Disentangling Desire in 1950s Houston:
On Assemblages and Racial Disparity in American Criminal Justice

David Ponton, III
Originally submitted to: History 583: Southern History, Dr. Randal Hall, Fall 2013
Submitted for consideration: Friends of Fondren Research Award
Spring 2014

Abstract
The criminalization of black males has been documented and theorized by historians and sociologists alike. While scholars have often analyzed their data with a critical eye to gender and race when black men meet the United States' criminal justice system, they have thought of the social positions “black” and “male” as an important intersection, but have not thoroughly theorized it as a co-constituted, historically contingent state of being made of both semiotic and material components. Employing Deleuzian assemblages as a theoretical frame and analytical tool, I argue that the out of the symbolic and embodied component parts of the American criminal justice system, there is an emergent organism—a justice-complex. This organism is a “desiring-machine” that has co-evolved with white-male hegemony. However, in contradistinction to conflict theorists' narratives, I maintain that the justice-complex and white-male hegemony do not necessarily merge to form a whole defined by its relations of interiority. Thus, while inequalities produced by this organism are racist and sexist, analyzing it as essentially such elides historical contingency and constrains the terms of both scholarly and public policy conversations. I explore these ideas as I present the story of Johnny Elwood Gordon, a black man accused of rape in Houston in 1954, demonstrating the analytical importance of disentangling the desires of co-evolved assemblages for understanding how non-racist, non-sexist machines have historically perpetuated racial and gender disparities in the context of the American criminal justice system.
American jurisprudence has often been characterized as producing “miscarriages of justice.” Or sometimes we describe our justice system as contaminated by such things as “southern justice.”¹ Scholars, and the public alike, have often imagined that if Americans could just disentangle its criminal justice system from the desires of the racist and sexist stronghold that has exerted hegemonic influence over the system, the unjustified racially disparate outcomes in arrests, sentencing, and execution would change. The 1950s comprise a compelling moment through which to explore that notion. The Supreme Court had been expanding their interpretations of clauses in the Fourteenth Amendment since the late nineteenth century.² However, after the First World War, “the world was was beginning to change,” and the nation’s highest court, in its Dempsey v. Moore (1923) and its series of Scottsboro decisions in the 1930s, signaled that it recognized, in some capacity, that equal protection under the law was pivotal to self determination.³ The Court continued to challenge explicit racial discrimination in the nation’s lower courts through the 1950s in an effort to excise, from the criminal justice process, legal errors that violated the Fourteenth Amendment. However, there has not been any radical change in racially disparate outcomes in the justice system. I argue that this is because the criminal justice system is an assemblage with its own desires—desires which have co-evolved

¹ However, despite how frequently “southern justice” is used as an explanatory variable by historians to provide meaning to what is perceived as the backwards politics of “the South” infecting a presumably purer, truer form of justice, the term “southern justice” does not help us understand “the South” or “justice” at all. For example, Cynthia Skove Nevels discusses lynching as “southern justice” which fails to acknowledge, in any critical way, the fact that lynchings also occurred in the North. Likewise, Melvin Leiman explains that white supremacists exerted control over the “economy of the South” without defining the boundaries of “the South.” Cynthia Skove Nevels, Lynching to Belong: Claiming Whiteness Through Racial Violence (College Station: Texas A&M University Press, 2007), 93; Melvin Leiman, The Political Economy of Racism (London: Haymarket Books, 2010), 93. Laura Edwards critiques such linguistic deployments, saying that “the South” has become “a crutch for historians who wish to use the concept as explanation for what they see in the region.” Laura F. Edwards, “Southern History as U.S. History,” Journal of Southern History 75, no. 3 (August 2009): 562–63. Likewise, I submit that justice is often presented with such antecedents as “southern” or “miscarriage of” or otherwise placed in quotes as a means by which historians and other scholars can effectively maintain that there is such a thing as pure justice and that it exists outside of society. I explore the materiality of justice more thoroughly elsewhere.


with those of a racist and sexist hegemonic assemblage, but which are not dependent on the presence of racism and sexism inherent to the system itself in order to produce disparities that are often characterized as unjust. The criminal justice assemblage desires legitimacy as a moral authority and gains this recognition, in part, by producing criminals. The system most effectively produces criminals out of the most vulnerable members of the society of which it is a part, and these tend to be poor people of color.

Johnny Elwood Gordon was one such vulnerable man. It was July 29, 1954. The relentless rain threatened to drown the city of Houston. The eye of Tropical Storm Barbara would never visit the growing metropolis, but its circular winds and extensive bands of water-filled clouds could not resist a flyby of the Bayou City. Barbara was a “menace” and a “nuisance” who seemed to overstay her welcome, displacing over 125 families as she swept water into homes sitting too close to Hall’s, Green’s, and Little White Oak Bayous. Hundreds of other residents were displaced throughout the rest of Harris County. As night fell, the rain continued to soak the earth beneath Houston’s feet.

Houston’s characteristic swampy, humid air wrapped itself around Blanche Beard on the night Barbara came to town. The forty-two-year-old white mother of one had recently taken up a job as a waitress at Leo’s Tavern to help care for her six-year-old son and her husband Orvis, who was recovering from an injury that prevented him from going to work. Her five-minute walk to her Lawndale Street home began at 10:10 that night. Her neck of the woods, the Harrisburg

---

neighborhood on the East End of Houston, was a small town that had been annexed by the growing city in 1926. She was only a little over one hundred feet from the safety of her home when another menace made Barbara’s fury the least of Blanche’s worries.⁵

Johnnie Elwood Gordon was on a quest for fun that night. He had gotten off of work at 9:00 that night, and after a jaunt downtown for a later dinner, he rode the bus to Harrisburg. By 10 o’clock he was searching for a “good time” around the neighborhood. Failing to find two local girls with whom he was acquainted, he decided it was time to head home. Then he spotted Blanche walking down Frio Street.⁶

To the frightened woman, Gordon appeared to be seven feet tall, epitomizing all of the monstrous features little white girls had learned to fear all over Jim Crow’s kingdom; he was powerful, insatiable, vicious, and as black as ebony under the cloudy sky.⁷ The “slender young man wearing a white T-shirt” grabbed Blanche, and together she and Johnnie rolled into a muddy ditch.⁸ She tried to let out a scream, but he grabbed her by the throat. “If you scream, you s – o – b, I will kill you,” he snarled.⁹ She struggled some more, but she could not get a sound out as Gordon forced her throat closed and warned her again, “You scream and I’ll kill you.”¹⁰

With Blanche subdued, Johnnie reached his hand under her dress and “tore the crotch from her pants.”¹¹ The force of his manhood penetrated Blanche’s body.¹² She lost consciousness.

---

⁷ For an excellent study on the constructed and iterative nature of “racial etiquette,” and particularly how the “black male rapist” was a constitutive part of this learning process, see Jennifer Lynn Ritterhouse, Growing Up Jim Crow: How Black and White Southern Children Learned Race (Chapel Hill: University of North Carolina Press, 2006), 36–41, 191–217.
¹⁰ “Police Hunt for Assailant of East End Mother, 42,” 1.
¹² In an earlier version of this article, I write of Blanche’s “soft pink matter.” I borrow this metaphor from the lyrics
Perhaps it was because she could not breathe. Or maybe she blacked out because of the hurricane force with which she felt the sanctity of her body violated. Either way, she was at Gordon’s mercy.\(^{13}\) Three times. That was the total number of times Blanche blacked out, awakening the first two times only to realize that Gordon was still sexually assaulting her.\(^{14}\) While her mind escaped her body for the third time, Gordon “reached a climax and took [his] penis out of her.” The entire ordeal could not have lasted for more than fifteen minutes, but before Blanche awakened to realize she had been freed from Gordon’s grip, the rapacious monster had already climbed out of the ditch and began a determined sprint down Manchester Street toward a bus stop.\(^{15}\)

Bob McClendon was driving down Frio Street on that rainy night. He lived just on the other side of Brays Bayou, about two miles west of where the attack had occurred. He saw the unmistakable shadow of a black man running in his direction. He stopped his car and noticed a lady, “screaming and crawling on her hands out of some weed.”\(^{16}\) Though Beard’s screams were

---

\(^{13}\) Gordon v. State, 161 Tex. Crim. 594 (Court of Criminal Appeals of Texas 1955).

\(^{14}\) “Police Hunt for Assailant of East End Mother, 42,” 1.

\(^{15}\) The fifteen minutes are calculated by taking the following times into account: Beard said she left work around 10:10, Gordon guessed he was in the neighborhood between 10:00 and 10:15pm, and witness Robert A. McClendon testified that he saw the assailant fleeing the scene at approximately 10:30 that night. Gordon v. State, 161 Tex. Crim. 594 (Court of Criminal Appeals of Texas 1955).

hoarse, they managed to arouse several residents who were able to catch a glimpse of a man running from the scene. McClendon sprang into action, chasing the rain-soaked assailant to Broadway Street. But the dark figured managed to get away.17

Blanche carried her own bruised and battered body to her home. Orvis caught sight of his wife. Wet. Muddy. Terrified. And he heard all he needed to hear. A Negro. A monster. The devastation. He rushed out of the house to avenge his wife. Pocket knife in hand, Orvis prowled the prowler.18 Meanwhile, calls were made to emergency personnel; fortunately for Blanche not all the phones in Harrisburg had been knocked out of service by Barbara. However, before any police or health professionals arrived, Orvis had his own chance to seal Gordon’s fate.

While the distressed husband braved the rain, he ran into Bob McClendon who had failed to keep the assailant in sight. Together, in McClendon’s car, the two criss-crossed the streets of the neighborhood, until finally, the shadowy figure reappeared at a bus stop about five blocks away from where the attack had occurred. McClendon pointed out the Negro. Orvis vacated the car, knife in hand. Gordon caught sight of him, a white man, running to catch the bus—or so the satisfied rapist assumed until he caught a glimpse of the weapon. Orvis lunged at Gordon, aiming for his neck. The slender shadow of a man side-stepped the dagger and was cut in the forearm, about halfway between his elbow and wrist. Gordon reasoned that this was about the assault; Orvis’ anger was unmistakable. Gordon ran and soon enough simply “disappeared” into the darkness.19

Blanche was taken to nearby Jefferson Davis Hospital. Police had arrived on the scene, but were more interested in finding the perpetrator than collecting evidence for the rape. The

17 “City Mother Assaulted by ‘7-Foot’ Man,” 1.
poor woman had been humiliated enough. Dr. C. R. Turner cared for the devastated mother that night as the search for Gordon continued.20

“Five cars of officers” searched Harrisburg into the wee hours of the morning on July 30th, but Gordon had already escaped. After he slipped away from Orvis, Gordon remained hidden until he made a desperate phone call to William P. Hemphill, a local mortician and friend. A little after 1:45 in the morning, Hemphill arrived at the LaPorte Road convenience store parking lot, behind which Gordon had camped out in some shrubs. The tired rapist ran through the rain with the stab wound on his arm still bleeding. He opened the door to Hemphill’s car and explained that he had been attacked. The sympathetic mortician dressed Gordon’s wound and “gave him a change of clothes.” It would not be the first time a white man had senselessly attacked a black man; whatever story Gordon told him that night in the car would not need much further explanation than that. Two days later, Hemphill granted Gordon one last favor when he took his frightened, injured friend to San Augustine. Gordon stayed there with an associate. Fortunately for Blanche, the beginning of the end of her nightmare would end when police arrested Gordon and returned him to Houston, where he signed a confession admitting to all of the savage details of his assault on Blanche.21

Presley E. Vinson was an established landman in the oil industry, responsible for leasing several lots of land in Lull, Texas, for drilling. He worked for Amerada Petroleum and later became the second president of the Houston Association of Professional Landmen, an organization established in late 1946 “to promote personal acquaintances and to aid in professional enlightenment of landmen.”22 The former loan agent earned the equivalent of

---

20 “Johnnie Elwood Gordon: Amended Motion for a New Trial.”
$50,000 per year in 1940, which he used to support his wife, Margaret, and their then three-year-old daughter in their West University home.\textsuperscript{23} In many ways Vinson was like most people chosen to sit on grand juries in Harris County. Although Vinson was the foreman of the petit jury that came to decide on Gordon’s case, the key-man selection system in the Harris County court system had guaranteed that the grand jury that initially returned Gordon’s indictment was made up of men just like Vinson: wealthy, white, and older men who were celebrated members of an old boys’ networks. The interrogation process used to seat the jury in the \textit{State of Texas vs. Johnnie Elwood Gordon} would be composed of white men as well, and together they would decide what was fact and what was not. If found guilty, Gordon would necessarily be assessed anywhere from five years to life in the penitentiary or death.\textsuperscript{24}

The testimony and argument portion of the trial lasted one day, and the jury was issued the charge of the court on October 7, 1954, the same day on which they returned their verdict. Dark ink and clear cursive against off-white paper. It had been decided. At 6:30 in the evening Presley E. Vinson signed his name, stood before the court, and read aloud, to the “stolidly staring” Gordon and the rest of the room, the jury’s final decision.\textsuperscript{25}

At least, that is how the jury decided things happened.

Desire and struggle are ever-present in Gordon’s saga: a mother and wife wanting to provide for her family; a conquistador cutting through the night in search of a sexual object to subdue; a battered woman screaming into the dark, hoping for a savior and redemption; a devastated husband lashing out for revenge; police searching for a monster; a prosecutor looking

\textsuperscript{25} “Death Penalty Given Woman’s Assailant,” 10 (quote); “Johnnie Elwood Gordon: Charge of the Court.”
for a conviction; a defendant hoping against hope for freedom; and a jury with an answer for them all. These desires, these longings, these productions of feeling and action—they all became channeled into a criminal justice-complex, an assemblage, made up of so many parts: judges, juries, attorneys, police officers, affidavits, inquests, prison bars, even the very pen that was used to decide Gordon’s fate. This network of people, objects, organizations, bureaucratic processes—yes, even the whiteness on the skin and the maleness on the bodies of the most powerful people in this network, the powerful metal on the jail cells, the long wood paneled desk in the booking room at that selfsame jail—it all was the visceral material of the criminal justice-complex, making it tangible, giving it spatial and temporal boundary. That is to say, the criminal justice-complex is real. It is not a concept, at least not singularly so. It is a thing, with jurisdiction, with power, and, yes, with its own desires.26

However, it is the desire of this complex, which I will call C.J., that is perhaps the most difficult to immediately decipher.27 If C.J. desired “justice,” as it is often imagined conceptually, we would expect a lot of things.28 The jury in Gordon’s case would be diverse, a “cross-section”

---

26 My analytical framework comes out of the work of assemblage theorists. Assemblage theory is a “realist approach to social ontology” that “assert[s] the autonomy of social entities from the conceptions we have of them.” See Manuel DeLanda, A New Philosophy of Society: Assemblage Theory and Social Complexity (London: Continuum, 2006), 1. Assemblages are, first and foremost, “actual entities” at all scales of existence. Ibid., 40. Single-celled organisms, nation states, and even galaxies are all assemblages, “made up of parts which are self-subsistent and articulated by relations of exteriority, so that a part may be detached and made a component of another assemblage.” Ibid., 17. Assemblages are desiring-machines; they have affect, which is responsible for “the capacities of bodies to do, desire and feel, in turn producing subsequent affective flows.” Nick J. Fox and Pam Alldred, “The Sexuality-Assemblage: Desire, Affect, Anti-Humanism,” Sociological Review 61, no. 4 (2013): 772–73, doi:10.1111/1467-954X.12075. Assemblages “de-exceptionalize” human bodies, dispensing with the nature/culture and human/nonhuman binaries, recognizing that “matter is an actor.” Jasbir K. Puar, “‘I Would Rather Be a Cyborg than a Goddess’: Becoming-Intersectional in Assemblage Theory,” philoSOPHIA 2, no. 1 (2012): 57.

27 My use of “C.J.” is not simply shorthand, nor is it flippant. I mean to emphasize that the criminal justice-complex is an embodied entity. It is an organism. It acts and is acted upon. And most important, C.J. desires. It acts in ways that are not always easily discernible, as its actions are always accompanied by discourse about “justice,” which seem asymmetrical with what C.J. often produces. Nevertheless, it is important to maintain C.J., not as an “agent” per se, but as an organism that produces desire—productive desire that has real consequences on individuals and groups of humans as well as on the things we treat as “simply” discourse, such as “justice.”

28 Kevin Boyle begins his masterful recounting of a highly racialized murder trial in 1920s Detroit with an epigraph which cites abolitionist Theodore Parker’s belief that: “The arc of the moral universe is long, But it bends toward justice.” Though Boyle does not explicitly deconstruct or ratify this claim, his work supports the idea that injustice is easy to come by in black Americans’ historical experiences, but that there is unmistakeable overall
of people who can admit the impossibility of impartiality and objectivity; a panel of citizens who are consciously aware of their situation in society, not as individuals, but as members of several social assemblages that are delineated by race, gender, sex, class, sexuality, and so on. C.J. would admit that it cannot “escape” subjectivity—that it can only seek to “balance” bias on a jury by maintaining jury selection strategies that insure an array of opinions, values, and social directionality in the march toward “justice.” Indeed, though unfair, blacks “had to pay for [justice]” and “it never came cheaply.” Justice, then, appears to exist on two planes: a tangible one wherein (in)justice is felt by parties who are treated fairly or unfairly. But then justice also exists, it seems, as an ahistorical concept. History itself is being driven toward something that exists outside of its confines: a justice unburdened by human stains. Kevin Boyle, *Arc of Justice: A Saga of Race, Civil Rights, and Murder in the Jazz Age* (New York, N.Y.: Henry Holt and Co., 2005), 192 (quote). Other historians’ works evoke this same sense. Robert V. Haynes, in his study of the 1917 Houston “riot,” maintains that “Negroes in Houston were continually subjected to a double standard of justice—one for the white man and another for the colored man.” The assumption the historian needs to make in order to hold this statement true is that “justice” is one “thing” that exists outside of discrete moments of time and space. Robert V. Haynes, *A Night of Violence: The Houston Riot of 1917* (Baton Rouge: Louisiana State University Press, 1976), 7, 30 (quote). Khalil Gibran Muhammad argues that racism is so endemic in the criminal justice system that the system can only fail to dispense justice to blacks who are subjected to its powers of surveillance and punishment. Again, justice appears outside of history as a concept rather than an event. Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, Mass.: Harvard University Press, 2010), 159–168, 229–230. Lisa Lindquist-Dorr's thorough and nuanced reading of black-on-white rape cases in Jim Crow Virginia historicizes the “justice” concept more than others by allowing the term to be defined by her historical subjects, many of whom equated injustice with racial oppression and inequality. Others, particularly many whites, believed that justice often came in the form of punishment for black men who were accused of sexually assaulting white women. Thus, whites and blacks bickered across the race gap and among themselves over what constituted “justice.” Ultimately, however, Lindquist-Dorr also maintains the existence of a sanitized justice somewhere in the ether when she argues, “Today's black men are the casualties of an imperfect justice system.” Lindquist, *White Women, Rape, and the Power of Race in Virginia, 1900-1960*, 78, 207, 250 (quote). Glenda Gilmore's seminal work on the oppressive deployment of gender in Jim Crow regimes makes explicit that “Freedom, justice, and rights are relative concepts, and context conditions their meaning.” However, Gilmore points out that for activists like Ida B. Wells-Barnett “justice could never be partial.” Gilmore demonstrates her concurrence with Wells-Barnett's belief, opening her book with the adage “justice slumbers but never sleeps,” and concluding her introduction by noting that, indeed, in the life of Sarah Dudley Pettey, “justice slumbered.” Glenda Elizabeth Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896-1920* (Chapel Hill: University of North Carolina Press, 1996), 100 (first quote), 51 (second quote), xv (third quote), xxii (fourth quote). Additional examples of similar conceptual deployments of “justice” include: Eric W. Ruse, *The Martinsville Seven: Race, Rape, and Capital Punishment* (Charlottesville: University of Virginia Press, 1998); Lawrence D. Bobo and Victor Thompson, “Racialized Mass Incarceration: Poverty, Prejudice, and Punishment,” in *Doing Race: 21 Essays for the 21st Century*, ed. Hazel Rose Markus and Paula M. L Moya (New York: Norton, 2010), 322–355; and Lawrence D. Bobo and Victor Thompson, “Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System,” *Social Research* 73, no. 2 (July 1, 2006): 445–472. Richard Kluger's seminal work on the desegregation of American public schools is a study of “how law and men interact,” and how court justices act as “arbiters of justice.” His approach, then, is slightly different from the aforementioned scholars'. However, ultimately even Kluger opines that there is such a thing as “genuine social justice” and that “justice of any type cannot materialize” where American hypocrisy dwells. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Vintage Books, 2004), E–book. Elsewhere, I argue that a realist understanding of justice does not allow for this ahistorical conceptualization of justice. Justice is both historically and materially contingent wherever and whenever it is real. For this, and the majority of the following paragraph, see David Ponton, III, “Murder, Race, and Heuristic...
positionalities have voice in the administration of a verdict. We would also find evidence that the system remained as open as possible to evidence that supports the innocence of the defendant, given that the presumption of innocence is supposed to rest in his seat. Moreover, in the same way that indictments must be written in express language as to the charge against an alleged offender, if C.J. were looking for “justice,” it would hold its juries accountable by requiring the articulation of a verdict that exposes their logic to the court and to the general public, to be scrutinized and searched for its honest and thoughtfulness. But those deliberations and decisions were and are cloaked in secret.

However, justice does not exist in quotes. Like C.J., justice is never just a concept. It is always both expressive and material—discursive and visceral. It is emergent out of historical processes and is never without tangible form. Criminals, crime, and justice are all man-made and codified, not through “morality” or “natural law,” but through actual legislation. Indeed, justice emerged out of an assemblage of offices, networks, peoples, and laws that, together, decide a defendant's legal status within a legally defined jurisdiction. This emergent justice is decidedly more than discursive: through the eyes of district attorneys it sees race; through the make up of the juries and the authoritative figures and their beliefs, justice becomes gendered; through the practice of discretionary authority, justice is necessarily arbitrary; through material control of defendants' bodies and their senses of space and time, justice manifests as boundary maintenance. In the United States, justice is believed to define what behaviors are punishable, not necessarily what actions are understood to be wrong or right. C.J., then, does not seek tikkun olam; instead, the justice-complex produces actual justice, which is not impartial and incapable of restoring all losses or of erasing all of the consequences of any wrongdoing.


No. C.J.’s material and expressive components and the actions of the justice-complex assemblage do not indicate that this “desiring-machine” is in search of imagined justice.³⁰ Popular and embattled death row inmate, Mumia Abu-Jamal, notes, “The criminal court system calls itself a justice system, but it measures privilege, wealth, power, social status, and—last but not least—race to determine who goes to death row.”³¹ In 1953, the Houston Informer, the city’s black-owned newspaper, stated what justice should look like when it came to “Negro crime” and the criminal justice system. The courts needed to abandon their “laxity” in cases were black people were both the victim and the accused. And although the majority of the newspaper’s editorial speaks specifically of the “moral” failings of the “Negro community,” it was the “cheapness” with which the courts delivered care to black victims of crime that robbed the court’s justice discourse of any sense of authenticity.³² Indeed, in the spring of 1953, the Catholic Archbishop of New Orleans, Joseph Rummel, wrote to all the churches in his parish that “any practices that tend to reduce the importance and human dignity of the individual (regardless of external characteristics)” were anathema to “justice” and righteousness.³³ “Texas’ famous one-sided justice” expressly devalued black humanity. Indeed, according to Harris County Council of Organizations leader Sid Hilliard, when justice “took a holiday,” it went on vacation in the Harris County “court building.”³⁴ Political scientist Keesha Middlemass writes of this justice-complex in the United States: “The criminal justice system, over time, has evolved into a set of

³⁰ I borrow this language from Fox and Alldred’s discussion of the sexuality-assemblage as a desiring-machine. See Fox and Alldred, “The Sexuality-Assemblage,” 780.
³⁴ “Policemen ‘No Billed’ on Rape Charges,” Houston Informer, November 28, 1953, sec. 1, 1 (quotes), 10.
interlocking policies that reinforce each and other and ensure the loss of human rights.”

C.J. is an organizational assemblage, and like all organizations, its desires are not necessarily expressed in the rhetoric that surrounds its claims to power. C.J. is a system of authority, and as such, it has something else in common with other organizational assemblages. As philosopher and assemblage theorist Manuel DeLanda explains, assemblages have two types of components: expressive ones and material ones. The expressive components in organizational assemblages work to articulate “the legitimacy of the authority.” In C.J., this is accomplished through language, deployment of justice discourse, court commands and orders, displays of “uncoerced obedience” by all parties involved, courtroom rituals of sitting, standing, questioning, and being silent, and control of when and how things are said through a dizzying bureaucratic legal system. The material elements work to ensure “the enforcement of obedience” to C.J. immediately apparent, DeLanda points out, is that organizations use punishment to command obedience. Indeed, C.J. confines bodies in jails, locks them away in prisons, exposes them to abuse by officers of the “law” and other convicted “criminals,” and sometimes kills them. But the indicted and the convicted are not the only bodies who must obey. Due dates, work cycles, the organized space of the courtroom, accessibility to the judge, the presence of the bailiff, and the closing of the court doors all arrange and punctuate time and space. Attempts to move and exist outside of those parameters mutes the voice of a would-be renegade. It is upon deafened ears and hardened hearts, for example, that motions and appeals filed after deadlines reach their bureaucratic deaths.

36 My list is not exhaustive, but I hope to have made clear what some of the expressive elements of the justice-complex assemblage are. For a general discussion of organizations as assemblages, see DeLanda, A New Philosophy of Society, 68.
37 Ibid., 70–73. For a gripping first person narrative that demonstrates materiality of punishment, see Haywood Patterson and Earl Conrad, Scottsboro Boy (Garden City, NY: Doubleday, 1950).
38 For more on the material components of organizations, see again DeLanda, A New Philosophy of Society, 70–74.
C.J. desires legitimacy and the 1950s represent a crisis moment when its presentation of moral authority was in question, although perhaps that image had always been in some state of crisis for blacks in America. Nevertheless, the 1950s were a volatile time in American jurisprudence, as the Supreme Court struggled to legitimate its own moral and legal authority in a post-Hitler, post-Holocaust world. In the days just before the summer of 1954, the *Informer* published a work by syndicated black political cartoonist R.S. Pious. It depicted the foot of the Supreme Court kicking a figure that embodied “indecency” out of its presence. Pious captioned his work: “The Supreme Court’s Answer.” About a month earlier, just after the court ruled in the *Brown v. Board of Education* (1954) cases, the *Informer* printed another one of Pious’ works in which the artist reprimanded Georgia governor Herman Talmadge. Pious drew the staunch segregationist, who was determined to stop integration in Georgia schools, as a dictator, posturing in front of a mirror with a ghostly and ghastly Hitlerian reflection looking back at him.

Slowly, the Supreme Court had already been chipping away at racial injustice in C.J. In *Norris v. Alabama* (1935) the justices ruled that the Fourteenth Amendment rights of Clarence Norris, one of the infamous Scottsboro Boys, had been violated because of the sheer weight of the *prima facie* evidence that blacks were systematically excluded from jury rolls by the State. *Shelley v. Kraemer* disempowered courts from enforcing racially restrictive covenants, which meant, at the very least, that white homeowners could not be forced to sell their properties only to other whites, and blacks, if given the opportunity, could buy homes in neighborhoods with

---

39 See, for example, the way that Justice Taney discussed race and the Constitution in the infamous Dred Scott decision of 1857 and the ways those words have been explored historically by such scholars as Don E. Fehrenbacher, *Slavery, Law, and Politics : The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981); Paul Finkelman, John F. A. Sanford, and Dred Scott, *Dred Scott V. Sandford: A Brief History with Documents* (Boston: Macmillan, 1997); and Walter Ehrlich, *They Have No Rights: Dred Scott's Struggle for Freedom* (Westport, Conn.: Greenwood Press, 1979).
41 R. S. Pious, “Is This The Plan, To Stop Integration In The Schools?,” *Houston Informer*, May 8, 1954.

racially restrictive contracts, albeit usually at price far above the houses’ market values.⁴³ Several important wins in school desegregation predated the *Brown* decisions, including *Missouri ex rel. Gaines v. Canada* (1938), which forced states to recognize Plessy’s “equal” qualification and set in motion the groundwork for deployment of the NAACP’s Margold Strategy, which would eventually expose to the courts that forced racial segregation by race was inherently unequal and economically untenable. In *Sipuel v. Board of Regents of the University of Oklahoma* (1948), a unanimous Court undercut the university’s denial of Lois Sipuel’s admission on the basis of race. *McLaurin v. Oklahoma Board of Regents* (1950) solidified that the segregation George McLaurin experienced within his graduate program was a “handicap to graduate instruction” with no discernible justification or state interest. And in *Sweatt v. Painter* (1950), a case brought forth in the name of Heman Marion Sweatt, a young scholar who had applied to attend the University of Texas at Austin’s law school, the Court further cemented the substance of its decision in *McLaurin* and declared that “intangible” factors, such as the exchanges that occur in a classroom setting, not just physical facilities, were critical to any student’s education.⁴⁴

In post-WWII America, the types of racial injustice that were so characteristic of Jim Crow—“Whites Only” and “Colored Only” signs and practices—threatened the legitimacy of the Supreme Court by exposing the judicial body to powerful critiques that compared the gas chambers of Hitler to the manifestations of Jim Crow on Billie Holiday’s blood-stained poplar trees.⁴⁵

⁴⁴ For a thorough narrative account of these and other important moments leading to May 1954, see Kluger, *Simple Justice*, chaps. 9–12.
So, why then did C.J. continue to produce innocent and guilty verdicts in racially disparate ways? First, again note that C.J.’s primary desire was not necessarily to create, maintain, or reproduce racial disparity. Though it is easy to confuse C.J. with the smaller assemblages that make up its component parts—particularly the white, male networks of judges, prosecutors, law enforcement officers, powerful businessmen, and politicians who have, for the majority of American history, been the sole captains of the criminal justice ship—the desires of racist assemblages within the justice-complex to police racial borders, gender performances, and expressions of sexuality through the court system, and to maintain white, male hegemony are the longings, not of C.J., but of that particular white-male, race-gender-class assemblage. C.J., remember, desires foremost to have its authority legitimated.

Thus, while it is true that the Supreme Court challenged lower courts to sweep all explicit utterances of racial prejudice out of the legal process and it is duly noted that this challenge would eventually produce such measurable changes as blacks and women seated on juries in criminal cases and even black and female prosecutors, C.J.’s desire for legitimacy was not challenged by the rumbles of change in the 1950s. Moreover, racist, masculinist hegemony need not be expressed only by white men, given that systems of domination can be internalized by the dominated through what Pierre Bourdieu calls “symbolic violence,” but also because assemblages are not defined by “relations of interiority.”


47 Bourdieu, Masculine Domination, 34; DeLanda, A New Philosophy of Society, 16 (second quote).
often imagine this thing we call “society” as a body, comprised of parts in compulsory relationships with one another. Thus, the social construct of “men” only exists in relation to the construct of “women”; “black” only exists because it is the implied manifestation of “that which is not white”; white-male, racist-sexist courtrooms exist because of an absence of diversity. However, assemblages are not defined by constitutive parts; that is to say, for example, that Jim Crow signs were only a historically contingent component part of American segregation. But even if those signs were outlawed Jim Crow could still exist as an assemblage, affecting black and white members of society in the same ways it did before those signs were taken away. Thus, when the Supreme Court changed the rules about what kinds of racial discourse could be legitimately evoked by representatives of the state, by stripping those government figures of the authority to explicitly articulate racial enmity and get away with it, the justices did not necessarily change anything structurally. Moreover, even if racism and sexism were excised from the justice-complex, racialized and gendered disparities can still be produced out of the assemblage.  

However, my central contention is that the Supreme Court’s decisions did not change or threaten to change C.J.’s desire for legitimacy. While the hegemonic white-male assemblage faced critical challenges to its authority, which was in part based on its ability to maintain a gendered and racially homogenous legal system, this particular racialized and gendered desire was never necessarily C.J.’s. However, because C.J.’s desires and hegemonic white-male desires have been so closely connected in American history, even overlapping to the point where C.J.’s desires are obfuscated in some academic analyses, the very different ways through which these two assemblages are both implicated in a “one-sided” justice system are often obscured.  

48 For much more on “relations of interiority” and an opposing theoretical alternative, “relations of exteriority,” see DeLanda, *A New Philosophy of Society.*  

49 In a compelling empirical piece, Lizotte concludes that there is a “complicated interweaving of extra-legal and legal characteristics” that affect criminal sentencing. Nevertheless, the variance explained by this analysis and
conflict theorists maintain that white-male hegemony uses the legal and judicial system to maintain its position in society and to hoard material and socio-cultural resources for itself. The consequence of this is clear: the subjugation of women and the dehumanization of non-white members of society. It is these powerful ramifications that compel the work of many scholars and social justice activists.

However, this particular explanatory tradition in conflict theory does not necessarily capture the logic through which C.J. reproduces racial disparity. Because C.J. is an organizational assemblage that desires for its authority to be legitimated, it must be constituted not only by expressive components that convince the public of both its claim to moral authority and its ability to enforce that morality, but also by material components that command obedience and mete out punishment. In plainer language, crime is a social construction. So is justice. C.J. plays a central role in defining them. But crime and justice cannot exist solely as abstract concepts. They are assemblages and, thus, necessarily have material components. By organizing bodies in space and time and commanding obedience, C.J. participates in the visceral emergences of crime and justice and punishment and redemption, making order out of social chaos. But C.J. does not do this for “justice,” as a concept. A purely semiotic justice, after all, cannot direct and shape C.J.’s desires if justice itself is emergent out of C.J.’s actions. C.J. produces crime and justice, then, for a different purpose—for the purpose of legitimating its others, is minuscule. Lizotte imagines this may be a methodological or theoretical failing, but also posits that, “In the American criminal court process very little is patterned.” While these conclusions are synergetic with at least part of my present argumentation, Lizotte does not address organizational desire. Alan J. Lizotte, “Extra-Legal Factors in Chicago’s Criminal Courts: Testing the Conflict Model of Criminal Justice,” *Social Problems* 25, no. 5 (June 1, 1978): 578 (quotes), doi:10.2307/800105. More recently, Melissa Thompson’s important work demonstrates how actors in the criminal justice system interpret race and gender as data in their assessment of the mental health of defendants. This insightful work highlights the processes through which the beliefs of court actors affect the administration of justice, but does not ask how the desires of the justice complex influences court actors. Melissa Thompson, “Race, Gender, and the Social Construction of Mental Illness in the Criminal Justice System,” *Sociological Perspectives* 53, no. 1 (March 1, 2010): 99–126, doi:10.1525/sop.2010.53.1.99.

50 LaFree, *Rape and Criminal Justice*, 115.
51 See DeLanda, *A New Philosophy of Society*. 
authority.

Racial disparity, then, present in the emergence of those socially-constructed persons we call “criminals,” comes out of this process, not necessarily because of the historically close relationship that C.J. has had with white-male hegemony, but because as the criminal justice system is currently organized, C.J. must produce criminals and it must punish them. C.J.’s desires have not changed, and while the bodies that participate in making the system work come in various skin colors and genders, the social structure that C.J. seeks to affect has not experienced much change either. It is easiest and most believable, given the ways that “crime is written into race” and “race is written into crime,” for C.J. to make criminals emergent out of black bodies. Even when stripped of racist and sexist laws, judges, prosecutors, and juries, structural inequality makes the poorest, weakest, and most vilified members of American society most susceptible to the flows of affect that help C.J. realize its desire. Racial disparity in the


53 The language of “writing crime into race” and “writing race into crime” I borrow from Muhammad, The Condemnation of Blackness.

54 Fox and Alldred explicate how desiring assemblages produce “affective flows,” which demonstrates the capacities of assemblages to change or to effect change. See Fox and Alldred, “The Sexuality-Assemble,” 773 (quote). Assemble theorists have employed the work of affect theory to explain the emergence of “bodies, identities, and the social world.” Affect, they argue, is responsible for change, and thus is constitutive of history; it is the momentum, the acceleration, and the reverberations that causes all things to emerge. Affect, however, is not an ahistorical force. At times it is prehuman and concept-independent; affects, such as gravity and inertia, produce physical effects on macro- and microscopic levels. See Nick J. Fox, “Flows of Affect in the Olympic Stadium,” Sociological Research Online 18, no. 2 (May 31, 2013): E–journal, doi:10.5153/sro.2941. At other times, affect is a force that is characterized much more specifically as “pre-subjective” or “pre-personal,” precisely because the consequence of affect is the production of a subjective identity or emotion. See John Hodgkins, The Drift: Affect, Adaptation, and New Perspectives on Fidelity (New York: Bloomsbury Academic,
criminal justice system, then, does not hinge on racist laws or even consciously racist actors. Instead this inequality lies in C.J.’s oft-unexamined desire for legitimacy and its relationship to the suffocating race-gender mechanisms that continue to make blacks appear, as a group, like a caste in the United States. Johnnie Elwood Gordon’s case demonstrates that C.J. does not desire justice, and also how, even in the tumultuous 1950s, when it appears justice discourse was being rewritten, C.J.’s desire did not undergo change. The appearance of fairness is enough to legitimate C.J.’s “moral” authority. Both the demand for obedience and the administration of punishment cement that claim to legitimacy.

---

2013), 23 (quotes). These are often called “affect programs,” the term itself demonstrative of the way that certain affective responses to environmental stimuli are instinctive (e.g., pleasure derived from consuming foods with high fat or sugar content or alertness in an unfamiliar space). For a good summary on affect programs see Department of Philosophy University of North Carolina Jesse J. Prinz Associate Professor, Chapel Hill, Gut Reactions: A Perceptual Theory of Emotion: A Perceptual Theory of Emotion (Oxford University Press, 2004), chap. 4. Neo-materialists who have deployed affect theory in their own work have been criticized for being “nonintentionalist”—seeing “will” only in the corporeal brain and not in the socially constructed mind Ruth Leys, “The Turn to Affect: A Critique,” Critical Inquiry 37, no. 3 (March 1, 2011): E–journal (quotes), doi:10.1086/659353. However, “The main thing an affective practice folds or composes together are bodies [material] and meaning-making [semiotic and discursive components].” See Margaret Wetherell, Affect and Emotion: A New Social Science Understanding (SAGE, 2012), 20. Affect as social practice then, is as bound up in the expressive components of assemblages as it is in the material; it is not simply the biology of emotions, but instead is transformed, directed, and redirected by socialization, memory, identity—indeed, all the things that make history a story at all. For the point directly at hand in this paper, note that affect flows between bodies, organisms, and networks and cause change within bodies Susanne Gannon, Kristina Gottschall, and Catherine Camden Pratt, “‘A Quick Sideways Look and Wild Grin’: Joyful Assemblages in Moments of Girlhood,” Girlhood Studies 6, no. 1 (June 1, 2013): 16, doi:10.3167/ghs.2013.060103.. One example of how this works is in the area of bias, which is often assumed to be cognitive, but is necessarily affective even when it is not conscious. Though not couched in the language of affect theory, Mahzarin Banaji and Anthony Greenwald’s work on hidden bias shows the complex interplay of belief, identity, and biology and the effect of said interaction on physiological and psychological responses to social situations. See Mahzarin R Banaji and Anthony G Greenwald, Blindspot: Hidden Biases of Good People (New York: Delacorte Press, 2013). Thus, discourses of black criminality undoubtedly shape affective responses and direct affective flows when a jury sees a black man charged for a crime; the uneasiness and compliance with which poor defendants interact with bureaucracies that challenge the limits of their literacy certainly makes it easier for faceless authority figures to assert their authority while the chains of powerlessness, and all its accompanying emotions, tie the hands and muzzle the mouths of defendants and their advocates. As affect bounces from body to body—fear of the dangerous black male bounces causes a certain aggressive posturing by the white police officer, which causes an emotional, physiological, and possibly verbal response from the “suspect,” which heightens tensions on both sides as the cognitive is complicated by the physiological—history takes shape. The poor, black, and brown are highly vulnerable to “misperception,” which Nancy Fraser defines as being “denied the status of full partner in social interaction and prevented from participating as a peer in social life--not as a consequence of a distributive inequality... but rather as a consequence of institutionalized patterns of interpretation and evaluation which constitute one as comparatively unworthy of respect or esteem.” Nancy Fraser and Axel Honneth, Redistribution Or Recognition?: A Political-Philosophical Exchange (London: Verso, 2003), 29. For more on affect and assemblages, see: Charles J. Stivale, Gilles Deleuze: Key Concepts (Montreal: McGill-Queen’s University Press, 2005).
Gordon’s Houston and Texas both had long-standing experience in flouting justice for the sake of social “order.” For example, legal scholar William S. Osborn discusses how some Texas courts, as early as the 1890s, delivered opinions that resisted the coming of Jim Crow on railroad cars that operated in the state. Big business, labor unions, and public opinions wrestled, each hoping to be heard over the cacophonous social confusion caused by Texas’ 1891 segregated railroad statute, a struggle comparable to the fight that would take place in the Supreme Court between Jim Crow states and the Interstate Commerce Commission in the 1930s.

“Notwithstanding the legal assault on segregation during the 1950s,” Osborn writes, “segregation did not end easily on Texas railroads or in culture.” Indeed, Osborn concludes that segregation in Houston’s places of public accommodation, including rail transport, did not end until the early 1960s, when the city “embraced a progressive new business image as ‘Space City.’”

For its part, the state of Texas was a real threat to black folks’ lives. Between 1930 and 1972, Texas was responsible for nearly 22 percent of the nation’s state-sanctioned executions. Nearly 83 percent of those who died at the hands of the state of Texas were black. More immediately, in the 1950s, the nation executed ninety-four convicts and those killed in Texas account for almost a full third of those deaths, more than doubling the total in Georgia, the state with the second-highest number of executions. Between 1942 and 1971, James Marquart, Sheldon Ekland-Olson, and Jonathan Sorenson found that in Texas, “When males from an African-American background raped an Anglo female, the case was approximately thirty-five times more likely to result in capital punishment than a prison sentence.” Indeed, whether for rape of a white woman or for some other breach of racial protocol, many white Texans found restorative solace in the convictions and executions of blacks who dared push back against Jim

Crow too strongly. For example, following the 1917 execution of thirteen black soldiers in Texas after their “mutiny” against Jim Crow accommodations, police brutality, and an apparently one-sided justice network, “most white Americans, particularly Houstonians, greeted the news with satisfaction if not enthusiasm. They were pleased that justice had been done.”

The threat of state execution was only one existential threat to blacks in Texas during the first half of the twentieth century, and it was not necessarily the most frightening menace. Mob violence and lynchings punctuate Texas history in harrowing ways. The NAACP counted that Texas whites lynched at least 122 blacks between 1889 and 1918, sometimes for reasons as trivial as “gambling,” as obtuse as being a “desperado,” and as fearsome as “writing [a] letter to a white woman,” but often enough for offenses “unknown.” On December 11, 1922, in the small town of Streetman, which sits about eighty miles south of Dallas, “more than 300 bullets were pumped” into the body of twenty-five year old George Gay, who happened to make the mistake of “ambl[ing] into” the “gunsites” of an angry and drunken mob responding to reports of the rape of a white schoolteacher. In a study about lynching in Brazos County at the turn to the twentieth century, Cynthia Skove Nevels demonstrates that mob violence in Texas was not only a method of social control against blacks, but also a way for immigrant peoples from Europe, whose whiteness was still in question in America’s racial schematic, to confirm their positions as whites. Nevels writes, “One of the fastest ways to establish whiteness was through violent racial

---

58 One of the most well-known lynchings occurred in Waco. A mob burned, mutilated, and hanged Jesse Washington’s body outside Waco’s city hall after he was convicted of raping and murdering a white woman. See James M. SoRelle, “The ‘Waco Horror’: The Lynching of Jesse Washington,” *Southwestern Historical Quarterly* 86, no. 4 (April 1, 1983): 517–536. Blacks were not the only victims of ghastly lynchings in Texas. Mexicans were also a highly targeted group. See William D. Carrigan and Clive Webb, “The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928,” *Journal of Social History* 37, no. 2 (December 1, 2003): 411–438.
oppression, a method that a number of immigrants did not shun.” These newcomers to Texas understood that “whiteness... equaled domination, and the ability to insist on a certain level of justice in criminal affairs—in both legal and extralegal arenas—that was denied to blacks.”

Like Atlanta, the sunbelt city “too busy to hate,” by the 1950s “Heavenly Houston” offered a less “hellish” quality of life for blacks when compared with surrounding areas in the state and across the region. Indeed, in 1954 the Informer spoke of a “Houston of yesterday,” marked by racial violence. The new Houston was one in which blacks had their own hospital and where they received attention from federal housing authorities. It was a city where it was estimated “that a larger number of Negroes own their homes” compared with “any other city in the South.” Nevertheless, James Martin SoRelle argues, “In truth, blacks living in Houston in the years between the two world wars developed paradoxical relations to their city.” Black Houstonians could send their kids to schools, but these were separate and unequal; they could find jobs, though these were usually horizontally and vertically stratified; and though they worked to improve their residences and neighborhoods, they were sequestered into “slum areas,” which many white Houstonians were blissfully unaware even existed “within the city limits.”

Ironically, the racial intimacies present within Jim Crow society opened up space for resistance. In the world of separate-but-equal racial accommodations, blacks in Houston walked

61 Nevels, Lynching to Belong, 2007, 8.
62 William Henry Kellar, Make Haste Slowly: Moderates, Conservatives, and School Desegregation in Houston (College Station: Texas A&M University Press, 1999), 32; On Atlanta, see Kruse, White Flight.
65 Tera Hunter’s work demonstrates how, despite Jim Crow restrictions, the (under)paid domestic work done by black women in Atlanta during the era of Jim Crow required them to traverse neighborhood boundaries and penetrate white women’s homes. Indeed, the white families that employed these black women would have preferred these workers to be live-in employees, despite the segregationist and white supremacist values that structured whites’ knowledge about the proper places of blacks and whites. See Tera W. Hunter, To “Joy My Freedom: Southern Black Women’s Lives and Labors After the Civil War (Cambridge, Mass.: Harvard University Press, 1997). Thomas J. Ward explores the ironies within such areas as the prevalence of black nursemaids as a buffer between black patients and white medical personnel, even as whites insisted on having whites fully staff an all-black medical institution. See Thomas J. Ward, Black Physicians in the Jim Crow South
the same streets, rode the same streetcars, and shopped in many of the same stores as their fellow white citizens. These close spatial interactions certainly allowed for opportunities to deploy the rules of racial “etiquette,” which reinforced white superiority and black inferiority. However, it was in these same spaces that black Houstonians could practice resistance. Longtime Houstonian and law professor Otis King says, of being a teenager shopping in downtown Houston in the middle of the twentieth century:

We would sort of challenge the system just a little bit, as we had the courage to do so. For example, we would go over and drink out of the white water fountain and one of us would drink out of the colored water fountain and we would shout across the store or whatever, ‘is the white water any different from the colored water?’ things like that.

King and his friends were aware of the threat of violence they faced even in “Heavenly Houston,” but they also seemed equally aware that relative to other parts of Texas and major cities in the South, “black Houstonians largely escaped racial violence.”

Space for resistance to Jim Crow notwithstanding, black Houstonians had long questioned just how heavenly their city was. In 1919 the Informer editorialized about the absurdity of lynching as a control mechanism for reducing black-on-white rape, pointing out the near-impossibility for “an unescorted, decent-looking colored woman to appear in the streets even in ‘heavenly Houston’ without being insulted and pursued by ‘lecherous brutes’ whose racial connection is not of Hamitic descent.” The Informer published a similar editorial in late

---

67 Otis King, King, Otis, interview by David Goldstein, MiniDV, August 6, 2008, Houston Oral History Project, Houston Public Library.
68 Howard Beeth, Black Dixie: Afro-Texan History and Culture in Houston (Texas A&M University Press, 2000), 180.
1953, after two white policemen were no-billed by an all-white grand jury after they had been charged with the rape of a black woman in their patrol car. The Informer asked, “Are Negro women safe in Heavenly Houston? Can the daughter of the Negro home, or the mother for that matter, walk the streets without fear of molestation?... Are Negro women actually defenseless in this Metropolis of the Southwest, this important city of the nation?” The editorial sought to demonstrate the potential damage of this disregard for black people’s sense of dignity to the city’s public image. The newspaper decried the fact that, “The men involved, gravely accused, seen and identified by several in the initial stages of the act, will not even have to stand trial.”

There was nothing heavenly about a city where justice for blacks, male and female, was not simply miscarried, but mocked as it lay lifelessly at the feet of an undisturbed court system:

The whole spirit of the judicial system that makes Negroes less safe, that takes Negro accusations against whites lightly, that presumes Negroes to be less truthful, less honorable than whites is a menace to the safety of all—Negroes and whites alike. Until rape is rape, and murder is murder, and crime is crime, and justice is justice regardless of race, race relations will never be much better than they are, and Houston will never be much more civilized than it is.

An eight-year-old black Houston girl, unfortunately, reportedly had her own taste of the consequences Houston’s shortage of “civilization.” The Informer reported on the same day that the unnamed girl told police investigators “she was molested by a ‘skinny-faced’, middle-aged white man as she walked down the street to board a bus.” She said the man grabbed her, struck her as she tried to escape, and tried to muffle her mouth. Medical examiners confirmed that the girl had marks on her body consistent with the story. Jim Crow Houston exhibited the same ironies of white supremacy that slave and post-slave American society trafficked in: though black women were deemed inferior, this did not seem to exempt them from sexual objectification by

70 “Policemen ‘No Billed’ on Rape Charges,” 1, 10; “Are Negro Women Safe? An Editorial,” Houston Informer, November 28, 1953, 1, 10 (all quotes).
white men. This remained true in the 1950s.

Johnnie Elwood Gordon’s Houston was also rife with instances of neglect and state-sanctioned abuse that affected black women, children, and men. The Informer pressed blacks to pay their poll taxes, arguing that political power was necessary to challenge “police brutality against Negroes exclusively from which the group suffers.” The NAACP was alerted that “all night duty officers” in Houston “should be kept under constant surveillance by your organization for allleged violations of civil rights of colored people in this area.” Informer editorialists also complained of disparities between black and white schools, restrictions on access to parks and recreational facilities, neglect of the black homeless population, and the continued segregation of the public library. Moreover, the Informer pointed out that, “Negro policemen are confined to work in Negro districts and are, generally speaking, ‘negro policemen’ rather than full-fledged police officers. There are no Negro firemen, no Negro court employees, no Negro tax clerks.”

In addition to improvements in some areas in 1954, such as the desegregation of the city’s public golf courses, black Houstonians also experienced bomb threats to their homes and cross burnings on their lawns. One victim of this domestic terrorism was baffled as to why her family was targeted, believing she would be safe in Houston “because [my family doesn’t] live in a white neighborhood.”

Thus, even in the relative paradise of Houston, black residents navigated the social

73 “Poll Tax Season,” Houston Informer, October 31, 1953.
74 NAACP Papers, Part 20, Group III, Box A-281, at 0083, April 25, 1956; It was also in the early 1950s that reform and professionalization efforts began to take hold of the Houston Police Department as demoralization among the underfunded and understaffed force and reports of brutality remained a discredit to the city when compared with comparable metropolises like San Francisco and Boston. See Mitchel P. Roth, Tom Kennedy, and Houston Police Officers’ Union, Houston Blue: The Story of the Houston Police Department, 2012; and Louis J. Marchiafava, “The Houston Police, 1878-1948,” Rice University Studies 63, no. 2 (Spring 1977): 1–119.
landscape as a lower-caste group. Their relative lack of resources, aggravated by legal barriers to their financial and social advancement, made Houston’s black citizens particularly vulnerable to the affect projected by C.J. That is, they remained among the easiest groups out of which criminals could be created, convicted, and executed. Like other black folk, Johnnie Elwood Gordon, whether he was innocent of rape or not, was therefore predisposed to the least-desired outcome of C.J.’s efforts to fulfill its desire for legitimacy through the expressive act of punishment. The monopoly maintained by the assemblage of white males who enjoyed the privileges of their hegemony through the bureaucracies of the criminal justice-complex further increased the likelihood that Gordon would be a target for conviction.

Little is known about the “strapping six-foot-five Negro” whom Blanche Beard identified as her attacker on that rainy July night. Gordon spent at least some of his early childhood in a household headed by his aunt Sedalia Green, a twenty-eight-year-old presser at a steam laundry. Five other children resided in the home with them, ranging from ages one to twelve, as did one other adult, Cordelia Johnson, Green’s thirty-three-year-old sister. When the grand jury indicted Gordon for raping Beard, they also returned two other charges against him to judge A.C. Winborn: the rape and burglary of Ray F. Barbour on May 29th of the same year. The cases were tried as one docket, though only the records for Beard’s case seem to have survived. The burglary accusation claimed that Gordon “did by force, threats and fraud, and at night, enter a

---

79 The Nolle Prosequi in Gordon’s case indicates that he was “charged, indicted, convicted... and... given the death penalty” for case numbers 72, 532 and 72, 533. The former was the docket in which the assault on Barbour was charged, the latter was Bearde’s case. A separate Nolle Prosequi listed case number 72, 534, wherein Gordon was charged with theft. The document, certifying Gordon’s death, indicated that he was executed for rape, despite the fact that this particular Nolle Prosequi only referenced the case for the theft charge. “Nolle Prosequi (No. 72, 532),” January 25, 1956, Harris County District Clerk’s Office; “Nolle Prosequi (No. 72, 534),” January 25, 1956, Harris County District Clerk’s Office; “The State of Texas vs. Johnnie Elwood Gordon Indictment: Rape,” August 9, 1954, Harris County District Clerk’s Office; “The State of Texas vs. Johnnie Elwood Gordon Indictment: Burglary,” August 9, 1954, Harris County District Clerk’s Office.
house... with the intent then and there to fraudulently take” possessions from Barbour’s home. Atorneys Walter Conway and Peter S. Navarro submitted a motion of continuance on Gordon’s behalf in early October. They alerted the presiding judge, E. B. Duggan, that Conway was representing another defendant who would be tried simultaneously and that the lawyer would not be able to act as counsel for Gordon. Conway and Navarro noted that Navarro was not the lead attorney for Gordon’s case and thus was not adequately prepared to represent Gordon. They also urged the judge to consider that the case was set to begin on a Wednesday, which “would no doubt cause an improper trial” as all parties raced toward as quick an ending to the case as possible by the end of the week. Finally, the attorneys pointed out that they believed the death penalty would be sought in the case and that because “the defendant is a Negro male charged with rape of a white female in Harris County Texas, a continuance of this cause is almost mandatory and a denial of this said continuance would be a great abuse of discretion on the part of the trial judge.” Duggan overruled the motion without comment.

Before they issued their verdict at the end of the one-day trial, the jurors wrote Duggan two questions regarding sentencing. First they asked, “If given a life sentence, how many years would [Gordon] have to serve, i.e., when would he be eligible for parole[?]” Second, they inquired, “Is there a term of years he could be assessed in order to guarantee life imprisonment, i.e. imprisonment for the balance of his life[?]” On the reverse side of a “while you were out” message, Duggan wrote back to the “gentlemen of the jury”: “I am sorry but I cannot answer your questions.” As other scholars have noted, when all-white juries contemplated a life sentence for a black male defendant despite a prosecutor’s request for death in the case involving

---

81 “Johnnie Elwood Gordon: First Motion for a Continuance,” October 6, 1954, Harris County District Clerk’s Office.
82 “Johnnie Elwood Gordon: Charge of the Court.”
the rape of a white woman, this signaled that there was significant doubt at the jurors’
deliberation table as to the man’s guilt.83

The court’s charge defined rape as “the carnal knowledge of a woman without her
consent, obtained by force, threats, or fraud, said woman not then and there being the wife of the
person.” “Force” should “take into consideration the relative strength of the parties... and
penetration of the sexual organ of the female alleged to have been ravished, by the male organ of
the accused.” The accusation “must be proved beyond a reasonable doubt.”84 Under the words,
“We the jury, find the Defendant guilty as charged in the Indictment and assess his punishment at
death,” Presley Vinson signed his name and literally transformed Gordon from a defendant to a
convicted criminal.85

Staring death in the face, Gordon finally spoke in his own behalf. Navarro filed a motion

83 For example, in 1924, in the case of black Houstonian Luther Collins, the Houston branch of the NAACP was
able to get a reversal in the death penalty of Collins. He had been accused of criminal assault of a white woman.
Discord among the jurors, fueled by doubt, resulted in a retrial in which Collins avoided the death penalty. This
victory gave Collins' supporters opportunities to continue the struggle to prove his innocence. By 1926, Collins' supports
won him his freedom when the State decided there was not enough evidence for further litigation. See
“Luther Collins Case,” The Crisis 29, no. 2 (December 1924): 71; Tyina Leaneice Steptoe, “Dixie West: Race,
Migration, and the Color Lines in Jim Crow Houston” (Ph.D. dissertation, The University of Wisconsin
Madison, 2008), 96–100; James Weldon Johnson, “The Luther Collins Case,” in In Search of Democracy: The
NAACP Writings of James Weldon Johnson, Walter White, and Roy Wilkins (1920-1977): The NAACP Writings
of James Weldon Johnson, Walter White, and Roy Wilkins (1920-1977), ed. Sondra Kathryn Wilson (New York:
Oxford University Press, 1999), 64. In 1932, Charles Hamilton Houston and his student, Thurgood Marshall,
achieved “victory” in the case of George Crawford, a black man charged with the murder of a white woman, by
avoiding a death sentence and winning, instead, life imprisonment. This indicated “that there was reasonable
doubt sufficient enough to save Crawford's life.” See Genna Rae McNeil, Groundwork: Charles Hamilton
Houston and the Struggle for Civil Rights (University of Pennsylvania Press, 2011), 93 (quote); “Thurgood
Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences (Lawrence Hill Books,
2001), xix. Also see the case of George Davis, another black man accused of attempted assault on a white
woman in 1932. He, too, avoided the death penalty as a three-judge panel expressed doubts and concerns about
the evidence in the trial and the conviction. “So twisted was the justice system when black men were accused of
crimes against white women,” Sherrilyn Ifill writes, “that Davis's sixteen-year sentence was perceived as a
victory for the defense, and in a way it was.” Sherrilyn A Ifill, On the Courthouse Lawn: Confronting the Legacy
84 “Johnnie Elwood Gordon: Charge of the Court.”
85 Ibid. By “literally” I mean to emphasize that “criminals” don't just exist discursively, despite the fact that they
are socially constructed. “Criminals” are emergent and component parts of the assemblage that is C.J. They are
physical bodies that can be subjected to surveillance, punishment, and death. And regardless of their guilt or
innocence, there is material consequence to their conviction: a loss of freedom to move through space and time,
sometimes a loss of their right to vote, and frequently a loss of attention or care from a society that is taught,
through the practice of “locking up” offenders, that we are better off forgetting them.
for a new trial with the district clerk on November 26th. The attorney argued that he discovered “new testimony material” since the trial had come to a close, namely that Gordon’s purported confession to the rape “was not voluntary,” but instead “a result of many abuses, both physical and mental.” Navarro said that Gordon was in a state of “intense fear” of “the law enforcement officers in and within” Harris County. In addition, because of this fear, and not necessarily of the abuse itself, Gordon “neglected to tell his attorneys of certain alibi witnesses,” who would be able to verify the defendant’s presence elsewhere during the time when Beard was assaulted. Facing new terror, that of the death penalty, Gordon had “recovered from his fear, and upon advice of his council, that he will not be injured if this evidence is produced in Court,” the defendant was now willing to submit these facts for judgment.\(^{86}\)

Navarro also argued that the court precluded Gordon from a “fair and impartial trial” because of the carelessness with which the speedy trial was scheduled—in the middle of the week—and its lack of concern that Gordon’s main counsel, Walter Conway, was not available because of his required presence in a federal court defending another client. Most important, and most clearly indicative of the unfair nature of the trial, Navarro claimed that, in his closing argument to the jury, the prosecutor called one of the defense’s witnesses, Gordon’s friend William P. Hemphill, “that Black Nigger,” an action that Navarro believed was intended to “inflame the jury against the negro race as such, to the detriment of the Defendant who is a negro.”\(^{87}\)

Justice Duggan qualified Navarro’s Bill of Exception, writing that the assistant district attorney did not use the word “nigger,” but instead, while addressing the jury in his closing arguments, said: “The next witness for the State, one of the best witnesses other than the prosecutrix was - - - (addressing his co-counsel, another Assistant District Attorney) what was


\(^{87}\) Ibid.; “Johnnie Elwood Gordon: Amended Motion for a New Trial.”
his name? – well, it makes no difference- you remember him, the black negro who testified - - -.”
Navarro and Conway objected to this statement, Duggan noted, because they believed the ADA had “inject[ed] the racial issue into the trial.” The ADA responded, “If the court please, I do not mean any disparagement of the witness whatsoever, I am sorry I cannot remember his name, the gentlemen of the jury saw him and observed him and I would say undoubtedly he was a black negro.” Duggan did not believe that the prosecutor “deliberately or willfully” made any “appeal to racial prejudice,” and thus overruled the objection and the defense’s motion for a mistrial.
Duggan felt the description was an appropriate one, given that Hemphill was “the only negro who appeared as a witness” and, moreover, “he was extremely dark complexioned.”

Lastly, Navarro claimed that the verdict was “contrary to the law and the evidence.”
Navarro and Conway signed the document from their law office at the intersection of Preston and Main streets in downtown Houston. In response to the motion, the court ordered that Dr. Sam W. Law, who examined Gordon on August 2nd, bring Gordon’s records from that day to the court on December 10th.

In the same week, Navarro and Conway certified before the district clerk that their law firm was to be replaced in Gordon’s case by Dent, Ford, King, & Wickliff. The woman who took the lead in the case was the newly hired Gloria K. Bradford, the University of Texas School of Law’s first black female graduate, a feat that she accomplished in May 1954. Heman Sweatt, whose namesake Supreme Court case desegregated the law school, had been unable to finish “due to medical issues,” but Bradford, who had the privilege of meeting Thurgood Marshall during her first year as a student there, was encouraged by the future Supreme Court justice’s

88 The states’ attorneys in this case were Bea Woodall and Alcus Greer. “The State of Texas vs. Johnnie Elwood Gordon: Bill of Exception No. 1,” January 5, 1955, Harris County District Clerk’s Office.
89 “Johnnie Elwood Gordon: Motion for New Trial.”
words: “You’re going to make it.” Marshall was right, and Bradford became the “first African-American woman to try a case in Harris County District Court.”

Bradford filed an amended motion for a new trial two days before Christmas of 1954. The much more evocative docket claimed that Gordon was “subjected to physical and mental torture” by local officers after his arrest. “He was threatened with bodily harm,” she wrote, “and had reason to believe he would be physically abused as long as he remained in the custody of law enforcement officers in Harris County.” She argued that the defendant’s “alleged confession” was “procured through fraud and deceit” following the fomenting of a “climate of fear.”

Moreover, Bradford claimed that the law enforcement officers created false evidence by forcing Gordon to sign papers that were made to resemble identification cards. These papers, she argued, were then read to Gordon, the text of which was “a confession.” If Gordon denied that he had willfully sign these confessions, the officers admonished, “it would only get him into further trouble.” Gordon certified to the court that, “I was never warned that I was signing a confession,” and that, “I never saw that confession and never made a confession to officers at the City Jail.” Bradford also concurred that Gordon was denied a fair trial due to the court’s refusal to grant the initial motion of continuance, which would have secured more time for Conway and Navarro to prepare the case.

Bradford’s major point of contention, however, was that the final verdict handed down by the jury was “contrary to the evidence and the law.” The young attorney argued that the

---

92 Despite reporting receiving low grades and intimating that this was because of racial discrimination on the part of law professors, Bradford received a score of 77 out of 80 on the bar exam. Gloria K. Bradford, Gloria K. Bradford: An Oral History Interview, interview by William J. Chriss, December 28, 2006, Jamail Center for Legal Research, The University of Texas at Austin, http://tarlton.law.utexas.edu/rare/documents/bradford_oral_history.pdf.

93 “Johnnie Elwood Gordon: Amended Motion for a New Trial.”

94 Ibid.


96 “Johnnie Elwood Gordon: Amended Motion for a New Trial.”
conviction was “predicated upon an inference based upon an inference,” pointing out that Beard’s testimony contradicted the testimony of the physician who examined her after the alleged attack. Indeed, Dr. Turner “found no positive evidence of rape and could not find many of the alleged scars and bruises which the complaining witness stated were present.” Bradford pointed out to the court that the lack of medical evidence in the case supporting a claim of rape “was completely disregarded.” If the police officer’s apparent fraud in getting a signed confession were not enough, their negligence in questioning Beard about “the whereabouts of her underwear” and the failure to collect the garment for evidence hinted of willful carelessness and a conspiracy to “destroy the best evidence on the issue of rape.” Thus, without physical or medical evidence to support the conviction, Bradford argued that the jury convicted “based on the inference” that because Gordon was the man that Beard’s husband attacked at the bus stop he was also the alleged rapist.97

This was not the only instance where Beard’s testimony contradicted a pivotal witness. The man who saw a dark figure running toward his car that rainy night, Bob McClendon, testified that the running assailant at the scene of the crime was “bareheaded,” and Gordon, while waiting for the bus, “had on a cap.” Indeed, when it came to his identification as the rapist, Gordon believed he was fingered at the lineup by Beard because he was “the only Negro present” and, moreover, his height was not comparable to anyone else present in the row. Even more troubling to the young attorney was that police preconditioned Beard to choose Gordon as her assailant, first by making him the only black man present in a lineup for a crime in which the assailant had been identified as a “Negro,” and second by telling her, before hand, that they “caught the man who ‘did it.’”98

---

97 Ibid.
98 Ibid. See Steblay et al.’s demonstration of the positive effect on false identifications in police lineups where one suspect resembles the assumed offender. False identifications of this type are exacerbated in cases where suspects of are a different race than the witness, as is demonstrated in the work of Brigham and Ready. Nancy
Bradford also pointed out that the identification of Gordon as the assailant was improbable due to the conditions on the night of Beard’s assault. “The nearest street light,” she said, noting that this fact was present in the case records, “is located approximately one hundred twenty-five feet” away from the place of the attack. Moreover, it was a dreary and rainy night, thanks to Tropical Storm Barbara. In her own statement, Beard indicated that on the night of the attack she could not provide any description of the man other than the fact that he was black, despite having claimed to have gotten “a good look at [him].” Moreover, even Beard's husband, Orvis, testified that when he found Gordon, the black suspect's clothes were not “wet and muddy in the fashion” of Blanche Beard’s.99

The young attorney filled her motion for a new trial with further claims of a lack of rigor in the trial proceedings. She pointed to the testimony of William P. Hemphill, who had treated Gordon’s wound. Bradford argued that Gordon did not avoid formal medical attention and instead asked for Hemphill’s help, because regardless of his innocence or guilt, Gordon must have understood that in 1950s Houston he would be arrested for whatever crime he was suspected of committing. Moreover, Bradford wrote, there was no evidence that the wound was serious enough to require medical treatment in a hospital. However, more to the point, she noted that the important nugget in Hemphill’s testimony was that, like Orvis Beard, the mortician saw no indication that Gordon’s clothes were soaked in rain or that he had been at all exposed to mud. If Gordon had been present in the ditch, Bradford claimed, “His clothes would have also been wet and muddy.” Bradford signed her name, requesting a new trial because, given these facts, the “trial court erred in refusing to declare a mis-trial.”100

99 “Johnnie Elwood Gordon: Amended Motion for a New Trial.”
100 Ibid.
The state’s attorney objected that Gordon’s revelation that he had been beaten and that he had been tricked into signing a confession were “newly discovered evidence.” Judge Duggan certified that “The court... did not wish to hear evidence in regard to the matters alleged.” After this brief repartee the court offered to listen to any other evidence from Bradford’s amended motion for a new trial, but ultimately overruled the motion, ruling that, “The State of Texas denies each and every allegation in said motion.” Duggan once again sealed Gordon’s fate. The court did not “wish”—did not desire—to extend an opportunity for the new criminal to be unmade. Why not?

Crucial to any assemblage’s identity is its ability to stabilize that identity through territorialization. Territorialization and deterritorialization are “nongenetic and nonlinguistic processes” wherein the former stabilizes identity and the latter threatens to disturb the homogeneity of individual bodies. Displays of obedience to system, the practices of bureaucracy, the ritual of courtroom procedure, and placement of parties in assigned physical space structure the ways that affect is shaped and directed from body to body, all towards the end of expressing C.J.’s identity as a legitimate locus of authority. When Bradford promised that Gordon would “show the Court” testimony of his torture, she expressed that C.J. Was a legitimate arbiter and signaled that she recognized its power.


103 See note 54 on flows of affect. A pertinent example in the courtroom setting is the ritual of rising for the entrance of the presiding judge. All parties, including spectators, stand for the judge. This mandate is given by a bailiff who stands in symbolic garb that indicates his or her authority to command attention and order, and the power to remove unwanted or non-compliant bodies. This ritual recognition of the bailiff's authority may be rooted in fear, or is perhaps better explained by a higher-cognitive emotion. Whatever the most appropriate affect label might be, this ritual ceases the attention of all parties, triggers certain physiological responses, which then play a role in shaping behavior towards the judge and the authority of the court. The affective responses of juries, attorneys, and defendants are undoubtedly shaped by their positions in the courtroom—both their physical and semiotic locations. This collision of their emotions, behaviors, and beliefs happens in a world of ritual and practice, constrained in many ways by the possibility of sanction by the court if its authority goes unrecognized.

104 “Johnnie Elwood Gordon: Amended Motion for a New Trial.”
in no uncertain terms that it was written, “In the Name and by Authority of the State of Texas,” the document made discursive and jurisdictional claims that were not just emergent on paper, but created actual change in the material world: the grand jury was called, a decision was returned, police officers were moved, a court trial was set into motion. Every official seal, every stamp, every affidavit signed in the presence of a notary—they were all expressions of C.J.’s territory.

But it is the threat of deterritorialization that is of most interest to us. It is in those unstable moments—in those spaces where C.J. is exposed as desirous and contingent an organism as all assemblages—that we see how the desiring-machine works to sustain itself. It is also then that C.J.’s desire becomes more discernible. The major deterritorializing threat C.J. faces is in iterative exposures to the public that the system is incapable of administering “justice.” After all, Texas’ justice system had been re-established after the Civil War specifically as “courts of justice... open to every person” wherein “right and justice shall be administered without sale, denial, or delay.” If it could not accomplish this end, C.J. Did not have existential purpose. As discussed, explicit racism was a serious threat to C.J.’s legitimacy, and increasingly so in the 1950s when Gordon’s case went to trial. Nevertheless, racially disparate outcomes produced by an ostensibly race-blind legal system were not threatening—at least not to Americans whose minds connected justice and black criminality discourses as explanatory of higher rates of black convictions and executions.

Ironically, however, when decisions are reversed occasionally it does not necessarily mean that C.J.’s authority will be subject to scrutiny. For example, a few months before Gordon's trial, an editorialist for the Informer wrote, “A Texas Court Sees a Light,” likely alluding to the

---

105 “Johnnie Elwood Gordon Indictment: Rape.”
106 This desire, I argue, has often been obscured by the assemblages within it, such as a white-male hegemony, and by the discourses it employs to legitimate its practice, in particular “justice” discourse and the affect associated with a “sense” of “justice” or “injustice.”
107 Journal of the Constitutional Convention of the State of Texas, Begun and Held at the City of Austin, September 6th, 1875 (Galveston : Printed for the Convention at the “News” Office, 1875), 120.
Supreme Court of Texas’ decision in *Texas Employers Insurance Association v. O. T. Haywood* (1954). The court decided that when attorneys made “an appeal to racial prejudice in language clear and strong” by using the term “yellow nigs” to imply miscegenation, they had done irreparable damage to the jury’s ability to render a just decision. The editorialist explained that:

Negro citizens, practically without exception have long considered that sort of conspiracy of repression ran through the whole of white officialdom... a conspiracy calculated to humiliate and embarrass them, and eventually to rob them of legal rights. Judges have used such belittling terms as “boy” in addressing Negro grandfathers from the bench, and trial lawyers have used every advantage race prejudice gave in conducting trials.

A court had finally taken a stand against this “improper” injection of “racial feeling” in court proceedings. In so doing, according to the *Informer*, “Appeals courts occupy the most strategic position for... the realization of a raceless democracy.” Indeed, “If they would consistently turn back for retrial every case in which racial considerations were shown,” the courts would restore justice to the system.\(^{108}\) As a mechanism purportedly built for the purpose of self-correcting misapplications of justice, the appeals and reversal process, though it can momentarily destabilize the authority of the lower court, actually reterritorializes C.J.’s moral authority.

However, when miscarriages of justice are not as obvious, as was the case in *Morris Addison v. State*, decided on the same day in 1954 as *Texas Employers*, the appeals process reinforces the authority of the lower courts by affirming district-level decisions.\(^{109}\)

Gordon’s 1955 appeal to the State received the written opinion of James Wesley Dice Jr. Dice had been the state’s attorney in cases that came before the Court of Criminal Appeals in Texas from 1953 through 1954 and would not officially join the Court of Criminal Appeals as a judge until 1967. His position in 1955 was as Commissioner for the appellate court, which means

---


\(^{109}\) In the *Morris* case the Texas Court of Criminal Appeals demonstrated a lack of investigative interest in the claims of racial discrimination on grand jury panels. *Morris Addison v. State*, 160 Tex. Crim. 1 (Court of Criminal Appeals of Texas 1954).
he was not a judge, though he appears on the record in Gordon’s case as “Dice, Judge.”

Earlier in his career as a district judge, Dice expressed his belief that, “A district’s judge’s record is measured by the number of cases he has affirmed or reversed on appeal.” If anything, then, he appeared predisposed to affirming the decisions of lower courts, understanding that reversals threatened the reputations of trial judges and the district court system. His legitimacy and the legitimacy of the lower courts were at risk every time a decision was overturned.

Dice, thus, struck down every claim in Gordon’s appeal. In his 1952 re-election campaign for district judge, the commissioner wrote in a public letter that he “tried to be fair and impartial in... every case.” So, it was important for Dice to establish that Gordon did indeed “receive a fair and impartial trial.” He argued that despite the overruling of Navarro’s motion for continuance, the overextended attorney Walter Conway had nevertheless been present throughout Gordon’s trial. This was evidence, he reasoned, that Gordon was not denied fair counsel. Next, he completely abrogated Navarro’s claim that Hemphill had been referred to as “that Black Nigger,” and instead affirmed that calling a witness “that black Negro,” especially in a moment when the witness was being lauded for his testimony, could not be “construed as discrimination.” After all, he explained in folksy logic, “Praise is not condemnation.” Third, he agreed that the revelation of Gordon’s torture and falsified confession did not amount to “newly discovered evidence.” Dice cited McCutcheon v. State (1955) as precedent, maintaining “that testimony of an accused after conviction that a confession was involuntary was not newly discovered evidence and did not constitute a new trial.”

However, McCutcheon differed from from Gordon in one important, unmentioned

respect. The attorneys in McCutcheon’s case knew the confession was involuntary during the initial trial and objected to its admissibility during the presentation of the evidence. The objection was overruled, and the defendant, for his part, failed to “establish as an undisputed fact that the confession was produced by” coercion. Moreover, the testifying officer was “questioned at length” in regard to the circumstances under which the confession was made. Thus, Dice glossed over the facts in the McCutcheon ruling in his reach for precedent. Much later, McCutcheon itself proved a misinterpretation of Morris v. State (1898).

Morris established that, “There being an issue on [the admissibility of the confession]... as to whether or not the confessions were voluntarily made after proper caution, the court was correct in submitting such issue to the jury. In this case, the court would not be justified in solving this question of fact or against either party.” Therefore, what the court in Morris did not decide was that information made newly available to attorneys did not count as “newly discovered evidence.” Indeed, McCutcheon, it was decided, in 1968, was one among a number of cases that “lost... the origin of the rule” in Morris. Moreover, Morris, together with several other cases in Texas, established regarding each confession that it “must first be shown that it was in every respect freely and voluntarily made.” Any charge that the confession was the result of “however slight... hope or fear” would make the confession a question of disputed fact, which, again, Morris clarified would have to be decided by a jury and not by a judge. Gordon’s claim of the involuntariness of his confession was not presented in the initial trial and his silence during the trial was a direct result, he claimed, of fear of torture as he remained in police custody

114 Fernandez v. Beto, Civ. A. No. 5-345 (Court of Criminal Appeals of Texas 1968); Thomas Johnson Michie, The Encyclopedic Digest of Texas Reports (Criminal Cases): Being a Complete Encyclopedia and Digest of All the Texas Case Law (Criminal) Up to and Including Volume 60 Texas Criminal Reports and 140 Southwestern Reporter (Michie Company, 1912).
115 Harry Clay Underhill, A Treatise on the Law of Criminal Evidence: Including the Rules Regulating the Proper Presentation of Evidence and Its Relevancy, the Mode of Proof in Particular Classes of Crimes, and the Competency and Examination of Witnesses, with Full References to Decisions (Bobbs-Merrill, 1898), 242.
throughout the trial. The details in Gordon’s case, juxtaposed to those in *McCutcheon*, reveal glaring differences to which Dice was either oblivious or which he was purposely misrepresenting.

Commissioner Dice also cited the 1941 case of *Emliano Benavidez v. The State of Texas* as precedent that would affirm the trial court’s decision that Gordon’s after-the-fact revelation of his forced confession was not new evidence. However, again, Dice seemed to take much liberty with his citations. Much like in *McCutcheon*, in *Benavidez* the confession was challenged during the initial trial “at the time it was offered.”\(^\text{116}\) If C.J. desired justice and truly presumed Gordon’s innocence, Dice, as an immediate judicial material component in this assemblage, demonstrated no evidence of such a longing. In order to interpret Dice’s actions and make a final conclusion about C.J.’s desires, then, it is important to make a statement about what the intended consequences of the appellate process.

Economist and legal scholar Steven Shavell theorizes, in functionalist explanatory language, that the appeals process exists because it is a cost-effective way to correct errors in the trial process. Embedded in his argument is the claim that when “the appeals process is utilized, an error will result in an appeal [emphasis added],” a rather dubious flouting of historical contingency. Shavell’s theory also forwards the assumption that the appeals process fundamentally plays a corrective role. Moreover, Shavell believes that “disappointed clients” self-select themselves to enter the appeals process while those who are not disappointed with rulings in the lower court do not appeal, dismissing how access to money pre-selects who can retain services for filing an appeal in the first place. Shavell also argues that the very existence of the appeals process works to prevent errors in the lower courts by forcing district judges to avoid error in order to prevent an overturned decision.\(^\text{117}\)

\(^{116}\) Emeliano Benavidez v. The State, 143 Tex. Crim. 481 (Court of Criminal Appeals of Texas 1941).

Bowie and Donald R. Songer have demonstrated that lower court judges do not alter their decisions out of concern that their rulings will be overturned, given the low rate and unpredictability of reversals. The fundamental error in Shavell’s approach is an assumption that the court desires a reduction in error when it comes to the production of justice. However, C.J.’s legitimacy is not dependent on the reduction of error, but rather on the appearance of justice.

More systematic approaches to understanding the appellate process have revealed that, “Frequently... appeal not only increases the arbitrariness and partiality in the legal system but is actually designed to do so.” Embedded in the appeals process is a reliance on a judge’s or a panel of judges’ particular readings of both the case at hand and precedent law. As was evident in the case of Dice’s reading of Gordon’s case, the social positionality of the judge is obscured by the interpretation of precedent by apparently rational, fair, impartial, objective eyes. Biologist and feminist scholar Donna Haraway decries this “mythical... conquering gaze from nowhere” as a “god trick.” Thus, the appeals process is inherently partial and its claims to objectivity particularly obscuring. Moreover, scholars have shown that even when possibilities to introduce conclusive new evidence emerge, appellate courts continually express disinterest in helping defendants procure that evidence. Creating innocents seems an unnecessary affective flow when the conviction of criminals has already successfully legitimated the court’s authority. Lastly, legal scholar and political scientist Thomas Y. Davies found that appellate courts are actually “incline[d]... to affirm” lower court decisions by dismissing what are perceived to be

---

“harmless errors” and by imposing often insurmountable standards of “substantial evidence” on the appellant. Davies’ case study demonstrates that the institutional features of the appellate court actually express an allergy to high rates of “due process enforcement,” and that the appeals process does not generally function to correct errors.122

In Dice’s decision to deny Gordon’s appeal we find evidence that, indeed, the appellate court that reviewed Gordon’s case was not predisposed to dispense “justice,” though it did necessarily produce justice.123 Dice demonstrated a lack of concern for new evidence. The revelation that Gordon’s testimony was possibly forced corroborated all of the witness’s testimony that introduced doubt that Gordon assaulted Beard—that, as the defense counsel believed, Gordon “was a victim of mistaken identity”: Dr. Turner’s testimony that there was no evidence of rape or assault; Orvis Beard’s and William Hemphill’s testimonies that Gordon’s clothes were not muddy; Blanche Beard’s admission that she could not describe her attacker; Bob McClendon’s description of the assailant’s attire as different from Gordon.124 Dice was also unwilling to consider Bradford’s claims that there were trial court errors and that they were harmful to the defendant. The commissioner also exposed his affinity to the position of the district judge, publicizing his understanding that remanded decisions delegitimated both a judge who received a reversed decision and his court. Dice demonstrated, just as the lower court had in its hurried execution of Gordon’s trial, little concern for “justice.” Instead, both courts functioned as arbiters who could create innocent persons and criminal persons. Indeed, in order to be a

123 Refer to my discussion in and around note 28, in which I differentiate between the symbols and affects associated with a concept of justice (i.e., justice in quotes), with actually existing justice. I reiterate here in the conclusion that the criminal justice system does not traffic in discursive justice, though it often deploys such discourse to affirm its legitimacy as a moral authority. Instead, as criminals are produced, so is justice produced in a form that actually matters—matter being material. “Justice” is often mistaken for justice, and this confusion helps obfuscate the impossibility of “justice” and the unattainable positivist assumptions necessary for any real deployment of the concept.
124 “Death Penalty Given Attacker of Woman,” 19.
legitimate authority, C.J. needed not to produce “justice” ever, though it would always produce justice and participate in the affirmation of “justice” by doing so. However, the justice-complex did and does need criminals in order to exercise its capacity to punish. It found an opportunity to create a criminal, innocence or guilt aside, in the person of Johnnie Elwood Gordon.

This 1954 conviction provides us with an opportunity to disentangle C.J.’s desires from those of the racist-sexist supremacists who often used the criminal justice-complex’s channels of authority to meet their own ends. As white-male hegemony became increasingly destabilized by Supreme Court orders that questioned the righteousness of racial and gendered privilege, courtrooms, clerks’ offices, and jury rooms began to change shape and color. Nevertheless, the racial and gendered disparities in convictions did not improve. I have argued that this is in part because the desire of the justice-complex to be legitimated as an authority was not at risk in this moment of social transformation. Colluding in the endurance of racially disparate and gendered outcomes out of C.J.’s work are the structural inequalities with which C.J. interacts; in its quest to create criminals C.J. seeks and then devours the easiest prey: those who are at the bottom of America’s caste system and who are easiest to identify with existing popular ideas about what dangerous criminals look like.

Gordon’s request for a rehearing was thus denied and his conviction and sentencing upheld.125 Gordon was received at Huntsville for death row on June 22, 1955 to be executed for the rape of Blanche Beard.126 The warden was ordered to “safely keep said Johnnie Elwood Gordon and to execute said sentence of death any time before the hour of sunrise on the 22 day of July A.D. 1955, by causing to pass through the body of... Gordon a current of electricity of sufficient intensity to cause death... until the said Johnnie Elwood Gordon is dead.”127 The death

126 See note 79 on Ray F. Barbour's case.
127 “Death Warrant,” June 21, 1955, Harris County District Clerk’s Office.
row inmate was granted several stays of execution by Governor Allan Shivers as the felon’s attorneys continued their appeal efforts. However, the United States Supreme Court decided not to grant Gordon a rehearing.\textsuperscript{128} Gordon, the “strapping six-foot-five Negro,” as reported in the \textit{Herald Post}, was strapped into the electric chair at Huntsville on January 24, 1956.\textsuperscript{129} The execution began two minutes after midnight, and at 12:06 in the morning, the prison physician, Dr. L. E. Bush, pronounced Gordon dead. His body was delivered that same day to the funeral home of that same “black Negro” William P. Hemphill—the man whom Gordon called on that fateful, rainy night on the East End.\textsuperscript{130}


\textsuperscript{129} “Execute Negro”; “Nolle Prosequi (No. 72, 532)”; “Nolle Prosequi (No. 72, 534).”

\textsuperscript{130} “Warden’s Return After Execution,” January 24, 1956, Harris County District Clerk’s Office.