of them had committed a rape on a white woman (Act No. 17, 1932 First Special Session).

Two substantive criminal laws and one concerning evidence were also passed by the territorial legislature. The first was an anti-loitering measure. The loafing and loitering groups of young males around the street corners of the poor neighborhoods had, as we have seen, long been viewed as a threat to women. And although the defendants in the alleged rape of Mrs. Massie were not loitering at the time the event was supposed to have taken place, they were clearly regarded as part of the "gangster" phenomenon that should be controlled. The previous loitering statute enacted by the territory had been declared unconstitutionally vague by the U.S. Ninth Circuit Court of Appeals in March of 1931 (Terr. v. Anduha 48 F.2d. 171), leaving the territory with no statutory means of repressing vagrancy and loitering. The special 1932 session passed a new, more specific, loitering statute (Act No. 4, 1932 First Special Session) expressly to ameliorate the gang problem believed to have led to the attack on Mrs. Massie.

The second substantive change in the criminal law by the special legislative session had very nearly the character of a post hoc ratification of the killing of Kahahawai and was

perhaps the most directly symbolic expression of the disapproval by at least a portion of the community of the act of rape. The rape statute had remained unchanged since 1850, when it was first written, to provide for a maximum penalty of life imprisonment. In the weeks just after the killing of Kahahawai, the maximum penalty was raised to death (Act No. 10, 1932 First Special Session).

And finally, there was an important change made in the law of evidence with respect to the trial of rape cases. It will be recalled that the requirement that no man could be convicted of rape solely on the uncorroborated testimony of the victim was incorporated in the 1850 statute. Although Mrs. Massie's story of her rape was inherently believable to many of the haoles of Honolulu, it was questionable whether the corroboration requirement was met. It was interpreted to require corroboration as to each material element of the crime, including the identity of the offenders, the central issue in the case. Hawaii case law provided that the question of whether there was any corroborating evidence was a question of law to be decided by the court. However, if this minimal test was met, the sufficiency of the corroborating evidence was a question of fact for the jury (Ter. v. Capitan 23 Haw. 771).

Judge Steadman discussed the corroboration requirement extensively in his instructions to the jury saying in part:

> Hence in this case you are instructed that you cannot convict the defendants or any of them upon

> the sole testimony of the complaining witness, Mrs. T.H. Massie, her testimony as to the alleged offense must be corroborated by evidence other than her own and tending to prove, beyond a reasonable doubt, each material element of the crime. (Star-Bulletin, January 13, 1932:5)

Despite the fact that the judge was to make the initial determination of whether there was any corroborating evidence, he clearly left that determination up to the jury in the Massie rape case. There is little doubt that the requirement highlighted the weakness of the territory's case, and it may have contributed to the jury's inability to agree.

The corroboration requirement received considerable criticism after the mistrial and the killing of Kahahawai. As part of the reform package the territory dropped the requirement completely (Act No. 10, 1932 First Special Session).[138]

In sum, it is clear that the legislative actions taken subsequent to the Kahahawai killing corresponded to the definition of the situation that had been constructed and disseminated by the dominant haole group, and that the

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[138] The abolition of the rape corroboration requirement was by no means supported by all or even most of the members of the legal community, who had considerable attachment to it as part of the legal culture. Attorney E.J. Botts opposed dropping the requirement because he believed many girls were "unscrupulous" in their charges (Botts, 1932:1328-1330). Attorneys C.D. Crozier (1932: 1330-1333), P.C. Morris (1932:1361-1364), and "Dean of the Hawaii Bar," W.J. Robinson (1932: 1392-1394) opposed dropping the requirement because of their belief in the great danger of false charges and blackmail.

legislative actions were intended to send an immediate symbolic message to the Mainland that Hawaii's leaders were in control and were committed to reform.

In the view of the haole elite, the needed evidence was not "produced" by the police department; it was reorganized and put directly under the control of the elite. The prosecutor's office was seen as inept and ridden with "politics;" the position was made appointive. The haole elite, and the Navy, believed that conviction was made difficult because of the nature of juries in Hawaii, particularly that many non-haoles had different sexual standards and may not take rape sufficiently seriously; juror selection procedures and qualifications were changed. Many haoles thought that Mrs. Massie was attacked by a group of idle young "gangsters;" a new loitering statute was passed to control them. One of Mrs. Massie's alleged attackers died for his crime, a punishment some thought he deserved; the death penalty was established for rape. There were problems with the sufficiency of corroborating evidence of Mrs. Massie's story; the statutory requirement for such evidence was dropped.

Competing definitions of the situation held by non-haoles, that the defendants had been railroaded, that the press had been unfair and prejudiced, that the Navy had brought on much of the trouble and had encouraged the killing of Kahahawai by its own actions and attitudes, did not result in any new legislation.

5.6.3 The Investigations

After the killing of Kahahawai, various aspects of the Massie Case and of the territory in general were subjected to three important investigations in efforts to authoritatively define particular aspects of the situation. The most important and comprehensive was by the United States attorney general who focused on the enforcement of criminal law in Hawaii. Another was by the Pinkerton Detective Agency which focused rather narrowly on the question of whether Mrs. Massie was raped by the defendants. And finally, there was an internal investigation by the prosecutor's office focusing on the same question and going beyond, to try to determine who, if not the defendants, really did attack Mrs. Massie.

5.6.3.1 The Richardson Investigation

In response to the U.S. Senate resolution (Senate Resolution No. 134), previously mentioned, U.S. Attorney General William Mitchell sent to Hawaii Assistant Attorney General Seth Richardson and a staff to investigate conditions in the territory, to render an authoritative definition of the situation, and to determine whether any change was advisable in the organic law of the territory. Richardson and his assistants arrived in Hawaii during the first week of February, 1932 and stayed until the second week of March. They arrived just after the legislature, in its special session, had passed most of its reforms.

Richardson's investigation was both broad and detailed. He examined in detail not only all aspects of criminal law enforcement and crime, but also ethnic relations, the sexual proclivities of the Hawaiians and other non-haoles, general politics and governance, labor conditions, and industry. Of course, his most detailed information gathering was on crime and law enforcement. His major method of data collection was by interviewing. He and his staff interviewed all major territorial and local officials including the governor, mayor, many legislators, judges, the present and former prosecutors and their staffs, police officials, and prison personnel. Many of the persons who had had any direct connection with the rape case were also interviewed, including the jurors. In addition, interviews were conducted with many attorneys, the publishers of the newspapers, businessmen, and prominent women (Richardson, 1932a:175). The list of names of individuals interviewed by Richardson and his staff has approximately 450 entries. Thirty-nine organizations were contacted, ranging from the Hawaiian Sugar Planters Association to the Women's Christian Temperance Union. Richardson also collected numerous government, military, and private reports on various aspects of the Hawaiian Islands, including crime statistics and statutes.

Richardson and his staff asked their interviewees a wide range of questions depending on the particular knowledge and

expertise the interviewee might have. Although a wide range of opinion was expressed on some issues, e.g., whether a segregated prostitution district should be established to contain and regulate vice, most of the interviewees in community leadership positions presented a picture that can be very briefly summarized as follows. There was no sex crime wave in Hawaii nor any serious sex crime problem; at most there had been a minor series of such crimes. The alleged rape of Mrs. Massie and the rape by Kaikapu were isolated incidents. Hawaiians were not vicious or prone to violent sex crimes, although non-haoles generally had lower standards of sexual morality than did whites. There was no particular race problem in Hawaii other than some tension generated by recent events. Civil government had not broken down. There had been problems with the police department and prosecutor's office that had been brought on by "politics." However, community leaders were committed to reform, and indeed, had already made reforms. The rape of Mrs. Massie was related to the large number of idle non-haole youths in the city for whom there were no jobs. Part of this problem was that the schools had educated youths away from the soil; they were not satisfied with plantation work. Efforts were being made to redirect the school curriculum so that it did not overeducate the non-haole youth and so that it directed them into agricultural work. Self government was a fundamental American principle, the investigators were told,

and should be retained in Hawaii. Hawaii's people were strongly opposed to "carpetbaggers." Hawaii did not need commission rule and, in fact, it would be deleterious to the efforts to Americanize the resident aliens and their children.

Of course there were many exceptions to this general definition for the situation communicated to Richardson by the leading citizens of the territory. Many Hawaiians were very resentful of the images of Hawaiians as lustful savages preying on white women that had been disseminated by the Navy, the Mainland press, and the more hysterical haole residents of Hawaii. And they criticized the hypocrisy of the haoles who, they contended, as vagabonds, whalers, and military servicemen, had preyed on Hawaiian women for more than a century. If there was lust in Hawaii it was haole lust, not Hawaiian lust. And, of course, the Hawaiians profoundly resented the killing of Kahahawai, and its approval in some quarters, by haoles who had always exhorted Hawaiians to law observance (cf. Kawananakoa, 1932:475-519; Akana, 1932: 1479-1497).

The definition of the situation proposed by the haole elite, and that proposed by the Hawaiians, were not universally subscribed to. The Citizens' Organization for Good Government was still in existence and made presentations to Richardson. Its leaders complained that sex crimes were common and were getting worse, but were being

covered up by political leaders so as not to affect the tourist industry. For sex crimes there were few convictions, light sentences, easy pardons and paroles, and prison was pleasant. They complained that one of the judges was opposed to women participating in sex crime cases and that in most cases it was the victim who was tried and not the defendant. The organization favored women jurors. Women, it was said, were recently very fearful, but the fear was subsiding (Honolulu Citizens' Organization for Good Government, 1932:1498-1504). J.F.G. Stokes still advocated commission government (Stokes, 1932:1000).

Richardson and his staff considered all the conflicting evidence and testimony presented to them and constructed their own definition of the situation.

With respect to general crime conditions, Richardson reported that he and his investigators found "no organized crime, no important criminal class, and no criminal rackets." They found "no substantial evidence" of a crime wave in Honolulu. They reported that they found no serious racial prejudices. They did find that the business leaders of the territory had been focusing too much on their own businesses and had allowed public administration to suffer. They found "extreme laxity in the administration of law enforcement agencies" and "inefficiency in the administration of justice" to the extent that encouraged the commission of crime and that had led to "a feeling of

personal unsafety among a substantial portion of the citizens. Richardson reported that crime was probably not any worse in Hawaii than in many Mainland cities but that reforms were necessary because Hawaii's potential, due to size and isolation, for better law enforcement, because of Hawaii's military importance and large military population, because of the growing potential for future serious problems, because Congress had a special interest in and obligation in the governance of Hawaii that it did not have over Mainland jurisdictions, and because of the ethnic composition of Hawaii's population Hawaii represented an extraordinary experiment in self-government under American principles and no effort should be spared to ensure its success through proper law enforcement (Richardson, 1932a:vi-vii).

Richardson made particular comment concerning the alleged sexual dangerousness of the Hawaiians, concluding that the portrayals by the press were false. Referring to the reports that "the Hawaiian and part-Hawaiian presented an unusually dangerous, lawless, and vicious criminal complex, particularly along sexual lines," Richardson said:

> I do not think that this report and estimate is accurate. I do think the Hawaiians have a different sexual standard than we have and that the act of sexual intercourse is not, in and of itself, so vitally regarded as is customary among white races, but I found no reason for believing that the result of such a different standard predisposes the Hawaiian to violent sex crime or other outrages of that sort. Unquestionably the old condition of affairs referred to by Governor

> Judd in his statement (Tr. Vol. 1, p.1)[139] with respect to the abhorrence of the Hawaiians toward forcible sexual assaults no longer exists. The present-day Hawaiians do, in some instances commit these abhorent crimes, but I do not think it is just to claim that the Hawaiian people generally have any unusual tendency toward the commission of such crimes or, in fact, from the record show as much tendency toward such crimes as do either the Porto Rican, the Filipino, or the Portuguese. From such limited comparisons as we were able to make with the Mainland the Hawaiians seem to have a lower rate of forceable (sic) sex crimes charged up against them than exists among white people in many communities on the Mainland. (Richardson, 1932a:15-16).

So, at the most general level, the definition of the situation developed by Richardson, a prestigious "special definer of the situation" in Thomas' terminology, was one of extreme laxity. As he said in his report, "The greatest trouble with the Territory, particularly Honolulu, I think, is laxity in governmental and administrative affairs. (Richardson, 1932a:15 emphasis in original). To change this laxity Richardson made two major recommendations and a number of minor suggestions. Most importantly he suggested that the president appoint, with U.S. Senate confirmation, a police chief for the entire territory and that a territorial constabulary under his direction be established. Although he approved of the recent reforms by the territory, he did not think they went far enough to assert control and to ensure the avoidance of "laxity." Similarly, and for the same

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[139] Richardon's reference here is to a written statement submitted by Judd to the investigators. See Judd (1932b).

reasons, he recommended presidential appointment of the territorial attorney general under whose authority all criminal prosecutions would be conducted (Richardson, 1932a:vii-ix). Surprisingly, Richardson had little interest in Hawaii's rape statute. In his report, he simply noted the changes the territory had just made in the statute by establishing capital punishment as one possible penalty, and by eliminating the corroboration requirement. Richardson expressed reservations about the wisdom of eliminating the corroboration requirement. He commented:

> I have grave doubts as to the wisdom of the elimination of the necessity of corroboration of the complainant on the question of identity. As was said in Lord Blackstone's time, "The charge of rape is a hard charge to make, and still harder to defend." The extreme severity of the offense plus the possibility of capital punishment, makes me feel disinclined to permit the conviction upon the uncorroborated testimony of the complainant on the question of identity. It results unless an innocent defendant is able to establish an alibi, in possibly his life depending upon the verdict of a jury, as between his denial and the complainant's assertion.
>
> And since the complainant in a rape case, because of her sex and the outrage committed upon her, usually is, in the eyes of the jury, a favorable witness, the position of the defendant, erroneously identified, is critical. I realize there is another side to the argument, but certainly if any such rule is to be adopted, the court ought to have the greatest possible lattitude in the administration of punishment.
>
> Consequently, I see no reason for any further strengthening of the Territorial rape statute.

When Richardson left the islands the details of his report and recommendations were not known to the officials and the residents of the territory. The report was released in Washington during the first week of April, 1932 and the highlights of the report were immediately reported in the Honolulu press. Immediate opposition to his major proposals emerged in the legislature and from the governor (Star-Bulletin, 1932:1-3). Although bills were introduced into Congress to make the suggested changes, they failed to pass. Hawaii's police and prosecutorial system remained as they had been established by the refcrm legislation of 1932.

5.6.3.2 The Pinkerton and Prosecutor's Investigations

After the mistrial due to the hung jury in the case of the defendants charged with raping Mrs. Massie, the subsequent murder of Kahahawai, and the manslaughter conviction, to be discussed below, of Lt. Massie, Mrs. Fortescue, and the two sailor accomplices, the territory was still confronted with the task of how to dispose of the rape case. Mrs. Massie had left the territory so the complaining witness was not available, but the case could have been retried using her prior testimony. Internal political pressure and pressure from the Mainland discouraged the dropping of the case as it stood. The situation needed to be authoritatively defined. In order to resolve the ambiguity, the governor hired the Pinkerton Detective Agency

from San Francisco to conduct a focused investigation on the question of whether Mrs. Massie was raped by the defendants. After an investigation of approximately six weeks, examining the existing evidence and conducting new interviews, the detectives delivered a lengthy report to the governor.[140] In the introductory letter accompanying the report, one of the executives of the firm wrote to Governor Judd:

> An analysis of the reports of the representatives, together with the reports and statements of the Attorney General's office, the office of the Public Prosecutor, and the Police Department, also the testimony at the trial of the defendants, makes it impossible to escape the conviction that the kidnapping and assault was not caused by those accused, with the attendant circumstances alleged by Mrs. Massie. (Rosseter to Judd, October 3, 1932).

An investigation conducted internally by the prosecutor's office reached the same conclusions and went further in following up leads as to who might have, at the least, beaten Mrs. Massie. But the investigation did not identify any firm suspects (Wright, 1966:284-295).

Armed with this information, the prosecutor, on February 13, 1933 entered with the court a nolle prosequi in the case.

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[140] The report was never made public although its major conclusions were revealed in the Star-Bulletin (February 13, 1933:1).

5.6.4 The Trial of Lt. Massie, Mrs. Fortescue, and Accomplices: The Unwritten Law

Before leaving the Massie Case we must examine one more event that gives some insight into the varying definitions of the situation, influenced by well established cultural conceptions, held by the parties and the actions based on them. After the Richardson investigation took place, but before the Pinkerton investigation, Lt. Massie, Mrs. Fortescue, and the two sailors were indicted and tried for murder in the second degree.

Although it was clear that Massie and Fortescue and the others had committed a crime, getting an indictment was difficult. Most haoles thought what had occurred was a "code of honor" slaying and that no prosecution should be pursued (Wright, 1966:204). Nevertheless, legal officials proceeded to seek an indictment before the Oahu grand jury. After an initial consideration of the case, the grand jury returned a finding of "no bill." Circuit Judge Albert Cristy virtually ordered the members of the grand jury to reconsider, and they finally indicted the four on a charge of murder in the second degree. After being indicted the defendants secured the aging Clarence Darrow to defend them. He arrived in Honolulu in late March of 1932. The issue at the trial was Lt. Massie's state of mind at the time of the killing. The defense brought "alienists' from the Mainland who testified that Massie had suffered from "uncontrollable impulses" and a "somnambulistic ambulatory automatism" when Kahahawai

allegedly confessed under duress to the rape of Mrs. Massie. In essence, the defense was temporary insanity. Of course, the territory produced psychiatrists who said it wasn't so (Wright, 1966:237-253).

In the defense's summation of the case, some of it handled by an associate of Darrow's, resort was made more openly to the "unwritten law" -- Anglo-American conceptions of the shame of a man whose wife was raped and his duty to avenge her honor. Darrow himself spoke for four hours to the jury, a speech which was broadcast to the Mainland, pleading for sympathy for his clients (Weinberg, 1957:104-118). Nevertheless, the jury of seven haoles, one Portuguese, two Chinese, and three Hawaiians, convicted the defendants of manslaughter. Under the mandatory maximum sentencing statute then in effect, the judge sentenced the defendants to a maximum sentence of ten years at hard labor, minimum term to be later determined.

Again a storm of protest fell on Hawaii from the Mainland. Governor Judd buckled under the threats that were being made concerning external control of Hawaii's affairs and commuted the sentences to one hour served in his custody. Shortly thereafter the defendants and Mrs. Massie left Hawaii. Two years after leaving, the Massies were divorced and Mrs. Massie attempted suicide. In 1963 she died of an overdose of barbiturates.

5.6.5 A Period of Calm: 1932-1941

After the close of the Massie Case in 1932 attention to rape gradually waned. Outside of routine reporting in the press of some sexual attack cases they received little publicity. No crime waves were defined, and no sexual attack cases were transformed into the types of "crises" that have heretofore been described. Not wishing to bring further national attention to Hawaii with the attendant threat to existing social and economic arrangements, sex crimes were down played. Cases were handled by law enforcement authorities and by the courts in a routine manner. No legislative changes were made in the rape statutes.

Chapter VI

THE TRANSFORMATION OF THE ETHNIC STRATIFICATION SYSTEM: 1942-1970

Like the previously discussed periods in the history of the Hawaiian Islands, the period to be discussed in this chapter, the decades of the 1940's through the 1960's, witnessed enormous social changes, the major feature of which has often been described as a political and ethnic "revolution."

During this period the issue of rape received minor public attention from time to time, but generally received less direct, concentrated attention than in the first three decades of the twentieth century, particularly the 1920's. The only concentrated episode of community concern about rape began in 1959 and lasted in varying intensity for several years.

In examining the second and third decades of the twentieth century it was proposed that the defined sex crime waves may be interpreted in large part as anxious responses of the haoles to the social changes they were witnessing and experiencing. The demographic changes in the city and instability in the ethnic stratification system, along with the importation of Southern racial attitudes, focused ethnic and class tensions, and stimulated haoles to reassert their

dominance in the community by acting as the moral guardians by identifying and repressing the presumed deviant behaviors in the dangerous classes. In this process great attention was given to the control of crime in general and rape in particular, it being the most threatening affront to morals and the most directly symbolic transgression of ethnic and class boundaries.

Now we enter a period also characterized by a high level of social change, similar in nature to the 1910's and 1920's, but with little attention to sex crime except the episode beginning in 1959. How then can this apparent theoretical contradiction be explained?

Before answering that question in detail let us first examine the social changes occurring in the territory and the city of Honolulu.

6.1 SOCIAL CHANGES: 1942-1970

During the first decades of the twentieth century, the ground work was being laid and battles were being fought for changes that would transform the territory. Perhaps the most important arena in which this was occurring was education.[141] Having imported tens of thousands of uneducated immigrants, mostly from non-Western countries, to work as plantation laborers, the haole elite soon faced the question of how and to what extent to educate the children

[141] Fuchs (1961) has a good chapter on this subject and the following discussion draws in part from that source.

of those who chose to remain in the Islands. One view, popular among plantation owners, held that the only possible jobs for these non-haole children in the territory were in plantation work; so education should be limited in years, should be vocationally oriented, and should be devoted to socializing these young people to appreciate the dignity of manual labor. Another view, subscribed to by some of the more liberal members of the haole elite, and by some progressive Mainland educators who had come to Hawaii, held that educational opportunities should be widely available subject only to the limits of a child's potential, and that children should be taught to appreciate and participate in American democratic institutions. Independent thinking should be encouraged and the ideals of equality and justice should be cultivated.

By and large, the liberal progressives prevailed and a public school system was established and maintained that gave talented children of all backgrounds some opportunity for social advancement through education. Chinese and Japanese families in particular strongly valued education and viewed it as a means of escaping demeaning plantation labor.

Along with educational advancement, advancement of another kind was taking place. The first generation Asian immigrants to Hawaii were aliens and, of course, could not vote. Their children, however, born in the U.S., were

American citizens, and even many of the first generation became naturalized American citizens. Yamamoto (1959) estimated that in 1955 54% of the adult citizens of the territory were Asian, 41% were Japanese. Haoles became more and more a minority at the polls.

By the time of the Japanese attack on Pearl Harbor in 1941, there was a large number of Japanese males, some of whom were studying at the University of Hawaii, anxious to enter the military and to prove the loyalty to the U.S. of Hawaii's Japanese-Americans. Hawaii's all nisei 442nd Regimental Combat Team and 100th Battalion so distinguished themselves in Europe that all questions about loyalty and Americanism disappeared.

Using the G.I. Bill, many of these veterans completed college and some completed professional school on the Mainland. Some became lawyers.

Returning to Hawaii many of these young Japanese men had a strong desire to right past wrongs and to dismantle the ethnic stratification system that had relegated most Asians to second class status. Forming alliances with labor unions, particularly the ILWU, which had been successful in orgainzing plantation laborers in the 1930's and after the war, the nisei group rejuvenated the Democratic Party and set about to challenge the Republican haole control that had for so long dominated Island politics and social life. Each election after the war brought more Democrats into the

legislature, and after the election of 1954, the Democrats controlled it. In a study of the political participation of Asians in territorial and county government Yamamoto (1959) found that in 1955 50.5% of elected officials were Asian and 43.0% were Japanese.

The admission of Hawaii to the U.S. as a state in 1959 increased local control of government and thereby the power of the new local elite. Statehood gave the local electorate control over the governorship, previously subject to appointment by the president, and the governor, with state Senate confirmation, became responsible for Circuit and Supreme Court juducial appointments. As a consequence, in the years after statehood, most major political, administrative, and judicial positions came to be filled by Democrats, many of whom were non-haoles.

Concomitant with these political changes, the Islands underwent vast post-war economic change which facilitated and reinforced political change. Tourism and military expenditures grew to surpass plantation agriculture in contribution to the local economy, and the three, agriculture, tourism, and the military, became the economic mainstays. Between 1950 and 1970 the level of military expenditures in the Islands increased from $147,000,000 to $675,000,000 (Schmitt, 1977:668-669). The number of armed forces personnel resident in the Islands grew from 20,063 in 1950 to 53,039 in 1970. In the intervening years it had

fluctuated greatly reaching a high of nearly 79,000 in 1962 (Nordyke, 1977:164).

Tourism was the other great transformational force in the economy and demography of the Islands. We have already seen the birth of tourism as an industry in the 1920's and intimations that protection of the tourist industry figured in the Massie Case. Inexpensive, fast air travel put Hawaii within the reach of the American middle classes in the 1950's and Oahu, particularly Waikiki Beach, became a prime tourist gathering place. The average number of tourists present at a given time in the Islands rose from 3,027 in 1950 to 37,631 in 1970. Annual visitor expenditures rose from $24,200,000 in 1950 to $595,000,000 in 1970 (Schmitt, 1977:273-274).

This fantastic growth of the Hawaiian economy created a window of opportunity for social mobility, of which Hawaii's Chinese and Japanese, in large part due to their educational and political advancement, were situated to take advantage. For example, in 1912 Honolulu Japanese were most commonly employed as domestics and servants, laborers, and store clerks. In the rural areas they worked as contract cane growers and plantation laborers. In 1970 Hawaii's Japanese males, according to census data, were 30% in the category of craftsmen, foremen, and kindred workers, 14% professionals and technicians, and 12% managers and administrators. Only 2% were farm laborers. Japanese women were also well

represented in the labor force although they tended to be clerical and service workers (Kitano, 1976:176). Much of this occupational mobility occurred postwar.

One of the favored professions that attracted young Japanese men after the war was law. In the only study that has been done of the legal profession in Hawaii, Yamamoto (1979) found no Japanese lawyers practicing in Honolulu in 1920, in a total population of 85 lawyers, 80 of whom were haole. In 1958 he found a total of 388 lawyers in Honolulu of whom 113 (29.1%) were Japanese. Only ten women lawyers in Honolulu held licenses in 1958 to practice law.[142] Of 75 Japanese lawyers interviewed by Yamamoto, all had received their legal education on the Mainland; 40% of them had attended "top national" law schools. The Mainland education of all of Hawaii's lawyers is important because its consequence was that all of Hawaii's lawyers and judges, regardless of ethnic background, were trained and socialized into American legal culture, including the law of rape and the legal and social theories on which it was based. Lawyers, haole and non-haole, provided a major mechanism of cultural diffusion from the Mainland to Hawaii of Anglo-American perspectives and images of rape, rapists, and rape victims. Despite the entrance of persons of Chinese and Japanese ethnicity into influential legal positions,

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[142] The source of the data on the number of women lawyers is a personal communication from Professor George Yamamoto September 24, 1982.

Chinese law and Japanese law had no influence at all on legal culture in Hawaii.

Increasing Japanese and Chinese influence on the profession and practice of law is also revealed by the changing ethnic representation of judges. In 1950 all the justices of the territorial Supreme Court were haole as were the three judges of the First Circuit Court (Oahu). In 1960 the Supreme Court consisted of three haoles and two Japanese justices while the first Circuit Court consisted of seven haole and one Japanese judges. In 1970 the Supreme Court consisted of one Part-Hawaiian, one haole, and three Japanese, while the First Circuit Court had three haoles, five Japanese, and two Chinese sitting as judges.[143] Thus, it is clear that between 1950 and 1970 there was a major shift in ethnic representation on the bench.

With these transformations of the economy and of the ethnic stratification system in mind, we will now examine in detail rape as a public issue between 1942 and 1970. The first major event of the 1940's was the war. With large numbers of men stationed in Hawaii, the war brought into public discussion the then current thinking about the relationship between prostitution and rape. We will now turn to that topic.

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[143] These figures are drawn from the appropriate volumes of Hawaii Reports which provide lists of the Supreme Court justices and the Circuit Court judges.

6.2 PROSTITUTION, RAPE, AND THE WAR

Prostitution had long been a public issue in Honolulu. The large number of sailors in Hawaii in the mid-nineteenth century had created a great demand for the sexual services of native women and the payment for these services constituted a large component of the total income of the local economy. But, in the view of many, prostitution had severe disadvantages. To the missionaries it was, of course, immoral and they believed it should have been completely suppressed for that reason alone. In addition it was viewed, by the missionaries and others, to be a prime factor in the depopulation of the Hawaiians because it spread venereal diseases.

Prostitution was a much debated issue in the 1850's between the members of two groups, those that favored complete and vigorous suppression and those who favored regulation and control. Economics conquered morality and in 1860 the legislature passed "An Act to Mitigate the Evils and Diseases Arising from Prostitution" (Hawaii, 1860) which provided for the registration and periodic medical examination of all Honolulu prostitutes (Greer, 1973). The act remained in force until shortly after the turn of the century with prostitution coming to be concentrated in Iwilei, a poor district near downtown. Just after the turn of the century repression of prostitution, in the form of closing the district, became a favorite cause of the newly

emerging religious and civic improvement groups. There followed a series of vacillating policies and activities with regard to the district until it was again closed in 1916 (Greer, 1973). It remained more or less closed until after the Massie Case in 1932 when prostitution again came under the regulation of the police (Allison, 1946:78) The return to segregation and regulation grew out of the belief that when prostitution was not segregated it flourished in all districts, as it did prior to the Massie case.[144] Men seeking the sexual services of prostitutes were unable to distinguish respectable women from prostitutes, increasing the likelihood of aggressive sexual advances to and rape of respectable women.

But the level of prostitution that had existed in prior years in Honolulu was dwarfed by the activity that was brought on by the advent of WWII. The population of armed forces personnel in the Islands rose from 48,187 in 1941 to 406,811 in 1944. Most of these were young men and most were located on Oahu (Nordyke, 1977:162). Prostitution was regarded as a necessary outlet for the healthy libidinous

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[144] Richardson (1932a:35) commented on prostitution in Honolulu as follows:

> Prostitution is exceedingly prevalent. It presents itself in nearly every section of Honolulu. Rarely have I seen a city in which this element has so far invaded many portions of the municipality.

The transcript of Richardson's (1932b) interviews reveals that he frequently sought and received opinions on the issue of whether or not having a segregated district for prostitution lessened the danger of rape.

impulses of these American boys and the prostitution trade was tightly organized and regulated by military authorities and the Honolulu Police Department.[145]

According to Laune (1946) the Honolulu Police Department had 250 prostitutes on its registry in 1943-44, operating out of 20 to 25 houses and charging rates of $3.00 to $5.00 for three minutes. Lines of servicemen waited in the streets to avail themselves of these services.

In 1944 the Honolulu Council of Social Agencies took up the issue of prostitution and appointed a "Social Protection Committee" to concentrate on the matter. Various high-ranking military authorities were pressured to come out publicly against prostitution, and subsequently, on September 21, 1944, the houses were closed by order of the governor (Laune, 1946).

The importance of the foregoing for this study is the close association seen by many individuals between prostitution and rape. They were both viewed as outlets for normal sexual drives. And if the least offensive, prostitution, was not permitted, the most offensive, rape would inevitably occur. Organized prostitution was viewed by many as a program of rape control. As one participant in the drive to close the houses in 1944 put it:

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[145] In 1944 an expose was published on police corruption and complicity in the operation of prostitution in Honolulu. The pamphlet, Honolulu Harlot, was written by Honolulu's best known prostitute and madam, Betty Jean Norager, under the pseudonym, Jean O'Hara (1944).

> One of the reasons that the community was so complacent about tolerating this vice was because the impression had been cultivated that unless prostitution was permitted the community would be infested with sex crimes and that boys deprived of sexual indulgence would engage in wanton rape of innocent women and girls. (Laune, 1946:69)

Another participant described the reaction of the average citizen as ranging from "skeptical to disturbed" about the closing of the houses because he believed that "rape would become rampant; the streets would no longer be safe for his wife or daughter." (Allison, 1946:80)

But the participants in the Social Protection Committee did not believe that the suppression of prostitution led to rape, and, after the closing of the houses, produced statistical data that purported to prove their case. They reported that in the eleven months prior to the closing of the houses there had been twenty-nine rapes, and in the eleven months after the closing of the houses there had been only twenty-two. Therefore, in their view, the case was proved that not only did toleration of prostitution not lessen the incidence of rape, it increased it. The finding received considerable publicity, including two advertisements taken out in the local newspapers (Laune, 1946:69-70).[146]

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[146] An eleven month decline in the incidence of reported rapes can hardly be so definitely interpreted, especially in the light of the fact that the military population had declined considerably during the eleven months after the closing of the houses.

In the postwar period, open, officially organized and regulated prostitution was never again tolerated in Honolulu, although it was advocated from time to time as a solution to the problem of sex crimes.

6.3 THE SEXUAL PSYCHOPATH BILLS OF 1947

The postwar period saw another important development concerning rape in addition to interest in the presumed reduction of rape after the closing of the houses of prostitution. This other development was the introduction into the 1947 territorial legislature of two bills intended to create the category "sexual psychopath" as a legal category into which certain persons might be placed, and to provide for the special disposition of such persons. But before examining these bills and their fates in detail, we need to pause and examine the origins of such measures on the Mainland.

We have already discussed how theories of hereditary criminality led to the development of the eugenics movement on the Mainland in the early twentieth century, how that movement diffused to Hawaii, and how it affected proposed solutions to the problem of rape. Medical professionals in Hawaii who subscribed to theories of inherited criminality and to eugenics programs asserted themselves in the sex crime episode of 1912-13 and proposed castration and sterilization as opposed to whipping for rapists. The

growth of sociology, social work, psychology, and psychiatry displaced hereritary models, which largely fell into disrepute. These newer perspectives, in their early form, we saw expressed in Hawaii in the episodes of the 1920's. Professional psychiatry, however, was the most assertive and successful of these new approaches nationwide, and led a "mental hygiene" movement throughout the U.S. that focused on individual pathology, usually developed in childhood, and individualized treatment. The medical model was applied to large areas of deviance.

One of the prime areas of behavior laid claim to by psychiatrists, probably related to the importance of sex in Freudian theory, was sexual deviance. Psychiatry created a new "scientific" imagery of rapists. In this view, rape and other sexual offenses, were not acts in themselves that should be punished, but rather symptoms of a deeper "illness" that must be treated. Every sex offender needed treatment. Reflecting this view, Benjamin Karpman, the chief psychotherapist at St. Elizabeth's Hospital in Washington, D.C., and a prominent authority on sex offenses, said in his influential magnum opus, The Sex Offender and His Offenses (Karpman,1954:346): "All cases of rape that have come under the writer's care have proven to be profoundly abnormal." In another work Karpman revealed the dynamics of this abnormality.

> The social offense with which the sexual psychopath may be charged, be it minimal or highly aggravated, is at most a compromise with or a

> symbol of a greater offense that has been completely repressed because it is so strongly prohibited socially - namely, incest and homosexuality. The sexual offense, therefore, extreme as it may appear to be, is committed in lieu of another greater crime. (Karpman, 1951:188)

Karpman went on to extend this imagery in an equally revealing passage reminiscent of the pronouncements of the eugenicist Dr. Goodhue during the 1912-1913 episode.

> Sexual psychopaths are, of course, a social menace, but they are not conscious agents deliberately and viciously perpetrating these acts, they are victims of a disease from which many of them suffer more than their victims, often ending in the suicide of the sufferer (Karpman (1951:189-190).

Karpman (1951:191) contended that the offenses of sexual psychopaths are the consequences of "irresistible impulses" which are not under voluntary control. Thus, punishment is not useful. He further pointed out that not only did sex offenses result from these deep, psychic disorders, but that many other crimes such as assault and murder, that had no surface sexual component, also had an underlying sexual motivation.

So, then, there are similarities and differences in the imagery of the sex offender advanced by psychiatry and that advanced by the older biological theories of criminality. They share the image of the sex offender as at the mercy of irresistible inner forces, beyond voluntary control, that drive a man to commit his crimes. He is not "responsible" for his acts either morally or legally and should receive

individualized treatment, not punishment. He is an object of pity, not of hate.

A major difference in the images of psychiatry and biology, though, concerns the mutability of the condition. That is, sexual psychopathy is an achieved status, its etiology lying in the unsatisfactory resolution of sexual conflicts early in life. Unlike the biological criminologists, psychiatrists believed that if they could work on the head of the rapist they could leave his genitals intact.

Sexual psychopath laws became popular on the Mainland in the late 1930's and through the 1940's. Sutherland (1950a) presents a critical analysis of their diffusion through the states. He viewed sexual psychopath legislation as an expression of a long-term, general social movement in society away from punishment and toward treatment of criminals. This trend away from punishment is exhibited in other social institutions such as the church, the home, and the schools. And the trend draws on, and is consistent with, the use of purported scientific procedures in many fields and activities.

Concomitant with this general social movement, Sutherland contended, was a growing generalized fear of sex crimes in the 1930's and 1940's fueled by inflammatory articles in the popular press.[147] These conditions, along with the readiness

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[147] Sutherland cites Dutton (1937), Harris (1947), Hoover (1947), Waldrup (1948), Whitman (1949), and Wittels

of mental health professionals to put forth claims to special powers of identification and treatment of sexual offenders provided some of the preliminary conditions for the passage of sexual psychopath acts.

Sutherland further suggested that states that passed such acts went through a series of events and actions much like those proposed in our initial model. According to Sutherland's analysis, the first step was the arousal of fear in a community by a few shocking sex crimes. The press played a key role in the generation of such fear. Next, there were rather unfocused demands from many sources and groups, often through mass meetings, for reform and control. Next, a committee was appointed to consider the many demands and recommendations, to discover the "facts," and to make recommendations. Sutherland observed that if a committee was not appointed, an episode of community fear was much less likely to result in legislation. He also observed that it was at the committee stage that psychiatrists made their key contribution and were the prime interest group that backed the sexual psychopath laws. Finally, legislation was proposed in which the sexual psychopath approach was presented as the enlightened and effective control measure for sex crimes.

(1948), as examples.

Sutherland contended that the sexual psychopath laws were based on a series of propositions, largely advanced in the press and popular literature, that were demonstrably false or at best questionable. He describes the propositions as follows:

> that the present danger to women and children from serious sex crimes is very great and is increasing more rapidly than any other crime; that most sex crimes are committed by "sexual degenerates," "sex fiends," or "sexual psychopaths" and that these persons persist in their sexual crimes throughout life; that they always give warning that they are dangerous by first committing minor offenses; that any psychiatrist can diagnose them with a high degree of precision at an early age, before they have committed serious sex crimes; and that sexual psychopaths who are diagnosed and identified should be confined as irresponsible persons until they are pronounced by psychiatrists to be completely and permanently cured of their malady (Sutherland, 1950a:88)

Based on these propositions, or in our term, this definition of the situation, by 1949 a number of states had passed sexual psychopath laws. The first was Michigan in 1937[148] followed by Illinois in 1938 and California and Minnesota in 1939. By the end of 1949 eight more states and the District of Columbia had enacted sexual psychopath laws (Sutherland, 1950a:142). By 1955 Hacker and Frym (1955) found seventeen states and the Dictrict of Columbia with such statutes. In a review of enactments by 1960, Swanson (1960) found twenty-six states and the District of Columbia with sexual psychopath commitment laws.[149]

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[148] Invalidated on constitutional grounds, but revised and reenacted in 1939.

Despite the popularity of such laws, most commentators have been highly critical of them. Tappan (1949) sounded an early warning about the ambiguity of the concept of "sexual psychopath" and the potential for abuse of civil liberties under the guise of helping and treatment. Sutherland (1950b) pointed out that the laws were ineffective in practice because the concept "sexual psychopath" was so vague as to be unworkable, and even socially injurious; that states with such laws made practically no use of them; and that the laws had no demonstrable effect on the rate of serious sex crimes.

It was in this context and with this history that Hawaii in 1947 considered enactment of sexual psychopath legislation.

6.3.1 Sexual Psychopath Bills in Hawaii: An Abortive Attempt at Statutory Change

As has been discussed in the preceeding section, sexual psychopath laws on the Mainland were closely linked with the mental hygiene movement and the growth of professional psychiatry. As an initial step in considering attempts at sexual psychopath legislation in Hawaii we should examine the diffusion of the Mainland-based mental hygiene movement to Hawaii.

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[149] Swanson (1960) points out that not all states used the term "sexual psychopath." He also provides a useful chart that gives a state by state review of the provisions of each statute.

The genesis of the mental hygiene movement in Hawaii can be traced to the charitable activities of some of the haole upperclass women of Honolulu. In 1910 a group of these women residing in Manoa Valley established the "Manoa League" to "Make this district a safe place in which to raise our children." (Catton, 1959:63) In 1914 the group expanded the organization to include other women's groups in Honolulu and renamed itself the "Central Committee on Child Welfare." This group interested itself in a range of issues and activities including nutrition for undernourished children, institutional care for mental defectives, a home for the feebleminded, sterilization for the feeble minded, and juvenile court operations (Catton, 1959:63-67). Based on rumors of maltreatment of juveniles under the jurisdiction of the juvenile court, the women's group in 1919 secured the services of a newly arrived, New York trained social worker to do a detailed study of 100 children under the jurisdiction of the juvenile court. Detailed social examinations (family background), physical examinations, and mental examinations were performed on the children. The mental examinations were performed by a psychiatrist who happened to be visiting the Islands, there being none resident in the territory. The results of the investigations revealed, according to the investigator, that fully 93 of the 100 children were "dull-normal" in mental ability and 55 of the children were "feeble-minded," with 11

more bordering on that condition (Catton, 1959:69). Armed with this shocking and "scientiffically" indisputable link between child criminality and mental deficiency, several recommendations were made by the women's group, including the establishment of a mental hygiene clinic.

At its 1921 session the territorial legislature acted upon this recommendation and established the "Psychological and Psychopathic Clinic" and placed it within the University of Hawaii. A Mainland psychologist was consulted to assist in actually setting up the clinic. He suggested that a psychologist be appointed to direct the clinic and suggested Dr. Stanley Porteus, who was brought from the Mainland to take the position. The selection of a psychologist rather than a psychiatrist for the job was later viewed as a grave error by some of those who had initially been involved in pushing for the establishment of a clinic (Catton, 1959:73). Although the Psychological and Psychopathic Clinic carried on an extensive program of mental testing and diagnosis for the courts and the schools of the territory, Porteus was not much interested in treatment and therapy, and these activities were neglected.

Throughout the late 1920's and 1930's various Mainland mental health experts visited Hawaii and recommended an improved program of clinical mental hygiene services. Some were greeted with indifference and even hostility by the established medical profession. Perhaps most influential in

exciting interest was a visit in 1931 by Clifford Beers, whose autobiography, A Mind that Finds Itself had stimulated the mental hygiene movement on the Mainland. In 1937 Dr. Frank Ebaugh, Professor of Psychiatry of the University of Colorado Medical School at Denver, was retained to do a survey of Hawaii's mental health needs and services. Among his recommendations was the establishment of a psychiatric clinic to provide treatment services (Chung, 1955:19). In 1938 such a clinic was started under private auspices and Chamber of Commerce funding. Immediately a campaign began for a public, territorial clinic, and one was established in 1939 as the Bureau of Mental Hygiene under the territorial Board of Health (Act 257, 1939). The Bureau of Mental Hygiene demonstrated an immediate interest in psychiatry and crime by bringing a consulting psychiatrist from the Mainland, who, among his activities, gave a series of lectures to the members of the Honolulu Police Department on the psychiatric viewpoint on crime. He told his audience that many criminals should be committed to institutions not jails. He also told them that

> The new approach to police work is not only to find out who is guilty of the crime, but to find out why they did it ... We must find out why they're guilty, if it's a sickness, a mental illness, then we must treat them. (Advertiser, December 13, 1939:1)

With the Bureau of Mental Hygiene as the official organizational center of psychiatric activities and ideology in the territory, there was established, in 1942, a private

group calling itself the Mental Health Society of the Territory of Hawaii, consisting of some of the staff of the Bureau and other forward thinking, enlightened citizens of the territory. It was from this group that, in 1947, legislation was introduced into the territorial legislature to enact "sexual psychopath" statutes.

Two bills were introduced into the 1947 legislature that would have provided for commitment of sexual psychopaths to the territorial hospital. Each was introduced into both the House and the Senate. One bill defined a sexual psychopath as a person who

> is afflicted with sexual psychopathy, that is with conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions such that he is in fact irresponsible for his conduct with respect to sexual matters to the extent that he is in fact seriously dangerous to other persons, has in fact pursued a habitual course of serious misconduct in sexual matters, and has in fact shown an utter lack of power to control his sexual impulses. (Senate Bill No. 213, House Bill No. 147, 1947)

The bill further provided that such persons were to be committed to the territorial hospital in the same manner as insane persons and "when recovered from such sexual psychopathy" to be discharged from the hospital in the same manner as insane persons.[150]

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[150] This procedure is specified in Revised Laws of Hawaii (1945), sections 4015-4020, 4029-4031, 4038, and 4039.

During its deliberations on the bill, the Senate apparently was not pleased with the cumbersomeness of the definition because it produced a new draft which simplified the definition. In the new draft, "A sexual psychopathic person is a person who has shown such utter lack of control of his sexual impulses that he is in fact seriously dangerous to other persons." (Senate Bill No. 213, Senate Draft No. 1, 1947) The commitment and discharge procedures were not changed. Heller (1949) notes that the original draft of the bill followed the Minnesota sexual psychopath statute as it had been interpreted by the courts. The new draft had no known parallel on the Mainland.

The other bill which was introduced was considerably more elaborate and more limited in that only those persons would be subject to commitment as sexual psychopaths who had been charged with a criminal offense. A sexual psychopath was defined as

> Any person who is suffering from a mental disorder but is not mentally ill or feeble-minded to an extent making him criminally irresponsible for his acts, such a mental disorder having existed for a period of not less than one year and being coupled with criminal propensities to the commission of sex offenses, is hereby declared to be a criminal sexual psychopathic person. (Senate Bill No. 227, House Bill No. 155, 1947)

With respect to procedure, the bill provided for petition to the court by the prosecutor or defense attorney, alleging sexual psychopathy. Upon such petition the defendant was to be examined by two court appointed psychiatrists. If they both agreed that the defendant was a sexual psychopath the

court was to hold a non-jury hearing on the issue. If a court determination of sexual psychopathy was made, the defendant was to be committed to the territorial hospital. If and when the defendant "fully recovered" from his criminal sexual psychopathy, a court hearing would again be held upon petition to determine whether the defendant was recovered. If a determination was made that he was recovered, he would be released to stand trial on his original offense.

Unfortunately, little is known about the legislative history of the two sexual psychopath bills in the House and the Senate. They were introduced first in the House by several Democrats and a few days later in the Senate by a Republican. Their introduction received almost no publicity in the newspapers.[151] Hearings on the bills were held in both the House and the Senate, but records of those hearings have not been preserved. A newspaper report of a House hearing on House Bills No. 147 and 155 noted favorable testimony on the bills by "six experts on mental diseases."[152] The article noted that although the experts disagreed on which of the bills was better, they "agreed on

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[151] An exception was a small article noting the introduction of the Senate bills (Star-Bulletin, March 21, 1947:6).

[152] Those listed as testifying were Dr. William Shanahan, former director of the Bureau of Mental Hygiene; Dr. R.D.Kepner, former criminal director, Territorial Hospital; Dr. Marcus Guensberg, director, Territorial Hospital; Dr. M.F. Chung, psychiatrist, Dr. Bryant Wedge, psychiatrist, Queen's Hospital; and Margaret Hackfield, executive secretary, Mental Hygiene Society.

the principle that psychopaths should be treated as 'sick' persons rather than criminals." (Star-Bulletin, April 1, 1947:5) In its report on Senate Bill No. 213, the Public Health Committee commented that it had held a hearing on the bill attended by "representatives of public and private agencies interested in the care and treatment of mentally ill persons and several psychiatrists." The comments of the those present resulted in the redrafting (already described) of the bill (Senate Standing Committee Report No. 258, 1947). The committee reported that it favored the amended bill and recommended that it be sent to the Judiciary Committee for study in conjunction with Senate Bill No. 227.

In the House the two bills were tabled by the Judiciary Committee without explanation. In the Senate the Judiciary Committee recommended that the bills, along with several others on mental illness, be held for interim study since they had far reaching effects.[153]

Senate Bills No. 213 and 227 were referred to the Legislative Reference Bureau of the University of Hawaii for study after the close of the session. A study was conducted and a report written by political scientist Norman Meller, the Bureau's director. Meller examined the experiences of Mainland states with their sexual psychopath laws and interviewed local psychiatrists to determine their definitions of sexual psychopathy. Meller's (1949) report

[153] The progress of the bills may be followed in the House and Senate journals for the 1947 session.

outlined the serious definitional problems that existed with the concept of sexual psychopathy, the fact that at most ten men per year would be subject to the bills' provisions, and that the territorial hospital would need new, expensive facilities and staff to treat sexual psychopaths. Apparently Meller's report discouraged advocates of sexual psychopath legislation because no such measures were introduced in the next session.

Given Sutherland's analysis of factors leading to sexual psychopath legislation, it is not difficult to explain their failure in Hawaii in 1947. Even though Hawaii was subject to the national trend toward treatment rather than punishment, and even though the mental hygiene movement had diffused to Hawaii, and a professional group of psychiatrists existed advocating sexual psychopath legislation, there was a critical factor missing; there had not been a crisis of attention generating sex crimes in 1947 prior to the legislative session. There was no media attention and consequently no public demand to "do something." No committee was established to render an authoritative definition of the situation. The Legislative Reference Bureau was a special definer of the situation but it was not controlled by psychiatrists and consequently its report was skeptical. Consequently, mental health professionals were unable to mobilize sufficient media and legislative resources for their desired statutory changes.

However, as we shall see below when we examine the next episode beginning in 1959, sexual psychopath statute or not, the psychiatric image of sexual deviance was a powerful one that strongly influenced the working culture of law enforcement personnel and the lay culture of the populace.

6.4 THE MAJORS-PALAKIKO CASE: CRIME AND PUNISHMENT IN A CHANGED COMMUNITY

While the Legislative Reference Bureau was considering the wisdom of enacting sexual psychopath laws in Hawaii, there occurred in 1948 an event that, like the Fukunaga and Massie cases, was to become a crisis in ethnic and class relations in Honolulu, which was to lead to a major change in the penalty for rape, and which was to again to reveal the symbolic ethnic and class dimensions of sex crime. This case, however, occurred in a changing community in which political and legal power was slipping from the hands of the haoles; consequently, this case had a quite different outcome from those previously examined.

Events of the Majors-Palakiko case[154] began on March 10, 1948 when James Majors and John Palakiko, two Part-Hawaiian young men incarcerated in Oahu Prison, escaped from a woodcutting detail near one of the upperclass neighborhoods

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[154] The case was initially referred to in the press as "the Wilder case" using the name of the victim. Later, as attention focused more and more on the defendants during their years of trying to avoid the gallows, the case came to be referred to as "the Majors-Palakiko case" and still is.

of Honolulu. After spending a night hiding in the mountains, they broke into the home of Mrs. Therese Wilder, the 68 year-old widow of one of the most prominent businessmen of Honolulu. They told her they were only looking for food and would not harm her, but she called out and was struck by one of the men. She was carried into her bedroom, placed on her bed, and bound and gagged. While Palakiko gathered some food, Majors may or may not have raped Mrs. Wilder.[155] The two departed the house leaving Mrs. Wilder bound, gagged, and possibly unconscious. Sometime in the next few hours she strangled.

On the morning of March 16th Mrs. Wilder's body was discovered by her maid and yard man. As the police investigation began and information began to trickle out from the police, the newspapers and officialdom began to mobilize. The initial report, made by the Star-Bulletin (March 16, 1948:1) on the afternoon of the discovery of the body, identified Mrs. Wilder as "a kamaaina widow" and a "member of one of Hawaii's best known families." It gave a detailed description of the crime as it was reconstructed by

[155] Whether he did in fact rape or attempt to rape her was a key factual point at the trial. The arrangement of the victims clothing suggested at least an attempt at rape, but the advanced decomposition of the victim's body at the time of discovery precluded the recovery of seminal evidence. Laboratory examination of the victim's bedding and clothing were negative for seminal stains. During one of Majors' three confessions he admitted attempting to rape Mrs. Wilder. In the other two confessions he denied doing so. Majors explained his incriminating confession by claiming that he had been beaten and coerced.

the police and reported that a preliminary report by the examining physician from the city and county coroner's office raised the possibility of "criminal assault" as the motive for the attack.

The morning Advertiser (March 17, 1948:1), with additional lead time, was not only able to report information about the ongoing investigation, but also official reactions to the crime. Mayor John Wilson was reported to be shocked and angered by the crime and to have characterized it as "fiendish" and "dastardly." Mayor Wilson also sent a message to the board of supervisors stating that this was part of a wave of crimes, and that "Things have gone from bad to worse, and its about time somebody woke up." (Advertiser, March 17, 1948:9) He urged the board of supervisors to post a reward for the capture of the criminal responsible for the murder of Mrs. Wilder. The supervisors obliged, unanimously appropriating the statutory maximum of a $500 reward. It was the first reward offered by the supervisors for the solution of a crime since one was offered for the apprehension of the attackers of Mrs. Massie in 1931. The Advertiser also published a brief statement from each of the seven supervisors revealing his definition of the situation. A sample is as follows:

> SUPERVISOR PACHECO: This crime is one of the worst perpetrated in many years, the victim being a helpless old lady living by herself. It's the climax of a crime wave in the city, and something should be done quickly by the police to stop it.

SUPERVISOR DILLINGHAM: A heinous, dastardly crime that has, I think, brought matters to a head. It's high time that the police commission and the police department do some serious work in crime prevention. If the laws are such that criminals cannot be brought to justice swiftly and dealt with, severely, then the people should demand that the laws be changed.

SUPERVISOR ASING: No one seems to be safe at home, or on the roads - or anywhere. It's about time something is done to awaken the appropriate authorities and the people to the realization of this evil situation.

SUPERVISOR BEAMER: A fiend or a group of fiends must have committed that atrocity, and the guilty party or parties should be captured and brought to justice immediately.

On Wednesday afternoon the Star-Bulletin (March 17, 1948:1) reported that a special meeting of the directors of the Chamber of Commerce had been held and an additional $1,500 had been added to the reward fund. In addition the directors had appointed a special nine-man law enforcement committee to "probe every phase of Honolulu's worsening crime situation." The committee was to be chaired by Judge Alva E. Steadman, who, as president of Cooke Trust Co. Ltd., had administered Mrs. Wilder's financial affairs.[156] The Star-Bulletin (March 17, 1948:1) reported that at the directors' meeting Judge Steadman characterized the murder as a "heinous crime" which "agitated me more than any other occurrence since the Fukunaga kidnapping." He said that while it had occurred in a fashionable neighborhood, it

[156] Judge Steadman may be recalled as the judge who presided over the rape trial in the Massie Case in 1931.

could have as easily occurred in a poor neighborhood, and constitutes "an emergency which involves neither rich nor poor, white nor black." He called the murder the "top crime" to occur in Honolulu in the past twenty-five years and further stated that "The one important thing is that we catch this criminal and hang him for murder. It is a crisis in the community."

The Advertiser (March 18, 1948:20) contributed to the defining of the situation by editorially describing Honolulu as "a community aroused," which had for the past year been subjected to many "outrages against decency," including the Wilder murder in which the "blood lust of a killer slew a woman mercilessly and savagely." It applauded the action of the board of supervisors and of the Chamber of Commerce, and called on every civic organization to bring pressure on the government if law enforcement agencies did not "promptly, piteously (sic), and effectively supress what has actually become a crime wave."

The Star-Bulletin (March 17, 1948:8) editorially put the crime in larger perspective defining it as part of a wave of post-war lawlessness that afflicted both the Mainland and Hawaii and which was a consequence of the war's breaking down of social restraints and disciplines. It called for not only the punishment of criminals but an inquiry to identify and remedy the basic reasons for crime. The Star-Bulletin also suggested the appointment of a "public committee to

make a complete examination and report on feasible and logical steps and measures." In another editorial, the Star-Bulletin (March 19, 1948:16) contended that the "plague of lawlessness" was due to the fact that "There may be an infirmity somewhere in the statutes, or in the enforcement of them, or in the administration of justice." It said it was the duty of the bar association to make an examination and diagnosis just as the medical association would do if an epidemic threatened the city. The bar association was receptive to the suggestion and appointed a committee of attorneys to investigate law enforcement conditions and to recommend measures to combat the crime wave in Honolulu (Star-Bulletin, March 23, 1948:1).

Various other contributions were made to the defining of the situation. One of the police commissioners suggested that lawlessness could be explained in part because the public would not cooperate with the police department in apprehending criminals out of fear of becoming involved (Star-Bulletin, March 17, 1948:1). A man who was past president of the Chamber of Commerce and the president of the bar association suggested that there were deficiencies in the prosecutor's office due to the fact that the position of city prosecutor had for some time been vacant (Star-Bulletin, March 17, 1948:1; Advertiser, March 23, 1948:1). The Advertiser (March 20, 1948:14) editorially agreed with the criticisms of the prosecutor's office. It

said the police department was "well-organized," but that the prosecutor's office had, through months of delay in naming a new prosecutor, become "a weak link in the chain that is supposed to bind lawbreakers."

Of course, once the fact became known that the killers of Mrs. Wilder were prison escapees who had absconded while on an outside work gang, prison administration and the work gang system came under attack as the proximate cause of Mrs. Wilder's death. After a couple of editorials on lax prison conditions and the work gangs were published (Advertiser, March 27, 1948:14 ;April 2, 1948:18), the system of employing prisoners on outside work gangs was ended. They were to be replaced by civil service workers (Advertiser, March 3, 1948:1).

While all this discussion was going on, Majors and Palakiko were captured; Palakiko had in fact been apprehended for escape on March 12th, the day after the attack on Mrs. Wilder, although it was not known for several days that he had been involved in the attack. Majors was apprehended at a roadblock on March 20th after a massive manhunt that employed all available resources.

During the course of questioning by police, Majors and Palakiko made several confessions to having attacked Mrs. Wilder. Palakiko made one confession in which he admitted, among other things, seeing Majors on the bed with Mrs. Wilder, but said he was not sure what Majors was doing.

Majors made three different confessions. In his first statement, he denied raping or attempting to rape Mrs. Wilder. In his second statement he admitted raping her. And in his third statement he repudiated the admission of rape (Advertiser, June 17, 1948:1). The voluntariness of these statements, whether Majors and Palakiko were beaten, or whether they had been promised leniency in exchange for their confessions, was to become a key issue at their trial and on appeal.

But before the trial was to begin the matter of the nature of the charges to be lodged against the defendants became an issue. Hawaii statutes at that time defined murder as

> the killing of any human being with malice aforethought, without authority, justification or extenuation in law, and is of two degrees, the first and the second, which shall be found by the jury. (Revised Laws of Hawaii 1945, Chap. 265, Sec. 11391)

The statutes defined the degrees of murder as follows:

> Murder committed with deliberate premeditated malice aforethought, or in the commission of or attempt to commit any crime punishable with death, or committed with extreme atrocity or cruelty is murder in the first degree. Murder not appearing to be in the first degree is murder in the second degree. (Revised Laws of Hawaii 1945, Chap. 265, Sec. 11932)

Since the death of Mrs. Wilder was apparently not a consequence of "deliberate premeditated malice aforethought," the question was whether the act came under one or both of the other two provisions for first degree

murder. Did the death occur in the commission or the attempt to commit a crime punishable with death, i.e. rape? Or was the murder committed with extreme atrocity or cruelty? It was over these issues that the community began to divide.

With characteristic stridency the Advertiser (March 23, 1948:18) editorially let its position be known early. It demanded that

> the extreme limit of punishment permitted under the law be imposed with no more delay than the normal process of the law makes mandatory.

The paper mentioned the disagreement among local attorneys over the appropriate charges in this case and demanded that the issue be settled at once, with the highest charge possible lodged. If the law did not permit a charge of first degree murder to be lodged the law should be changed, the Advertiser said.

Acting City and County Prosecutor John Desha, in consultation with the police, initially decided to charge Majors and Palakiko with second degree murder, based on his belief that there was no premeditation, no evidence of criminal assault, and no extreme atrocity. However, the Advertiser (March 23, 1948:1) reported that as public pressure mounted for a first degree murder charge, the prosecutor and the pclice were meeting again to consider whether the higher charge could be made. The next day the Advertiser (March 24, 1948:1) reported that Desha vowed to go for the higher charge if possible, but that he still had

doubts because there was no precedent. He said he had never seen a first degree murder charge made where there was no premeditation. Later, when the details of the history of the prosecution of the case were being heard by the territorial Supreme Court, Desha testified that he was pressured by Alva Steadman and Charles M. Hite, a lawyer who Desha testified was a "great friend" of Mrs. Wilder's, to charge Majors and Palakiko with murder in the first degree. He testified that both Steadman and Hite telephoned him several times to urge him to bring the more serious charge. In addition, Desha testified that both Steadman and Hite complained to the mayor about his handling of the case when it appeared he was only going to seek an indictment for murder in the second degree.

At the hearing before the Supreme Court Hite denied pressuring Desha, but Desha's testimony was corroborated in part by Desha's wife who testified to her recollection of two phone calls from Hite to her husband at home while he was investigating the case and determining what charges to bring.[157]

Meanwhile, the police chief asked the city and county attorney for a ruling on what constituted first and second degree murder (Advertiser, April 2, 1948:1). The reply was that the degree was a matter for the jury to decide and that

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[157] Accounts of Desha's testimony can be found in the Star-Bulletin (November 27, 1951:1) and the Honolulu Record (November 29, 1951:3; December 6, 1951:5).

the prosecutor was obligated to bring the most serious charge indicated by the facts (Advertiser, April 5, 1949:9).

It was becoming rather clear that law enforcement authorities were giving this case more than the usual consideration and were searching for any possible way to charge the defendants with murder in the first degree. After several delays, on April 15th, the territorial grand jury indicted Majors and Palakiko for first degree murder on the basis that the crime was committed with "extreme atrocity and extreme cruelty." Premeditation or rape were not mentioned in the indictment (Advertiser, April 16, 1948:1). On May 6th the grand jury reindicted the defendants for first degree murder on three counts to meet the proof: murder while committing the crime of rape, murder while attempting to commit the crime of rape, and murder with extreme atrocity and cruelty (Advertiser, May 7, 1948:1).

The pair of defendants pled not guilty to the charges as required by Hawaii's statutes and their trial began on June 7, 1948.[158] After a ten day trial, at which the defendant's confessions were admitted over their objections, they were convicted of murder in the first degree. The defense gave notice of appeal to the territorial Supreme Court (Advertiser, June 18, 1948:1). On July 16th the defendants

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[158] At that time Hawaii's statutes did not permit a guilty plea to a charge of first degree murder (Revised Laws of Hawaii 1945, Chap. 265, Sec. 11393).

were sentenced to hang (Advertiser, June 17, 1948:1). For the year and a half while the appeal was pending before the territorial Supreme Court, the case received little newspaper or other public attention.

On appeal the defense raised several issues it contended were errors at trial, their primary challenge being, however, the admissibility of the confessions. The court upheld their admissibility describing them as "voluntarily made without the slightest indication of force, threat, duress, or promise of reward or immunity (Ter. v. Palakiko et al. 38 Haw. 490). It also dismissed the other challenges, and, after reviewing the evidence, concluded that there was a sufficiency of evidence to "conclusively prove guilt."

The defense appealed the decision of the territorial Supreme court to the United States Court of Appeals, Ninth Circuit, in San Francisco, on the grounds that the defendants were denied due process of law because the confessions admitted by the trial court were not made voluntarily. After a lengthy review of the conditions under which the confessions were obtained, the federal court ruled them legally valid and affirmed the decision of the territorial Supreme Court (Palakiko et al. 188 F. 2d 54).

After the upholding of the conviction by the federal appeals court, and after a territorial sanity board found the defendants sane, they were scheduled to be hanged at Oahu Prison on September 13, 1951. On September 11th well

known labor lawyer and champion of leftist causes in Hawaii, Harriet Bouslog, visited the governor and asked him to commute the sentences. She informed him that petitions were being circulated in Honolulu asking for commutation and that the fairness of the trial was an important issue because the newspapers had whipped up an "atmosphere of hysteria and fear" at the time of the crime and the trial (Advertiser, September 12, 1951:7). Fifteen minutes before the scheduled execution the next morning, Governor Oren Long ordered a one week stay so that he could study the case. The governor came under "terriffic pressure" as the result of his reprieve. He said he had received many phone calls and visitors to his office taking positions opposing or favoring the execution (Advertiser, September 14, 1951:1). He also received dozens of letters and telegrams pleading for mercy for the condemned or demanding that the law be allowed to take its course. A petition with several thousand names was submitted requesting commutation. Messages were described as being ten to one in favor of commutation (Star-Bulletin, September 19, 1951:1). The Star-Bulletin received so many letters on both sides of the issue that it had to limit them in length (Star-Bulletin, September 19, 1951:8). The Advertiser refused to print any letters to the editor on the case once it had been taken up by left-wing lawyers (Hormann, 1952:9).

Nevertheless, after deliberating for a week, the governor decided not to commute the sentences of the condemned men. He decided that the trial had been fair and just and that there was no evidence that would justify commutation (Advertiser, September 20, 1951:1). The Advertiser (September 21, 1951:4) editorially applauded the governor's decision and the fact that he had, in the newspaper's view, withstood an organized campaign by a pressure group. Despite the governor's decision, letters favoring and opposing the execution continued to pour in.[159] The execution was set for September 22nd.

On the evening of September 21st defense attorney Bouslog petitioned the U.S. District Court in Honolulu for a writ of habeas corpus on the grounds that new evidence revealed that the confessions had indeed been given involuntarily. The federal judge denied the petition on the grounds that the petitioners had not exhausted their remedies in the territorial courts. He told them they must "go across the street" to those courts (Advertiser, September 22, 1951:1).

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[159] Curiously, one of the writers of a letter commending Governor Long for his decision to proceed with the executions was from former governor Lawrence M. Judd, who, it will be recalled, commuted the long prison sentences given to the haole murderers of Kahahawai in the Massie Case in 1932. It is not clear whether Judd's commendation to Long on his decision to let the law take its course in the cases of Majors and Palakiko is a repudiation of his own behavior in the Massie Case or a simple application of a double standard of justice. Judd's letter to Long, as well as many other letters and petitions, is in Long's files on the Majors-Palakiko case in Archives of Hawaii.

They followed his suggestion and argued the petition until the early hours of the morning before one of the territorial Supreme court justices. He denied the petition (39 Haw. 141) but issued a stay of execution pending appeal of his decision to the full court. This time Majors and Palakiko had escaped the gallows by four hours.

The territorial Supreme Court, while believing the petition properly denied by the single justice, because of the "gravity of the situation" decided to hear the arguments of the defense in "the lengthiest hearing in the history of this court." The hearing lasted 30 days and involved 65 witnesses. In its written decision, issued December 20, 1951, the justices concluded:

> Against their conviction Palakiko and Majors have made a devious and many-sided attack. Despite the insufficiency of petition and traverse, they have been afforded a full and fair hearing into every conceivable avenue of inquiry. But they have signally failed to show that their conviction is void. (39 Haw. 167)

However, Majors and Palakiko's "devious and many-sided attack" was not yet over. Their lawyers now appealed the territorial Supreme Court's denial of the writ of habeas corpus to the U.S. Ninth Circuit Court of Appeals. That court, while denying the propriety of relitigating the case through the device of collateral attack by means of habeas corpus, itself thoroughly reviewed all the substantive and procedural points raised by the defendants, ranging from the voluntariness of the confessions to the competence of the

defense counsel at trial. It affirmed the territorial Supreme Court's opinion in a decision issued on December 10, 1953 (Palakiko et al. v. Harper, Warden of Oahu Prison, 209 F. 2d. 75). The defense appealed this decision to the United States Supreme Court which declined to review the case (Star-Bulletin, April 26, 1954:1). Mrs. Bouslog vowed to keep on fighting by asking the court to reconsider its decision, by asking the governor for a commutation, or by mounting a new habeas corpus attack through the federal courts. Her petition for a rehearing was denied by the U.S. Supreme Court in May, but she again reiterated her intent to pursue the other two avenues open. A defense committee was circulating petitions asking the governor for a commutation of sentence (Advertiser, May 29, 1954:1). On August 14, 1954 more than six years after their conviction, Governor Samuel Wilder King commuted the sentences of Majors and Palakiko to life imprisonment. The Advertiser editorialized that "justice was thwarted" by the commutation. The territorial Board of Paroles and Pardons set the minimum prison terms for Majors and Palakiko at 50 years. Judge Carrick Buck, in whose court the case was tried in 1948, raised the minimums to 90 years (Star-Bulletin, January 1, 1955:21). With one-third reduction for good behavior, Majors and Palakiko could be released in the year 2008. But in 1962, at the recommendation of the Board of Paroles and Pardons, Democratic Governor John Burns, who had led the

political organization of Hawaii's Japanese, the revitalization of the Democratic Party, and the political overthrow of the haole Republican oligarchy that had ruled Hawaii until the mid-1950's, paroled Majors and Palakiko.

6.4.1 The Majors and Palakiko Case as Symbol

Having traced in some detail the complicated history of the case with some attention to the role of the major English-language newspapers in Honolulu, we should now examine in a more focused manner the meanings of the case at the symbolic level for various social groupings. Fortunately to assist in this endeavor we can draw upon two discussions by sociologist Bernhard Horman (1952, 1953) who was living in and studying the community of Honolulu at the time. Hormann's (1953:1) first observation about the Majors-Palakiko case was that

> Like other dramatic court cases in Hawaii's history, this case has become a symbol to various component population elements in Hawaii, and if we can succeed in uncovering the various overlapping and conflicting meanings which this case has assumed to various groups, we can thereby verify our picture of the social complexion of our community.

The other dramatic cases Hormann was referring to were the Fukunaga Case and the Massie Case.

Hormann (1952) first divides the population concerned with the Majors-Palakiko case into two groups: first, "individuals known for independence of judgment" (presumably haole), and second, those with "views more closely

identified with ethnic and interest groups." Among the former Hormann identifies two subgroups, those "showing a genuine concern with Communism in Hawaii" who focused on the exploitation of the case by Hawaii's left-wing elements and lawyers who emphasized that this was a case of differential justice in which members of the underprivileged class could not receive equal justice from a law enforcement and court system controlled by the bosses. People concerned with this issue defended the justice system and tended to believe justice should be allowed to take its course.

The other group of individuals known for independence of judgment favored commutation, and while disassociating themselves from the left-wing defense efforts, focused more on the difficult and under privileged personal background of Majors and Palakiko and the fact that they belonged to a group (Hawaiians) "still suffering from the too rapid transition of a folk people with a sacred order to an urban people with a secular way of life." (Hormann, 1952:4) Members of this group were also likely to be concerned about some aspects of the criminal justice system, particularly the treatment of juveniles.[160] But, Hormann says "they usually did not impugn the courts."

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[160] This consideration was relevant to Majors and Palakiko since they both had extensive juvenile records and had been incarcerated in the territorial industrial school.

Hormann says that the independent observer group also split over the issue of the degree of hysteria in the community at the time of the discovery of the crime and during the trial, some saying that community arousal was much less than it would have been on the Mainland and others pointing to the fact that two prior murders of Chinese peddlers did not receive nearly the attention of the Wilder murder.

Besides the "independent observer" group with its two factions Hormann describes the symbolic meanings for groups with ethnic and other interests. For Hawaiians, of course, the major element of meaning was the contrast between Majors and Palakiko, two underprivileged Hawaiian boys who (inadvertently?) killed an upperclass haole woman and were to be hung for it, and the treatment received in 1932 by the haole murderers of the Hawaiian boy, Kahahawai, whose sentence was commuted to one hour in the custody of the governor. What more proof was needed that a double standard of justice existed in Hawaii, one for the rich and white and one for the poor and brown? The leftist Honolulu Record (1951) encouraged this definition by publishing a pamphlet reviewing the Massie Case and comparing it to the treatment received by Majors and Palakiko.

The Chinese, too, were able to discern a double standard of justice operating. Their community was concerned about the handling of the two cases involving the murder of the Chinese peddlers, in which the attention given to solving

and doing justice in those cases was much less than that given the Wilder case.

Persons of Japanese ancestry likewise had an historical symbolic reference point. The Fukunaga case of 1928 in which a mentally unbalanced Japanese youth was hanged for the murder of an upperclass haole boy was still resented by many older Japanese. They regarded the Majors and Palakiko Case as following this precedent (Hormann, 1952:6).

In a concluding comment on the definitions of the situation held by the various ethnic groups Hormann speculated that the differing interpretations may have been a reflection of class. The lower class non-haoles tending to favor commutation of the sentence and the upper-class haoles tending to favor execution.

Beyond class and ethnicity, Hormann identified two groups with "special interests" who were active in the controversy. One was a group of ministers who petitioned the governor for commutation as a general expression against capital punishment. The other special interest group was the left-wing group speaking through the Honolulu Record and acting through the attorneys who took over the defense of Majors and Palakiko. They concentrated on the theme of dual justice and how the case revealed exploitative class relationships in Hawaii (Hormann, 1952:8).

6.4.2 Legal Action

The nature of the demands for legal change arising out of the Majors and Palakiko case are rather different than those we have encountered before, largely of the "stronger laws" type. In general most haoles were well satisfied with the progress of the case in its early stages. The police acted quickly in apprehending the murderers and in gathering persuasive evidence against them. There was some initial trouble with the acting prosecutor, but he was pressured to charge murder in the first degree and then replaced. Prison work gangs came to be regarded as dangerous and they were abolished. The newspapers regarded the Wilder murder as the capstone of a crime wave and committees from the Chamber of Commerce and the bar association were established to investigate conditions. But not much came of them. The courts appeared to work well; a conviction was secured at trial and upheld on appeal. And it would have been difficult to demand "stronger laws," since the death penalty was already provided as mandatory on conviction of first degree murder and optional on conviction of rape.

But many non-haoles were not satisifed. Their definition of the situation was that there existed a system of unequal justice, one type of justice for haoles and one type for everyone else. The major symbolic representation of this unequal justice was capital punishment. And there is some evidence that this sanction had in fact been unequally

administered. There had been 46 hangings at Oahu Prison since the annexation of the Islands as a territory. The ethnic distribution of the executed is as follows:

American (Caucasian)	1
Hawaiian	3
Puerto Rican	3
Japanese	9
Korean	6
Filipino	24
TOTAL	46

Now in former times, such dissatisfaction by non-haoles would have only been expressed as lingering repressed resentment. The power to effect legal change had heretofore been lacking. But as mentioned before, just at the time that the Majors-Palakiko case was dragging on, 1948 to 1954, the Japanese of Hawaii were positioning themselves to seize political power. And when they did, in the election of 1954, the abolition of capital punishment was one of the first matters in their agenda. A brief examination of the legislative sessions of 1951, 1953, 1955, and 1957 with respect to the issue of capital punisment is revealing.

In the 1951 session, a session which was concluded before the mid-September scheduled execution dates and the mobilization of opinion about the planned executions, no bill to abolish capital punishment was introduced. In the 1953 session, after the possible execution of Majors and Palakiko and after capital punishment in general had been politicized, two bills (House Bill No. 410 and House Bill No. 532, 1953) were introduced in the territorial House of

Representatives by Democrats. Since both the House and the Senate were still under Republican control the bills were quickly "placed on file" at the recommendation of the House Judiciary Committee (House Standing Committee Report No. 971, 1953).

During the 1955 session, after the taking of a majority of both House and Senate seats by the Democrats in the 1954 election, two bills abolishing capital punishment were introduced in the House by Democrats (House Bill 339 and House Bill 404, 1955). House Bill 339 passed the House and went to the Senate where it was amended at the initiative of Republicans[161] from an outright abolition of the death penalty for all crimes, to abolition of the death penalty for all crimes other than first degree murder, with the provision that on a conviction for first degree murder the invocation of the death penalty or a sentence of life imprisonment would be at the discretion of the jury. The bill as amended passed the Senate and the House, and became law (Act 239, 1955).

In the Senate, separate bills were introduced by a Democrat to abolish the death penalty for murder (Senate Bill 379, 1955), for rape (Senate Bill 378, 1955), and for arson (Senate Bill 380, 1955). The bills did not pass out of the Judiciary committee.

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[161] Republican senators Ben Dillingham and Wilfred Tsukiyama led the effort to defeat the bill and finally to compromise by amending it.

So, although the Democrats did not successfully get the death penalty completely abolished during the first session they had power, they did knock it out for specific crimes, including rape, other than first degree murder and made it discretionary for murder.

At the 1957 session the Democrats tried again for a complete abolition of the death penalty. House Bill 706 (1957) was introduced by the Democrats and passed the House with a vote largely along partisan lines. The bill also passed the Senate with a similar partisan profile of votes and was signed into law as Act 282 (1957).

Thus, a clear link can be seen between the abolition of the death penalty when the Democrats came to power and the symbolic environment of the haole and non-haole groups. Although the courts and political system were soon to be no longer dominated by haoles, this most obnoxious reminder of the double standard of justice, the sentiments toward which were mobilized and focused by the Majors and Palakiko Case, was one of the first things on the Democrats' agenda for change.

6.5 HUNTING COMMUNISTS: A FUNCTIONAL SUBSTITUTE FOR HUNTING RAPISTS?

It was proposed in Chapter 5 that the social changes occurring in Honolulu in the early decades of the twentieth century were an important underlying factor leading to periodic expressions by some members of the haole ethnic

group of an ethnically and class based moral superiority such that nonhaoles were portrayed as a sexually dangerous class. And it was proposed in the beginning of this chapter that if the above thesis is correct it may be problematic to account for the absence of episcdes of great concern about sex crime from the end of World War II until the last year of the 1950's. Certainly the city of Honolulu was growing and its ethnic composition was changing, although not quite as rapidly as in the decades 1910 to 1930. And certainly there were challenges to the ethnic stratification system. So, why did not a segment of the haole population, and the press, create a sex crime wave cut of one or more of the many rapes that ocurred during this period?

Although there is no way of proving it in any rigorous sense in a case study such as this, I will offer as an explanation to this apparent anomaly a hypothesis that is at least plausible and which offers a somewhat satisfying explanation. The hypothesis is that during the late 1940's and most of the 1950's the haoles of Honolulu who were most prone to the indirect collective expressions of anxiety about the stability cf the ethnic stratification system (sex crime waves), created a functional substitute for sex crime waves, a substitute which more closely corresponded to the nature of the challenge being made by the nonhaoles, which lent itself better to the mobilization of the resources of the external community on the Mainland for assistance, and

which more directly and efficaciously opposed the defined threat.

This hypothesis has a theoretical and several observational bases of support: first, the notion that different social phenomena may perform the same function for a social grouping has a long history in sociology back to Durkheim; second, the hypothesis is empirically supported by the temporally inverse relationship between concern about sex crimes and concern about communism. While concern for the latter was high, there were no episodes of sex crime waves which animated the community. But with the decline in concern about communism in the late 1950's, concern about sex crime reappeared. Third, the social segment that had been in the past most concerned about sex crimes, middle and upper-middle class haoles, along with selected members of the haole elite, appear to be the social segment most concerned about communists. Similarly, the English language newspapers played key roles in publicizing events, mobilizing sentiment, and manipulating language and symbols, both in regard to sex crime waves and the threat of communism.

As was mentioned in the early sections of this chapter, the late 1940's and early 1950's brought a period of intense political and economic organization by Hawaii's Japanese and Chinese. Unionism grew rapidly after the war, particularly the ILWU. Labor, along with the newly educated nisei, who

had distinguished themselves during the war, took over the nearly moribund Democratic party and used it as a vehicle to seize political power.[162] Some of the participants in this process, particularly some associated with the ILWU were communists, who had developed their views in the 1930's. When the existing elite was confronted with direct challenges to established political and economic arrangements, these communists, and others who could be so labeled, became convenient symbols of a red menace that was seen to be threatening all of the United States, but particularly Hawaii, in the form of political, labor, and racial agitation. Although the communists comprised only one small faction of the new democratic party, others feared guilt by association, and eventually the non-communists themselves purged the party of communists in order to prevent the issue from destroying the credibility of the total effort at changing the system.

Anti-communist efforts took many forms. They may be categorized for convenience as official (acts by the government or government officials) and unofficial (acts by private persons or groups).

Among the official acts was the notification in 1947 of Hawaii's governor by Army Intelligence that the ILWU was infested with communists. This led to a campaign by the governor to rid the territory of these dangerous people.

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[162] The following brief discussion draws in part on Daws (1968) and Fuchs (1961).

Some of the first targets of the campaign were two alleged communists, John and Aiko Reinecke, who were public school teachers. They were dismissed from their jobs in 1948. In 1949 Senator Hugh Butler of the United States Senate Committee on Interior and Insular affairs conducted an investigation of communism in Hawaii and issued an alarming report. In response, the Republican dominated territorial legislature established a subversive activities commission to investigate and monitor communist activities in the territory. In 1950 the U.S. House Committee on Un-American Activities held hearings in Honolulu and cited for contempt of Congress 39 individuals who refused to answer questions. In 1951 seven residents of Hawaii, including Jack Hall, the leader of the ILWU in Hawaii, John Reinecke, the dismissed school teacher, and Koji Ariyoshi, the editor of the leftist Honolulu Record (which was championing Majors and Palakiko), were indicted for violation of the "Smith Act." They were tried before a jury in Honolulu in 1953 and convicted. In 1958 their conviction was overturned by the United States Circuit Court of Appeals, Ninth Circuit. Meanwhile, Hawaii had another Congressional investigator interested in communism, Senator James Eastland of Mississippi.

In addition to this campaign of official red hunting, there were several unofficial organized groups that concerned themselves with communism and subversive activities, one of which went on to play a major role in the sex crime wave that began in 1959.

Most visible on the anti-communist scene was IMUA (forward), a large, mostly haole group organized several years after the war to fight communism. It published a tabloid newsletter which extolled the virtues of loyalty and patriotism and which warned of ethnic and labor agitation as part of the red menace, a menace that existed internationally and nationally, as well as in Hawaii. Among those active in the group was Mrs. Walter Dillingham, and Dillingham himself was a financial backer of the group (Fuchs, 1961:372).[163] Initially the group had wide support among influential hacle businessmen and military officers, but its support dwindled in the late 1950's due to the hysteria of its approach (Fuchs, 1961:367). As Fuchs (1961:373) says, it lumped "radicals, liberals, labor leaders, and Communists all together." The group further alienated itself eventually by continuing to pound on the issue of communists in Hawaii after economic and ethnic accomodations had been made and after the issue of communism in Hawaii had begun to interfere with the growing campaign in the late 1950's for statehood. By 1958, after the reversal of the convictions for violation of the Smith Act, the people of Hawaii had become bored with the issue of communism. Labor and industry had largely accomodated one another and no particular benefit was being gained by

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[163] Walter Dillingham, it should be recalled, was a principal figure in the events of the Massie Case in 1931-32 on the side of the Navy and the haole elite.

continuing to flog the issue (Fuchs, 1961:371). IMUA lost most of its influence, although it did persist as an organization for several more years.

Another group that emerged in the late 1940's with communism on its agenda was "We, the Women of Hawaii," an all woman, middle and upper middle-class, mostly haole group that organized in 1946 in opposition to a threatened public utilities strike. During the 1950's it engaged in a variety of social and charitable activities, but was most committed to fighting subversion. According to a statement by its president in 1966, "We're just old fashioned Americans. We try to live and let live. We are against any subversive activities against the United States Government or any disrespect toward the United States Government." (Star-Bulletin, April 21, 1966:F1). The president in 1961 said, "We try to see that nobody who has anything to do with communism participates actively in the government." And the news reporter writing the story commented, "The members rise as one body against the danger of economic or government control by unionists with more than a pinkish tinge." (Star-Bulletin, November 8, 1961:15). As we will see below, after the heyday of anti-communism ended, We, the Women of Hawaii turned much of its attention to rape.

We see, then, a variety of official and unofficial activities during the late 1940's and the 1950's tending to discredit those agitating for social change. These

anti-communist, anti-labor efforts were able to invoke fundamental, widely held American values of free-enterprise, patriotism, loyalty, liberty, and national security. The resources of the external political community, the federal government, were also drawn upon to assist the local effort. To the extent that these efforts were broadly aimed at the non-haole underclass, they were much more directly addressed to the nature of the threat, loss of economic and political power, than would have been any campaign to neutralize the efforts of the nonhacles by portraying them as constituting a criminally and sexually dangerous group. We see here a much more specific response to a much more specific challenge than we saw in the early decades of the twentieth century. But the processes are sufficiently similar that the contention that there was a functional similarity to the campaigns of both eras is a reasonable one.

6.6 THE 1959 EPISODE

Communism as an issue having mostly died out, in mid-1959 the attention of most of the people of the territory of Hawaii was focused on the process of Hawaii's admission to the U.S. as a state. In March of that year both the U.S. House and Senate voted for admission and a plebiscite was scheduled for June 27th for the citizens of Hawaii to ratify the congesssional action. But a few days before the vcte, which did overwhelmingly apprcve of statehood, the people of

Honolulu were again confronted with an ugly, attention-grabbing crime, which again put rape on the front pages of the newspapers, and which set off a "sex crime wave" which lasted for several years.

On June 23, 1959 the nude body of a twelve year-old Japanese girl was discovered on Sand Island, an isolated industrial area, a short distance from downtown Honolulu. It was determined that the girl had been raped and strangled. The discovery of the body ended an intense search and investigation that had been conducted since the girl's disappearance several days before. Within hours after the discovery of the body police arrested John Carvalho, a thirty year-old ex-convict who had previously been incarcerated in Oahu Prison, most recently on a conviction for indecent assault on an eight year-old girl. Carvalho had been released from prison on July 1, 1957 as a good risk, and his parole had expired the following September. Carvalho confessed to the rape and murder almost immediately upon his apprehension.

Of course, the case received massive publicity. With a long lead time between the discovery of the body on the afternoon of June 23rd and its first edition on the morning of the 24th, the Advertiser was able to give the case concentrated coverage. Its entire front page on the morning of the 24th was devoted to photographs of the scene and articles about various aspects of the case. Parts of the inside pages also were devoted to the case.

Given the facts of the case it was not difficult to predict how the issues would be defined by the community in the next several weeks; capital punishment, prison and parole practices, and the role of psychiatry in the handling of sex offenses.

The capital punishment issue was raised immediately when the Advertiser (June 25, 1959:A1) published comments by the father of the victim advocating restoration of the death penalty. Accompanying that article the Advertiser (June 25, 1959:A4) published comments by a minister and by State Representative Spark Matsunaga, who opposed restoration, and by state senators Wilfred Tsukiyama and Hebden Porteus, Republicans, who had strongly opposed the abolition of the death penalty in 1957 and favored its restoration now. The next day Democratic candidate for the state House, Frank Loo, weighed in with his opinion in favor of capital punishment for rape and murder, and promised, if elected, to introduce such a bill. He also wanted an investigation into the question of why a "known sex maniac" had been set loose in the community (Advertiser, June 26, 1959:A8). Of course, these statements by prominent politicians, solicited by the newspapers, touched off a lively debate among writers of letters to the editors of the newspapers about capital punishment. On the one side were those favoring execution of rapists and/or murderers[164] and on the other were those

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[164] See, for example, the letters by E. Makishima (Advertiser, June 28, 1959:B8), "A Portuguese Mother"

who subscribed to the psychiatric illness and rehabilitative models.[165]

Since Carvalho had recently been released from prison as a good security risk, prison and parole practices received scrutiny. Questions were raised about how officials of the territorial parole board could have released Carvalho as a good security risk, only to have him go out and rape and murder a young girl. Officials of the parole board, too, took refuge in psychiatry. Executive secretary Arthur Hoke explained that the board had been "operating in the dark" when it released Carvalho in 1957 and would continue to do so until it had the full-time services of a psychiatrist. Only then, Hoke contended, could "unsafe risks be ferreted out and treated." Hoke said that based on Carvalho's record in prison he did not appear "a bit mentally unbalanced." But, Hoke said, "I'd much rather let a psychiatrist make the decision." (Advertiser, June 25, 1959:1)

The mental health establishment in Honolulu agreed with Hoke that psychiatry was the best approach to individuals like Carvalho. Dr. E.W. Haertig, psychiatrist and former director of the Mental Health Division, proposed that

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(Advertiser, July 2, 1959:B2), George F. Nellist (Advertiser, July 5, 1959:A14), Charles K. Thornton (Advertiser, July 9, 1959:A14), and "E.D.F." (Advertiser, July 12, 1959:A18).

[165] See, for example, letters by Dennis E. McKiernan (Advertiser, June 30, 1959:A8), "C.F." (Advertiser, July 2, 1959:B2), Lois Coombs Hayes (Advertiser, July 2, 1959:B2), and "A Parent" (Advertiser, July 8, 1959:A14).

Carvalho may have been helped if he had been treated when he first came to police attention at age fifteen. The present (at that time) director of the Mental Health Division, psychiatrist W.Y.T. Wong, agreed on the necessity of early treatment and cautioned that if examination revealed Carvalho to be a sexual psychopath, there was little hope of rehabilitation at this point. He proposed that molesters of young children, like Carvalho, are individuals who are personally inadequate, who feel sexually inferior, and are fearful of humiliation by adult women. Approaches to children offered less chance of humiliation. Psychiatrist W.I. Cody, clinical director of the Territorial Hospital, added that Carvalho exhibited the behavior profile of many rapists. According to Cody, rapists often have a history of breaking and entering homes. The basic drives, of rape and burglary, were the same in Cody's view.

The psychiatrists opposed "emasculation" as the solution to rape, pointing out that the problem is in the brain. They agreed that sex criminals belong in hospitals where they can be helped. But they noted that the public urge to punish is very strong (Star-Bulletin, June 24, 1959:49).

Psychiatrists were not the only advocates of the mental illness model of rapists. Several early letters to the editors of the newspapers mostly written in response to demands for capital punishment, reveal acceptance of these images in the lay culture. For example, Dennis McKiernan

wrote that he was opposed to punishment for the mentally retarded and emotionally disturbed. Carvalho should have been treated after his first offense. McKiernan said, "Criminals are not evil beings possessed by the devil, but mentally and emotionally disrupted people in dire need of help." (Advertiser, June 30, 1959:A14)

Lois Hayes noted with distress the "mass hysteria" over the murder of the young girl and warned against the death penalty.

> After all we must realize that this man was overwhelmed by unholy desire; he did not willingly offend; he is not proud of his deed.
>
> For us to call for the death penalty, for revision of the parole system, etc. is not the answer. We are not dealing with a criminal in the strict sense of the word but rather with a criminally insane person, one who is not responsible for his deeds. The answer lies in a change in our method of confinement.
>
> Prison is not the place for the mentally deranged. They should be committed to mental institutions for their terms. (Advertiser, July 2, 1959:B2)

The psychiatric image also found some adherents in the judiciary. When Circuit Court Judge William Fairbanks sentenced a man to six months in jail for molesting a young girl, his seventh offense in the past fourteen years, Fairbanks commented that jail was not the answer. What was needed in such cases was psychiatric treatment. He suggested that Hawaii build a hospital for sexual psychopaths or work

out an agreement with an appropriate Mainland institution to take such cases (Advertiser, December 1, 1959:1). The Advertiser, in a break with its historical hardline approach to sex crimes, editorially agreed with the judge. It contended, following the judge, that the offender would emerge from jail unchanged. It pointed out that

> Hawaii has *no* rational, organized system for dealing with sex offenders. There's no provision for restraining them, giving them preventative treatment. They serve their time for offenses, then go free often to offend again. (Advertiser, December 3, 1959:32)

The Advertiser contended that Hawaii could not afford a special institution for sex offenders, but that California had such an institution, with good results, and that the state legislature should authorize Hawaii to join the Western States Prison Compact, and that the state should contract with California to treat Island sex offenders. The Advertiser (December 5, 1959:B2) reiterated its recommendation again two days later.

But, of course, there was another point of view that was expressed in response to these soft-hearted proposals. George Nellist wrote to the editor of the Advertiser that

> It is sickening and revolting to a realist to hear and read these mawkish protests of the anti-capital punishers against the legal execution of such beasts as the one who murdered little Joanne.
>
> * * *
>
> I agree that sex maniacs should be 'put away' but not in an asylum, in an incinerator ash pile. No medical or psychiatric treatment will serve the

> purpose in such cases. The common alibis, mentally disturbed, mentally maladjusted, and under privileged' etc. make me sick. (Advertiser, July 5, 1959:A14)

While these expressions were filling the pages of the newspapers and the columns of "Letters to the Editor," another extraordinary rape was reported on July 9th. This involved the abduction and rape by a gang of seven young local men of a haole University of Hawaii coed visiting from Iowa who had been sitting on a popular Honolulu beach one evening with a male companion. Her companion was beaten and she was taken to another location where she was raped. (Star-Bulletin, July 9, 1959:1) (Advertiser, July 10, 1959:1).[166]

Moving quickly, the governor, on July 15th, appointed a seven man, one woman committee to investigate the recent "rash" of sex crimes and to recommend remedies. The formal charge of the committee was to

1. Review methods of treating and paroling sex offenders.
2. Determine the scope of sex crimes in the state.
3. Survey the handling of sex criminals within state penal institutions.
4. Gather and compare data on the programs of other states for dealing with the sex crime

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[166] This case is State vs. David Hashimoto, George M. Tanisue, Florendo Guillermo, Leo Bajo, Aurelio Barro, Alfred L. Canianes, and Henry A. Alejandro, First Circuit criminal case No. 30865, Hawaii Supreme Court No. 4179. The opinion of the Supreme Court on the defendants' exceptions is at 47 Haw. 185.

with the sex crime problem. (Advertiser, July 14, 1959:A7)

The composition of the committee was also indicative of the definition of the problem emerging out of the particular characteristics of the Carvalho case.[167] The most obvious aspect of the committee's composition was that it was predominantly male, with only one woman. It was also predominantly composed of professionals, particularly psychiatrists. No ministers, newspaper editors, representatives of the Chamber of Commerce, or members of ladies' societies were on this committee, a marked contrast to the committee of 1912-13, and indicative of the trend toward greater reliance on professional authority to define situations, also apparent in the Governor's Advisory Committee on Crime of 1930. The other notable characteristic of the committee is the representation of mental health professionals on it. Both the chairman and the vice chairman were psychiatrists, and there were two other

[167] The members of the Governor's Committee on Sex Offenders were: E.W. Haertig, M.D., psychiatrist, Chairman; Y.T. Wong, M.D., Director, Division of Mental Health, Vice-chairman; Jess H. Walters, Legislative Assistant to the Governor, Recorder; Willard V. Bolling, Deputy Warden, Hawaii State Prison System; Bert T. Kobayashi, President, Bar Association; Ferris F. Laune, Ph.D., Chairman, Board of Paroles and Pardons; Pershing S. Lo, M.D., psychiatrist; Lt. Roland D. Sagum, Juvenile Crime Prevention Division, Honolulu Police Department; Robert S. Spencer, M.D., Medical Director, Territorial Hospital (substitute, Wiliam J.T. Cody, M.D., Clinical Director); Richard S. Takasaki, Chief Budget Examiner, Bureau of the Budget (substitute: Michael A. Meriwether, Budget Analyst); Mrs. Shizue M. Yoshina, President, Hawaii Congress of Parents and Teachers.

psychiatrists (Spencer and Lo) and a social worker (Laune).

As the committee was deliberating toward its November, 1959 report, there was no absence of grist for the sex crime wave mill. The newspapers carried numerous articles about reported rapes, rape attempts, and child molestations, as well as reports on the cases as they passed through the criminal justice system.

Most notable of these reports was an article on September 26, 1959 of an attack in Hilo of a seventeen year-old local girl by a group of seven local boys ranging in age from sixteen to eighteen years old,[168] a report on October 5th of a attack on a haole housewife by four local men on Diamondhead Beach,[169] and a report on October 23rd of the indictment for rape of two local men for the rape of a young, haole, polio-crippled nurse.[170]

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[168] The initial report of this case in Honolulu was in the Star-Bulletin (September 26, 1959:2). It received extensive publicity throughout the next several years as it progressed through the system, including going up to the state Supreme Court (44 Haw. 455).

[169] This case, State vs. John F. Gager, Douglas B. Histo, Leroy S. Oliveira, and Andrew Fuchs, First Circuit Criminal Case No. 31072, was reported in the Advertiser (October 9, 1959:1) and extensively thereafter. The conviction of Histo and Gager of attempted rape was appealed to the state Supreme court and is reported at 45 Haw. 478.

[170] This case, State vs. Fortunato Cansana and Robert J. Pence, First Circuit Criminal Case No. 31112, was reported in the Advertiser (October 23, 1959:1) and extensively thereafter. The defendants were convicted by a jury of assault and battery.

The report of the Governor's Committee on Sex Offenders was completed in November of 1959 and was made public in early December. The committee reported that it had been handicapped in its work by the fact that the attorney general's office and the Legislative Reference Bureau were completely occupied with the transition to statehood and were unable to assist the committee. The committee presented its report as a "preliminary survey" of the topics it had been assigned. It, therefore, only presented data on the subject and limited its recommendations to improvements in existing services. It did not recommend major changes in legislation, practices, or programs. Its most forceful recommendation was a cautionary one. According to the committee:

> One conclusion above all others appears to be inescapable. Impetuous legislation is likely to be expensive and of dubious value. The well-intentioned ineffectuality of the "Sexual-Psychopath" laws in many states is fully attested in numerous references in the bibliography. (Governor's Committee on Sex Offenders to Governor Quinn, November 10, 1959)

Despite the strong representation of the psychiatric profession on the committee, the report was modest in its claims for the ability of psychiatry to address the situation as it was defined by the members of the community demanding action. Although the committee rather clearly regarded sex offenders and their offenses as largely a mental health problem, it noted that it was difficult "to make out a smoothly running case" for this perspective

because the psychiatric schema does not easily categorize sex offenders. They usually know right from wrong and "do not fall into any well-defined neurotic classification." The legal system by its nature cannot well deal with the inner conditions thought, in the psychiatric model, to underly sex offenses. (Governor's Committee on Sex Offenders, 1959:2)

The committee did claim for psychiatry the ability to help a "fair percentage" of sex offenders. It contended that "another fair percentage" could be rehabilitated by prison, but that a "small percentage" could not be helped by present knowledge. The committee also pointed out that psychiatry could not predict dangerousness, nor did it have techniques for the prevention of sex offenses. In general, the committee recommended that the best approach to the problem of sex offenses was to view them as "caused by diverse constitutional, psychological, and social forces at work in the life of the person — the bio-psycho-social approach." It presented a seven category classification scheme which it claimed every sex offender would fit into, ranging from "the obviously mentally ill (psychotic)" to the "situational criminals." Each type, the committee suggested, required different treatment -- some psychiatric, some correctional, and some medical (Governor's Committee on Sex Offenders, 1959:2-4).

In summary, the committee found as follows: Despite an increase in convictions for all felonies during the period

January, 1952 through June 30, 1959, there had been no definite increase in convictions for sexual felonies.[171] But, the committee said, such data on convictions do not reveal the true frequency of sex crimes, and adequate data were generally lacking. Therefore, the committee was unable to draw reliable conclusions concerning the magnitude of the sex offense problem.

Recidivism for sex offenders was found to be very low, but it was found that sex offenders often had prior records of non-sexual offenses.[172]

The committee also concluded that many states had passed ineffective legislation because of "aroused public sentiment." Many states had also done extensive studies of the sex offense problem from many different perspectives. In Hawaii the committee found a general deficiency of mental health services to assist agencies with sex offenders (Governor's Advisory Committee on Crime, 1959:7-8).

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[171] It is unclear how the committee arrived at this conclusion since the statistical analyses presented in Appendix A of the report present data on number of offenses and number of arrests for each year for rape, according to the FBI's Uniform Crime Reports classification. To complicate matters further, in 1957 the FBI changed its classification so that "statutory rape" was no longer included as "rape" among the Part I offenses.

[172] This finding was based on an analysis "of all major sex offenders who were released from Oahu Prison in the five-year period ending June 30, 1957," not including those imprisoned for statutory rape, homosexuality, and indecent exposure. Of the 33 men released during this period, only one had been imprisoned for another sex offense (attempted rape). See Digest No. 3 of the report.

From its findings of fact, the committee arrived at several general conclusions: that provable sexual offenses had not increased in the five years prior to the rape-murder that had initiated this episode; that the parole board had been careful in granting paroles to sex offenders and that recidivism was low; and that there was a need for a "substantial increase in mental health services" to law enforcement agencies. The committee was unable to conclude whether sex offenders constitute a special class or type of individual that required special legislation or programs (Governor's Committee on Sex Offenders, 1959:8-9).

Based on its findings of fact and conclusions, the commitee made several recommendations. The major recommendation was for the establishment of a mental health team to assist the courts and the prison to assess such factors as legal competence and responsibility of defendants, appropriate disposition of defendants, and appropriatness of parole. In addition, such a team would train staff in the understanding and treatment of mental and emotional problems.

Secondarily, the committee recommended better collection of statistical data on sex offenses and the undertaking of studies on methods of prevention of first sex offenses through community mental hygiene. It also recommended against major changes in legislation and programs for sex offenders until more study had been completed (Governor's Committee on Sex Offenders, 1959:9-10).

The report of the Governor's Committee appears to have been well received by those most interested in the sex offense problem. The Advertiser (December 4, 1959:15) reported the committee's findings and editorially commented on them (December 5, 1959:B2). It agreed with the general finding of the committee that there were no simple solutions to the problem and that hasty legislation under the pressure of inflamed public opinion was to be avoided. The newspaper commented critically that the committee did not consider the proposal to join the Western States Prison Compact through which Hawaii could send selected sex offenders to California for treatment. The Advertiser recommended that the legislature should approve joining the compact and should attend to the committee's recommendations.

Now, judging from the pattern of past episodes and from the sequence of the model being employed to guide this analysis, it would be expected that this episode was very nearly complete. An event took place which was interpreted as a crisis by powerful segments of the community. Various indications were made and symbolic representations made to interpret the event for self and others. Like past episodes, a split developed between some members of the community who were oriented toward punishment and members who subscribed to the now culturally powerful psychiatric model of deviance -- what they believed to be the enlightened, scientific approach to the situation. To

remedy the ambiguities arising from the competing emerging definitions of the situation, the governor appointed a professionally authoritative committee, a special definer of the situation, to discover the truth. While generally partial to the psychiatric model of deviance, the members of the committee were modest in their claims for psychiatry's ability to provide solutions to the problem of sex offenses. They did recommend improved mental health services for law enforcement agencies. Most emphatically, the committee found no particular crisis with regard to dramatically increasing numbers of sex offenses, and, drawing on Mainland experience, warned against hasty legislation.

Following the model we would now expect that the episode would fade away, possibly with some legislative followup to the committee's recommendations at the next legislative session. But this was not to be. One of the rape cases that had begun while the Governor's Committee was deliberating, State vs. Fortunato Cansana and Robert J. Pence, came to trial in March of 1960. The trial received some newspaper attention, in part because the victim had characteristics which elicited sympathy, being a young nurse partially crippled by polio, and the defendants were two ex-convicts on parole. The newspapers and some members of the community were shocked when the jury of eleven women and one man acquitted the defendants of rape and convicted them only of assault and battery. The victim had testified that she had

been dragged off the street and forced to submit at knife point. The defense successfully contended, however, that while the nurse may have been an unwilling victim at first, she eventually agreed to have sexual intercourse, or at least did not sufficiently resist to meet the legal requirement for the act to be rape. Although the victim testified that she had been threatened with a knife, the knife was not introduced as evidence. Three jurors who were willing to discuss publicly their decision, cited the lack of the knife in evidence and their belief that the woman did not sufficiently resist or take advantage of opportunities for escape or cry for help, as justification for their decision (Advertiser, March 26, 1960:1).

Reaction to this new crisis began immediately. One of the jurors, whose names had been published in a newspaper, received a threatening phone call, as did another woman who had the same name as one of the jurors (Advertiser, March 26, 1960:1). Letters to the editors of the newspapers began to come in that criticized the degradation and humiliation of the complainant on the witness stand by the defense attorney and the behavior of the jury in acquitting the defendants.[173]

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[173] See, for example letters by Donna G. Reeves (Advertiser, March 25, 1960:B2), "Buster Caveman" (Advertiser, March 26, 1960:A14), "Another Woman" (Advertiser, March 27, 1960:A16), Gerri Madden, Patrick Nolan, J. Ng, "W.M," and "Disgusted Teenager" (Advertiser, March 28, 1960:A14), and Mrs. Nodi Lum, "Pearl City Reader," "Buster Caveman, Jr.," "Local Citizen," and "Wailuan" (Advertiser, March 29, 1960:B1).

The Advertiser (March 27, 1960:16) editorially questionned the resistance standard that had been applied in the case and which had been part of Hawaii's case law since 1919 when, in Ter. v Nishi (24 Haw. 667) the territorial Supreme Court laid down a strict rule of resistance that had influenced Hawaii's rape prosecutions ever since. According to that decision:

> In the absence of threats, or other things which make resistance impossible, there must be not only an entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist penetration and a persistance in such resistance until the offense is consummated. The term 'rape' implies not only force and violence on the part of the man, but resistance on the part of the woman. There must be force, actual or constructive, and resistance. In the absence of the proof of resistance consent is presumed. Mere general statements of prosecutrix that she resisted are not sufficient, but the specific acts of resistence must be shown. The dissent and repulsion must be shown beyond a reasonable doubt.[174] (Ter. v. Nishi 24 Haw. 677)

The Advertiser asked, "is the definition right?" Might not a woman faced with rape be "frozen by fear" so as to be unable to resist? Might not a woman fearing murder, decide prudence dictated submission? "Must a woman be killed or half-killed before rape is rape?"

Local lawmakers moved quickly on the emerging issue of the adequacy of the rape statutes and rape case law. On March 28, 1960, only four days after the verdict, ten Republicans in the House of Representatives introduced a

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[174] This entire statement is a quote by the court from 33 Cyclopedia of Law and Procedure p. 1427.

resolution (House Concurrent Resolution No. 42, 1960 Session) citing the "extreme degree of public interest in the definition of the crime of rape," and directing the attorney general and the various county prosecutors to "study the applicable statutes and decisions relating to the definition of the crime of rape, particularly in reference to the type and degree of resistance required of the victim ...." If the officials determined that the definition of rape should be changed, they were to submit recommendations to the 1961 session of the legislature.

Two days later, on March 30th, Representative Eureka Forbes, a Republican, joined with four other Republicans and four Democrats to introduce a bill (House Bill No. 654, 1960) as an urgency measure to modify the rape statute to address the perceived problem with the resistance standard. It would have created the crime of second degree rape in cases where submission was gained by threats (Advertiser, March 30, 1960:4).

However, these two legislative efforts were short lived. Democratic Representative Robert W.B. Chang, a lawyer who was chariman of the House Judiciary Committee, killed the resolution and the bill. He complained that there had not been adequate time to study the resolution and the bill, and complained that the resolution implied that the existing rape law was inadequate. He said he was not ready to make such an assumption without further study (Advertiser, April

7, 1960:7). Representative Forbes vowed she would try again next year with her bill (Advertiser, April 5, 1960:A5).

Meanwhile, in the Senate, a similar resolution (Senate Resolution No. 44, 1960) to that which failed in the House was introduced by twelve Republicans and four Democrats. It passed the same day.

A few days later, after the demise of legislative proposals at the hands of Judiciary Chairman Chang, the episode moved into a new phase. A mass meeting was called by We, the Women of Hawaii, of recent communist hunting fame, to demand explanations and protection. It was attended by 150 women "Many of them well-established, long-time residents." (Advertiser, April 19, 1960:A5) Representative Chang spoke to the group attacking the Star-Bulletin for what he regarded as a partisan attack on the Democratically controlled House for dumping the rape measures, while not criticizing the Senate which had been inactive on the issue. Part of the Star-Bulletin's motive for publicizing rape cases, according to Chang, was to sell newspapers. He said he would not support any bill or resolution that implied that the present rape law was inadequate, but that he might support a resolution that asked if the administration of the rape law was adequate. He suggested that the women leave the investigation of such matters to experts. He noted that at a hearing he held on the resolutions and the bill, City Prosecutor John Peters

had appeared and testified that the current rape law was adequate. Chang alsc defended the jury's decision in the case that had stimulated the new crisis. Chang was indignantly booed by "matrons in pearl chokers" at the meeting.[175]

The results of the meeting were a series of resolutions asking the governor to extend the legislative session so that there would be sufficient time to change the rape law, asking the legislature to pass resolutions that would ensure study of the present rape law, and asking for the hiring of 50 more policemen.

The women's mass meeting drew immediate results. The Advertiser (April 19, 1960:B2) editorialized that a rape law study was "a must." It cited the "growing alarm in the Islands over the current wave of rape cases and attacks on women." The Star-Bulletin (April 19, 1960:8) defended its coverage of the sex crime wave denying any partisan motive in criticizing the Democratically controlled House and denying that sex crime publicity was an effort to sell newspapers. It stated that it only published crime news as a public duty and gave sex crimes recent prominence "not to sell newspapers but to give this community the stark realization that such crimes are not only possible but are being committed here with recent apalling frequency." It

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[175] Reports of the meeting are in the Star-Bulletin (April 19, 1960:2) and Advertiser (April 19, 1960:A5). The text of Chang's speech is in the Star-Bulletin (April 19, 1960:9).

further said:

> This newspaper has felt -- we still feel -- that only by giving these horrid crimes realistic news treatment can the urgent necessity of swift and salutary action by all law authorities concerned - the Governor's office, Legislature, police, the courts, the penal institutions, -- be made a matter of first and inescapable responsibility. (Star-Bulletin, April 19, 1960:8)

Paradoxically, the same day that the Star-Bulletin published this editorial, it also published a small article reporting that despite the "hue and cry" about increasing attacks on women, the records of the police department showed no increase in rape cases. In 1958, it reported, there were eighteen confirmed reports of rape in Honolulu; in 1959 there were the same number. And in the first three months of 1960 there were only two confirmed reports.

The legislature, too, got into the act. Only hours after the women's meeting adjourned, the Senate unanimously passed a resolution asking for expert study of the rape law with particular focus on the amount and type of resistance that must be required of the victim (Advertiser, April 19, 1960:1). The House followed with two similar resolutions (Star-Bulletin, April 21, 1960:8).

The Star Bulletin (April 21, 1960:8) published contrasting opinions by law enforcement officials on the need for reformulation of the rape law. Police Chief Dan Liu argued that the law with regard to the resistance standard should be changed. He said, "Women should not be required to risk serious injury or possible death in order to satisfy

the law ..." Deputy Chief Arthur Tarbell agreed. He cited changing conceptions of rape as underlying the need for change. According to Tarbell, "The concept once held that a woman's honor is to be valued above her life is no longer prevalent."

On the other side was City-County Prosecutor John Peters, who termed the concern over the law in the community "a tempest in a teapot." He cited the similarity of Hawaii's rape law to those of most other states, and its long record of good service. He pointed out that according to the Nishi decision resistance was only required in the absence of threats or other things that made resistance impossible. He felt that specification of the resistance requirement would only aid defendants.

With all these conflicting opinions and definitions of the situation being proposed by legislators, prominent women, newspapers, and law enforcement personnel, it was clear that an authoritative special definer of the situation was again needed. On April 19th the governor announced that he was reviving and reconstituting the Governor's Committee on Sex Offenders which had dissolved the previous November after delivering its report. Governor Quinn cited the need for "calm and cool deliberation," and cautioned against passing expensive and ineffective legislation "in the heat of emotionalism" (Advertiser, April 20, 1960:A1).

While the governor was reviving his Committee on Sex Offenders, debate over rape law continued. The Advertiser (April 21, 1960:A1) reported a poll it made of twelve leading attorneys, a Circuit Court judge, and the city-county prosecutor concerning the adequacy of Hawaii's rape law. The consensus was that the law was adequate and should not be changed. They referred to the fact that Hawaii's rape law was similar to that of most states, and that it had a long history, coming from the common law of England. Their views were divided on the advisability of reinstituting the death penalty for rape. Several noted that the bill introduced by Representative Forbes simply converted what was under existing law first degree rape, to second degree rape, because submission under threat clearly constituted first degree rape under the then current statute. Attorney Arthur Trask suggested that houses of prostitution which the Army had "deemed a social necessity here" in prior years be reopened for "a group of young men here -- sailors, soldiers, and others -- who have a need for a natural sexual outlet."[176] (Advertiser, April 21, 1960:A1).

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[176] This proposed definition of the situation, that military personnel were in part responsible for the sex crime wave, was rejected by several writers of letters to the editor. See letters by Capt. Cole Manes and by M.R. Saunders (Advertiser, April 26, 1960:B2). "Annoyed" wrote that "local boys" not servicemen were to blame for rapes (Advertiser, April 28, 1960:C2). See also letter by "RLB USN" (Advertiser, April 30, 1960:B2).

One prominent attorney, former District Court Magistrate Clifton Tracy, wrote a long letter to the editor of the Star-Bulletin (April 24, 1960:8) criticizing the current rape law as it had been judicially interpreted and proposed a new statute. He pointed out that the flaw was not in the rape statute, which did not require superhuman efforts at resistance, but rather in the Supreme Court's interpretation of "by force and against her will" in the Nishi case. He contended that any new statute which included a "by force and against her will" provision would be subject to similar judicial interpretation. He suggested a complete revision of the statute such that:

> Whoever has sexual intercourse with a woman who is not his wife or his intimate friend or a prostitute, shall be guilty of rape and if the jury or the court in a jury waived case shall find him guilty of the said act of sexual intercourse then the defendant may present any extenuating circumstances such as consent or nonresistance for the consideration by the court in determining the sentence. The prosecution may offer evidence in rebuttal.

The great advantage of his formulation, according to Tracy, was that it removed the burden of proof of resisitance from the complainant and placed the burden of showing nonresistance or consent where it rightly belonged, on the defendant. While Tracy's proposal was deficient in its overbroad inclusion of all sexual intercourse except with wife, intimate friend, or prostitute as rape, and its exclusion of those categories of people from the protection

of the rape statute, it was probably the most imaginative proposal to be advanced since Hawaii's first written rape law in 1835. It went beyond calling for "stronger laws" to question some of the underlying legal and cultural conceptions.

The same day that Tracy's letter was printed, the Advertiser (April 24, 1960:16) published an article by one of its reporters questioning whether a new sex crime study was really needed. He noted that amid the "hue and cry," the previous report of the Governor's Committee on Sex Offenders was "gathering dust," its major recommendations not having been followed by the legislature. He reviewed fully the findings, conclusions, and recommendations of the first report of the Governor's Committee.

Keeping things going, the Honolulu Press Club, on April 27th, held a breakfast meeting featuring six speakers from the criminal justice system: the chief probation officer of the First Circuit Court, a police detective, Dr. Cody, psychiatrist member of the Governor's Committee, City-County Prosecutor John Peters, Juvenile Court Judge Gerald Corbett, and Circuit Judge Harry Hewitt. Hewitt and Peters defended the current rape law as "adequate." Hewitt contended that the Pence and Cansana case, which triggered the episode, was the "only unfortunate experience" with the law he could think of. Prosecutor Peters said that as many as 50% of complaints of rape were unfounded and he did not favor

broadening the rape statute because "We have screwballs by the dozen." Judge Corbett criticized the community for its attack on the jury in the Pence and Cansana case and for public criticism of the defense attorney in the case. Dr. Cody and Judge Corbett agreed that burglars should receive jail sentences because they are potential rapists. Cody contended that minor sex offenders, like peeping toms, do not graduate to rape, but rather that "aggressive burglar types" are the greatest risk. Keeping them off the streets would lower the risk of rape. Corbett, long an advocate of psychiatric treatment for offenders, suggested that convicted burglars be kept in prison until psychiatrists determined that they had changed. All the speakers rejected the proposition that legalized prostitution would reduce rape. Cody pointed out that prostitution and rape are not functional substitutes because rapists need resistance for gratification.[177]

Throughout May of 1960 rape continued to receive considerable attention in the newspapers, in editorials, articles, and letters to the editor. In late May, Governor Quinn appointed prominent attorney Bert T. Kobayashi as chairman of his new committee on sex offenders. He asked the committee to give him a report by October 15th on the adequacy of Hawaii's rape laws.

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[177] Newspaper reports of the meeting are in the Advertiser, (April 28, 1960:A6) and the Star-Bulletin (April 28, 1960:6).

But events did not wait on the deliberations of the new committee on sex offenders. In early June one of the other rape cases that was pending, Ter. vs. Histo, et al., came to trial. This case involved a young housewife and mother who had been drinking late one evening with her husband in some downtown Honolulu bars. She had a disagreement with him and the two parted, she going to another bar and continuing to drink. She left the bar with two men she had met. She rode with them in a car to Diamondhead Beach, where, she later testified, she was raped by the men and by two others who had followed them from the bar (Advertiser, June 3, 1960:8).

The defense in the case was consent, and the defense attorneys did their best to establish consent by portraying the complainant as not a respectable woman. To an "overflow crowd" in the courtroom, the defense hammered at the victim's character and behavior such that several recesses had to be declared to allow the her to regain her composure. As the Advertiser summarized her testimony:

> They wrung from her the following admissions:
>
> *She was on a bar-hopping binge the night of the alleged attack and had at least 10 shots of 'rum and Coca-Cola.'
> *She was wearing a contraceptive which she admitted putting on before leaving home.
> *She had, on prior occasions, entered bars unescorted.
> *Her husband had 'jokingly' suggested that she have a date with three Marines they met in one bar.
> *She met one of the defendants in a bar and let him buy her drinks and danced with him.
> *She then willingly went with him and another defendant -- whom she had never seen before -- to a deserted beach, at three o'clock in the

morning. (Advertiser, June 3, 1960:8)

The defense also made much of the complainant's undergarments she was wearing at the time of the attack, which consisted in part of a black brassiere with red ribbons and a rose colored panty girdle. Defense attorney Hyman Greenstein told the jury that "A woman who wears these does so because she wants someone to see them, and not her husband" (Advertiser, June 14, 1960:A4). Of course, the thrust of the defense case was that the complainant fell on the wrong side of the line between respectable women, those who could claim the protection of the rape law, and those who had compromised their "honor" and had therefore forfeited legal protection from rape.

The Advertiser (June 3, 1960:8) published portions of the complainant's testimony which, it said, constituted "one of the most lurid hearings in recent years." The publication of the details of the complainant's testimony in the case had several consequences. It made the trial even more popular than before as a spectator sport. The day after the first publication of the complainant's testimony, more than 200 would be spectators were turned away from the already full courtroom. Second, the publication by the Advertiser brought criticism to it for printing the testimony.[178]

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[178] See letters by Jean T. Kendall, Rev. John Morett, and Mrs. E. Glen Strader (Advertiser, June 7, 1960:B2).

The Advertiser (June 7, 1960:B2) editorially defended itself from these attacks stating that it only wished to present the public with some of the evidence that the jury was hearing so that the public would better understand the jury's decision and would not, as in the Pence and Cansana case, fault the jury without knowing the evidence.

The twelve day trial concluded on June 14, 1960 with convictions of two of the defendants (Gager and Histo) for attempted rape and acquittal of the other two defendants (Fuchs and Oliveira). Gager and Histo were sentenced to 20 years in Prison. The conviction was appealed to the state Supreme Court. The court affirmed the conviction (45 Haw. 478).

Throughout the remainder of June, all of July, and well into August, the issue of rape and particular rape cases received almost continuous publicity in the newspapers, particularly in the Advertiser in the form of reports of alleged attacks, reports on the processing of cases in the criminal justice system, letters to the editor, and editorials on the problem of rape. The most important event was the report in mid-August by the second Governor's Committee on sex offenders.

6.6.1 Second Report of the Governor's Committee on Sex Offenders

Given the redefined question put to the second Governor's Committee as contrasted to the first, the membership of the second committee was somewhat changed. Whereas the first committee focused on offenders and their treatment, it was, given the prevailing psychiatric ideology, dominated by mental health professionals. But due to the definition of the particular crisis that led to the revival of the committee, the jury verdict in the Pence and Cansana case, and the questions it raised about rape law as written and administered, the second committee was constituted to take the new definition into account.[179] Although mental health professionals remained strongly represented on the second

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[179] The first Governor's Committee on Sex Offenders had eleven regular and two substitute members; the second committee had seventeen members, of whom seven carried over from the first committee. The second committee was composed of Bert T. Kobayashi, Chairman, Past President, Bar Association of Hawaii; Willard V. Bolling, Deputy Warden, Hawaii Prison System, Department of Social Services; Professor C.K. Cheng, Professor of Sociology, University of Hawaii; Dr. Joseph C. Finney, Research Chief, Mental Health Division, Department of Health; Shiro Kashiwa, Attorney General; Arthur S.K. Pong, Deputy Attorney General; Mrs. George Kellerman; Dr. Ferris F. Laune, Chairman, Board of Paroles and Pardons; Dr. Norman Meller, Professor of Government, University of Hawaii; Miss Mary L. Noonan, Director, Department of Social Services; John H. Peters, Public Prosecutor, City and County of Honolulu; Capt. Roland D. Sagum, Juvenile Crime Prevention Division, Honolulu Police Department; Judge John Wiig, Attorney; Jess H. Walters, Legislative Assistant to the Governor; Dr. Robert S. Spencer, Acting Administrator, Mental Health Division, Department of Health; Dr. Y.T. Wong, Acting Chief of Clinical Services, Mental Health Division, Department of Health; Dr. William J.T. Cody, Acting Medical Director, State

committee, the expansion of the number of lawyers from one to five, including the appointment of a lawyer as chairman, was indicative of the new focus of the committee. The committee remained almost entirely professional. It also remained predominately male.

In carrying out its work, the new committee organized itself into four subcommittees: a "Statistics Committee," an "Enforcement Committee," a "Legal Committee," and a "Causes and Prevention Committee." Each of these subcommittees conducted its own investigation into its specified concern and drew up its own report. These findings and recommendations were submitted to a vote of the committee as a whole and were presented as the committee's final findings and recommendations.

6.6.1.1 Major Findings of the Statistics Subcommittee

Using Uniform Crime Reports data collected by the FBI, the statistics subcommittee made several major findings. First, comparing the rate of forcible rape among the seventeen states which provided for the imposition of the death penalty for forcible rape, and the thirty-one (including Hawaii) that did not, it found forcible rape rates of 8.6 and 8.3, respectively, per 100,000 population during the year 1958. From this it concluded that there was "no significant correlation between imposition of the death

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Hospital for Mental Disease, Department of Health. (Governor's Committee on Sex Offenders, 1960)

penalty for rape and the incidence of rape."[180]

Second, the subcommittee asked how the rate of forcible rape in the City and County of Honolulu compared with the rates in comparable cities on the Mainland. It found that the average rate of forcible rapes per 100,000 persons across twelve comparable standard metropolitan areas for the year 1958 was 8.8. The average for the City and County of Honolulu during the three year period 1957-1959 was 4.6. Thus, the subcommittee noted, that despite several factors that might be expected to be related to a high rate of forcible rape -- "multi-ethnic composition, young population, tropical-romantic setting, presence of military personnel, mobility and transiency, etc.," Honolulu appeared to have a rate of forcible rape about half that of comparable cities on the Mainland.

The committee also asked whether the abolition of capital punishment in Hawaii in 1957 was associated with an increase in rapes. It concluded that it was not.

Finally, in examining the disposition of rape cases, the subcommittee concluded that the number of convictions for rape was "low," only thirteen men having been admitted to Oahu Prison during the five years 1955-59.[181] In discussing

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[180] While the subcommittee's conclusion may well have been correct, it cannot be validly drawn from the data used. It compared states with death penalty provisions in their rape statutes with those not having such provisions. The subcommittee had no data on the actual frequency of imposition of the death penalty.

[181] The subcommittee does not reveal how it determined that

dispositions of cases the subcommittee also noted that in twelve cases the defendants were members of the military and were turned over to the military for disposition. For the ten cases[182] in which there was information on the sanction that was administered by the military, the sanction ranged from "Strongly Reprimanded by Battalion Commander" to "Dishonorable discharge from service, hard labor for 15 years and forfeiture of all pay and allowances." Generally, it appeared that the military punishments for rape were much lighter than civilian punishments.

6.6.1.2 Findings of the Subcommittee on Enforcement

The subcommittee on enforcement examined available data on the disposition of cases during the period 1955-59. It found that in 67.5% of the cases in which the complaints were not withdrawn (59 cases), arrests were made. In 57% of the cases in which the complaints were not withdrawn, there was a prosecution. The committee did note that the cases occuring in 1959 did differ markedly in one respect from cases in the prior four years in the fact that more (8 out of 13) involved multiple arrests, whereas only 13 out of 41 in the prior period involved multiple arrests.

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this was a "low" figure, but presumably it was by reference to a figure of 91 reported cases of rape during the same period.

[182] For one case the complaint was withdrawn, and in another the outcome of a general court martial was unknown.

With respect to the punishment for rape, the enforcement subcommittee, drawing on the findings of the statistics subcommittee, rejected proposals for reinstatement of the death penalty for rape. It also rejected proposals for "flogging or emasculation" as of unproven efficacy and also because "your subcommittee believes our society has progressed beyond the point of applying cruelty just to avenge the wrong committed."

With respect to the practice of turning over military personnel charged with crimes to the military for prosecution, the subcommittee suggested that if a policy change were to be made, it should be made for all crimes and not just rape.

In sum, the major findings of the subcommittee on enforcement were that there was no "inadequacy of enforcement requiring corrective action" and that statutory punishments for rape were adequate.

6.6.1.3 Findings of the Legal Subcommittee

The legal subcommittee decided it was its task to study the rape law of Hawaii as established in its case law and statutes, and to compare these with those of other states. If any inadequacies were revealed, the subcommittee would recommend appropriate changes. After a review of these materials, the subcommittee noted that Hawaii's statute was similar to that of most states, therefore, the committee

concluded, its effectiveness was indicated. The subcommittee noted that much rape law in practice was contained in judge's instructions to juries. Such instructions are only reviewed on appeal, a relatively rare occurrence in Hawaii. It noted that a refused instruction had been the cause of reversal in the Nishi case and, "We must assume that the refused instruction was proper and should have been given under the facts of the Nishi case." It commented that it was a matter of judicial discretion concerning what instructions were to be given to the jury in particular cases.

Concluding, the legal subcommittee found that "the statute defining the crime of rape ... is adequate to meet the needs of the community, and we recommend no ammendments to it."

6.6.1.4 Findings of the Causes and Prevention Subcommittee

The subcommittee on the causes and prevention of rape reported that there was a great lack of information on the topic. However, by reviewing "what is known, and what is believed by best informed opinion," the subcommittee was able to summarize the "present state of knowledge and expert opinion" as follows:

1. Sex crimes in general have a low rate of recidivism; i.e., a person who has committed one offense is not very likely to repeat.

2. Different kinds of sex offenses are committed by different kinds of persons, and a person is not likely to go from one kind of offense (for example, exhibitionism) to another type (for example, rape).

3. There is some expert opinion that the personality and character of the rapist resembles that of the burglar, rather than resembling that of other sex offenders.

4. No previous study has been made on the rape victims, to investigate what type of behavior is likely to lead to being raped.

The subcommittee was unable to conduct its own studies of the phenomenon of rape in the limited period available, but recommended that a four year study of rape cases be undertaken to determine what individual and situational factors lead to rape.

6.6.1.5 Conclusions and Recommendations of the Committee

Drawing upon the work of the subcommittees, the whole committee offered its definition of the situation. The incidence of forcible rape was low, enforcement was adequate, the statute was adequate, punishment provisions were adequate, the agreement with the military should not be changed for rape alone, and more study was needed on the causes and prevention of rape.

6.6.2 Press Reaction to the Committee's Report

The newspapers had two opportunities to react to the report of the Governor's Committee, one in mid-August when the committee publicly adopted the reports of the subcommittees, and one in mid-October when the committee released its final report. In both cases the findings of the committee received moderate publicity, largely limited to a

review of the findings.[183] The Advertiser (August 16, 1960:B2) editorialized that the study it had initially called for had been carried out "in a far more calm and detached atmosphere than prevailed at the height of public debate over the rape law." The editorial seemed to approve of the committee's conclusions and particularly approved of the committees call for a study of the causes of rape.

Other than these reports and comments, the report of the Governor's Committee received no further newspaper attention.

6.6.3 Legislative Proposals Subsequent to the Report of the Governor's Committee

The 1961 legislative session began in the January following the October presentation of the final report of the second Governor's Committee. Several bills were introduced pertaining to rape, but none passed. House Bill No. 303 and Senate Bill No. 36 (1961) proposed to make Hawaii part of the Western States Prison Compact enabling the state to send sex offenders to Mainland institutions for specialized treatment. While Senate Bill No. 36 passed the Senate, both bills failed in the House.

Several bills (House Bill No. 141, House Bill No. 647, and Senate Bill No. 191, 1961) would have reinstated the death penalty for rape. All failed. The recommendation by

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[183] See Star-Bulletin (August 16, 1960:24), Advertiser (August 16, 1960:A1), and Star-Bulletin (October 14, 1960:22).

the Governor's Committee that a study be undertaken to determine the causes of rape did not lead to any legislative action and apparently such a study was never done.

6.6.4 Summary and Conclusions About the 1959-60 Episode

The 1959-60 episode follows the pattern of the model, which has by now become familiar. The rape and murder of a young girl stimulated intense press coverage and gained the attention of the community. The particualr characteristics of the offender in the case and the focus of the press reports led to definitions of the situation drawing on mental illness and psychiatric models well established in the scientific culture and even with some acceptance in the law culture. Other portions of the community rejected these models and demanded more punishment.

The gang rape of a University of Hawaii coed while these issues were still being debated led to the definition of the situation that there was a "rash" of sex crimes. The governor appointed a committee, a special definer of the situation, to clarify matters. Reflecting existing cultural expectations, it was professional, male, and dominated by the psychiatric viewpoint. However, aware of the bad news from the Mainland about sexual psychopath laws and the events which provoked their passage, the committee delivered a cautionary opinion about what to do.

Another crisis, occurring even before the last sequence was concluded, redirected in part the definition of the situation. The acquittal of the alleged rapists of the polio-crippled nurse raised questions concerning the adequacy of the rape law as written and as administered. The issue became politicized, and most lawyers, respectful of the traditions of the legal culture, defended the existing rape law. As in 1929, however, a mass meeting, this time of women, convinced politicians that some action had to be taken. The legislature passed resolutions calling for study, and the governor revived his committee on sex offenders -- this time to examine the adequacy of the rape law. Again, the committee, this time dominated by lawyers, recommended no change.

6.7 THE REMAINDER OF THE 1960'S: THE LAST DECADE OF TRADITIONAL RAPE LAW

Rape cases continued to get considerable press attention in late 1960 and throughout 1961. This continued attention was probably due to an actual increase in reported rapes and also the occurrence of several rape incidents that lent themselves to publicity. On the first point, the F.B.I. reported in November of 1961 that there had been a 100% increase in rapes during the first nine months of that year (Star-Bulletin, November 30, 1961:1). With respect to well-publicized cases, in July of 1961 a young haole stewardess was grabbed off of a Waikiki sidewalk by two

part-Hawaiian young men, driven to an apartment, and raped. Prosecutor John Peters determined that a rape charge could not be sustained and ordered the police to charge intermediate assault and battery. The police disagreed, citing the nature of the abduction, the fact the woman was a stranger in the city, and her reasonable and extreme fear to explain any lack of "utmost resistance." (Star-Bulletin, August 3, 1961:1) The Star-Bulletin (August 3, 1961:10) editorially severely criticized the prosecutor. It said that the case was typical in that the police did their job with "superb efficiency" but the case was lost in court or by other functionaries. It claimed that "Honolulu has established a reputation for itself where women are ready prey for hoodlums who roam the streets at night."

Responding to the press criticism, Peters changed the charge to rape from assault and battery and the defendants were indicted for rape by the grand jury. With considerable press coverage they were tried and convicted of the crime in January of 1962.[184]

The police department received its share of criticism in September of 1961 along with the prosecutors office when, because of bureaucratic bumbling involving the lodging of a rape charge against a defendant, he was released and he and his wife promptly committed suicide. The case prompted a thorough review of charging procedures and promises of

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[184] The case is State vs. Apau and Kahunahana.

future police-prosecutor cooperation.[185]

In July of 1962 the Star-Bulletin published a seven-part series on how women can protect themselves from rape.[186] The series provides good insight into the then current beliefs and ideology concerning rape.

In discussing the question of whether potential rapists can be identified, the series drew on the expertise of Dr. Cody, the psychiatrist who had been on both Governor's Committees on Sex Offenders. He reiterated his belief that most rapists "have personality disturbances and use violence as a common denominator to express their hostility." They are not differentiated from the rest of the population by their hostility, but by how they express it. Cody again reiterated his belief that rapists and housebreakers have similar personalities but that they are different from other sex offenders. Rapists have destructive motives rather than motives of purely sexual gratification (Star-Bulletin, July 20, 1962:12).

Next, the series addressed the question of who were likely to be rape victims. Apparently there was a formidable array of professional and law enforcement opinion that there were many false claims of rape and that many, if not most, women who were raped asked for it. Dr. Cody said,

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[185] See the Advertiser (September 19, 1961:A1 September 20, 1961:A1) and the Star-Bulletin (September 20, 1961:1).

[186] The series was written by reporter Betty Patterson and was published on July 19,20,21,23,24,25, and 26th, 1962.

"I don't think rape or attack is really a threat to the average woman, because she doesn't set herself up for it by dressing carelessly, visiting bars or accepting rides with strangers." (Star-Bulletin, July 21, 1962:9)

Deputy Police Chief Arthur Tarbell had similar views on women's behavior and rape. He said,

> A woman may establish herself by her actions and by her dress or undress as a temptress. She should not be surprised if her indiscretion results in her being accosted.
>
> Women have no business drinking alone in bars and accepting offers of a ride home -- they contribute to their own victimization.
>
> * * *
>
> Women can't go up and down the beaches and streets forever in revealing bikinis, or parade nude or half nude in front of open windows at home without implying an invitation or tempting someone.
>
> Women should not try to find friends under too informal circumstances. Young girls often say that they have been lucky -- they have gone to drinking parties with large groups of new friends and nothing has happened to them. Anytime their luck may run out.

Prosecutor John Peters, the man who determined whether charges of rape were to be brought, also revealed his views:

> the majority of girls that cry rape are bums -- by drinking alone in bars and parading on the beaches, most of them put themselves in vulnerable positions.

Circuit Judge Harry Corbett had similar views. According to him:

> Although there doesn't seem to be an inordinate number of rape cases here, we are faced with too many girls who report they have been 'raped' either without knowing what rape is, or by trying to save face by terming their promiscuity 'rape.'

> Many girls come in, insisting that they have been raped, and when asked how this occurred, they say 'well, he kept asking me and pestering me until I let him.'

The article further quoted a Honolulu psychiatrist, who wished not to be identified, on the topic of subconscious factors that may lead women to become attack victims. According to this expert, these involved the greater masochism of women than men, which is expressed in their enjoyment of pain, and in the fact that

> every woman has the deep seated need to be raped or to be dominated by force. It is a generic instinctive thing that goes all the way back to the practice of women being pursued and overpowered for mutual sexual satisfaction. (Star-Bulletin, July 21, 1962:9)

In the fourth and fifth articles of the series women were told that their best defense to rape was a loud scream and they were given the usual advice on locking doors, etc. The sixth and seventh articles focused on the reporting of rapes and their processing by the criminal justice system. Deputy Chief Tarbell stressed the civic duty of women to report rapes and to take their cases to court lest the community be "inundated with an unchecked tide of criminality." The fact that a key issue at trial would be the woman's reputation was discussed. Prosecutor Peters pointed out that "She (the complainant) must put her reputation on the block, just like the boy." Judge Corbett said he supported the practice of cross-examining the victim as a fundamental right of the defendant's. Dr. Cody pointed out that "the victim who has

nothing to hide in her past life has nothing to fear from this cross-examining."

Prosecutor Peters said that juries had delivered the right verdicts in past rape cases in Honolulu, with perhaps one exception. He cited the difficulty of proving rape and the fact that juries seemed to be influenced by the defense's showing that the complainant had previously been promiscuous. In such cases juries seem to feel that "she got what she asked for this time, although possibly more than she bargained for," according to Peters. He stressed the difficulty of successful prosecution of rape without prompt complaint and medical evidence showing assault by force. He said, "The courts will also take into consideration how the victim and attacker got together, why they got together, why and when the attack was reported." (Star-Bulletin, July 26, 1962:21)

Dr. Cody argued for expanding the role of psychiatrists in rape cases. He believed that psychiatrists could help the courts reach decisions in rape cases by studying the persons involved, their past histories, and by making a report to the court on their findings. Cody believed it would be useful to "measure the severity of the possible personality disturbances of the offender and the victim." Judge Corbett agreed.

In sum, it was clear from the third article in the series that the woman who made a charge of rape in Honolulu in 1962

faced a formidable array of suspicion and even of hostile opinion from law enforcement officials. To successfully prosecute for rape, a woman would have had to be beyond reproach (by 1960's standards) in her behavior and would have had to convince officials that she fell on the right side of the line that divided the respectable from the unrespectable. Otherwise she might be dismissed as one of the "bums".

Rape received more concentrated newspaper attention in August of 1963 after two 21 year-old men were convicted by a Circuit Court jury of assault and battery on an original rape charge. The evidence in the case appeared to be strong.[187] A writer for the Star-Bulletin reviewed a number of rape cases occurring in the past three years in which juries had convicted of lesser offenses, or original rape charges had been reduced through plea bargaining. He charged that law enforcement officials seemed to be too inclined to take the easy route of plea bargaining. In particular the writer criticized Prosecutor John H. Peters who, he said, "seems to sympathize with the rapist almost as much as he does with the victim." The writer defined the rape problem as a "problem of law enforcement."[188]

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[187] The case was State vs. Bob I.K. Smith and Tyrone W. Fernandez, First Circuit Criminal No. 33567.

[188] The writer was Chuck Frankel and the article was published in the Star-Bulletin, August 15, 1963:1).

Crime in general came to be regarded as more and more of a social problem as the 1960's progressed. Various symposia and forums[189] were held and efforts were begun to completely revise the penal code and to reorganize the corrections system. The idelolgy of rehabilitation was dominant. Not the least of the concerns which stimulated these moves was continuing attention to sex crimes.

In November of 1966 the Advertiser sent staff writer Bob Krauss to a workshop for reporters at the Wisconsin Sex Deviate Facility sponsored by the Reader's Digest. On returning he wrote a five-part series on what he learned about sex criminals.[190] Among the things he learned were: all persons who commit sex crimes lack "a healthy, loving relationship with their parents when they were children; child molesters tend to fear adult women and to feel generally inadequate ("the child molester is not so much a monster as a rabbit"); rapists are seething with inner conflicts and are seeking to get even with women more than they are seeking sexual gratification; that victims of rape often experience psychological disturbances after the rape, but little is done for them; that victims of sex crimes often feel brutalized and degraded in court to the point that many will not report rapes; that most released sex

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[189] See, for example, the article in the Advertiser (February 5, 1965:C1).

[190] The series was published in the Advertiser on November 20,21,22,23, and 24th, 1966.

criminals have good parole records, particularly in Hawaii; that Hawaii had a very low incidence of reported rapes compared to Mainland cities, but that the reasons for this were not clearly apparent; and that while the Hawaii correctional system had no special program, its controlling ideology in the mid-1960's was rehabilitation, not punishment, and that all imprisoned offenders underwent some sort of mental treatment.

The Advertiser (November 26, 1966:B2) editorially commented on some of the points raised by Krauss, in particular the problems of rape victims and prison programs for sex offenders. It advocated consideration of the provision of mental health follow-up services for rape victims and some sort of victim compensation program. It also favorably commented on the record of Oahu Prison in dealing with sex offenders.

In December of 1969 the Star-Bulletin published a four-part series on rape by a female writer.[191] In this series we find little change in attitudes about rape charges on the part of law enforcement officials with respect to their extreme skepticism toward rape complaints. It was readily admitted that in a rape case the woman was put on trial too. This practice affected all stages of investigation of rape complaints. Describing police investigation of cases, one Honolulu police detective said,

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[191] The series was by Kathy Gautier and was published in the Star-Bulletin, on December 1,2,3, and 4th, 1969.

> The woman is put through the mill. She takes a pounding from us - we have tc know all about her background -- and then if she gets to court, she takes another pcunding from the defense attorney, who will be out to make her reputation look bad and try to prove it was not rape at all. (Star-Bulletin, December 1, 1969:E1)

Another detective was reported to have stated, "Quite a few women yell rape, but when we get through, we find there is no rape involved." Deputy Prosecutor Barry Rubin pointed out that the chastity of a rape complainant was a legitimate legal issue. He said that "although legally a prostitute can be raped, I'd hate tc have to take it to court." Former Deputy Prosecutor Eggers characterized the fact that a rape complainant had to relate all the details of her private sex life as "unfair," but said that such matters carried weight with juries. He maintained that, "Women are the greatest critics of other women."

The series also discussed the resistance standard, pointing out that since the Nishi case in 1919 the standard had been "utmost resistance." This principle had regularly been used as a jury instruction up until the Kahunahana and Apau case in 1961 when Circuit Judge Sam King had refused the instruction in the case of the stewardess grabbed off the Waikiki street. In discussing the case with the writer of the series, King said the Nishi instruction had been given all these years because "it was there," but that the circumstances of the Nishi case were quite particular and that the Nishi instruction should not have been so slavishly

given in every case. When the Hawaii Supreme Court affirmed Judge King's decision in 1965 (48 Haw. 385) the Nishi rule was much diluted and the rule became that the degree of resistance required depended on the particular circumstances of each case. Of particular relevance, it was believed, was whether the attacker was a friend or a stranger. The issue of the relationship of the alleged attacker to the complainant was being taken up, according to the series writer, in a project to revise the penal code. The State Judicial Council was sponsoring a Penal Law Revision Project which had drafted a new proposed code, including a new rape statute, which provided for three degrees of rape. A major distinction between first and second degree rape was to be whether the defendant had been the "voluntary social companion" of the complainant, who had been sexually intimate with him within the past year.[192]

The Star-Bulletin's series also addressed the question of the nature of rapists. Mental health experts were quoted on the now familiar proposition that rape arises from hostility and desire for domination rather than desire for sexual gratification. Police officials reported that an increasing phenomenon they were observing was that contacts made between women tourists in Waikiki and local men and boys sometimes led to rapes. Contacts made in bars led to

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[192] The proposed law was modeled on the American Law Institute's Model Penal Code (American Law Institute, 1962).

misunderstandings as to what had been agreed to and to eventual use of force (Star-Bulletin, December 2, 1962:E1). It was further pointed out that many of these rapes were never prosecuted because the victim would not return from the Mainland for the trial, despite the fact that the state would pay her expenses (Star-Bulletin, December 3, 1969:F3).

The series also took up the role of the woman in a rape. In addition to the usual points that many rape victims provoke, instigate, or invite rape by their dress or behavior, there was discussion of the conflicting sexual norms of the society that told girls that sex was bad but sexiness was good, and the double standard of behavior for men and women. In any event, women were advised to lock their windows and doors, etc. (Star-Bulletin, December 3, 1969:F3).

The final segment of the series related a case of a rape on Maui in which a haole girl was forced into a car, driven to a remote canefield, and forced to submit at the point of a fishing spear. The police were skeptical of her complaint and eventually decided that there was insufficient evidence that a rape had occurred. The girl felt that the police were unsympathetic because she was seen as a Mainland "hippie" and that she must have aggravated local people and got what she deserved (Star-Bulletin, December 4, 1969:E2).[193]

[193] There is probably some truth to the complainant's charge. At this time Hawaii, and Maui in particular, was experiencing an influx of "hippies" from the Mainland looking for easy living in an idyllic tropical setting.

This series was the last published in the newspapers that represented the traditional view of rape. As the series was being published the feminist movement was starting on the Mainland. It took as one of its principal foci reform of the lay and legal culture and practices as they pertain to rape. This movement also spread to Hawaii and the decade of the seventies is largely a story of the movement and its consequences for the legal system.

6.8 SUMMARY AND CONCLUSIONS ABOUT THIS PERIOD

We have seen that during the roughly three decades under discussion rape and rape law became a public issue in a variety of contexts and a variety of ways. The enormous expansion of the male population of the Islands associated with WWII provided the opportunity to examine cultural notions about the relationship between rape and prostitution as alternative outlets for sexual impulses. It was suggested by observers at that time that massive, organized, and regulated prostitution was established in part to safeguard respectable women from the libidinous impulses of military men who otherwise would have engaged in rape.

The immediate post-war period brought attempts by the profession of psychiatry to claim hegemony over the diagnosis and treatment of sex offenders in the form of sexual psychopath laws. Despite the growing strength of the

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They were viewed with considerable hostility by many local people and law enforcement officials.

mental health professions in Hawaii and the popularity of the application of the medical model to deviant behavior, information about the uselessness of sexual psychopath laws on the Mainland prevented their adoption in Hawaii.

The Majors and Palakiko Case reveals once again the ethnic segmentation of the community that becomes visible in the reaction to particular crimes, and the differential symbolism that may be attached to crime related events by the various groups. The Majors and Palakiko Case also revealed the twilight of haole hegemony. Majors and Palakiko were not executed, and when non-haoles seized political power they abolished the death penalty, the most obvious and obnoxious symbol of a double standard of justice.

1959 brought the last episode of sex crime concern to occur in the community involving traditional perspectives on women's status and on rape. It followed the sequence proposed in the model, while also demonstrating the fluidity of definitions of the situation. During the episode the problem-focus changed from a focus on sex offenders to a focus on the rape statute and its administration.

We now move to the 1970's which involve the rise of a social movement associated with a breakdown of the sexual stratification system, and the most intense period of rape law reform.

Chapter VII

THE REDISCOVERY OF WOMEN AND VICTIMS: 1971-1981

As described in chapter 2, the period of most profound change in rape law in the Hawaiian Islands was the two decades prior to 1850 leading up to the penal code adopted in that year. The change was strongly associated with important changes in the status of women and in socially and legally sanctioned norms of sexual regulation. The transformation also excluded the victim from the legal process except as a victim. The state assumed the decision of deciding whether or not to proceed against offenders, and the victim of rape lost any rights of compensation by virtue of having been raped. Much of the subsequent history of rape law in Hawaii is concerned with periodic public expressions of strong dissatisfaction at the working of that rape law and associated law enforcement arrangements. These recurrent episodes of concern and activity were usually led by (haole) men and called upon (haole) men of the community as protectors of female virtue to combat the danger. When women were involved, they also demanded "stronger laws" and more vigorous enforcement rather than revision of the nature of the social relationships between men and women or a rethinking of the cultural conceptions underlying rape law.

The recurrent nature of these episodes and the monotonous similarity of the complaints reveals that those legal actions taken in response to various definitions of the situation did not in fact solve the problems. It appears that there was some more fundamental set of problems underlying rape law than those that filled the columns of the newspapers and the letters to the editors.

We now move to the consideration of a decade in which events and processes represent a sharp break with the past 120 years and during which the fundamental assumptions underlying the rape law of 1850 were, with some degree of success, challenged. The decade of the 70's more resembles the decades of the 1830's and 1840's than it does the long intervening period, in that it brought real change in sexual stratification. The 1970's also saw critical examination and even reversal of some of the cultural expectations about sex roles that had been institutionalized by religious and legal missionaries in the mid-nineteenth century, and which formed the basis of rape law. We would expect to see, then, given our perspective that law is reflective of basic institutional arrangements in a community, legal action to bring law into congruence with these new arrangements and the cultural conceptions which explain and justify them. And we would expect to see these changing structural arrangements and cultural conceptions most forcefully expressed as crises in rape law, and conseguent legal action

to remedy the situation as defined through symbolic interaction.

This chapter will describe and analyze the major social changes in Hawaii during the 1970's that were associated with succesful or unsuccessful attempts to change rape law. As one aspect of this analysis, we will examine two major episodes of community concern about rape law, which, while reflecting a new consciousness about rape and rape law, are similar in structure to the episodes with which by now we have become familiar. We will begin by briefly outlining the major relevant social changes that occurred in Hawaii during the 1970's.

7.1 MAJOR SOCIAL CHANGES IN HAWAII DURING THE 1970S

Hawaii's economy continued to grow during the 1970's, continuing to enjoy the benefits of the closer relationship with the Mainland conferred by statehood and by easy, inexpensive air travel. Of the three main economic sectors, agriculture, military, and tourism, tourism was the most vigorous, becoming in 1972 the largest industry in the Islands. From 1970 to 1980 the annual number of overnight visitors to the Islands rose from 1,747,000 to 3,936,000, and annual visitor expenditures rose from $595 million to $3 billion (Dept. of Planning and Economic Development, 1981). Businesses in the tourist industry grew into a powerful lobby which continuously sought to protect and enhance its economic interests.

Associated with the continued post-statehood growth of tourism and general economic growth was a boom of land development, and real estate investment and speculation which resulted in the building of hotels and condominiums near many of the beach areas of all islands and a general inflation of land and housing costs.

Although some members of the dominant ethnic groups, haoles, Japanese, and Chinese profited handsomely from these developments, the benefits were not evenly distributed among ethnic groups. Many Hawaiians, in particular, without the resources to take advantage of these development opportunities, felt increasingly alienated and voiced their resentment about the transformation of the Islands, the usurpation of the land, and the generally low esteem in which Hawaiians and things Hawaiian were held.

In part growing out of this increasing resentment, and in part growing out of the lessons of the black civil rights movement, some younger Hawaiians began a campaign of social and political action to raise the status of the Hawaiians. This effort took many forms including physical resistance to certain land development projects,[194] a partially successful attempt to reclaim from Navy use as a bombing target the island of Kahoolawe, revival of interest in Hawaiian society and culture, the establishment of a Hawaiian Studies Program

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[194] For example, an unsuccessful attempt to prevent the development of Kalama Valley and a successful effort to block displacement of small farmers in the Waiahole and Waikane Valleys on Oahu by a subdivision.

at the University of Hawaii, the establishment of the Office of Hawaiian Affairs within the state government, and the establishment of the Native Hawaiians Study Commission by Congress to examine the needs of Hawaiians.[195]

Other than these organized efforts to address the conditions of Hawaiians, their subjugated status and their newly emerging consciousness of it expressed itself in other ways, one of which was occasional opposition to tourism and tourists. For some Hawaiians, tourists were seen to be responsible for their continuing difficulties. One expression of this definition of the situation by some Hawaiians were occasional crimes against tourists.[196] These ranged from petty thefts and car lootings , to occasional beatings, rape, and murder. While these activities usually did not emerge out of any conscious or articulated theory of crime as retaliation against an oppressor, they nevertheless grew out of an emerging set of beliefs about tourists as legitimate victims. As La Free (1982) points out, developed political consciousness is not necessary, simple "awareness

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[195] See Trask (1983) for a discussion of the Hawaiian nationalist movement.

[196] Anti-development and anti-tourist sentiment reached a significant and conscious level on Molokai, location of the most activist of the Hawaiian groups. In December of 1978 one of the most prominent activists, Walter Ritte, conceded that the movement there may have resulted in some attacks against tourists, including a rape. He organized an assembly for the purpose of persuading young Hawaiians not to express their resentment in that way (Advertiser, December 10, 1978:A14).

of unjust social relationships may provide a justification for criminal behavior."

In 1980 the rape of a young Finnish tourist woman by a gang of Part-Hawaiian boys on a beach near the Hawaiian community of Nanakuli led to an episode similar to those with which we are already familiar and led to an extended consideration of rape, tourism, and crime in general. This episode will be discussed below.

But more important than matters of ethnic stratification in considering rape law in Hawaii in the 1970's are matters of sexual stratification, essentially, the continued breakdown of the sexual stratification system on the Mainland and in Hawaii, and in particular, the rise of feminism as a social movement.

Despite its particular mix of cultural traditions, and the strong representation of Asian culture, with its stress on familial values, Hawaii has experienced many of the same social processes as the Mainland that tend to breakdown of traditional sex roles: widely available contraception, urbanization, educational opportunities for women, and employment of women in occupations outside the home. In fact, Hawaii has traditionally, due to high living costs, had a larger proportion of its adult women employed in outside occupations. In 1975, for example, 51.5% of Hawaii's women sixteen and older were working or seeking work, while 45.9% of women in all the U.S. were similarly

situated (Kautz, 1976). While these are long-term trends, during the 1960's, and particularly the 70's, women made marked gains in assuming important occupational roles and legal and political positions that put them in strategic positions to influence the legal system. For example, in 1970 there were only four (out of seventy-six) women in the state legislature, but by 1981 there were thirteen. Women also began to enter the legal profession in large numbers. In 1973 the University of Hawaii established a new law school which has had 40% to 50% women among its enrollees. In 1978 Hawaii elected a woman lieutenant governor, and Honolulu in 1980 elected a woman mayor. Also in 1980, a woman who was a member of Women Against Rape was appointed a member of the parole board. Women have made significant gains in other occupations.

The foregoing is not to deny the still substantial sexual inequalities that exist, but rather to show that critical advances were made during the 1970's that facilitated the diffusion of the feminist movement to Hawaii and the consequent changes in the rape laws.

Freeman (1973) describes the feminist movement, as a self-conscious social movement, as having its genesis in the early 1960's with such events as the establishment of the President's Commission on the Status of Women, the subsequent formation of the National Organization of Women, and the establishment of commissions on the status of women

in the states. Women's groups of various sizes and programs began to proliferate in the late 1960's and early 70's. Their ideologies varied widely, but they all endeavored in one way or another tc change the pattern of sexual stratification in the United States.

In the early 70's the issue of rape emerged as an important focus of the feminist program as it was being defined on the East Coast (cf. Connell and Wilson, 1974). The issue emerged quickly out of consciousness raising groups where women shared stories of victimization by rapists and by law enforcement authorities. Responses to defined problems were rapidly developed in the form of hot lines for rape victims, task forces on rape, self-defense classes, and action groups.[197] In 1971 Susan Griffin's "Rape--The All American Crime" was published in Ramparts, and by 1973 major scholarly, feminist critiques of rape law had begun to emerge (e.g. Legrand, 1973; Weiss and Borges, 1973; Wood, 1973).

These critiques took the general perspective that rape law as it functioned in America was a sexist institution. Rape law had little to do with the protection of the dignity and rights of self determination of women, but rather the sexual property of men. Rape itself was analyzed as a

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[197] Rose (1977) gives a good account of this history. Key events in the emergence of rape as an issue were the New York Radical Feminist Speak-Out on Rape, January 24, 1971 and the New York Radical Feminist Conference on Rape, April 17, 1971 (Brownmiller, 1975:405; Connell and Wilson, 1974:3-4).

mechanism for the subjugation and domination of women; it has been a sanction used on women who stepped outside the confines of their culturally defined, proper sex roles.

All aspects of the criminal justice process were criticized, from the skeptical and sometimes leering investigatory practices of the police, the reluctance of prosecutors to prosecute rape complaints, the victim blaming tactics of defense attorneys, such legal principles as resistance, the corroboration requirement, and the culturally influenced reluctance of juries to believe rape complainants.

The early feminist activities and writings on rape led to a burgeoning literature on the topic (See Chappel, et al., 1974; Chappel and Fogarty, 1978). As the movement gained strength, its prime focus became statutory reform. The effort has been extremely effective. By the late 1970's a majority of the states had changed their rape statutes in some way in response to the growing critique and the demand for more effective law enforcement against men who rape.[198]

The anti-rape movement in Hawaii followed a pattern similar to that on the Mainland. In fact, both the feminist movement and the rape reform movement in Hawaii can best be viewed as social phenomena diffused from the Mainland into a social situation that was as ready for reform as were the Mainland communities.

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[198] See Bienen (1977, 1980) for a state by state description of statutory changes through 1979.

Hawaii had its State Commission on the Status of Women begun in 1964 and its local chapter of the National Organization of Women. In 1975 the Women's Studies Program was started at the University of Hawaii (Manoa). In 1976 a group of women started Women Against Rape (later called People Against Rape) specifically to address the issue of rape in Hawaii. More on its activities will be discussed below.

Not the least of the changes in Hawaii was the ongoing revision of norms concerning appropriate sexual behavior of women. In this, too, Hawaii was undergoing the same process of change as the Mainland. The basic element of this change in the culture of sexual behavior was an increasing rejection of the theologically based, puritanical perspective on sexual behavior, particularly the behavior of women. The perspective that sex was a sober and solemn activity only to be engaged in after marriage was increasingly rejected. As sexual intercourse came to be increasingly divorced from reproduction, because of the advent of convenient, effective birth control techniques, it came to be seen to have value for its own sake, as an activity to be enjoyed. The double standard was increasingly rejected and norms of sexual regulation came to be less sex-based. Premarital virginity came to be no longer required, and even fell into disrepute in some circles. The notion that women could be defined as "respectable" or

"unrespectable" based on rigid norms of sexual exclusivity continued to be questioned.

By the early 1970's these changed attitudes about sexual behavior were expressed in Hawaii's penal law. In 1972 the Hawaii legislature adopted a new penal code for the state. This code explicitly rejected the theologically based restrictions on consensual sexual behavior among adults and removed all restrictions on such behavior (except prostitution and incest).

A final social change that affected rape law in Hawaii in the 1970's was increasing crime and changing attitudes about crime and criminals. During the 70's the incidence of serious crimes in Hawaii increased dramatically, as did the crime rate. The total number of "Index" crimes in the state increased 72% from 42,011 in 1970 to 72,102 in 1980. 1981, however, brought a decrease of 8,038 below 1980, or 11% of Index crimes. Between 1970 and 1980 the number of personal, violent crimes[199] reported statewide increased 206% from 943 in 1970 to 2,887 in 1980. 1981 brought a decrease of 463 or 16% of reported crimes below 1980. During the period 1970 to 1981 the resident population increased only 28%, from 769,882 to 989,000.[200]

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[199] Murder, rape, robbery, aggravated assault.

[200] All of these crime and population statistics are drawn from the reports of the Hawaii Criminal Justice Statistical Analysis Center (1981a, 1981b) and Hawaii Criminal Justice Data Information Center (1982).

Public concern about crime in general also increased during the 1970's. Several polls at the end of the decade revealed crime to be among the foremost concerns of the residents.[201]

The number of crimes was not the only aspect of the crime situation that concerned Hawaii residents. Questions were raised about the efficacy of all aspects of the criminal justice system in dealing with all aspects of what was perceived as an increasingly threatening crime situation. A collaborative research effort by a professor of sociology at the University of Hawaii (Manoa) and a reporter for the Advertiser, resulted in a detailed multi-part series in the Advertiser (Keller and Kassebaum, 1978) that showed that only a small percentage of persons arrested in Honolulu for violent crimes ever spent time in prison. Worse still, from the point of view of many, little rationality could be discerned in the outcomes of cases.[202]

Intense publicity about crime in the 1970's along with its occasional emergence as a political campaign issue, and as a defined threat to tourism, combined with hardline attitudes developing on the Mainland which led to local rejection of the ideology of rehabilitation, and increasing belief in the efficacy of imprisonment of persons convicted

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[201] See, for example, Advertiser (January 13, 1978:A1; January 31, 1978:A4) and Star-Bulletin, (January 31, 1978:A4).

[202] The study was of the population of all persons arrested in Honolulu during 1973 for crimes of violence.

of crime for purposes of retribution, incapacitation, and punishment.[203] In 1980 the Hawaii legislature enacted a strict mandatory sentencing statute (Act 294, 1980) which required judges to sentence all persons convicted for class A felonies to prison. This, of course, included rape in the first degree. The strong law and order attitudes emerging in the 1970's combined with feminist interests in more efficacious enforcement of rape law to constitute a powerful force for rape law reform which would facilitate conviction.

Before moving intc the period of most intense activity toward rape law reform, occurring after 1973, we will pause and consider an important related event, the adoption of the new penal code in 1972. This was not directly associated with the feminist movement, but rather with the more general movement toward penal law modernization and liberalization of law with regard to sexual matters, and with Hawaii's post-statehood move toward cultural integration with the Mainland.

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[203] A comprehensive study of sentencing in 1981 advocated a movement toward a more punitive sentencing policy with more use of imprisonment (Statewide Sentencing Project, 1981).

7.2 THE ADOPTION OF THE NEW HAWAII PENAL CODE AND A NEW RAPE STATUTE

As Hawaii moved into the 1960's its penal code, which had not been completely revised since the penal code of 1850, came to be seen as more and more inadequate to meet the needs of the new state. It was disorganized and in many ways archaic (Baldwin, 1971). Leading lawyers of Hawaii's bar invited Mainland attorneys involved in revising the codes of other states to study Hawaii's existing code and to report on the advisability of reform (Baldwin, 1971). They recommended reform, and a project was begun in 1966 under the aegis of the Judicial Council of the state. A Committee on Penal Law Revision was established. It was chaired by Judge Masato Doi and consisted of one Circuit Court judge, four attorneys, a corrections official, and a political scientist. Patricia Putman, a lawyer employed by the Legislative Reference Bureau of the University of Hawaii, was the only woman on the committee. After several years of work, a draft code was presented to the legislature in 1970. After more consideration and revision, the code was adopted in 1972 (Act 9, 1972) to become effective January 3, 1973. The most important influence on the new code was the Model Penal Code of the American Law Institute (1962). In addition, codes and draft codes of several other states (i.e. Michigan, California, Delaware, and New York) were drawn upon.

The two parts of the new Hawaii penal code of interest here are the parts pertaining tc sex offenses in general, and the part pertaining to rape, sodomy, and sexual abuse in particular.

On the first matter, the new Hawaii penal code, following the Model Penal Code, dismissed all consensual behavior between adults (except prostitution and incest) as inappropriate for regulation by means of criminal law. It therefore limited the regulation of sex offenses to those involving "(1) forcible compulsion, (2) imposition on a youth or other person incapable of giving meaningful consent, or (3) offensive conduct." (Commentary, Chap. 707, Title 37, Hawaii Revised Statutes) Thus, reflecting changed views of sexual behavior, the role of women, rights of privacy, and the proper ambit of the criminal law the "generalized sex taboo," (Murdock, 1949) which the missionary and New England Yankee culture had succeeded in institutionalizing in Hawaii's penal laws in the 1820's, 30's, and 40's, was wiped off the law books. In a sense, the decriminalization of consensual sexual behavior in private resembled a return to the norms of sexual regulation of the Hawaiians before the imposition of the puritanical concepts of the missionaries. Certainly the issue of what values were threatened by rape was affected by these changes in sexual legal norms.

With respect to the remaining sex offenses, the new code established three major categories of concern to us; rape in three degrees (Secs. 707-730 to 707-732), sodomy in three degrees (Secs. 707-733 to 707-734), and sexual abuse in two degrees (Secs. 707-736 to 707 737). The sections pertaining to rape prohibited males from having sexual intercourse by forcible compulson with females, and males from having sexual intercourse with females under the age of fourteen, or who were mentally defective, mentally incapacitated, or physically helpless. The sections pertaining to sodomy were sex-neutral (could be committed by male or female on male or female) and prohibited "deviate sexual intercourse" with the same set of persons under the same conditions. The sections pertaining to sexual abuse were sex-neutral and prohibited "sexual contact" by forcible compulsion or with persons under fourteen, between sixteen and fourteen if the victim is at least four years younger than the perpetrator, or persons mentally defective, mentally incapacitated, or physically helpless. Rape and sodomy, first, second, and third degree, were Class A, B, and C felonies respectively, with respective maximums of twenty, ten, and five years. Sex abuse first degree was a Class C felony and sex abuse second degree was a misdemeanor (imprisonment not exceedig one year). The text of the sodomy and sex abuse sections is presented below.

CHAPTER 7
OFFENSES AGAINST THE PERSON
PART I. GENERAL PROVISIONS RELATING TO OFFENSES AGAINST THE PERSON

Sec. 700—Definitions of terms in this chapter.

In this chapter, unless a different meaning plainly is required:

(1) "Person" means a human being who has been born and is alive;

(2) "Bodily injury" means physical pain, illness, or any impairment of physical condition;

(3) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(4) "Dangerous instrument" means any firearm, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury;

(5) "Restrain" means to restrict a person's movement in such a manner as to interfere substantially with his liberty:

(a) By means of force, threat, or deception; or

(b) If the person is under the age of 18 or incompetent, without the consent of the relative, person, or institution having lawful custody of him;

(6) "Relative" means parent, ancestor, brother, sister, uncle, aunt, or legal guardian;

(7) "Sexual intercourse" means any act of coitus between male and female, but does not include deviate sexual intercourse; it occurs upon any penetration however slight and emission is not required;

(8) "Deviate sexual intercourse" means any act of sexual gratification:

(a) Between persons not married to each other involving the sex organs of one and the mouth or anus of the other; or

(b) Between a person and an animal or a corpse, involving the sex organs of one and the mouth, anus, or sex organs of the other.

(9) "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor, done with the intent of gratifying the sexual desire of either party;

(10) "Female" means any female person to whom the actor is not married;

(11) "Married" includes persons legally married, but does not include spouses living apart under a judicial decree;

(12) "Forcible compulsion" means physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped;

(13) "Mentally defective" means a person suffering from a disease, disorder, or defect which renders him incapable of appraising the nature of his conduct;

(14) "Mentally incapacitated" means a person rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a substance administered to him without his consent;

(15) "Physically helpless" means a person who is unconscious or for any other reason physically unable to communicate unwillingness to an act.

PART V. SEXUAL OFFENSES

Sec. 730—Rape in the first degree.

(1) A male commits the offense of rape in the first degree if:

(a) He intentionally engages in sexual intercourse, by forcible compulsion, with a female and:

(i) The female is not, upon the occasion, his voluntary social companion who had within the previous 12 months permitted him sexual contact; or

(ii) He recklessly inflicts serious bodily injury upon the female; or

(b) He intentionally engages in sexual intercourse with a female who is less than 14 years old and he recklessly inflicts serious bodily injury upon the female.

(2) Rape in the first degree is a class A felony.

Sec. 731—Rape in the second degree.

(1) A male commits the offense of rape in the second degree if:

(a) He intentionally engages in sexual intercourse by forcible compulsion with a female; or

(b) He intentionally engages in sexual intercourse with a female who is less than 14 years old.

(2) Rape in the second degree is a class B felony.

Sec. 732—Rape in the third degree.

(1) A male commits the offense of rape in the third degree if he intentionally engages in sexual intercourse with a female who is mentally defective, mentally incapacitated, or physically helpless.

(2) Rape in the third degree is a class C felony.

Sec. 733—Sodomy in the first degree.

(1) A person commits the offense of sodomy in the first degree if:

(a) He intentionally, by forcible compulsion, engages in deviate sexual intercourse with another person or causes another person to engage in deviate sexual intercourse, and:

(i) The other person was not, upon the occasion, his voluntary social companion who had within the previous 12 months permitted him sexual contact of the kind involved; or

(ii) He recklessly inflicts serious bodily injury upon the other person; or

(b) He intentionally engages in deviate sexual intercourse with another person who is less than 14 years old, or causes such person to engage in deviate sexual intercourse, and he recklessly inflicts serious bodily injury upon the person.

(2) Sodomy in the first degree is a class A felony.

Sec. 734—Sodomy in the second degree.

(1) A person commits the offense of sodomy in the second degree if:

(a) He intentionally, by forcible compulsion, engages in deviate sexual intercourse with another person or causes another person to engage in deviate sexual intercourse; or

(b) He intentionally engages in deviate sexual intercourse with another person who is less than 14 years old.

(2) Sodomy in the second degree is a class B felony.

Sec. 735—Sodomy in the third degree.

(1) A person commits the offense of sodomy in the third degree if he intentionally engages in deviate sexual intercourse with another person, or causes another person to engage in deviate sexual intercourse, and the other person is mentally defective, mentally incapacitated, or physically helpless.

(2) Sodomy in the third degree is a class C felony.

Sec. 736—Sexual abuse in the first degree.

(1) A person commits the offense of sexual abuse in the first degree if:

(a) He intentionally, by forcible compulsion, has sexual contact with another or causes another to have sexual contact with him; or

(b) He intentionally has sexual contact with another person who is less than 14 years old or causes such a person to have sexual contact with him.

(2) Sexual abuse in the first degree is a class C felony.

Sec. 737—Sexual abuse in the second degree.

(1) A person commits the offense of sexual abuse in the second degree if:

(a) He intentionally has sexual contact with another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with him; or

(b) He intentionally has sexual contact with another person who is under 16 years old and at least 4 years younger than him or causes such a person to have sexual contact with him.

(2) Sexual abuse in the second degree is a misdemeanor.

(3) It is an affirmative defense to a prosecution under subsection (1) (b) that the other person had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

Sec. 738—Indecent exposure.

(1) A person commits the offense of indecent exposure if, with intent to arouse or gratify sexual desire of himself or of any person, he exposes his genitals to a person to whom he is not married under circumstances in which his conduct is likely to cause affront or alarm.

(2) Indecent exposure is a petty misdemeanor.

Sec. 739—Knowledge of incapacity to consent; prima facie evidence.

(1) In any prosecution for an offense defined in this part, a victim is deemed incapable of giving effective consent if:

(a) He or she is less than the age specified in the definition of the offense, or is mentally defective, mentally incapacitated, or physically helpless; and

(b) The age or condition of the victim is an element of the offense.

Sec. 740—Prompt complaint.

No prosecution may be instituted or maintained under this part unless the alleged offense was brought to the notice of public authority within one month of its occurrence or, where the alleged victim was less than 16 years old or otherwise incompetent to make a complaint, within one month after a parent, guardian, or other competent person specially interested in the victim learns of the offense.

Sec. 741—Incest.

(1) A person commits the offense of incest if he commits an act of sexual intercourse with another who is within the degrees of consanguinity or affinity within which marriage is prohibited.

(2) Incest is a class C felony.

While a detailed analysis of the sex offense statutes in the new penal code is beyond the scope of this study, several important points about the statutes must be discussed, particularly because some of the provisons of the new statute later became the focus of organized dissatisfaction and the rallying points for change.

The primary source of Hawaii's new (1972) rape statute being the Model Penal Code (Sec. 213.1), it followed the philosophy of the Model Penal Code that the global concept of "rape" empirically consisted of different behaviors, of differential dangerousness, and to which should be applied different sanctions. According to the new Hawaii penal code, the dimensions of social dangerousness were: age of victim (over or under fourteen), whether or not serious bodily injury was inflicted on the victim, whether the victim was on the occasion of the rape the male's voluntary social companion who had permitted him sexual contact within the prior twelve months, whether forcible compulsion was used, and whether the victim was mentally defective, mentally incapacitated, or physically helpless. These various dimensions were combined to establish rape in three degrees with commensurately graded sanctions.

There were several differences between the rape statute adopted by the Hawaii legislature and the Model Penal Code, the most important for our purposes concerning forcible compulsion, the voluntary social companion provison, and corroboration.

(1) Forcible Compulsion

The Model Penal Code did not include forcible compulsion as an element of rape. Consequently there was no requirement of resistance, a requirement usually construed as inherent in the concept of forcible compulsion. Rather the Model Penal Code shifted the focus from the behavior of the victim (i.e. level of resistance), usually the key issue at trial, to the nature of the threatening or forceful behavior of the attacker (See Comment, 1975: 1503-1516). The Model Penal Code (Sec. 213.1) said a man committed rape if "he compels her to submit by force or by the threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone ..." The new Hawaii code, however, not following this part of the Model Penal Code, took an approach apparently taken from a 1961 New York penal law which requires forcible compulsion, which it defines as

> physical force that overcomes earnest resistance, or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped (Sec. 130.00(8)).

It has been pointed out that compared to the Model Penal Code approach, the New York and Hawaii approach was a "regressive step in the development of modern rape law" because it retained the focus on the behavior of the victim rather than that of the attacker (Comment, 1975: 1512-1513). As we will see below, the "regressiveness" of this provision became more and more unacceptable in Hawaii.

(2) Voluntary Social Companion

As part of the Model Penal Code's attempt to differentiate rape into grades according to social dangerousness, the concept of "voluntary social companion" was introduced. According to the Model Penal Code, if the victim of the rape was the attacker's voluntary social companion on the occasion of the rape and had previously permitted him "sexual liberties," the crime was rape in the second degree, unless the attacker had inflicted serious bodily injury. The Hawaii code incorporated the same provison with the substitution of "sexual contact" for "sexual liberties" and the limitation that the sexual contact must have taken place within the past twelve months for mitigation. The commentary to the Hawaii penal code explained the rationale:

> The degree and nature of the victim's acquaintance with the actor as a mitigating circumstance (or the absence of an acquaintanceship as an aggravating circumstance) is based on the theory that a person who resorts to sexual aggression against a female who has permitted previous sexual intercourse, and who has thereby furnished to some extent an incentive to further amorous advances, presents less of a social danger than the person who commits sexual aggression against a female who is not his voluntary social companion or with whom he has not been previously familiar. Moreover, a male who forces sexual intercourse in such situations does not deserve the same degree of moral condemnation, as the male who forces sexual intercourse upon a female with whom he has little or no acquaintance. (Commentary, Sec. 707-730 to 707-732, Hawaii Revised Statutes)

Again, the "voluntary social companion" innovation as a dimension of offense gradation was a concept that became

controversial later in the 1970's in revisonist thinking about rape.

(3) Corroboration

A final aspect of the new Hawaii penal code to be discussed is the corroboration requirement. In what one commentator (Comment, 1975:1531) called "One of the least satisfactory sections of the Code's article on sexual offenses," the Model Penal Code included the following section:

> (6) Testimony of Complainants. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private. (Sec. 213.6(6))

Hawaii's Penal Law Revision Project proposed that Hawaii follow the Model Penal Code in establishing a corroboration requirement, although it dropped the last sentence of the Model Penal Code version that stated that juries must be given special cautionary instructions to carefully evaluate the testimony of the alleged victim because of her emotional involvement in the matter and the special difficulty of ascertaining the truth in rape cases (Hawaii, 1970: Sec. 741).

However, the Hawaii legislature rejected the approach of the proposed draft and deleted the corroboration requirement

when it adopted the final code. Since corroboration requirements in other states came under considerable criticism during the 1970's, the Hawaii legislature of 1972 was prescient in its refusal to incorporate such a provision in its new rape statute.[204]

With the major provisions of Hawaii's new penal code in mind, a code that reflected modern legal and social thought about the nature and degrees of social dangerousness, but which did not yet reflect the perspectives arising from the feminist redefinition of rape, we move to consider rape law for the balance of the 1970's.

7.3 THE EMERGENCE OF RAPE AS AN ISSUE IN HAWAII

The decade of the 70's was the most intense period in the history of Hawaii during which rape was a public issue. Innumerable articles appeared in the newspapers on the subject. Likewise there were countless workshops, panel discussions, seminars, self-defense courses, and legislative hearings on various aspects of rape and rape law. Two major task forces and the Hawaii Crime Commission research staff addressed the question of what changes should be made in the statutes. The legislature considered dozens of bills to modify the rape statute. For example, in 1979 there were at

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[204] The proposed corroboration requirement would have applied to all the sexual offenses in the chapter (rape, sodomy, and sexual abuse), but since the issues are the same, this discussion is limited to rape for purposes of brevity.

least twenty bills introduced on the topic. Because of the level of the activity it will not be possible to cover events in the detail given in previous sections, and it is necessary to work with broader brush strokes.

The movement to address rape during the 1970's had three main goals: to change the treatment of rape victims by law enforcement agencies, health personnel and the courts; to increase the apprehension and conviction of rapists; and to change public attitudes about rape and rape victims. Particularly the first and third goals represent a marked break with the past. While past periods of concern with rape have seen attempts to facilitate rape convictions, almost no attention was given to rape victims, other than utterings about the tragedy that had befallen them. Treatment of rape victims by police, medical personnel, and prosecutors received no scrutiny. There were occasional complaints about the treatment of rape complainants in court by defense attorneys, but these focused on the villainy of the particular defense attorney and not system qualities. This historical neglect of the treatment of victims was a consequence of the fact that women were so effectively excluded from powerful and responsible public roles, that victims' viewpoints rarely were represented, and even when they were, because of the dominant cultural attitudes about sex roles, they tended not to address victims' rights issues. When women took over the rape issue in the 1970's,

not surprisingly they addressed it largely from from the perspective from which they experienced rape -- as victims.

Rape began to reemerge as a public issue in Honolulu in mid-1973. One of the first public manifestations was an article by Advertiser staff writer Laurel Murphy who wrote a long article titled "Rape: the law that Seldom Works" (Advertiser, July 25, 1973:C1) that described the case of a rape victim as she went through a grueling investigation and trial. During the prccess she was subjected to demands to repeat her story many times to a series of investigators and to having to reveal to the investigatcrs, and at the trial, the details of her past sexual conduct. The defense contended that she had consented to have sexual intercourse with the defendant and only claimed rape because her husband had become suspicious. The defense prevailed in the case.

In a companion article (Advertiser, July 25,1973:C1), the same writer recounted another case in which the victim was injured and thus had the ample, and apparently necessary, physical evidence to prosecute a rape case successfully. But the writer pcinted out, this type of outcome was rare. Since 1970 (exact date not given) the Honolulu Police Department had recorded 353 "legitimate" complaints of rape. 237 arrests were made, but only 38 indictments were delivered. Four convictions were achieved, three by juries.[205] The writer noted that many factors are

[205] It is not clear exactly how these figures were arrived at or what they represent. Given the processual nature

responsible for the low rates of conviction, among them victim reluctance to testify, evidentiary problems, and reduction of the crimes to lesser offenses.

The writer revealed that some of the problems being experienced by rape victims were currently being addressed. She mentioned that a group of women calling itself "The Rape Collective" was meeting at the YWCA and was doing a study of rape. And Honolulu resident Maureen Leopold, an officer of the National Women's Political Caucus, was advocating an all-women rape squad in the police department.

A couple of months after this article appeared, state Representative John Leopold, the husband of Maureen Leopold, requested the mayor of Honolulu and the Speaker of the House of Representatives to establish a rape task force. He cited the increasing incidence of rape in Honolulu in recent years, the known underreporting of the crime, and the inhumane treatment of the victims. Leopold suggested that the task force would examine:

> The effectiveness of existing statutes dealing with rape.
>
> The relationship, if any, between traditional legal and social attitudes toward sex roles, the act of rape, and the formulation of laws dealing

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of the criminal justice system, it seems doubtful that these figures precisely reflect the outcome of the 353 complaints, as is implied. It is likely that some of the arrests were for offenses occurring during a prior time period. The same is true for indictments. Also, the writer gives no indication of the number of cases still pending at the time the statistics were collected. Nevertheless, the general finding that most complaints are not successfully prosecuted was undoubtedly correct.

with rape.

The treatment of the victims of rape by law enforcement agencies, hospitals, the prosecutors, and the courts.

Sexual assaults in correctional institutions.

The actual incidence of forcible rape as compared to the reported cases and the reason for the low rate of rape convictions.

The effectiveness of existing private, County and State education and counseling programs designed to prevent and control rape.

The need for special training of police personnel dealing with rape victims. (Advertiser, October 9, 1973:A15)

The mayor of Honolulu rejected Leopold's request[206] citing the fact that the Mayor's Advisory Commission on Law Enforcement Planning was devising its own rape control program and had submitted a grant proposal to the State Law Enforcement Planning Agency[207] for $45,000 to fund a rape crisis center and special projects to change attitudes about rape. The Advisory Commission had been working about six months and was begun after FBI crime reports showed a rise in the incidence of rapes. The Advisory Commission was studying the legal aspects of rape and all aspects of rape victims (Advertiser, October 17, 1973:A12).

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[206] Leopold being a Republican, and the mayor a Democrat, the likelihood of any proposal being accepted from Leopold, regardless of its merits, was nil.

[207] The State Law Enforcement Planning Agency was the local conduit of LEAA funds.

At about the same time Leopold made his request for a task force on rape, a volunteer worker at the Boston Rape Crisis Center visited Honolulu. She participated in a women's symposium at the University of Hawaii (Manoa) during which she discussed rape issues and events on the Mainland (Advertiser, October 10, 1973:D2).

The rape issue emerged prominently in the legislative session of 1974. Again the focus was on modifying procedures to ease the trauma for the rape victim. Senate President David McClung introduced two resolutions pertaining to rape. Senate Resolution No. 165 (1974) called for the establishment within the Honolulu Police Department of a special rape investigation unit to be staffed with female officers. Senate Resolution No. 166 (1974) called for a study by the Judicial Council of the state of judicial procedures, rules of evidence, and the substantive law regarding rape. The Senate Judiciary Committee held hearings on the resolutions in March of 1974. The most important testimony given was a long written statement by a middle-aged woman who had been a recent rape victim. She described in detail, skeptical, humiliating, and ineffective actions by the police. She said,

> The nightmare of harassing questions, insinuating suggestions, and dehumanizing treatment began with the arrival of the first policeman, continued with the ambulance attendant, included the male nurse in the hospital emergency room and still goes on as the investigation continues.
>
> * * *

> The case is still open but seems to progress only at my request.

The victim went on to criticize commonly held attitudes toward rape which she felt were hampering her case.

> The age, race, sexual experience, marital status, state of dress, occupation, income, time of day, or whether a woman lives alone should have nothing to do with influencing the police investigation of rape cases. Neither should the victim be made to feel that she has to prove that she is worthy of being taken seriously. (Star-Bulletin, March 27, 1974:D1)

The rape victim's statement was given prominent attention in the press. The Star-Bulletin, devoted nearly an entire page to it.

The Honolulu Police Department defended itself at the hearing, and pointed out that it already had a rape investigation unit, although admitting that it was not called into a case until the woman had been extensively questioned. The police spokesman said that the police department was trying to hire more women officers but it would be some time before women would be detectives. The department testified in favor of Senate Resolution No. 166 regarding the study of the rape laws. Also testifying in favor of the resolutions was the American Civil Liberties Union, Life of the Land (an environmental group), and the Hawaii Women's Health Center (Star-Bulletin, March 27, 1974:D1).

The Senate Judiciary Committee reported favorably on Senate Resolution No.165 (Standing Committee Report No. 706,

1974) and on Senate Resolution No. 166 (Standing Committee Report No. 710, 1974). Both resolutions were unanimously adopted by the full Senate.

Meanwhile, in the state House, a resolution (House Resolution No. 121, 1974) introduced by Representative John Leopold requesting the creation of a rape task force was killed by the Democratic chairman of the Judiciary Committee, probably a casualty of inter-party wrangling (Star-Bulletin, April 11, 1974:B1).

One other measure of note (House Bill No. 2720, 1974) in the 1974 legislature, one that did not get any publicity, was a proposal to substitute "sexual intercourse" for "sexual contact" in the voluntary social companion provision of rape in the first degree (Sec. 707-730). Consequently, only if a defendant had actually had sexual intercourse with the rape complainant in the prior twelve months could he invoke the provision in extenuaton of his offense. The change passed both houses and was signed into law by the governor (Act 197, 1974).

Nearly simultaneous with the consideration of rape by the state Senate, the School of Social Work at the University of Hawaii (Manoa) held a two-day conference on rape. Psychologist John Blaylock, chief of the State Health Department's Mental Health Team for Courts and Corrections, spoke to the group and his remarks were reported in the newspapers. Among the major points he made were:

*the irrelevancy of a rape complainant's prior sexual conduct to the issue of whether she was raped

*the irrelevancy of the notion of victim provocation

*his opposition to the present Hawaii penal code provision that makes rape of a voluntary social companion who had permitted sexual contact in the previous twelve months, rape in the second degree

*his belief that rape is a symptom of a much larger social problem- "the mess the American people have made of the whole sexual thing, and I don't think we are going to solve the rape problem until we solve the way the whole thing is messed up." (Advertiser, April 10, 1974:H3)

By May of 1974 the rape reform movement began to have an impact on the newspapers. The Star-Bulletin (May 25, 1974:A10) approvingly discussed proposals to aid rape victims that had been offered at the School of Social Work, conference including the idea of closed judicial hearing in rape trials to spare rape victims public embarrassment and the suggestion that more women should be involved as investigators, attorneys, and judges in the criminal justice system.

The emerging new perspectives on rape soon began to be institutionalized. In the fall of 1974 proposals surfaced for a treatment center for victims of rape for the purpose of providing more humane and sympathetic treatment and for better collection of evidence needed for successful prosecution of cases (Advertiser, August 27, 1974:A9). Interest in this project, centered in the staff of Kapiolani

Hospital[208] and the staff of the University of Hawaii School of Medicine. In October of 1974 the Research Committee of Kapiolani Hospital appointed an ad hoc committee to research the question of the need for services to rape victims and possible approaches. The ad hoc committee received $12,230 in grants from several local foundations to conduct a feasibility study. A researcher was hired and a study was conducted resulting in a final report completed in September 1975. The study found a need for services to rape victims and recommended that a crisis center be established at Kapiolani Hospital (Chun, 1975). Anticipating the final report somewhat, the state legislature appropriated during its 1975 session $200,000 to fund the first year of operation of a rape crisis center at Kapiolani Hospital.

The handling of rape cases by the police department was also affected. Although the police department did not establish a rape squad with all female investigators, it did modify its procedures so that the victim did not have to tell her story over and over before seeing an investigator from the rape detail. Investigators also became more sensitive to the needs and feelings of the rape victim (Advertiser, February 3, 1975:B6). Questioning of rape victims was modified so that it no longer had its "attack" character (Star-Bulletin, January 22, 1976:A11). Detective Earl Benson, of the police department's rape squad, and a

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[208] Kapiolani Hospital is the primary obstetric-gynecological hospital in Honolulu.

man highly regarded as a sympathetic investigator by women's groups, was sent to a two-week seminar on the Mainland on sex crime investigation (Star-Bulletin, January 22, 1976: A11).

7.4 RAPE LAW REFORM IN THE LEGISLATURE

The most important arena for rape law reform in Hawaii during the 1970's was the state legislature. Women saw legislative enactments as the most strategic approach to the change of the practices of law enforcement agencies as well as the courts. Some of their efforts have already been mentioned.

1975 was the most important year for rape legislation in Hawaii. It was the first year that the legislature took a serious look at the issue of rape law reform. In addition to the appropriation for the establishment of the rape crisis center, several other bills were introduced into the legislature on the topic of rape. One very important bill passed.

The most organized effort during the 1975 legislative session was the introduction of a "package" of rape bills by Reps. Tony Kunimura, Kate Stanley, and Lisa Naito. House Bill No. 104 (1975) provided for the establishment of special rape investigation teams in the police departments of each of the counties of Hawaii to have the principal responsibility for the immediate investigation of sex

offenses. When possible, the special rape squads were to be composed of both males and females. House Bill No. 104 passed the House despite opposition by the Honolulu Police Department to the provision that the squads be composed of both sexes. The House severely criticized the police department for foot-dragging on getting qualified female detectives on its rape squad (House Judiciary Standing Committee Report No. 64, 1975) (Advertiser, February 19, 1:A6). The bill passed the House forty-nine to one. It failed in the Judiciary Committee of the Senate.

House Bill No. 105 (1975) paralleled House Bill 104 in establishing a rape treatment center in each county to provide examination, treatment, and counseling to rape victims. The center was to be staffed by professionals on call 24 hours a day. Despite a favorable report by the House Judiciary Committee (House Judiciary Standing Committee Report No. 61, 1975) the bill died in the House Finance Committee due to cost considerations.

The third bill, House Bill No. 106 (1975) was the most important of the legislative package. It provided that in trials on charges of rape, first, second, and third degree, if the defense wished to offer evidence of the complainant's prior sexual conduct in order to attack her credibility the defense first had to prove to the judge, out of the presence of the jury, the relevancy of such evidence. The House Judiciary Committee considered the new statute as a "middle

course" between the defendant's due process rights to question victims about all the "attendant circumstances" of a crime and rape reformer demands to exclude prior sexual conduct evidence completely in all cases. The compromise was a case-by-case showing of relevancy. The committee commented in its report that the courtroom character assassination of complainants was "common knowledge" and that this fact deterred rapes from being reported to the detriment of adequate protection of society (House Standing Committee Report No. 63, 1975).

The prime considerations of the committee, humane treatment of rape victims as an end in itself and as a means to more effective rape prosecution, indicate the remarkable change in social and legal thinking about women and rape. The remarkable change was that it was no longer accepted as a given that one of the most, if not the most, significant issues in a rape trial, bearing on the question of consent, was the question of whether a complainant in a rape case had been sexually exclusive. The culturally defined division between respectable and unrespectable women based on their sexual behavior had broken down. The protection of rape law was being extended, due to changes in the sexual stratification system and changes in the norms of sexual regulation, to women whose behavior would have, under older notions of rape, left them unprotected. Defendants were, under the new provision, still able to present such evidence if it was "relevant," but understanding of what is relevant

had been drastically changed, and this was reflected in new court procedures.

House Bill No. 106 passed both the House and the Senate and was signed into law by the governor on May 14, 175 (Act 83, 1975). The bill apparently had consequences for rape trials even before being signed by the governor. In a rape trial going on the week before the governor signed the bill, Circuit Judge Robert W. B. Chang[209] removed the jury from his courtroom and heard arguments on the relevancy of evidence about the complainant's past sexual conduct. He decided not to permit the evidence (Advertiser, May 7, 1975:A9). Since Act 83 was passed, the nature of rape trials has been fundamentally transformed. Defense attorneys are rarely permitted to question complainants in rape cases on their prior sexual behavior.

The statute pertaining to the exclusion of evidence of past sexual history of a complainant was modified by the legislature in 1977 to further protect the complainant's privacy. The 1975 act had required that if the defense's offer of proof to the judge of the relevance of evidence of the complainant's sexual conduct was sufficient, the judge was to conduct a hearing on the offer of proof, out of the presence of the jury, at which time the complainant could be

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[209] Judge Chang may be remembered as the Speaker of the House of Representatives in 1960 who refused to let pass any resolutions that implied that the rape law was inadequate. He defended the rape statutes as "adequate."

questioned on her sexual conduct (Sec. 707-742(a)(3)). By 1977 it came to be perceived that the procedure was deficient in that, while excluding the jury from the hearing, all other persons, including press and spectators were allowed to attend. Thus, the purpose of the original act was in part defeated. Act 109 (1977) provided that the hearing was to be held "out of the presence of the jury, if any, and all other persons except for court personnel, the parties, their attorneys, and such other persons whose persence is determined by the court to be necessary for the hearing."

The mid and late 1970's, 1980, and 1981 saw many more bills on rape introduced and a few passed. There were bills to establish stiffer sentences,[210] to further restrict admissibility of evidence of prior sexual conduct by the complainant,[211] to "de-sex" the rape and/or other sex offense statutes,[212] to eliminate or modify the prompt

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[210] See, for example, House Bill No. 2332 (1974), Senate Bill No. 2224 (1974) House Bill No. 2397 (1976), Senate Bill No. 442 (1979), and House Bill No. 1886 (1980). These bills did not generally receive the support of rape law reformers, because harsher penalties were seen to be counterproductive by making juries more reluctant to convict.

[211] See, for example, House Bill No. 439 (1979) and Senate Bill No. 590 (1979)

[212] The usual consequence of these proposals is to make rape committable by a male or female on a male or female. See, for example, House Bill No. 2594 (1976), House Bill No. 1313 (1977), Senate Bill No. 1464 (1979), Senate Bill No. 884 (1979), House Bill No. 303 (1979), House Bill No. 304 (1979), House BIll NO. 503 (1979), House

complaint requirement (Sec. 707-740),[213] to abolish rape altogether and to replace it with "sexual assault,"[214] to remove or modify the voluntary social companion provision,[215] and to delete or modify resistance as an element of forcible compulsion.[216]

Two major organized attempts were made to address questions of rape law reform. In 1977 the Hawaii Crime Commission established the Sexual Assault Offenses Task Force to consider problems of rape law.[217] The task force was comprised of twelve members with expertise concerning sex offenses. In a significant departure from earlier study groups on sex crimes, seven of the twelve members of the task force were women.[218] Also revealing the extent to which the definition of the situation had changed since 1960, not

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Bill No. 438 (1979), and Senate Bill No. 554 (1979).

[213] See, for example, House Bill No. 249 (1977), Senate Bill No. 1678 (1979), House Bill No. 1379 (1979), House Bill No. 404 (1979), Senate Bill No. 271 (1979), House Bill No. 435 (1981).

[214] See, for example, House Bill No. 1313 (1979), Senate Bill No. 1429 (1979), House Bill No. 1521 (1979), Senate Bill No. 2877 (1980), House Bill No. 52 (1980), House Bill No. 1654 (1981), and Senate Bill No. 610 (1981).

[215] See, for example, House Bill No. 1313 (1977), House Bill No. 380 (1981), and House Bill No. 300 (1981). Some of the other bills also included elimination of this provision.

[216] See, for example, House Bill No. 1500 (1979), Senate Bill No. 2877 (1980), and House Bill No. 300 (1981).

[217] The specific goals of the Sexual Assault Offenses Task Force are listed in Hawaii Crime Commission (1980:7).

[218] The committee members were Earl Benson, Detective,

a single psychiatrist or psychologist was on the task force.

The task force met during the year 1978 but was unable to agree on a draft of a revised rape law because of a split that developed in the group. One faction, more knowledgeable about and committed to legal tradition and practice, wished to retain the requirement of "forcible compulsion" and "earnest resistance" and the other faction, more victim advocacy oriented, wished to drop it. The first faction wanted a gradation of severity of offense based on the severity of the injury of the victim, while the other faction believed proof of injury placed too much of a burden on the victim. The task force also could not agree on whether to abolish "rape" as such as a crime and create degrees of "sexual assault." The members of the task force also did not agree on whether psychological injuries should be included as "serious bodily injury," how and whom to protect from sexual offenses by persons in "a position of authority," and "the effectiveness of existing administrative procedures such as pre-trial screening practices used by police and prosecutors."[219] Despite the

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Honolulu Police Department; Addison Bowman, Professor of Law, University of Hawaii; David Chandler, Professor of Sociology, University of Hawaii; Roy Chang, Deputy Prosecutor; Paula Chun, Director, Sex Abuse Treatment Center; Yuriko J. Hiramoto, Tripler Army Medical; Janice Arnold-Jones then Ramona Hussey, People Against Rape; Lila Johnson, Community; Marie Milks, Deputy Public Defender; Patricia Putman, Associate Dean, University of Hawaii Medical School; Geraldine Senner, Child Protective Services; William Woods, Sexual Identity Center.

lack of agreement among the task force members resulting in an official recommendation to the 1979 legislature, one comprehensive bill was introduced incorporating the ideas of the legally oriented faction (House Bill No. 1429, 1979) but it was opposed by other members of the task force and it failed to pass.

The other important organized effort at studying rape law with a goal of statutory change was a committee established in 1979 by People Against Rape, the Sex Abuse Treatment Center, and the National Organization of Women, to continue efforts at changing the rape statutes begun by the Crime Commission's Sexual Assault Offense Task Force the previous year. This group, called the "1980 Committee," consisted of sixteen women and one man, nearly all of whom were members of women's political, advocacy, or service providing groups.[220] Representative Kate Stanley chaired the group.

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[219] This description of the activities and difficulties of the Hawaii Crime Commission's Sexual Assault Offenses Task Force is taken from Hawaii Crime Commission (1980:9-11) and from a discussion with Dr. David Chandler, one of the participants, on May 2, 1983.

[220] The members of the "1980 Committee" were Kay Allan, Women's Self Defense Council; Marlene Bertolino, Women Helping Women; Paula Chun, Director, Sex Abuse Treatment Center; Diane DeBruno Cox, State Commission on the Status of Women; Jean Ebersole, Coordinator, Women's Center (Hilo); Marlene Gundlach, Women's Center (Kona); Ramona Hussey, Co-Chair, People Against Rape; Karen Kimura, Sex Abuse Treatment Center; Robert Luck, Victim/Witness Kokua Center, Prosecutor's Office; Capt. Dee Martin, Tripler Rape Crisis Team; Marie Milks, Office of the Public Defender; Claudia Nichols, NOW Legislative Task Force; Ellen Politano, Private Attorney; Pat Putman, Associate Dean for Legislative Affairs, University of Hawaii Medical School; Marilyn

Out of its deliberations, the 1980 Committee on Criminal Sexual Violence produced into the House a draft bill which was introduced by Stanley (House Bill No. 2152, 1980) and into the Senate by Senator Dennis O'Connor (Senate Bill No. 2877, 1980). The proposal would have completely rewritten the sexual offense statutes, abolishing rape, sodomy, and sexual abuse, and incorporating those behaviors within four degrees of sexual assault. It also eliminated such requirements as prompt complaint, resistance, and the voluntary social companion provision.

The proposal was greatly modified by the legislature, and the attempt to substitute sexual assault for the traditional offenses failed. Senate Bill No. 2877 did pass in a much modified form (Act 223, 1980). Its provisions are discussed below.

In 1980 the Hawaii Crime Commission again took up the issue of rape law reform, this time without a task force, but by the efforts of its own research staff. After doing a small survey of attorneys, law enforcement personnel, and representatives of victim advocate groups, and an analysis of rape laws in other states, the Hawaii Crime Commission proposed a substantial revision of the sex offense laws. The major elements of the revision were the consolidation within the meaning of "sexual intercourse" of the behaviors

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Shuey, Honolulu City/County Committee on the Status of Women; Kate Stanley, State Representative; Cassie Welch, Director, Kauai Women's Center.

formerly defined as "deviate sexual intercourse," the elimination of resistance as an element of forcible compulsion, complete sex-neutraliy, and the creation of four degrees of sexual assault in place of rape, sodomy, and sexual abuse. The proposal was submitted to the 1981 session of the legislature but failed to pass (Senate Bill No. 610, 1981).

Despite task forces that could not reach agreement and comprehensive revisions that failed to be adopted, among the dozens of bills that the legislature considered, some were adopted. As described above, the most significant change made was the adoption of restrictions on the extent to which evidence of the prior sexual conduct of the complainant could be introduced at trial (Act 83, 1975; Act 109, 1977). In 1979 the legislature made the rape statutes (Sec. 707-730 to 707 732) sex-neutral such that either the perpetrator of the act or the victim could be male or female (Act 225, 1979). This action was taken in response to a ruling in 1978 by Circuit Judge Masato Doi in the case of State v. Sasahara[221] that the second degree rape statute was unconstitutional in that there was no reasonable basis for limiting the statute to acts committed by males upon females since the same acts could be committed by females upon males. While the ruling had no precedential power, and was disagreed with by at least two other Circuit Court

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[221] State v. Sasahara, First Circuit Criminal Case No. 51251, 1978.

judges,[222] it did raise fears that the entire rape statute could be held unconstitutional.

What legislators did not realize, however, was that in eliminating the terms "male" and "female" from the rape statutes they also inadvertently eliminated the provision that a female could not bring charges of rape against her husband.[223] The error was discovered before the governor signed the bill, and, of course, considerable controversy arose concerning whether he should sign it. The state Senate leadership, which had just passed the bill, asked the governor to veto it, as exclusion of spousal immunity was not their intent (Star-Bulletin, April 28, 1979:A2). Others, particularly women, supported the bill (Star-Bulletin, May 2, 1979:B1). Finally, the governor reluctantly signed the bill into law becaue he was afraid that if he did not, and the existing law failed a constitutional test, Hawaii would be left without a rape law. He invited the 1980 legislature to return the spousal immunity provision (Star-Bulletin, June 27, 1979:A16).

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222 Kauai Circuit judge Alfred Laureta had earlier upheld the constitutionality of the first degree rape statute and in May of 1979 First Circuit Judge Toshimi Sodetani did likewise (Star-Bulletin, May 3, 1979:A3).

223 Since "female" was defined (Sec. 707-700) as "any female person to whom the actor is not married," when references to "female" were eliminated from the rape statute, so was the spousal exclusion provision.

Another bill (House Bill No. 404, 1979), passed at the same session (Act 6, 1979), extended the prompt complaint exemption from persons under sixteen, to all minors.

The 1980 legislative session declined to reintroduce spousal immunity into the rape statutes, but it did pass a bill (Senate Bill No. 2877, 1980) which made important changes in the rape statute (Act 223, 1980). It deleted "earnest" from the "earnest resistance" requirement in the definition of "forcible compulsion." Also within the definition of "forcible compulsion" the act deleted "immediate" from "immediate death," "serious" from "serious bodily injury," and "immediately" from "immediately be kidnapped." The intent of these changes was to facilitate the showing of forcible compulsion by broadening it and removing from the victim the burden of being in extremis before the conditions of forcible compulsion existed. Perhaps most importantly, the act broadened the definition of "sexual intercourse." Whereas under the old statute "sexual intercourse" means coitus, not "deviate sexual intercourse," the act redefined "sexual intercourse" to mean "sexual intercourse in its ordinary meaning or any intrusion or penetration, however slight, of any part of a person's body, or of any object, into the genital opening of another person, but emission is not required" (Sec. 707-700(7)). This, of course, was a substantial departure from the common law concept that rape consisted of the

entrance of a penis into a vagina under circumstances of forcible compulsion. The revision reflected the recent thinking that focuses on the assaultive aspects of rape rather than its sexual nature.

Act 223 (1980) also extended the period for complaint by an adult women from thirty to ninety days.

The 1981 legislature also took up the issue of rape law reform. It passed a bill (House Bill No. 300, 1981, Act 213) that sex-neutralized all pronouns in the rape law,[224] reduced the social companion extenuation from twelve months to thirty days, repealed the prompt complaint requirement altogether, and amended the definition of "forcible compulsion" to focus on the behavior of the perpetrator and to eliminate completely the requirement of any resistance at all. This latter revision was the consequence of a notorious rape case that stirred the community in 1979 and 1980, one of two such cases, the other, also involving resistance, having occurred in 1978. It is to these two cases and associated events that we now turn.

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[224] Even though the statute had previously been sex-neutralized in the sense that "person" was substituted for "male" and "female," the male pronoun "he" had been retained as it was generally used to refer to persons of either sex throughout the penal code.

7.5 THE JOGGER RAPE CASE AND THE NANAKULI CASE: THE COURTS AND STATUTES UNDER FIRE

Within the period of large scale social and legal change we have been examining there were two major cases that mobilized the women of the community and brought under public scrutiny the practices of the courts regarding rape cases. Like earlier episodes, the cases in this period followed a seguence from crisis to legal action and the model developed in Chapter 1 will be once again explicitly employed.

The first Case came to be known as the "Jogger Rape case." It was thrust upon the public consciousness on the last day of February 1978 with newspaper reports of criticism by Women Against Rape of Judge Robert Richardson of the Honolulu District Court for dismissing after preliminary hearing, a first degree rape charge against Wilbur Moyd, a black marine accused of intentionally knocking down a woman jogger with his car along a rural road and after threatening her with a broken bottle, and while transporting her to an isolated spot, sodomizing her, and then raping her. Richardson upheld a first degree sodomy charge.[225] The chairwoman of Woman Against Rape charged Richardson with "harassing" the victim when she was on the witness stand and that he had taken the "outrageous"

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[225] The case would probably not have come to public attention had not Women Agaist Rape had a court monitor in Richardson's courtroom during Moyd's preliminary hearing.

position that being hit by a car and threatened by a broken bottle did not in themselves establish a continuing condition of forcible compulsion. Richardson was charged with being sexist and with requiring women to place their lives in jeopardy by making them resist under dangerous conditions if they wanted to sustain a rape charge (Star-Bulletin, February 28, 1978:A4). By March 4th numerous letters to the editors of the newspapers harshly critical of Richardson were beginning to be printed (See Star-Bulletin, March 4, 1978:A9). On March 5, 1978 approximately one thousand persons attended a downtown rally organized by Woman Against Rape, the National Orgazation of Women, the Women's Political Caucus, the Women's Studies Program at the University of Hawaii, the American Civil Liberties Union, the Marathon Club, and Honolulu Women Runners. At the rally Richardson was criticized by a number of speakers and a petition was circulated asking the state Supreme Court to investigate his fitness to serve as a judge (Advertiser, March 6, 1978:A3). More letters to the newspapers, mostly from women, continued to pour in (See eg. Advertiser, March 8, 1978:A15). On March 11th the Star-Bulletin (March 11, 1978:A9) announced that it was unable to print all the letters on Richardson's decision.

The situation was somewhat clarified, although Richardson's position was somewhat worsened, when the Oahu Grand Jury, on the evening of March 8th, just three days

after the rally, indicted Moyd for assault, failure to render assistance, kidnapping, rape, and sodomy (Star-Bulletin, March 9, 1978:A1). Meanwhile, attempts were being made by the news media to more clearly define the situation by determining exactly what had happened in Richardson's courtroom. They attempted to obtain a transcript of the preliminary hearing, but the transcript was sealed by order of the court at the request of Moyd's attorney out of fear that its release might prejudice his case. Despite the efforts of the media, the transcript was held until the trial was completed.[226]

During the late spring and the early summer of 1978 rape continued to get attention. Occasional letters to the newspaper editors were printed. In late March Twenty-eight representatives introduced resolutions into the state House asking the media to better inform the public on prevention, treatment, and prosecution of rape cases (House Resolution No. 558, 1978) and that a rape education program be started within the legal system (House Resolution No. 557, 1978). In June Women Against Rape complained that its petition concerning Richardson was being ignored by the Supreme Court; court officials were noncommittal (Star-Bulletin, June 15, 1978:A1). It was widely believed that the case was being treated delicately because Richardson was the brother

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[226] See Advertiser (March 7, 1978:A1; March 8, 1978:A1; August 26, 1978:A1) and Star-Bulletin (March 10, 1978:A1; March 21, 1978:A2; March 29, 1978:F1; March 31, 1978:A1; April 29, 1978:A3; August 26, 1978:A1).

of Chief Justice William S. Richardson, who had appointed him to the District Court.

Moyd's trial began in August of 1978 in Honolulu despite a request for a change of venue by the defense. The victim testified that after being hit by the car and threatened by the broken bottle she did what she was told because "I was just so full of fear, I was scared to death. I thought if I complied I might get out alive." Moyd's defense was that the woman willingly had had sexual intercourse with him (Star-Bulletin, August 29, 1978:A4; August 23, 1978:A1). After a two-day trial and three hours of deliberation, the six-man and six-woman jury convicted Moyd on all counts. The Star-Bulletin (August 26, 1978:A8) editorially commented, "The Circuit Court jury's conviction, which of course can be appealed, shows how shallow Judge Robert Richardson's initial decision was." On October 10, 1978 Moyd was sentenced to twenty years each for rape and sodomy, and five years each for failure to render assistance and second degree assault, sentences concurrent. (Star-Bulletin, October 10, 1978:A1). In January of 1979 it was reported that Moyd was transferred to an Oregon prison for protective purposes. He had been stabbed in the eye at Oahu Prison; he was having trouble with inmates who disliked him because of the nature of his crime.

After Moyd's conviction, two matters were left to be resolved: the details of what happened during the

preliminary hearing and the question of whether Richardson would be disciplined by the Supreme Court. The transcript of the preliminary hearing was released immediately upon Moyd's conviction. It revealed that Richardson did not believe that Deputy Prosecutor Roy Chang had established, in his questioning of the victim, that there was a continuing condition of forcible compulsion by the time the rape had occurred. Richardson attempted to question the complainant on his own as to the details of compulsion and her resistance, but was stopped by objections by Deputy Prosecutor Chang.[227] Thereupon Richardson dismissed the rape complaint (See Advertiser, August 26, 1978:A1). The Star-Bulletin (August 26, 1978:A1) reported that the transcript "apparently vindicates him (Richardson) in the controversy with the Women's group, now called People Against Rape." The former chairwoman of People Against Rape rejected this interpretation, stating that while People Against Rape was very satisfied with the outcome of the case, it was still critical of Richardson's decision because it implied that some resistance was necessary by the victim, even after having been hit by the car and threatened.[228]

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[227] Deputy Prosecutor Roy Chang had been a member of the Hawaii Crime Commissions Sexual Assault Offense Task Force and was an advocate of rape victims. In the preliminary hearing he was clearly trying to educate the judge on new conceptions of the treatment of rape victims in court.

[228] See Letter to the Editor by Linda Spink (Star-Bulletin, September 6, 1978:A17)

On the other issue still pending, the question of the complaint to the Supreme Court about Richardson, the Court declined to take any action. People Against Rape registered its disappointment (Star-Bulletin, September 20, 1978:A7). Richardson subsequently asked the Office of Disciplinary Counsel of the state to investigate the behavior of Deputy Prosecutor Chang, for remarks he made to reporters after the dismissal of the rape charge at the preliminary hearing (Star-Bulletin, November 14, 1978:A6).

In August of 1980 the Judicial Selection Commission of the State of Hawaii announced that Judge Robert Richardson would not be renewed for another term as District Court judge. The Commission does not make known the reasons for its decisions, but it was widely believed in the community and speculated in the press that Richardson's decision in the "Jogger Rape Case" and the reaction to it by rape reformers and others, was the reason for the nonrenewal of his judgeship. If it was not clear before the "Jogger Rape Case," it was clear after it, that rape cases are fraught with danger for judges and must be handled with the utmost sensitivity.

7.6 THE "NANAKULI CASE:" RAPE, RESISTANCE, AND TOURISM

Close on the heels of the "Jogger Rape Case" there occurred another rape crisis on Oahu which set off yet another episode of interaction and action about rape and rape law. This episode began on the late afternoon of July 8, 1979 when a young Finnish dental student who was on an around-the-world trip, became stranded (unable to catch a bus) in the leeward Oahu community of Nanakuli, a district with a large population of Hawaiians. She was approached at the bus stop by a group of Part-Hawaiian, teenage boys who invited her to await the next bus at their tent nearby on the beach. She agreed and accompanied them to their tent where she chatted and smoked marijuana with them, but at some point the mood turned ugly, and, she later testified, she was held down and repeatedly raped by some of the boys over a period of as much as five hours. In the early morning hours of July 9th she hitchhiked into Honolulu, reported the incident to the police, and was taken to the Sex Abuse Treatment Center.

The incident came to the attention of the public by means of a large front-page article published by the Advertiser on the morning of July 10th. The article recounted the events that had happened to "Anna," as she was thereafter referred to by the media, and the fact that Anna was now destitute, all her money and air-line tickets having been stolen at the time of the rape. The article quoted officials at the Sex

Abuse Treatment Center as hoping that Island residents would assist Anna and the telephone number of the center was printed. With characteristic generosity the people of Honolulu opened their wallets and their homes for Anna. The day the plea appeared in the morning Advertiser nearly $2,000 was collected along with clothing and offers of places to stay. The Waikiki Improvement Association, an association of industry businesses, announced that it would help pay for Anna's return to Hawaii for court appearances. The Hawaii Visitors Bureau and the Hawaii Hotel Association offered rooms and meals to Anna (Star-Bulletin, July 11, 1979:A2).

Within two days of the rape, ten boys between fifteen and seventeen were arrested for the attack. With all the major participants assembled, the community set about the symbolic construction of the definition of the situation. Two elements were rapidly becoming clear; Anna, by now virtually an adoptee of the tourist industry, sex abuse service providers, rape victim advocates, the media, and other segments of the community, symbolically represented the essence of the sexually abused woman and of the naive tourist who innocently visited paradise and met with tragedy. The defendants in the case symbolized the worst aspects of male arrogance, helping themselves to a vulnerable woman, alone in an unfamiliar place, as if they had the right. To the tourist industry, they represented

the worst of threats, sensational crimes against tourists, and the appearance of a disorderly and unsafe community.

Reaction to the news reports of the case was almost immediate. At its meeting on July 11, 1979, just one day after the initial Advertiser report of the gang rape in Nanakuli, the City Council "started talking tough about crime" and made a number of suggestions on how to crack down on crime on the Leeward Coast.[229] Councilwoman Marilyn Bornhorst warned about the negative effects of publicity about crime on the tourist industry (Advertiser, July 12, 1979:A1).

The same day there was a community meeting held on the Leeward Coast called by the Waianae Military-Civilian Advisory Council, to discuss problems of crimes of violence in the area. Suggestions included improvement of the economy of the area to provide jobs, more ocean activities for young people, and programs to keep juveniles busy in the evenings (Star-Bulletin, July 12, 1979:A1).

On July 12th the mayor of the City and County of Honolulu held a press conference in which he stated that the problem of crimes of violence on the Leeward Coast was "deep-seated," and that it would require concerted efforts by church, business, and educational groups to be solved.

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[229] The same weekend as the rape of Anna, there had been a beating nearby of four servicemen who had gone to the assistance of a woman whose purse had been snatched. This event added to the perception that the area was increasingly dangerous and disorderly.

He also warned of the effects of crime publicity on tourism (Advertiser, July 13, 1979:A9).

The Advertiser, in its contribution to the defining of the situation, editorially commented that current thinking on rape regarded it as an expression of hostility. It suggested that this element was present in the Nanakuli Case. It commented that

> Certainly everyone deplores what happened, especially people along the Waianae Coast who are concerned about the region's reputation for crime and violence.
>
> Yet one has to wonder how much underlying racial resentment and anti-visitor hostility could have played a subconscious part- in effect making a crime a social statement of attitudes young people may learn from or share with their elders. (Advertiser, July 12, 1979:A12)

On July 15th the Advertiser began a four-part series[230] on rape of tourists in Hawaii. It introduced the series with the following statement:

> The recent sexual assault on a Scandinavian tourist is a reminder that such violent attacks are unusually damaging to Hawaii where the economy depends largely on a well earned international reputation for the Aloha Spirit. (Advertiser, July 15, 1979:A1)

Drawing upon information from the Sex Abuse Treatment Center for the years 1977 and 1978, the series first attempted to assess the risk of rape to tourist women. It made much of its finding that tourist women were at a higher risk of rape than resident women because during the study

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[230] The series ran on July 15,16,17,18, 1979.

period 13% of rape reports on Oahu were made by tourist women, while they constituted only 8.7% of the population of women on any given day. It also found that the rate of reported rapes by tourist women on Oahu was higher than the national average for all women, but lower than the rate for all women in such cities as Seattle, San Francisco, and Los Angeles. The Advertiser said that the "true frequency" of rapes of tourists could only be assessed by comparing the number of reports to the average tourist population. Locking at it this way, the newspaper determined there were 76 reported rapes per year per 100,000 tourist women. This was compared to 46 rapes per year per 100,000 resident women. It concluded that rape reports were 58% higher for tourist women than for resident women.

The Advertiser found the tourist-reported rape rate on Oahu of 76 per 100,000 women higher than the rape rate per 100,000 women of Miami (74), but lower than New York (83), New Orleans (87), San Francisco (101), Los Angeles (127), Las Vegas (127), Orlando (127), and Little Rock (160). But, the Advertiser warned, since there had been eighteen reported tourist rapes already in 1979, the data indicated that "the number of tourist rapes is increasing drastically." After making these points, the article did qucte several experts in the field of sex abuse to the effect that there may be differential propensities to report between tourists and local women. One reason given was that

Caucasians tend to be more likely to report rapes than other ethnic groups in Hawaii, and that most tourists are Caucasian. Second, tourists have less of a social support system, so they may be more likely to seek the services of the Sex Abuse Treatment Center (Advertiser, July 15, 1979:A1).

In a companion article on the first day of the series, the Advertiser reported some differences between typical resident and typical tourist rapes. Tourist victims tended to be younger, single, and were more likely to be raped by an acquaintance, often someone they had met in a bar or nightclub. Resident victims were older, more likely to be married, and more likely to be raped by a stranger. Tourist victims were more likely to be Caucasian (86%) than were residents (66%). The Oahu census tract where more rapes took place than any other was Waikiki. Sixty-one percent of reported tourist rapes occurred in Waikiki, while only 14.5% of reported resident rapes occurred there. The Advertiser did not point out that the argument could be made that Waikiki was more dangerous for tourist women than was Nanakuli (Advertiser, July 15, 1979:A3).

In subsequent articles, the series took up in a general way the relationship of tourism to increased crime rates, a detailed account by a tourist rape victim of her ordeal, and the question of how best to protect tourists from rape. The usual cautions about avoiding isolated places and strange

men were given. Better law enforcement and education were advocated, as were warnings to tourists that they should not let their guard down just because they were on vacation. It was revealed that the Hawaii Visitors Bureau would soon start distributing a pamphlet called "The Happy Hawaiian Visitor" warning visitors to take precautions for their safety (Advertiser, July 18, 1979:A1).

The (Star-Bulletin July 20, 1979:1) contributed its own small study of rape. Also using data from the Sex Abuse Treatment Center, it examined the phenomenon of "gang rape." It found gang rape, too, to be a "growing phenomenon in paradise." According to the statistics it presented, of the 385 reports of rape during 1977-78, 288 involved single assailants. In 32 of the 97 cases involving multiple assailants. tjhe woman was actually raped by more than one man. In the others the other persons present assisted or watched but did not actually commit rape. The dynamics of group rape were described as most often involving adolescents and considerable peer pressure. Workers at the Sex Abuse Treatment Center said that the amount of trauma experienced by a victim did not necessarily depend on whether the rape was by one man or more than one.

On July 21st a group calling itself "Sisterhood" and describing itself as "a radical feminist action group formed to respond to specific issues of concern to women in Hawaii" marched in Waikiki distributing flyers to women tourists

warning of the danger of rape (Advertiser, July 22, 1979:A6).

Following up on its four-part series on tourist rape, the Advertiser made some suggestions respecting actions women could take of an individual, organizational, and political nature. Individually, women could consider self-defense courses and, of course, observe the usual precautions concerning avoiding situations where rape might occur. They could also join such organizations and lobbying groups as People Against Rape. Politically, it was suggested that women could inform themselves about legislative issues concerning rape. Of particular concern, the Advertiser noted, were issues of the appropriate disposition of juvenile offenders such that they were not immediately released out on to the street. Also important, acording to the Advertiser, were issues of sentencing. It asked, were sentences so severe for rape that they reduced the probability of conviction? Finally, the Advertiser noted that rape counselors said that too often the victim of rape was still put on trial, so further reform must be made in the law and court system to help victims (Advertiser, July 22, 1979:B3).

While preparations were being made to try six of the defendants[231] in the Nanakuli Case, rape cases and other

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[231] The remaining four defendants were handled as juveniles in Family Court. The proceedings in Family Court are not public.

rape activities continued to get attention in the media. In late August, in a local observance of "Women's Equality Day," People Against Rape and the local chapter of the National Organization of Women organized a march through Waikiki called "Women Take Back the Night" as a protest against violence against women. At the end of the march speeches were made about rape, self-defense, and sexual harrassment (Advertiser, August 27, 1979:A3).

In October of 1979 rape protest spilled over to Maui. On October 29th approximately 300 persons marched to the courthouse protesting Judge Kase Higa's sentencing of two convicted rapists of a woman camper to one year in jail with work-release privileges (Star-Bulletin, October 30, 1979:A14). Those upset with the lenient sentences organized "Mauians for Justice" and gathered 10,600 signatures on a petition which they presented to the governor in late November. After having found out that Judge Higa's action had been within the law, they had set out to change the laws that made such sentences possible (Star-Bulletin, November 27, 1979:A3). The (Star-Bulletin, November 28, 1979:A16) editorially complemented the Mauians for Justice for their constructive approach but cautioned about limiting judicial sentencing discretion because of the danger that persons may be inappropriately imprisoned at great cost to the public. The Star-Bulletin agreed that the Maui sentences seemed too lenient.

The rape issue simmered in Honolulu through the remainder of 1979. The legislative session of 1980, which began in January, took up a bill (House Bill No. 2152) that was the result of Representative Kate Stanley's "1980 Committee" to consider rape law reform. The bill would have made Hawaii's law similar to the Michigan statute by abolishing rape, sodomy, and sexual abuse, and incorporating those behaviors under four degrees of sexual assault (Star-Bulletin, February 22, 1980:A13). Despite strong support by rape reformers the bill did not pass.

The issues of rape, tourism, and crime escalated during 1980 due to two principal factors; (1) the fact that the Mainland press picked up on the tourist crime issue, and, in a manner in some ways similar to the Massie Case nearly fifty years before, criticized social conditions in Hawaii and laxity of enforcement efforts, and (2) the fact that the mayoral campaign of 1980 was a heated one and the crime issue lent itself to political exploitation.

The first significant external publicity about conditions in Hawaii was a syndicated and widely distributed article by Janet Altieri, identified as a former health care clinic worker who recently moved to Maui. The article titled "A Troubled Paradise Is Producing Rapists," contrasted the idyllic setting with the fact that Hawaii is beset by social problems, not the least of which is "a large increase in crime, which is often directed at tourists." The article

discussed the Nanakuli Case and the Maui case and claimed that these types of crimes were becoming commonplace. Then the writer proposed her theory of causation:

> There are young local men who believe that they have been robbed of their former way of life with the advent of development and increased tourism. A new system has swept over the islands -- a system that discriminates against individuals of little or no formal education, whose number is shamefully widespread.
>
> There is a group of people who find it easier to survive in the more traditional Hawaiian way -- being compelled to do little or no work to survive -- than in the typical stateside American way with intense competition for jobs and in other aspects of life.
>
> These malcontents vent their frustrations by victimizing the tourist, a person who appears to be 'close enough' to those who caused their problems.

The writer went on to say that theft and rape were the most common crimes against tourists because the offender "can both 'avenge' an act he feels was perpetrated against him and at the same time get something he wants." She contended that the situation was aggravated by the inefficiency of the criminal justice system and the leniency of the courts. Further, the criminals were so poorly educated they did not seem to be able to tell right from wrong; and neither did the judges. Concluding, the writer said:

> Here the sun shines on, the palm trees still sway majestically in the cool breeze, and visitors are greeted with garlands and kisses. But the ugly facts beneath the surface reflect a lack of education as bad, or worse than, that in any third

> world country, and a system that allows violent criminals to walk the streets freely. (The Buffalo News, December 9, 1979).

In March there appeared in the New York Times a long article by former Times correspondent and current Honolulu resident, Robert Trumbull, giving his analysis of the situation and describing the many responses of community groups, political leaders, and tourist industry officials (New York Times, March 9, 1980:1) In May the Wall Street Journal followed up with an article on the same theme emphasizing the threat to the tourist industry of a reputation of high crime (Wall Street Journal, May 16, 1980:1). Just two days after the Journal article appeared the Advertiser (May 18, 1980:P2) editorially concluded, after commenting on Hawaii's recent national media attention, that "Hawaii has both a serious crime problem and a serious crime image problem." It called for steps to deal with crime "vigorously and forthrightly" and said that Hawaii would continue to receive bad publicity "until it is overshadowed by the fact and image of a community that with vigor, imagination and deeper understanding has dealt with its crime problem."

As the summer progressed, the crime situation became more and more politicized, with Mayor Frank Fasi and city officials tending to play down the issue by reference to Honolulu's favorable standing when compared with Mainland cities (See , for example, Star-Bulletin, May 29, 1983:A5)

and with the mayor's chief contender (and eventual victor) making crime a central issue (See, for example, Star-Bulletin, August 31, 1980:A3). The newspapers, which had long been having a feud with the mayor, kept the crime issue on the front burner and refused to be mollified by the mayor's comparisons (See, for example, Star-Bulletin, May 31, 1980:A8).

But the worst publicity was yet to come. On September 26, 1980 the Vancouver Sun began publishing a multi-part series on crime in Hawaii sparked by some incidents involving some Canadian tourists. The series was widely criticized locally for being sensational and distorted (See, for example, Star-Bulletin, September 25, 1980:A14 and Advertiser, September 26, 1980:A22). Mayor Fasi of Honolulu went to Vancouver immediately and made numerous public appearances to try to combat the impressions being given.[232]

Again local officials attempted to act to meet the external threat. The Hawaii Association of Counties called a meeting on crime in the Islands. Held on October 8th, it involved the police chiefs of the four counties, county officials, and tourist industry representatives. Various proposals for counteracting the Mainland publicity were discussed (Star-Bulletin, October 9, 1980:A2). The group met again in December and tourist industry officials aired an array of law and order proposals (Advertiser, December 6,

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[232] At about the same time a Candaian news program did a similar piece on crime in Hawaii.

1980:A2).

As time passed, the tourism and crime issue began to get less media attention. But the trial of the five remaining defendants[233] in the Nanakuli Case which began in January, 1981 renewed interest and somewhat refocused attention. It took more than eight weeks to impanel a jury. The trial began in March and was very short. The defense decided not to cross-examine the complainant after they perceived that the prosecutor had put on a weak and incomplete case. The seven woman, five man jury saw things similarly to the defense and acquitted the defendants.

Since the jurors would initially not talk, it was not immediately clear where to fix the blame. There was initial criticism of the deputy prosecutor for putting on a weak case in the first place, expecting to elaborate on it under re-direct, and then being out maneuvered by the defense. Later, though, as the jurors began to talk, the focus moved to the statute itself and the need to prove beyond a reasonable doubt forcible compulsion and resistance (Advertiser, March 18, 1981:A3).

Reaction to the verdict was immediate and heated. It was immediately announced that there would be a march outside the court building on Monday morning (the verdict came in on Friday evening) to protest the verdict (Star-Bulletin, March

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[233] Shortly after the trial began the charges were dismissed against one of the defendants because the victim was unable to identify him. The five other boys, tried as juveniles, had already been convicted in Family Court.

14, 1981:A3). On Saturday afternoon the Star-Bulletin (March 14, 1981:6) editorially commented on the verdict. It called the case "one of the most internationally publicized incidents in these islands in many years." It refused to condemn the jury's verdict, and counseled, as had the judge in the case, that jury verdicts must be respected. It went on to ask what the verdict indicated about community values. It concluded that the jury was saying "that women have a responsibility to keep themselves out of compromising situations."

At noon on Monday the 16th a crowd of approximately 1,000 persons, mostly women, demonstrated at the court building and then marched across the street to the Capitol. There the group was addressed by several legislators who commented that apparently a woman was expected to fight to the death before she could get a rape conviction. Although some still continued to believe that the prosecutor had blown the case, the definition of the situation was becoming well established that forcible compulsion and resistance, as determined in the courts, were the problem. Senate Judiciary Chairman Dante Carpenter promised the demonstrators a study of current rape laws.

The evening of the protest a smaller, more militant, group of women who believed the earlier protest insufficient, burned a man in effigy on the court grounds, representing "all men who have committed acts of violence

against women." A spokeswoman said the demonstration was to "publicly declare that women will no longer depend on men, the legal system, or our patriarchal society for protection." (Star-Bulletin, March 17, 1981:A1)

In the following days the newspapers printed numerous letters to the editor criticizing the rape verdict.[234] On March 20th the Advertiser announced that it had received so much mail on the case that it would only print in the future selected letters that made new points.

The Hawaii state legislature was in a quandary; it was feeling extreme pressure to change the rape statute to delete altogether the requirement for resistance. But, it being late in the legislative session, the deadline for bills passing one house to crossover to the other house had passed. Although there had been several bills pertaining to rape law in each house, none had passed and it was too late to resurrect any. With considerable legislative ingenuity, the Senate rewrote a bill previously passed over from the House, pertaining to the definition of firearms and only marginally relating to rape.

The governor also added his voice to those calling for a change in the rape statute such that resistance would no longer be required in the presence of physical force (Advertiser, March 25, 1981:A1). In a statement too little and too late, House Speaker Henry Peters tried to redefine

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[234] See, for example, Advertiser, March 16, 1981:A11; March 18, 1981:A12; March 19, 1981:A21; March 20, 1981:A15).

the situation and to lead the action off in another direction. He said he regarded much of the activity as an overreaction to the Nanakuli Case and complained that the legislature was being pressured to change the rape statute, which had been on the books for years, due to a tactical mistake in the courtroom by a prosecutor (Advertiser, March 25, 1981:A1).

The day of March 26th was filled with rape law reform activities. In a show of political strength, on the morning of the 26th, eighteen female elected officials met at the lieutenant governor's office to pledge their support for rape law reform. In the afternoon, approximately 300 persons attended a hearing of the Senate Judiciary Committee on changing the rape statutes. Fifty speakers offered testimony on the subject (Advertiser, March 26, 1981:A1).

Interest in change of the rape statute continued at a high level and the Senate Judiciary Committee reported out a bill (House Bill No. 300, Senate Draft No. 1, 1981) which deleted the resistance requirement and made other changes advocated by reformers (See Senate Standing Committee Report No. 845, 1981). The proposed changes were controversial and were opposed by some senators and representatives (Star-Bulletin, April 4, 1981:A2).

The House and the Senate met over the bill in conference committee and compromised on certain points; deleting the requirement for a mandatory life sentence for conviction on

rape or sodomy in the first degree, which the Senate had passed; reinstating the "voluntary social companion" provision, which the Senate had dropped, but limiting it to thirty days; retaining the Senate's deletion of the prompt complaint requirement; and further refining the forcible compulsion definition (Conference Committee Report No. 50, 1981). In its ammended form House Bill No. 300, Senate Draft No. 1, Conference Draft No. 1, passed the Senate unanimously and the House with 47 ayes and three excused.

While the legislature was considering the new rape bill and while the bill was awaiting the governor's signature, there was an attempt to revise part of the definition of the situation that pertained to the meanings that had been constructed about the communities on the Leeward Coast. Several residents of the Nanakuli community complained that the community had been unfairly stigmatized, particularly by the press, as a disorderly and dangerous community. The residents pointed out that most rapes did not occur on the Leeward Coast and that most rapes were of local women, but they did not get nearly the publicity that the rape of Anna in Nanakuli had (Advertiser, March 26, 1981:A16).

The issue of the quality of the press reporting of the Nanakuli case was seriously taken up in a forum sponsored by the Honolulu Community-Media Council and the Honolulu Journalists Association. Three reporters on the panel agreed that the fact that Anna was a tourist, and the

particulars of her situation, led to much more publicity than local rape victims received The panelists also discussed the problem of treating the Nanakuli community fairly (Star-Bulletin, April 5, 1981:A3). The Star-Bulletin, (April 7, 1981:A18) editorially commented on the complexities of news reporting in a pluralistic community and the ease of misunderstandings of meanings.

On June 9, 1981 the governor signed the rape bill into law (Act 213, 1981) Upon signing the bill, the governor telephoned Anna in Finland to inform her that despite her personal trauma and the lack of a conviction in her case, that the case had had some positive results.

7.7 SUMMARY AND CONCLUSION

The decade of the 1970's brought more rape law activity than any other period in the history of Hawaii. It is only approximated in the fundamental nature of the changes made by the decades of the 1830's and 1840's when the status of women in Hawaii was changing and when the first written rape laws were developed.

Most significantly, the rape law reform activities of the 1970's was a consequence of the sexual stratification system, made conscious in the feminist movement. Associated with these changes were changes in the norms of sexual regulation in American society. Rape law reform in the 1970's was both a pragmatic and a symbolic movement:

pragmatic in the sense that it was a serious effort to change the way women were treated by the criminal justice system, and symbolic in the sense that rape law reform was an attack on the entire structure of femal subjugation in American society. Rape law reform in the U.S. generally, and in Hawaii in particular, focused on many aspects of the rape statutes that were of symbolic repugnance, the idea that a woman gives up her right to legal protection from rape by a man if she marries him; the idea that a man is less culpable if he rapes a woman who has previously allowed him sexual intercourse; the idea that rape victims are under a special burden to report the offense against them promptly; the idea that a woman's prior sexual history is automatically relevant to the issue of whether she had been raped in a particular instance; and the idea that a woman must resist to her utmost, and even endanger her life, in order to sustain a rape charge.

During the 1970's women in Hawaii organized and were moderately successful in making statutory changes and changes in administrative organization and procedure that lessened the practical and symbolic impact of some of the more objectionable features of rape law. Several important changes were made as the result of low visibility, organized pressure. Other changes (the removal of a judge, the abolition of the resistance standard) came as a consequence of a sequence of events outlined in our analytical model.

The "Jogger Rape Case" and the "Nanakuli Case" were crises that set off sequences of symbolic interaction that had consequences for rape law. Both these sequences were the consequence of, and were affected by, changes in culture and social structure.

Facilitating the rape law reform movement in the 1970's were the general abandonment of the rehabilitative model in penology and the development of strong law-and-order attitudes in Hawaii associated with national trends and with perceived threats to the tourist industry by local crime. As in 1844 in the Wiley Case and in 1932 in the Massie Case, local actors responded to the expectations of the external community in order to protect their interests. One of the most significant symbolic changes on the feminist agenda, the abolition of the classical sex offenses of rape and sodomy and the incorporation of those behaviors in a comprehensive sexual assault statute, remains unfinished business.

Chapter VIII

SUMMARY AND CONCLUSION

This study was begun with an interest in examining the relationship between social change and rape law in Hawaii. Two major types of processes were of interest: (1) the consequences of changes in selected social structural and cultural aspects of the society, and (2) the social process sequence started by a "crisis" in the community and leading to legal action. The latter has been proposed to occur in the context of, and because of changes in the former, the social structural relationships and cultural elements.

It was also proposed that the episodes of concern about rape and rape law had emergent qualities that may best be analyzed by use of the symbolic interaction perspective. But it was also proposed that the sequences of symbolic interaction, leading to legal action, were shaped by the more enduring elements of the society, its social structure and culture.

Actors are predisposed to develop different definitions of the situation because of their differential location in the social structure. The extent to which their definitions become the controlling definitions also depends on their social position. Similarly, in making interpretations and

constructing meaning, actors draw upon their existing culture. Cultural elements provide initial categories, images, and behavioral theories which are invoked, deployed, and transformed through interaction. Stratification and cultural diversity increase the problematical nature of the use of existing cultural elements in the defining of situations.

The first major transformation of Island society was the unification of all of the islands into one kingdom and the establishment of a unified "primitive state." But the same foreigners who made this possible, acted as a strong disorganizing force on the native society. The arrival of the American missionaries in 1820 and their subsequent activities began the transformation of Hawaiian society in earnest. Through their influence on the King and chiefs, a "generalized sex taboo" was quickly institutionalized into law which, at variance with traditional norms, prohibited all sexual activity outside of monogamous marriage. Seeing the monogamous family as the foundation of the Christian society they were trying to build, the missionaries endeavored to subdue Hawaiian women and to make them into homemakers, child bearers, and child rearers. This process was reinforced and increasingly formalized when the first Western-trained lawyers arrived in Hawaii with their legal codes and such common law concepts as coverture.

The first written rape laws in Hawaii, those of 1835 and 1841, incorporated traditional Hawaiian cultural conceptions of the harm done by rape and the appropriate redress -- victim compensation. These statutes, however, symbolized for some foreigners the low state of civilization of the Hawaiian Kingdom. The first crisis of rape law in Hawaii, the Wiley Case in 1844, made more visible and salient Hawaii's legal deficiencies.

The Wiley Case (1844) and other collisions with aggressive foreigners from imperialistic nations convinced the King and chiefs that sovereignty could only be preserved through admission to the "family of nations." One of the prerequisites of such recognition as a civilized nation was a legal system based upon Anglo-American or Continental principles. In a series of practical and symbolic gestures, Hawaii adopted such a legal system, including Anglo-American rape law. One of the costs of such an approach was the virtual turning over of the legal system to the management of foreigners and the near extinction of Hawaiian traditional legal concepts.

The history of rape law as a public issue in Hawaii for 120 years after the adoption of the 1850 rape statute has been shown to be a history of alternating low visibility enforcement processes and episodes of intense community concern and shock about the perceived failure of rape law and the threat of sex crimes. The first such episode was

the Holden Case in 1867 when the newspapers charged the all-haole jury with refusing to convict due to ingroup sympathies and the severity of the penalties. The racial dimension of rape was expressed in the suggestion by the newspapers that if the racial roles had been reversed, if a Hawaiian man had raped a white child, a lynching probably would have resulted. A jury in a similar case three months later (Heinrichs) convicted the defendant with dispatch.

A brief review of rape prosecutions between 1850 and 1892 reveals 84 prosecutions for rape, assault with intent to ravish, and carnal abuse. The records reveal that approximately half (43) resulted in convictions. Sentences ranged from one week to life in prison. Qualitatively, the case records reveal that trials were much concerned with such issues as corroboration, resistance, and victim chastity and reputation. The new legal culture was taking hold with regard to rape law.

Sex crimes next emerged as a public issue in 1910 when an assault with intent to ravish charge against Edward Lane was reduced by the prosecutor to a charge of vagrancy. The newspapers made much of this supposed official deviance, and attention was focused on sex crimes. Hawaii's sex offense statutes came to be defined to be ineffective to combat a rising tide of sex crimes. A specific deficiency was the difficulty of proving "intent to ravish" in the assault with intent to ravish statute. A new crime was created,

"indecent assault," with the same penalty, but without the need to prove intent to ravish.

The 1910 episode sparked by the Lane Case was also the first episode in which the newspapers gave sex crimes extensive, continuing treatment, advancing and manipulating a complex set of symbols and images concerning the nature of men who commit sex crimes, the nature of the act, and the harm done to victims.

Close on the heels of the 1910 episode there occurred a prolonged episode in 1912-13, largely involving a defined threat to young girls from Asian men. Again the newspapers were the prime vehicle of dissemination of information and meaning, and again there was extensive development of complex imagery. With respect to legal action, the haole community split over eugenic and punitive (whipping) approaches to the problem.

Continued changes in the city between 1910 and 1930 led to more haole anxiety about their dominance and control. Attention focused on juvenile "gangs" and their alleged predations on women. Again the haoles warned that if this behavior was not stopped in the poor neighborhoods among the non-haoles, it would soon reach them. Three episodes involving these elements occurred in 1923, 1929, and 1931-32, the last being the notorious Massie Case, which led to extensive legal reform, largely as a result of outside pressure.

World War II brought more widespread, organized, and officially regulated prostitution to Honolulu, justified in part as a preferred sexual outlet for the normal libidinous impulses of American military personnel, the alternative being rape.

The post-war period brought an unsuccessful attempt to establish a new legal approach to handling sex offenders, and a new set of theories and images about them. Despite the failure of passage of sexual psychopath statutes, the psychiatric model strongly influenced thinking about sex crimes during the 1950's. It was expressed in the episode beginning in 1959 in the first Governor's Committee on Sex Offenders, dominated by psychiatrists.

The Majors and Palakiko Case, beginning in 1948 and lasting for several years revealed some of the consequences of a changing ethnic stratification system. The non-haoles, viewing the case as an expression of discriminatory justice, were successful in removing capital punishment, one of the most potent symbols of a double standard of justice, from the statutes.

It was suggested that during the 1950's the extensive social change that was occurring may have set the conditions for the definition of more sex crime waves. Their absence, though, during the 50's was explained by a theory of functional substitution: that the official and unofficial campaigns against communists in Hawaii both absorbed the

attention of persons who would otherwise have been active in sex crime episodes, and performed the same functions in defending the ethnic and class stratification system (albeit unsuccessfully). When the communist hunting period ended in the late 50's, a new sex crime episode emerged in 1959.

Women had complex roles in the sex crime wave episodes we have examined. They did at times participate, but their roles were always secondary to those of men, the primary protectors of womanhood. Although they did on occasion demand more participation for women in the legal system, their usual participation was in the form of a reiteration of traditional values and role expectations. They also defended the "honor" of "womanhood." In this way they reinforced their own subjugation, although the mere fact of participation may have been a forerunner of eventual liberation. It was not until the 70's that women seized the issue for themselves and defined it in new ways.

Anglo-American rape law, with its underlying cultural conceptions, was riddled with inconsistencies, tensions and paradoxes. While offering, on its face, the universality thought to characterize Anglo-American law, to protect all women from all men, it in fact offered protection to few. Based on Anglo-American kinship and marriage practices in which women derived their only status from their fathers, and then husbands, sexual exclusivity was all women had to offer in exchange for status through marriage. Sexual

exclusivity became women's prize possession and the social world was divided into those who had confined their sexual activity to marriage and those who had violated these restrictive sexual norms. At the same time a "double standard" of sexual behavior existed wherein males were expected to have a range of sexual contacts, at least before marriage.

Much of the difficulty with rape law, historically, is the result of a fundamental paradox. Men have had two different and somewhat contradictory interests in rape law. On the one hand they have desired a strong, effective rape law to protect their interests in their respectable wives and daughters. On the other hand they wished to be protected from charges of rape as they engaged in their often aggressive premarital and extramarital sexual activities with other, less "respectable," women. Since in Anglo-American legal culture statutes must be written in universalistic terms, such considerations could not be directly incorporated in the written law. The tension was resolved at the enforcement level wherein a woman had to prove at all stages that she belonged to the class of women deserving of protection. It was also resolved by the incorporation into statutes and case law of such requirements as resistance, corroboration, and prompt complaint. In order for a woman to successfully prosecute a rapist she had to not only prove that she was "respectable,"

but that she had resisted to her utmost, even to the point of death, the taking of her most prized attribute, her "honor."

Another paradox in rape law as it existed in Anglo-American legal culture was the expectation, in order for sanctions to be applied, that a woman who had been so socially transformed, that had been "ruined," would come forth and so declare herself, thus stigmatizing herself for life and subjecting herself to that particular torture that the Anglo-American legal system reserved for rape victims.

When Anglo-American rape law, with all its contradictions, was introduced into a society continuously undergoing change in ethnic and class stratification, and in which group boundaries were highly sensitive, the conditions were set for repeated disappointments in rape law for the dominant group, and repeated, though often short-lived, demands for change. It is suggested that most rape cases ended unstaisfactorily in one way or another from the point of view of efficacious prosecution of men who force themselves sexually on women. But some cases became causes, in large part, it is suggested, due to the functions of these causes for the dominant group. The portrayal of the non-haole underclass as sexually dangerous served to maintain and justify the ethnic stratification system. Conversely, in the 1970's the portrayal of males by women as sexually dangerous has been used to help breakdown the sexual stratification system.

8.1 THE SEX CRIME EPISODES

Having found that much of the legal action with regard to rape law was the consequence of episodes of intense concern and activity in the community, and having spent a good deal of time and effort describing and analyzing these episodes, I should at this point attempt to draw some general findings from these occurrences.

First, it is suggested that the model proposed in Chapter I and employed throughout this study is a useful one for analyzing these episodes. They all begin with a rather clearly defined "crisis," a disturbance of habit and expectation. These crises include what were regarded as unjustified acquittals (the Holden Case in 1867, the Pence and Cansana Case in 1960, and the Nanakuli Case in 1981), the failure of a prosecutor or judge to bring what was regarded as the appropriate charge in a case (Lane Case in 1910 and Jogger Rape Case in 1979), the occurrence of gang rapes (Kakaako Case in 1929, Kauluwela School Case in 1930, and the Massie Case in 1931), or the rape and murder of a young girl (Carvalho Case in 1959). The major English-Language newspapers have played the most significant role in making the initial selection of cases and the determination that a crisis has occurred or is occurring in the community, and in providing the selected information used in the construction of meaning and the definition of the situation.

Consistent with the model, we have observed that initial responses to the crisis constitute a cacophony of unfocused explanations and demands relating to the question of who is responsible for the situation and what must be done. During some episodes the factions, while agreeing on the existence of a crisis, neutralize each other with respect to solutions to such an extent that no legal change is made. The 1912-13 episode in which the eugenicists and the advocates of whipping neutralized each other illustrates the situation when one definition of the situation does not achieve hegemony. Likewise, the 1929 episode (Kauluwela School Case) resulted in no successful legal action due to the ability of the social work school adherents to have the whipping bill vetoed by the governor. On the other hand, after the acquittal in the Nanakuli Case, the explanation that the resistance standard was at fault achieved hegemony over competing explanations that the prosecutor had blown the case or that the jury was culpable. The legal consequence was a modification to the rape statute deleting the resistance requirement. W.I. Thomas' observation that one definition of the situation must subordinate rival definitions for action to occur seems supported in this study.

We find both the influence of culture and social structure on the sequences of interaction. Having control of the major sources of information and symbol deployment,

the haoles for most of the period under study defined situations. Haoles, too, for the most of the period under study held the controls of the legal system. While groups located in different positions in the social structure may have defined different situations as crises, or defined crises differently, their opinions did not count much. When the ethnic stratification system changed during the 1950's we observed a rather different reaction to a case than haoles might have had. The new, non-haole political leaders of the community used the Majors and Palakiko Case as a vehicle for the abolition of the death penalty.

We have also observed the influence of changing culture, both at the lay level and at the level of the most educated, advanced social thinkers. In the 1910's eugenic theory was called upon to explain the troublesome behavior which caused the crisis. Others believed in whipping as the appropriate response to such behavior. During the 1920's the perspectives of sociology, social work, and social psychiatry were moderating influences on punitive lay perspectives. Later, psychiatry emerged as a powerful model along with the belief in individual rehabilitation for legal offenders. Still later, in the 1970's, these models were largely abandoned and incarceration and punishment came to the fore as preferred and expected programs for dealing with rapists and other offenders. All these images were drawn upon and informed the construction of meaning and the

defining of the situation during the episodes during which each held sway.

One wonders if Hawaii and rape law have come full circle. The emergence of women into public roles in the 1960's and 70's reminds one of the sexual stratification system of the Hawaiians, which was transformed by the Westerners in the early decades of the nineteenth century. Associated with these recent changes in sexual stratification has been a loosening of the norms of sexual regulation of the society. The recent focus on the assaultive aspects of rape, rather than its sexual component, and the demise of notions of female ruination due to rape, also remind one of Hawaiian cultural conceptions. Perhaps sociologists and historians of future generations will regard the period that has received attention in this study, roughly 1820 to 1980, as an aberration in sexual stratification and in rape law, an aberration replaced by more equal relationships between men and women, and more justice for rape victims.

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