

THE MASSIE CASES: RACE, HONOR, AND JUSTICE IN DEPRESSION-ERA HAWAII

ROLES (IN ORDER OF APPEARANCE)

NARRATORS 1 AND 2

GEORGE CLARK	<i>A passenger in the car stopped by Thalia Massie</i>
MR. CLARK'S SON	<i>A passenger in the car stopped by Thalia Massie</i>
MRS. BELLINGER	<i>A passenger in the car stopped by Thalia Massie</i>
PROSECUTOR	<i>Prosecutor in the Ala Moana Trial</i>
DEFENSE ATTORNEY	<i>Defense attorney in the Ala Moana Trial</i>
GRACE FORTESCUE	<i>Mother of Thalia Massie</i>
CLARENCE DARROW	<i>Defense attorney in the Honor Killing Trial</i>
THOMAS MASSIE	<i>Thalia Massie's husband</i>
JOHN KELLEY	<i>Prosecutor in the Honor Killing Trial</i>
JUDGE DAVIS	<i>Judge presiding over the Honor Killing Trial</i>
THALIA MASSIE	<i>Alleged rape victim</i>
DEACON JONES	<i>Navy veteran who participated in the kidnapping of Joe Kahahawai</i>
PETER VAN SLINGERLAND	<i>Author of Something Terrible Has Happened</i>

TIMELINE OF EVENTS¹

Sept. 12, 1931	Thalia and Tommie Massie attend a party at the Ala Wai Inn. Thalia leaves the party alone shortly before midnight.
Sept. 13, 1931	Just before 1 a.m., Thalia stops a car on Ala Moana Road, claiming she was gang-raped by a group of Hawaiians. Honolulu police arrest five suspects: Horace Ida, Benny Ahakuelo, Joseph Kahahawai, Henry Chang, and David Takai.
Nov. 16, 1931	The Ala Moana trial begins.
Dec. 6, 1931	After 97 hours of deliberation, the jury informs the judge that it is unable to reach a verdict. A mistrial is declared.
Dec. 12, 1931	A group of Navy men force Horace Ida into their car and beat him with belt buckles.
Jan. 8, 1932	Grace Fortescue, Thomas Massie, Deacon Jones, and Edward Lord kidnap and kill Joe Kahahawai.
Jan. 22, 1932	A grand jury returns an indictment for second degree murder against Grace Fortescue, Thomas Massie, Edward Lord, and Deacon Jones.

¹ For a more detailed timeline of events, see Pub. Broad Serv., *Timeline: Hawai'ian History and the Massie Case*, AM. EXPERIENCE: MASSIE AFFAIR, <http://www.pbs.org/wgbh/amex/massie/timeline/timeline2.html> (last visited Sept. 9, 2012).

Apr. 4, 1932
Apr. 29, 1932
May 4, 1932

The “Honor Killing” trial begins.
The jury finds the defendants guilty of manslaughter.
Judge Davis sentences the defendants to 10 years in prison,
but Governor Judd commutes the sentence to one hour in
the custody of the sheriff.

INTRODUCTION²

NARRATOR 1: “Come home at once. Something terrible has happened.”

With those words, Thalia Massie, the 20-year old wife of U.S. naval officer Thomas Massie, summoned her husband home early the morning of Sunday, September 13, 1931, in Honolulu, Hawaii. When he arrived minutes later, she described how she had been kidnapped, beaten, and raped -- six or seven times -- by a gang of Hawaiians.

Within hours, the police arrested five men -- Ben Ahakuelo, Henry Chang, Horace Ida, Joe Kahahawai, and David Takai -- and charged them with the rape of Thalia Massie.

Not just one but two explosive trials would follow. They would capture the attention of the world, and have a lasting impact on race and politics in Hawaii.³

This afternoon, we will recreate those trials. We will present the first trial by calling upon a prosecutor and defense attorney to give summations based on the historical record, but using tools available to the modern-day litigator. We will reenact portions of the second trial, using the actual words from the trial transcripts.

NARRATOR 2: First, some background.

In the 1930s, even more so than today, Hawaii was the Paradise of the Pacific. But in Hawaii's physical beauty, there was racial and political tension.⁴ Hawaii had been a sovereign nation when

² The background information in this script is largely drawn from PETER VAN SLINGERLAND, *SOMETHING TERRIBLE HAS HAPPENED* (1966) and DAVID E. STANNARD, *HONOR KILLING: HOW THE INFAMOUS “MASSIE AFFAIR” TRANSFORMED HAWAII* (2005). Background information, trial transcripts, and other documents are also drawn from Professor Douglas O. Linder's very helpful “Famous Trials” website. See Douglas O. Linder, *FAMOUS TRIALS: MASSIE (“HONOR KILLING”) TRIALS* (1931-32), <http://law2.umkc.edu/faculty/projects/ftrials/massie/massie.html> (last visited Sept 6, 2012). Background information is also drawn from a report prepared by the Pinkerton Detective Agency. See *infra* note 59-60.

³ See, e.g., AMERICAN EXPERIENCE: THE MASSIE AFFAIR (PBS television broadcast Apr. 18, 2005); Michael Tsai, *Hawai'i Scandal Revealed Racial Prejudices, Passions*, HONOLULU ADVERTISER, Jan. 11, 2004, available at <http://the.honoluluadvertiser.com/article/2004/Jan/11/il/il01a.html> (calling the Massie affair a “defining moment in modern Hawai'i history, exposing the powerful influence of the federal government, the military and 'haole elites' on affairs of justice, and uniting a 'local' community against outside judgment”); Helen G. Chapin, *Getting Away with Murder: The Massie Case*, HAWAIIAN HIST. SOC'Y, <http://www.hawaiianhistory.org/getting-away-with-murder-the-massie-case/> (last visited Jun. 12, 2012) (proclaiming the Massie affair as the most famous criminal case in Hawaiian history).

⁴ See David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaii*, 16 TEMP. POL. & CIV. RTS. L. REV. 1 (2006) (discussing the United States' oppression of native Hawaiians and the forced annexation of Hawaii).

it was seized by the United States in the late nineteenth century.⁵ After annexation, Hawaii was effectively governed by a powerful business oligarchy -- a handful of corporations controlled by Hawaii's white society. The economy revolved around the sugar and pineapple plantations, and Hawaiians and other non-whites toiled under difficult conditions for low pay.

Tourism also emerged as an important industry, and in the 1920s Hawaii became a favored playground for wealthy Americans. The American military presence also grew dramatically, as Hawaii became home to naval bases and military outposts.

As a consequence, the white -- or *haole* -- population in Hawaii doubled. Still, 80% of the population was non-white -- primarily Hawaiian or Asian. But it was the small, wealthy, white minority that controlled the economy and the Government.⁶

NARRATOR 1: Lieutenant Thomas Massie and his wife Thalia moved to Hawaii in 1930 when Tommie was assigned to Pearl Harbor. Thalia had been raised in the highest social circles in the east, and with her blueblood background, she felt out-of-place. She had difficulty fitting in with the wives of other naval officers. She and Tommie drank heavily, and the two fought often. In August 1931, Tommie told Thalia he wanted a divorce. The couple reconciled, at least temporarily, as Thalia promised to do better.

THE ASSAULT

NARRATOR 2: On Saturday evening, September 12, 1931, Tommie, Thalia, and friends went to a Waikiki nightclub, the Ala Wai Inn. Thalia wore a green silk evening gown; Tommie a white linen suit. Thalia, who had not wanted to go in the first place, quickly became unhappy. She left the Inn alone, just before midnight, walking toward the beach.

About ten minutes after midnight, a man at a Japanese noodles stand saw a "white woman" walking, with her head down, followed by a white man.

About forty minutes later, George Clark, his wife and son, and Mr. and Mrs. Eustace Bellinger were in a car on Ala Moana Road. A young woman stepped into their headlights, gesturing for them to stop. She asked: "Are you white people?" They responded yes. "Thank God," she said, and asked them to drive her home.

[MR. CLARK, MRS. BELLINGER, and CLARK'S SON take center stage]

Clark, Mrs. Bellinger, and Clark's son later would make statements to investigators:⁷

MR. CLARK: [S]he told us that she had been to a party . . . She had left because someone had said something that peeved her, so she went for a walk and fresh air. . . . After she had gone

⁵ For a general account of the U.S. overthrow and annexation, see TOM COFFMAN, *NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAII* (Koa Books 2009).

⁶ In the aftermath of the Massie trials, even prominent *haoles* in the community would speak out against the arrogant oligarchy. STANNARD, *supra* note 2, at 410.

⁷ The following statements are derived from *id.* at 54-55.

down the road a short distance she said a car drove up behind her and two men jumped off it and dragged her into the car. When she cried out for help they punched her on the mouth and held their hands over her face to stifle her cries. She then said they drove her down the Ala Moana Road. . . . Then the gang beat her up and left her there.

MRS. BELLINGER: She was questioned by Mrs. Clark as to whether they had done anything other than beat her up. She answered, “no.”

CLARK'S SON: We all noticed that her evening gown seemed to be in good condition and . . . wondered how that could be if four or five men assaulted her.

[MR. CLARK, MRS. BELLINGER, and CLARK'S SON exit the stage]

NARRATOR 1: The group drove Thalia home. After Tommie returned and called the police, Thalia reported that four or five Hawaiians had raped her. But she said that it had been too dark to see the license plate number or to identify the men.

The police officers took Thalia for medical attention, and she was examined by a nurse and doctor. They found no evidence of rape, but noted swelling of the upper lip and both cheeks. Later, it was determined that Thalia’s jaw had been broken and that she had an abrasion on her left ankle.

THE ARRESTS

NARRATOR 2: That evening, Horace Ida and several friends had gone out in his sister’s car. Around midnight, Horace almost collided with another car. Words ensued, and someone shoved Agnes Peeples, a passenger in the other car. She called the police.

The police were already looking for the gang of Hawaiians who had raped Thalia Massie, and Ida was a convenient suspect. They arrested him. He insisted he knew nothing about an assault on any white woman.

Thalia was interviewed again by detectives, at the police station. She recalled, for the first time, the license plate number 58-805 -- only one digit off from the number of Ida’s sister’s car, 58-895, a number that had been repeatedly broadcast over the police radio the preceding hours.

Ida was brought into a room and presented to Thalia. The chief of detectives, Captain McIntosh, pointed at Thalia’s bruised face, and said to Ida, “Now look at your beautiful work.”⁸ Thalia stared at Ida. She then nodded her head, and asked: “Where are the other boys?”⁹

Ida said he had done nothing to this woman.

⁸ *Id.* at 91.

⁹ *Id.*

NARRATOR 1: Detectives continued to interrogate Ida. After several hours he revealed the names of his companions from the night before -- Kahahawai, Ahakuelo, Chang, and Takai. All were arrested later that day.

In the morning, Captain McInstosh drove Ida's sister's car to the Massie home. He asked Thalia to look at what he called "the suspect's car." Although Thalia had said several times that the men were in a dark, perhaps black car and Ida's car was light-colored, she told McIntosh that "it was a car like that."¹⁰

McIntosh directed a patrolman, Henry Sato, to drive him and the car back to the police station. Along the way, McIntosh directed Sato to take a detour to the crime scene. There, McIntosh ordered Sato to drive back and forth across the clearing, to be sure to leave tire tracks in the mud.

NARRATOR 2: Of course, the notion of an American naval officer's wife -- a 20-year old white woman -- being raped by a gang of Hawaiian hoodlums created an uproar. Admiral Yates Stirling, the top American military official in the islands, met with the governor of Hawaii, the mayor of Honolulu, and the District Attorney to demand that justice be done. They set in motion -- at full-throttle -- the prosecution of the five men for the kidnapping, beating, and rape of Thalia Massie.

The men were also prosecuted in the media. On Monday, the *Honolulu Advertiser* featured a banner headline that read "GANG ASSAULTS YOUNG WIFE."¹¹ The article reported that "a young white woman of refinement and culture" was sexually assaulted "six or seven times" by a gang of "fiends."¹² Within days, Honolulu newspapers published the names and addresses of the accused men and ran their mug shots.

The assault and events that followed were reported in newspapers all over the world. Editorials demanded that Congress place Hawaii under direct military rule so that "the honor of American womanhood" might be protected "from the Hawaiian rabble."¹³

¹⁰ *Id.* at 97.

¹¹ *Id.* at 128 (citing to the *Honolulu Advertiser* article); see also Pub. Broad. Serv., *People & Events*, AM. EXPERIENCE: MASSIE AFFAIR, http://www.pbs.org/wgbh/amex/massie/peopleevents/e_papers.html (last visited Sept 4, 2012).

¹² STANNARD, *supra* note 2, at 129.

¹³ *Id.* at 4.

THE ALA MOANA TRIAL: SUMMATIONS

NARRATOR 1: The trial in the Ala Moana rape case began on November 16, 1931, in the Honolulu Courthouse. The case was presided over by Judge Alva Steadman and prosecuted by Griffith Wight. The defendants were represented by William Heen, William Pittman, and Robert Murakami. Closing arguments began on December 1, 1931. Here are modern-day¹⁴ versions: first, the prosecution, and then the defense.¹⁵

MODERN-DAY PROSECUTOR: Saturday, September 12, 1931. *A dark day* in our territory's history. *A day* that destroyed Thalia Massie's life. *A day* that stained the reputation of our Territory.

You have heard about the brutal rape of Thalia Massie, a beautiful and virtuous young woman, cultured and of gentle bearing. She is the wife of a brave Navy man, Lieutenant Thomas Massie, a war hero who defends our Territory from *foreign* aggressors.

Thalia Massie had the right to walk on any street at any time, day or night. But when she tried to do that, she was assaulted six or seven times *by beasts*. Five *lust sodden* beasts who raped and brutalized Mrs. Massie.

Look at the faces of these five defendants. And imagine, imagine, that you are not in the safety of this Courthouse with the eyes of Hawaii upon you. Instead, imagine the terror that Thalia Massie felt on September 12, 1931, as she stared into the *hate-filled* eyes of the five gangsters who raped and beat her. That terrible night *burns forever* in her memory.

The defendants' guilt is established by the testimony of Mrs. Massie, by a court expert and by hard evidence. Today we ask you to

Protect Mrs. Massie's safety. Put Mrs. Massie's rapists behind prison bars. Get them off the streets of Honolulu.

And punish Mrs. Massie's rapists. See that *justice* is done and that her wrongdoers *pay* for their barbaric crimes.

Now, the judge will instruct you that the testimony of Thalia Massie standing alone, *without even one shred of corroboration*, is sufficient for a verdict of guilty. Nonetheless, ample evidence corroborated Mrs. Massie's testimony. You heard about Mrs. Massie's *injuries*, her personal items at the scene of the crime and the license plate on the assailant's car. Remember *this* corroborating evidence. But your *core mission* is to *remember* the testimony of Mrs. Massie

¹⁴ As the authors note in the introduction, one of the goals with the Massie presentation was to highlight the use of slides and computer graphics available to the modern-day litigator. These summations were highlighted throughout with slides and graphics, including, for example, a time-line used by defense counsel that showed the prosecution's proposed sequence of events was impossible. The slideshow was prepared by Jury Group, <http://www.jurygroup.com>. The slideshow is on file with the authors and *available at* <http://lawreview.aabany.org/>.

¹⁵ Because of the limited transcripts that exist for this trial, the parties' summations that follow are imagined. However, some of the words are drawn from actual statements of the lawyers. See STANNARD, *supra* note 2, at 82-217 (describing the trial proceedings at length).

about that horrible night. How *can you forget* that testimony? If you believe her, you must vote guilty -- based on *her testimony alone*.

Well, who is Thalia Massie and *why* should you believe her? Mrs. Massie is a 20-year old military wife. She has two sisters. Her father, Major Granville Fortescue, was an American hero, who worked for the President and protected all of us from *foreign aggression*.

And this is Lieutenant Massie. He and his wife moved thousands of miles to Honolulu to protect our islands against the menace *posed by foreigners*.

Now, on September 12, 1931, the Massies attended a party at the Ala Wai Inn, a party attended by other *brave Navy* fighting men. *That night*, Mrs. Massie took a walk alone. *That night*, a Model A Ford driven by defendant Horace “Shorty” Ida pulled up beside her. And *that night*, the car stopped and two men got out and dragged her in, scraping *abrasions* on her ankle.

Look, look, at the face of Horace Ida. Mrs. Massie identified the suede jacket he wore on *that terrible night* as he drove Mrs. Massie to a deserted animal quarantine center, where nobody would see the evil that they planned to commit.

Mrs. Massie feared for her life. As you good jurors would do, Mrs. Massie prayed to *Almighty God* for mercy, for rescue from the men who had brutally kidnapped her. But her prayers went unanswered. Instead, Joseph Kahahawai, a massive football player, known as “*Bull*,”¹⁶ punched her in the mouth as she continued to pray in vain.

You saw the results. *You saw* the X-ray showing that Mrs. Massie’s jaw was fractured in two places. *You saw* that Mr. Massie’s right eye was beaten. Her right cheek an unsightly mass of bruises. Her nose swelled and bleeding. Her body covered with marks and bruises. Gentlemen of the jury *you saw all this*. The Defense belittles this evidence because these injuries were mostly “above the waist.”¹⁷ Use your common sense. You know that the brutality of rapists *often extends* to the area above the waist.

And how did *these* rapists react to Mrs. Massie’s injuries? Did they react with even a shred of human decency? No. Ben Ahakuelo told Bull to “*Hit her again*.”¹⁸ And true to his name, that is *exactly* what *Bull* did.

And look at Henry Chang. He said that he “*wanted to go again*.”¹⁹ And true to his word, he raped her not once, but twice.

¹⁶ Thalia had told the police that one of her alleged rapists was referred to by others as “Bull.” Under questioning later on, the police had asked Kahahawai whether his nickname was “Bull” and Kahahawai responded that it was not his nickname. STANNARD, *supra* note 2, at 61, 102.

¹⁷ In a report by Dr. David Liu, the first doctor to examine Thalia in the emergency room, the results included “no apparent trauma anywhere below her waist.” *Id.* at 84.

¹⁸ *Id.* at 168.

¹⁹ *Id.*

After the defendants were finished with her, they threw Mrs. Massie out of the car. But Mrs. Massie saw part of the license plate number. A number that she will *never* forget. A number that led the police to these defendants. A number that permits you to do justice today.

Now, the Territory also presented Dr. John Porter, a top forensic pathologist who denounced the outrage that occurred here. Dr. Porter examined Mrs. Massie's wounds. He said that the "known facts and physical evidence are consistent with Mrs. Massie's claims of rape."²⁰ He continued that "this sizable abrasion resulted from her being dragged in a prone position from her abductors' car."²¹

Yes, it is true that there was no semen. But Mrs. Massie doused before going to the hospital. She expelled the wretched refuse that her assailants forced upon her. And do you blame her? The defense would let these devils go free because Mrs. Massie could not endure the horror of hours or days with the semen of these rapists inside her. I implore you: reject this twisted logic.

Now, Mrs. Massie may have been confused about a few details. In denial of the atrocity that had been committed on her, she may have described the rape as a beating. She may have mis-stated the time the rape took place by a half hour or so. Well, Gentlemen of the Jury, if *you* had been brutally beaten, how well would *you* remember *all the details*? And should guilty men go free because Mrs. Massie's memory is not perfect?

Well, let's turn to the last pillar of the Territory's case. In addition to the testimony of Mrs. Massie and the forensic expert, we have:

The hard evidence:

Judge for yourself whether Mrs. Massie's testimony was fabricated. Mrs. Massie's beads and items from her purse were found by the police. And found at the *animal quarantine center* where she was raped and brutalized. Judge for yourself whether this is a coincidence.

License plate number 58-895. You heard that number before. The evidence showed that Ida's car matches the description and license plate that Mrs. Massie reported to the police.

When faced with this evidence, the defense *attacks Mrs. Massie's character* and tries to *cloud your vision* with smokescreens. Gentlemen of the jury: remember this, Mrs. Massie *is not* on trial. These five defendants are. And when the defense throws up its smokescreens, keep your eyes focused on the facts. The testimony of Mrs. Massie. The expert. The Hard Evidence.

And keep your mind firmly focused on our goals:

To protect Mrs. Massie's safety.

And to punish Mrs. Massie's rapists.

²⁰ *Id.* at 172.

²¹ *Id.*

Gentlemen of the jury, wouldn't it be a travesty if *we* do not protect Lieutenant Massie's wife, just as Lieutenant Massie has fought to protect all of us? And wouldn't it be a travesty if we fail to vindicate Hawaii and to protect our women?

Gentlemen of the jury, could you *go home and look* your mother or wife *in the eye* if you fail to do what is right? You must stand together like the Rock of Gibraltar for a verdict that all five defendants are guilty, guilty, guilty as charged.

Thank you very much and God Bless our Territory and this Honorable Court.

MODERN-DAY DEFENSE ATTORNEY: Look at these five boys. They're not guilty. These five boys did not beat or rape Mrs. Massie, and the Territory has failed utterly to prove their guilt beyond a reasonable doubt.

Something terrible *did* happen that day: these boys were falsely accused.

There was *no time* for my clients to have done what Mrs. Massie claims. The Territory has presented *no proof* that Mrs. Massie was assaulted by my clients. And finally, there is *no truth* to Mrs. Massie's allegations. She lied to you.

No time, no proof, no truth.

First, a few words about my clients:

Joe Kahahawai: 20 years old. A local football star for St. Louis College and a talented boxer who had an athletic scholarship. He served in the 18th Infantry of the National Guard. Like Lt. Massie, also a military man.

Benjamin Ahakuelo: Also 20, also a local. Known as Flash for his football skill. Just a few months ago he was in New York City, representing Hawaii at the Golden Gloves boxing championship.

Henry Chang: Half Hawaiian and half Chinese, Henry had been working on a salmon farm in Alaska, and recently came back to Hawaii to help his parents tend the cattle and chickens on their farm.

David Takai, "Mack": A quiet young man of Japanese descent, he was never identified by Mrs. Massie.

Horace Ida: Also of Japanese descent, Horace's father died in a fishing accident. Horace moved back to Hawaii to help his mother and sister after his father's death.

There was simply *no time* for these boys to have committed the crime. FIFTY TWO witnesses placed them miles away during the critical time between 11:30 to 12:40.

Let's map out the boys' movements that night. Many witnesses testified that these five boys went to a dance at Waikiki Park and stayed there until around midnight. After the dance ended, they drove down Beretania Street to Mrs. Correa's luau, getting there around 12:30. The luau was pretty much over, and the boys decide to call it a night. They start driving home – and have a near miss with Mr. and Mrs. Peeples at an intersection downtown at around 12:35 or 12:40. No one is hurt, the cars are not damaged, but there is a bit of a scuffle. Mrs. Peeples reports the incident to the police right away. The time is around 12:40 or 12:45.

Now let's see what Mrs. Massie was doing at the same time. She was at the party at the Ala Wai Inn. Around 11:30 or midnight, she says, she left the party alone. Around 12:15, *seven* witnesses saw Thalia Massie -- wearing a green dress and "mumbling and stumbling" -- walking along Ena Road toward the beach, followed by a white man. None of the witnesses placed any of my clients near the beach. Around 12:50, Mrs. Massie is picked up by the Clarks and the Bellingers on Ala Moana Road. Six miles away from the boys. At some time between 12:15 and 12:50, Mrs. Massie says she was raped six or seven times at the animal quarantine center, here.

It was physically impossible for the boys to have done it. The boys were seen by witnesses all over downtown Honolulu at midnight – 12:15 – 12:30 – 12:40, miles away from where Mrs. Massie says she was assaulted. There was simply *no time* for these boys to have committed the crime.

There is absolutely *no proof* that the five boys assaulted Mrs. Massie -- no medical evidence, no physical evidence.²²

Mrs. Massie was examined a few hours after the alleged assault, and it's true she had a broken jaw and bruising around her face. And she was drunk. But the doctors and nurses found:

No injuries below the waist
No semen
No abrasions or contusions in the genital area
Nurse said she was "clean as a pin."²³

Yes, she had a scrape on her ankle. The doctor who examined Mrs. Massie the next day admitted that the scrape could have come from being dragged. But the doctor and nurse who saw Mrs. Massie an hour after the alleged assault found nothing. So isn't it possible that she scraped her ankle sometime after she was assaulted?

And what about the so-called medical "evidence" of rape? The most that Dr. Porter could say was that it didn't *disprove* rape, because Thalia had douched before going to the hospital and she was "a married woman."²⁴ In other words, Mrs. Massie was not a virgin.

²² Under the criminal rape statute at the time, a defendant could not be convicted solely on the uncorroborated testimony of the victim. Hence, it was important for defense counsel to emphasize that no physical evidence linked Thalia to any of the five boys. See Masaji Marumoto, *The Ala Moana Case and the Massie-Fortescue Case Revisited*, 5 U. HAW. L. REV. 271, 275 (1983).

²³ STANNARD, *supra* note 2, at 84.

²⁴ *Id.*

There is *no proof* of rape.

There is also *no proof* that the boys had anything to do with Mrs. Massie that night --

Looked for fingerprints in Horace Ida's car. Didn't find any.

Examined the boys' genitals to see if there were any signs that they had tried to rape anyone. Didn't find any scratches or abrasions.

Looked at Thalia's dress -- it was undamaged. Her shoes -- unscuffed. No sign that she'd been dragged anywhere.

Looked for tire tracks where Thalia said she'd been assaulted. Didn't find them. So the cops took Horace's car and drove it in the mud to make up the evidence.

There's no proof that Mrs. Massie was raped, and no proof tying my clients to Mrs. Massie.

Mrs. Massie is not on trial. But there is *no truth* to her story. No doubt, she was assaulted and her jaw was broken, but these five boys did not do it. She is the *only* one who claims that these boys assaulted her. No other witnesses corroborate her story. Nobody saw these boys anywhere near her. Plenty of witnesses -- 52 to be exact -- put these boys *miles* away. And plenty of witnesses saw a white man following Mrs. Massie shortly before she was assaulted.

Mrs. Massie lied. In the hours after the assault, she changed her story in several respects:

When Mrs. Massie was found on the road, Mrs. Clark asked if the men had done anything other than beat her up. Thalia said that she had not been injured *in any other way*. Mrs. Clark's son testified, "We all noticed her evening gown seemed to be in good condition and . . . wondered how it could be if four or five men assaulted her."²⁵

Mrs. Massie also lied about Horace Ida. At least three times that night -- when she was picked up, at the hospital, and then to the police -- Thalia Massie said she could not identify her assailants or the car. She said that it was too dark. But the next day, *after* the police bring Horace Ida before her, in essence telling her, "this is the guy,"²⁶ she suddenly says yes. They didn't bring anyone else before her, didn't put Mr. Ida in a lineup. Just said, "this is the suspect, right?"²⁷

Same thing with the car. All she said that night was that the car was old and dark-colored. Horace Ida's car is new and light-colored. But the police didn't seem to care. They just told Mrs. Massie, "this is the suspect's car."²⁸ She said, ok, it's the car. The prosecution says that Thalia remembered the license plate on the car. But Thalia "remembered" only *after* she heard the plate number broadcast at the police station. This even though she was visibly drunk that night. It's only after the police start feeding information to her that Thalia Massie miraculously recovers her memory and changes her story.

²⁵ *Id.* at 54-55.

²⁶ *See id.* at 91.

²⁷ *See id.*

²⁸ *Id.* at 97.

In its fear of the truth, in its desire to find someone to blame for this alleged crime, the prosecution has embarked on nothing less than a campaign to manipulate and suppress evidence. The role of law enforcement is to seek the truth, not to contrive a conviction through trickery and subterfuge.

Gentlemen of the jury, remember that the prosecution bears a heavy burden to prove, beyond a reasonable doubt, that these five young men were the ones who assaulted Thalia Massie. Not “maybe,” not probably, but beyond a reasonable doubt.

And in the face of that burden, consider: these boys had *no time* to commit the crime. There is *no proof* tying these boys to Mrs. Massie. And finally, there is *no truth* to Mrs. Massie’s statements.

Somebody hit Thalia Massie and broke her jaw. But was it this group of young men? Or was it someone else? There is more than reasonable doubt here.

Be courageous. Do not succumb to the hysteria. There should not be two sets of laws, one for the rich and mighty, and one for everyone else. The prosecution asks you to ensure that justice is done. We ask the same.

Do the *right* thing, do the *just* thing, and find the defendants -- Horace Ida, David Takai, Henry Chang, Ben Ahakuelo, Joe Kahahawai -- *not guilty*.

NARRATOR 2: The jury deliberated for ninety-seven hours, but could not reach a verdict. Finally, late Sunday night, Judge Steadman accepted the jury's insistence that it was deadlocked, and declared a mistrial. In the end, the jury was split -- six to six.

THE MURDER OF JOE KAHAHAWAI²⁹

NARRATOR 1: The mistrial was met with outrage. The *Honolulu Times* ran a banner headline: “The Shame of Honolulu.” The front-page editorial declared that women in Honolulu ran the “risk of being assaulted and foully raped by gangs of lust-mad youths . . . foul, slimy creatures crawling through the streets and attacking the innocent and the defenseless.”³⁰

Honolulu swarmed with navy men looking to teach locals a lesson. Admiral Pettengill wired the Fleet commander in Washington that conditions were unsafe for white women in Honolulu. Admiral Pratt sent a cable stating that “American men will not stand for the violation of their women under any circumstances.”³¹

Horace Ida was kidnapped at gunpoint by sailors. They beat him, as they tried but failed to force him to confess to raping Thalia. A passing motorist found him and drove him to a police station.

NARRATOR 2: Joe Kahahawai, too, was kidnapped, but not just by drunken sailors. Grace Fortescue, Thalia's mother, had come from Washington, D.C. to comfort her daughter. She and

²⁹ The facts set forth below are primarily drawn from STANNARD, *supra* note 2, at 222-301.

³⁰ *Id.* at 222.

³¹ *Id.* at 232. For more unpublished cables by the military, see also COBEY BLACK, *HAWAII SCANDAL* (2002).

Tommie Massie, with the help of two Navy enlisted men, Deacon Jones³² and Edward Lord, concocted a scheme to extract a confession from Kahahawai. They knew that Kahahawai, who was out on bail, was required to appear at the judiciary building in Honolulu each morning at 8 a.m. They waited for him, presented him with a fabricated police summons,³³ and took him, at gunpoint, to Mrs. Fortescue's rented home. Kahahawai's friends witnessed the abduction and called the police.

At 10:20 a.m., a police officer pulled over a blue Buick sedan. The Buick caught the officer's eye in part because its shade was drawn. In the vehicle, they found Mrs. Fortescue, Tommie Massie, and Edward Lord. In the rear seat of the car, wrapped in a blood-soaked bedsheet, was the naked corpse of Joe Kahahawai.

Back at Mrs. Fortescue's house, investigators found Deacon Jones, holding a glass of whiskey. Police officers seized rope, guns, a blood-soaked towel, and other evidence.

Mrs. Fortescue, Tommie, Lord, and Jones were arrested. Admiral Stirling could not envision Mrs. Fortescue or his men in jail, and he arranged to have them housed in the captain's quarters aboard a decommissioned ship in Pearl Harbor.

NARRATOR 1: American newspapers and politicians immediately sided with Kahahawai's killers.³⁴ Some dubbed the murder an “honor killing.” A syndicated Hearst editorial charged that Hawaii was a place where “bands of degenerate natives . . . lie in wait for white women.”³⁵ *Time* magazine blamed the murder on Kahahawai and his friends, describing them as “five brown-skinned young bucks” who demonstrated the “lust of mixed breeds for white women.”³⁶ The *New York Post* called for the Navy to send a battleship into Honolulu harbor to rescue Mrs. Fortescue, Tommie, Lord, and Jones.³⁷

On January 21, 1932, a grand jury convened to consider whether to charge the four defendants with the murder of Joe Kahahawai. Despite the overwhelming evidence, it was far from certain that the grand jury would indict. At one point the foreman of the grand jury told the supervising judge, Judge Albert Cristy, that they stood twelve to nine against indictment.

Judge Cristy asked the jurors “to lay aside all race prejudice,” and reminded them of the importance of the rule of law.³⁸ He instructed the jurors to indict if there was sufficient evidence to justify putting the defendants on trial. He said that any jurors who could not do their duty

³² Deacon Jones was an enlisted navy veteran sent to stand guard at the Massies' home after the end of the Ala Moana trial. He hit it off immediately with Grace Fortescue, who considered him trustworthy and sympathetic. STANNARD, *supra* note 2, at 232.

³³ The fabricated summons can be found at: <http://law2.umkc.edu/faculty/projects/ftrials/massie/summons.html>.

³⁴ Professor Williamson Chang contrasts the back-page attention that Horace Ida's abduction and assault received with the front-page coverage of the alleged rape of Thalia Massie. See Williamson B.C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Opinion, and the Realignment of Political Power in Post-statehood Hawai'i*, 14 U. HAW. L. REV. 17, n.13 (1992).

³⁵ STANNARD, *supra* note 2, at 267.

³⁶ See David Stannard, *The Massie Case: Injustice and Courage*, HONOLULU ADVERTISER, Oct. 14, 2001, available at <http://the.honoluluadvertiser.com/article/2001/Oct/14s/op/op03a.html> (quoting the *Time* article).

³⁷ *Id.* (citing the *New York Post* article).

³⁸ STANNARD, *supra* note 2, at 287.

“should resign immediately.”³⁹ In the end, by a vote of twelve to eight, the grand jury indicted all four defendants for second-degree murder.

With the indictment pending, Grace Fortescue gave a remarkable interview to the *New York Times*, published on February 8, 1932. She told the reporter the following:⁴⁰

FORTESCUE: How do I feel? Mostly that I am glad it is all out in the open. Those days, when it was not known whether my daughter had been the victim of an assault and people looked at us and wondered -- those days were worse than the last few weeks. There is a great sense of relief.

She had a bruise on her cheek. People asked questions about it, and it was awful. Now that the worst is over, I feel more at ease than I have in months. I have slept better, since the day of the murder, than I had for a long time.

[After we were arrested], I was dumbfounded that they wanted to know my name, that I could not keep this quiet. They had not mentioned my daughter's name in the first case, and I could not understand why they wanted mine or why it was made public.

It never occurred [to me] we were being followed by the police. Now, I realize we bungled dreadfully, although at the time I thought we were being careful. I can see now that we were not. I made the mistake of pulling down the shade in the car.

You must realize that we had been under a terrible strain; that we had all suffered as I did not know it was possible to suffer. There had been terrible slanders, and everything had been done to blacken her reputation.

NARRATOR 2: Some years later, the reporter revealed that Mrs. Fortescue had made another statement that he had withheld from his article:

FORTESCUE: I come from the South, and in the South we had our own ways of dealing with niggers.⁴¹

THE HONOR KILLING TRIAL

NARRATOR 1: The “Honor Killing” trial commenced on April 11, 1932. Judge Charles Davis presided. The Territory was represented by John Kelley, an experienced trial lawyer who had been hired recently to fill the \$7,500 a year prosecutor's post. The defendants retained Clarence Darrow, the most famous defense attorney in the country. He was seventy-five years old, and came out of retirement for this case.⁴² Darrow had been a defender of “the poor, the weak, and

³⁹ *Id.* at 284.

⁴⁰ See VAN SLINGERLAND, *supra* note 2, at 211-12 (citing to Russell Owen, *First Interview with Mrs. Fortescue; Gives Her Reactions to Honolulu Tragedy*, N.Y. TIMES, Feb. 8, 1932, at 3).

⁴¹ STANNARD, *supra* note 2, at 301.

⁴² The New York Times' obituary of Darrow describes this trial as the most dramatic moment of any of Darrow's courtroom battles. See *Clarence Darrow is Dead in Chicago*, N.Y. TIMES, Mar. 14, 1938, at 15. Darrow cites a number of reasons for agreeing to take the case, including: boredom, his desire to visit Hawaii, his dire financial condition, and his belief that the defendants were sympathetic. See CLARENCE DARROW, *THE STORY OF MY LIFE*

the weary,” and had progressive views on racial issues. Thus, it was surprising that he would agree to represent four whites accused of lynching a Hawaiian man. But Darrow had lost his retirement fund in the stock market crash, and he could not resist the princely fee of \$40,000 plus expenses, for two months' work in the Paradise of the Pacific.⁴³

Kelley presented the prosecution's case. Kahahawai's cousin had witnessed the kidnapping and described what he saw. Police officers testified to the arrests of the defendants and the seizure of evidence. Kelley showed the victim's blood-stained shirt, with a bullet hole on the left side, to the jurors, as Kahahawai's mother wept openly in the courtroom.

The defense theory of the case quickly became apparent: Darrow put the gun in the hand of Tommie Massie, and argued that the rape of Tommie's wife drove him temporarily insane. If the one who fired the pistol was not guilty by reason of insanity, Darrow argued, then all the defendants were equally innocent and all should go free.

Darrow called his first witness: Lieutenant Thomas Massie.

DIRECT EXAMINATION OF THOMAS MASSIE by DARROW⁴⁴

Q. Lieutenant. Tell us about the night of September 12th.

A. The Ala Wai event ended at 1 o'clock and I looked for Thalia. I called the Rigbys to see if they had taken Thalia home, but they hadn't. I then called my house, and Thalia answered and said—

KELLEY: Objection, hearsay and relevance.

JUDGE DAVIS: Overruled. Continue.

A. Thalia begged me, “Come home at once. Something terrible has happened.” When I arrived home, there was blood pouring from her nose and mouth, her lips were crushed, and her eyes were swollen from the violence. I took her in my arms and she cried repeatedly, “I want to die!” Thalia told me that after she left the Ala Wai, a group of men had pulled her into the car, beaten her, and then dragged her into the bushes and ravished her.

(Da Capo Press 1996); see also Douglas O. Linder, *Excerpts from Clarence Darrow's Account of the Massie Trial*, FAMOUS TRIALS: MASSIE (“HONOR KILLING”) TRIALS 1931-32, <http://law2.umkc.edu/faculty/projects/ftrials/massie/darrowaccount.html> (last visited Aug. 25, 2012).

⁴³ See STANNARD, *supra* note 2, at 5.

⁴⁴ The following portions of the direct examination of Thomas Massie are derived from VAN SLINGERLAND, *supra* note 2, at 242-43, 247-52; STANNARD, *supra* note 2, at 338-39, 342-43; Douglas O. Linder, *Excerpts from the Testimony of Thomas Massie*, FAMOUS TRIALS: MASSIE (“HONOR KILLING”) TRIALS 1931-32, <http://law2.umkc.edu/faculty/projects/ftrials/massie/massietommietestimony.html> (last visited Jun. 9, 2012).

- Q. Please continue, Lieutenant.
- A. I asked which one beat her mostly. She said there were two that beat her. One was Chang and one was Kahahawai, but Kahahawai had beaten her more than anyone. She said she prayed for mercy and Kahahawai answered by hitting her in the jaw.
- Q. What did you do next, Lieutenant?
- A. I called the police and two detectives arrived and interviewed Thalia. I then took her to the hospital
- Q. Did there come a time when Thalia was asked to make an identification?
- A. Yes, the authorities brought four of the assailants in. My poor Thalia mustered her strength and courage to identify them. I was concerned that innocent men not be unfairly accused of such a terrible crime, and so I leaned over and said, "Please, darling, don't let there be any doubt in your mind." Thalia's eyes filled with tears and she said, "Don't you know if there was any doubt in my mind I couldn't ever draw an easy breath as long as I live?"

KELLEY: Objection! Hearsay and relevance.

DARROW: Your Honor, this is relevant to our insanity defense.

JUDGE DAVIS: Overruled. You may continue.

- Q. Tell us what happened after Thalia was discharged from the hospital.
- A. I did not sleep much, partly because I kept reliving that tragic night in my own mind and also because Thalia would frequently bolt awake, screaming "Don't let him hurt me!" I would hold her and comfort her and tell her, "It's all right darling, nobody is here but me," and she would reply that someone was there -- Kahahawai."
- Q. How were you affected during this time?
- A. Well, for a month after the attack, I really couldn't sleep. I lost my appetite and began to lose weight. I was terribly worried, especially when Thalia's physician told us that we would have to expect two things that were possible: disease and conception. Those were the things that preyed on my mind every minute of the day -- it was worse than anything I could imagine.
- Q. Have you ever got it out of your mind?
- A. No. After Thalia's mother came, we knew that an operation was necessary to prevent pregnancy. This had a strange effect on my mind.
- Q. Was it done, the operation?
- A. Yes.
- Q. Did you know, or did she know, that the pregnancy was due to you or not?
- A. There couldn't be any doubt that it wasn't. . . .

Q. What effect did the mistrial in the Ala Moana case have on you, Lt. Massie?

A. I became confused.

Q. And what other difficulties followed?

A. The many vile and low rumors about Thalia and me escalated.

Q. What kind of rumors were they?

A. Rumors claiming we were getting a divorce. Rumors that I knew she had lied about the rape. Rumors that I returned home to find her in bed with another naval officer. Rumors that she had not been assaulted at all and was simply a seeker of notoriety.

Q. So what did you do about this? . . .

A. I went to see Machinist's Mate Deacon Jones to discuss how we could get a confession out of the defendants. . . . On seven January, I came up with a plan with Mrs. Fortescue, Mr. Jones, and Seaman Edward Lord to kidnap Joe Kahahawai and have him confess. . . .

Q. Had you any purpose or intent of killing the deceased?

A. Certainly not.

NARRATOR 2: Massie went on to testify about the kidnapping of Kahahawai and the group's arrival back at Mrs. Fortescue's rental house.⁴⁵

Q. Then what did you do?

A. I took the gun and went over to Kahahawai. I wanted to scare him. I said, "Do you know who I am?" He looked startled, and said "I think so." I put the gun on him and said, "You did your lying in the courtroom but you are going to tell the whole truth now."

He said, "I don't know nothing." I said, "You know what happened, and you are going to tell it, and you had better talk now."

I asked, "Who kicked the woman?" and he said, "Nobody kicked the woman," and I said, "Now you are lying. . . . If you were not there how do you know that nobody kicked her? You must have been there."

He sat there trembling and I said, "Now go ahead and tell the whole story." And suddenly he said, "Yes, we done it." The last thing I remember was the picture that came into my mind, of my wife when he assaulted her and she prayed for mercy and he answered with a blow that broke her jaw.

Q. Did you have a gun in your hand when you were talking to him?

A. Yes, sir.

Q. Do you remember what you did?

A. No, sir.

⁴⁵ See VAN SLINGERLAND, *supra* note 2, at 249-52.

Q. Do you know what became of the gun?
A. No, I do not, Mr. Darrow.

Q. Do you know what became of you?
A. No, sir. . . .

CROSS-EXAMINATION OF THOMAS MASSIE by KELLEY⁴⁶

Q. Did you ever entertain thoughts of killing Kahahawai?
A. No, sir.

Q. Never? Not even when he was at the hospital with Thalia, and she identified Kahahawai and three of the other defendants?
A. I might have felt like it at the time, but I never thought of it. I knew that was no way.

NARRATOR 1: After an hour of questioning, Kelley was unable to shake Massie, and so he decided to try a different approach.

Q. Where were you born?
A. Kentucky.

Q. Are you proud of being a Southerner?

DARROW: Objection – what was the purpose of that question?

KELLEY: I don't know. I just want to find out.

DARROW: Well, I do know, and the purpose of the question is to create prejudice.

KELLEY: We are concerned here with a man who claims he killed a man by reason of insanity. On the motivating impulses that led this man to become insane, we can trace them back to the cradle, and we desire to do that. It is those impulses, born of youthful experience, that create a condition of mind.

JUDGE DAVIS: I'm inclined to agree with the general principle, Mr. Kelley. However, I cannot agree that the witness's pride has any bearing on this case. The objection is sustained.

Q. Why did you use Mr. Jones's smaller pistol to frighten Kahahawai, when you could have used your more impressive Colt .45?
A. Jones's pistol was on the kitchen sideboard, and I just used it.

⁴⁶ The following portions of the cross-examination of Tommie Massie are derived from STANNARD, *supra* note 2, at 344-47, 354; VAN SLINGERLAND, *supra* note 2, at 255-56.

Q. A gun is personal equipment, like a watch – you get used to it. Why would you use someone else’s gun when you had yours?

A. **[shrugging his shoulders]** A gun is a gun to me. . . .

Q. Do you know who undressed the body of Kahahawai? . . .

A. Jones told me.

Q. What did he tell you?

A. He said, “The stains wouldn't come out so we took the clothes off.” . . .

Q. Did any of the three defendants ever tell you what you did after this shot was fired?

A. Yes.

Q. What did Mrs. Fortescue tell you in that respect?

A. She said I just stood there like a bump on a log and she talked to me and I would not answer her, and she finally took me into the kitchen and tried to make me drink some *oke*

. . . .

NARRATOR 2: Darrow called two psychiatrists, who testified that Tommie had been temporarily insane.⁴⁷ Darrow then called Mrs. Thalia Massie to the stand.

DIRECT EXAMINATION OF THALIA MASSIE by DARROW⁴⁸

Q. Mrs. Massie, on the night of Saturday evening, September 12, 1931, did you go to a party with your husband at the Ala Wai Inn?

A. Yes. We went to a dance....

Q. When did you leave the dance?

A. About 11:35 at night.

Q. Where were you going?

A. I planned to walk around the corner and back.

Q. Do you know where Tommie was when you left?

A. No. When I saw him he was dancing.

Q. Why did you leave?

A. I wasn't enjoying the party and I was tired and bored.

Q. Where did you go?

A. I started walking toward Waikiki Beach.

⁴⁷ STANNARD, *supra* note 2, at 347.

⁴⁸ The following portions of the direct examination of Thalia Massie are derived from *id.* at 354-56; VAN SLINGERLAND, *supra* note 2, at 260-62.

Q. Where were you when something unusual happened?

KELLEY: Objection. We are not retrying the Ala Moana case. . . .

DARROW: This testimony goes to Tommie Massie's state of mind. It is at the very heart of this case.

JUDGE DAVIS: I will allow the testimony regarding Tommie Massie's state of mind, but, Mr. Darrow, please keep it limited to Mr. Massie's state of mind.

DARROW: Thank you, your Honor. Mrs. Massie, when did you next see Tommie?

A. About one o'clock in the morning. I left the Inn about half an hour before midnight, when this terrible thing happened, and I finally reached home. Lieutenant Massie telephoned me and I asked him, "Please come home right away, because something terrible has happened."

[THALIA is overcome by crying. There is a pause. Testimony then resumes.]

Q. What did you tell Tommie when he came home?

A. I did not want to tell him what had occurred because it was all too terrible. He asked me, "Please, what happened?"

Q. Did you tell Tommie what happened?

A. Yes, I told him that four Hawaiian boys had come up to me in a car. They forced me to get into the car. One of them placed his hand over my mouth. They held me down. They kept punching me in the face. . . .

Q. How many men were in the car?

A. At least four.

Q. Did you tell Tommie that you heard any names mentioned?

A. I heard the name "Bull" used several times and some common name like Joe.

Q. Did you later find out that "Joe" was Joe Kahahawai?

A. Yes, I remembered the license plate number of their car and the police tracked down Kahahawai. The police also brought him to me in the hospital and I pointed him out as one of the men who raped me.

Q. And did you tell Lieutenant Massie what Kahahawai and the others did to you?

A. I told Tommie that they dragged me from the car. I told him Kahahawai would not even let me pray, but hit me just as hard as he could on the jaw, and the pain hurt so much. I said, "Look out, you have broken, you have knocked out some of my teeth.

Q. Keep on.
A. Kahahawai said he didn't care and for me to shut up. I asked him, "Please do not hit me any more," and he replied, "Well, shut up then," and he swore at me.

Q. Did the other men attack you, too?
A. Yes, all of them. . . .

Q. After these men assaulted you, what happened? Did they drive away and leave you there?
A. They bolted for their car, got into it, and drove away. I managed to get back on the road and stopped a car, which took me home. . . .

Q. Mrs. Massie, were you taken to Emergency Hospital?

KELLEY: I don't want to keep interjecting objections, but . . .

DARROW: You shouldn't!

KELLEY: I think I should have objected much more.

JUDGE DAVIS: Objection overruled.

A. Yes. I was taken there and examined.

Q. When you got home, what did you do?
A. I took off my clothes and took a douche.

Q. Were you successful?
A. No.

Q. What happened?
A. A couple of weeks later I found I was pregnant. . . .

Q. Was it due to Tommie?
A. I knew it wasn't.

Q. And you didn't have the baby did you?
A. No, I had an operation to stop the pregnancy. . . .

Q. How did Tommie take all this?
A. Tommie never complained about the many times I would wake him up at night. He was wonderful.

- Q. But he suffered, didn't he?
- A. He lost weight. He would get up in the night and go into the living room and walk up and down and smoke. When I got so I could cook, I would prepare tempting dishes for him but he wouldn't eat. . . .
- Q. Now, was there a trial that was held in which five men, including Kahahawai, were accused of raping you?
- A. Yes. There was a trial.
- Q. What happened at the trial?
- A. It was almost like being raped a second time. I identified the rapists and told the jury what they had done to me. I told the whole truth, even though I would rather have avoided the scrutiny of the press and the public. But the defense misled and confused the jury and ran circles around the truth.
- Q. What was the jury's verdict in that trial?
- A. A hung jury.
- Q. How did your husband react to the hung jury?
- A. My husband was angry at the system for letting these hoodlums walk free. He wanted justice to be done and he wanted these men to confess and to pay for what they had done to me. He felt helpless that he could not help me. He thought he was a failure and the system was a failure.
- Q. Did he try to bring about justice? Did he do what any husband would have tried to do in that situation?

KELLEY: Objection, argumentative. This isn't closing argument, Mr. Darrow.

JUDGE DAVIS: Overruled.

DARROW: Mrs. Massie, you may answer.

- A. Yes, he did. He confronted Kahahawai and tried to get him to confess. It was his only alternative because the courts had failed us.

CROSS-EXAMINATION OF THALIA MASSIE by KELLEY⁴⁹

- Q. About what time was it that you left the Ala Wai Inn?
A. It was about 11:35.
- Q. How do you recall that time?
A. Because some friends of mine left the dance at 11:30 and I left the party a few minutes after they did.
- Q. How did you happen to know it was 11:30?
A. My friend told me later that she had looked at her watch and it had been 11:30.
- Q. Several days later?
A. I don't remember. . . .
- Q. Now, is it not a fact, Mrs. Massie, that you were asked by one or more of the police officers who arrived soon after your husband arrived at home as to what had happened to you that night?
A. My husband told them, I think.
- Q. Do you remember telling the police officers . . . you were unable to identify any of these boys because it was dark?
A. No, I don't remember making any such statement.
- Q. Do you remember stating, upon being questioned, that you couldn't identify the car -- that you weren't sure what kind of car it was?
A. I didn't think about the car. . . .

NARRATOR 1: Kelley believed that Thalia's tears and air of injured innocence were a show for the jury. To elicit another side of Thalia, he decided to use a psychiatric questionnaire Thalia had filled out when she was seeking counseling. In it, Thalia described Tommie's coldness and cruelty to her and her loss of affection for him. All did not go as planned.

- Q. Now, Mrs. Massie, has your husband always been kind to you?
A. Of course, he's been.
- Q. Did you have a psychopathic examination at the university last summer?
A. Yes. . . .

[KELLEY reaches into his breast pocket, removes a folded piece of paper, slowly unfolds it, and hands it to the witness]

⁴⁹ The following portions of the cross-examination of Thalia Massie are derived from VAN SLINGERLAND, *supra* note 2, at 93-95, 263 (portion regarding the night of the alleged rape) and STANNARD, *supra* note 2, at 357-76 (portion regarding the psychiatric questionnaire).

Q. Is this your handwriting?

A. Where did you get this? [**Her face filled with rage.**]

Q. I'm asking the questions, not answering them. Now, I ask you again: Has your husband always been kind to you?

A. Don't you know this is a confidential communication between doctor and patient? You have no right to bring this into the courtroom! [**As she speaks, she slowly tears the paper in half again and again.**] I refuse to say whether that is my handwriting.

[KELLEY pauses, stunned.]

KELLEY: Thank you, Mrs. Massie, at last you have shown yourself in your true colors.

DARROW: I object to the words of counsel.

JUDGE DAVIS: Mr. Kelley, your language is objectionable. It is stricken.

KELLEY: I am through with this witness.

NARRATOR 2: Kelley's cross had taken only eight minutes. The defense rested.

THE SUMMATIONS

NARRATOR 2: We turn to the closings. Before a packed courtroom, Darrow summed up for more than four hours. His closing argument was broadcast live on radio throughout the country. Darrow made no real effort to challenge the prosecution's evidence. Instead, he resorted to what he was best at -- jury nullification.⁵⁰ He appealed to the jury's emotions, seeking sympathy for the defendants, asking the jury to apply the unwritten law that every man had the absolute right to avenge his wife's honor.⁵¹

DARROW:⁵² This case illustrates the mysterious workings of man and human destiny. It illustrates the effect that grief and sorrow have upon human minds and lives. It shows us how weak and powerless human beings can be in the hands of relentless circumstances.

Eight months ago Mrs. Fortescue lived in Washington, respected, known, moving along her way like any other woman. Eight months ago Thomas Massie was a lieutenant in the navy, respected by his friends, intelligent, courageous, belonging to the most dangerous branch of the service. Eight months ago his young wife, handsome, attractive, intelligent, was known, respected and admired by the whole community. What has befallen this family in this short space of time? They are here today in the criminal court. The jury is asked to send them to prison for life. . . .

⁵⁰ See Aaron T. Oliver, *Jury Nullification: Should the Type of Case Matter?*, 6 KAN. J.L. & PUB. POL'Y 49, 56(1997).

⁵¹ Darrow would later explain in his memoirs that this "unwritten law" referred to "the feelings and thoughts of people in general." CLARENCE DARROW, *THE STORY OF MY LIFE* 468 (1932).

⁵² Darrow's closing argument is derived from CLARENCE DARROW, *THE ESSENTIAL WORDS AND WRITINGS OF CLARENCE DARROW* 240-46 (Edward J. Larson et al. eds., Modern Library 2007).

Can any of you imagine anything worse that could have happened or any greater calamity that could have fallen upon that family? She was going on her way as she had a right to go, and in the twinkling of an eye her whole life, the life of the family, was changed and they are now here in this court for you, and you, and you, and you [pointing to individual jurors], to say whether they will go to prison -- for life! . . .

Tommie faced the boy and told him why he was there, and pointed the gun at him. He never intended to use it and that it went off is unfortunate. . . . Finally Tommie seemed to catch him in what seemed a lie. He pressed that idea until this boy said: "Yes, I done it." . . .

There came up in Tommie's mind -- here is the man who had beaten his wife, who broke her jaw when she tried to pray to God to save her. Here is the man who destroyed her life and peace of mind. Everything was blotted out and Tommie probably shot him.

Gentlemen, there was no malice connected with this shooting. . . . It was purely automatic, he had no intent to kill. He had in his hand a revolver. Put yourself in Tommie Massie's place -- do you know what you would have done? I don't know what you, or you, or you, or you [pointing to individual jurors] would have done, but I know what at least ten out of twelve would do. You would do what poor Tommie Massie did! How many men who are real men would have done anything else? . . .

Now, gentlemen of the jury, it was a hard, cruel and fateful episode in the lives of these poor people. Is it possible that any one of you would think of heaping more sorrows on their devoted heads? . . .

I can't understand it! On top of all they have suffered, is it possible that anyone should say that the black gates of a prison should close upon them? Are they that type? Tell me. What have they done? Would they steal? Would they forge? Do they look like any sort of a criminal type?

Let me say one last word. I would be sorry to leave this beautiful land, this fairy land, with the thought that I had made anybody's life harder; that I had compared any class against any other class I have all sympathy and understanding to make these Islands happier instead of more pain. I have loved your green mountains, your coral locked land, its waves that turn to every hue of the rainbow as they dash against the rocks. I love the peace and calm and quiet which only man disturbs. . . .

I have no feeling against the four or five men who committed this crime upon Mrs. Massie. I have no feeling on account of their race. . . . And I say that nobody can afford to stand by and condemn anybody on account of his race. . . .

I ask everybody in this box to forget about differences in race and nationality and to pass upon this case as a human case. As it affects the Massies so it affects you and it affects me. I know how it is. The forces that surround all of us. We are all human beings. Take this case -- with its dire disaster written all over by the hands of Fate -- take this case as you would take one of your own and ask what is right and I'll be content with your verdict. . . .

Take it -- gentlemen. You have in your hands not only the fate but the life of these poor people. What is there for them if you pronounce a sentence of doom upon them? You are in a position to heal; you are not a people to take and destroy -- to bind up wounds, to bring love and happiness and understanding. This case is placed in your hands and I ask you to be kind, understanding, considerate, both to the living, and to the dead.

NARRATOR 1: When Darrow finished, the Court took a fifteen-minute recess. The microphones were removed, as the radio stations were not interested in broadcasting prosecutor John Kelley's summation.

KELLEY:⁵³ I stand before you for the law -- and opposed to those who have violated it. The facts are unrefuted. The defendants killed Kahahawai.

Are you going to decide the case on the plea of a man who for fifty years has stood before the bar of justice -- which he belittles today -- or are you going to decide this case on the law?

Do you realize, Gentlemen of the Jury, that at no point in Mr. Darrow's summation did he discuss the applicable laws? No, not once. Do you realize why? Because his defense is not based on the law, but on sympathy. Sympathy for Tommie Massie, the *hero* out to defend his wife's honor. But let us look at the evidence -- there is no evidence that proves even that Tommie Massie fired the fatal shot. And who are these so-called doctors who argue that Tommie Massie was insane at the moment he supposedly pulled the trigger? Paid professionals, whose opinion is surely biased. What were Thalia Massie's tears, other than a cheap, mawkish bid for sympathy, with no bearing on the case at hand? She is cheered on by her clique of society friends, here to "create a Roman holiday" and to weep or applaud on cue.

Tommie Massie is no hero. He is "[a] conceited, vain, egotistical individual who is responsible for everything that has happened since the night last September when he insisted that his wife go to a party that she did not want to attend." When he hasn't been "hiding behind his mother-in-law's skirts," he has lied about everything, including "the trances the doctors give such funny names to. Ever since the case of Harry Thaw⁵⁴ that defense has been the screen for the rich and influential, so they could get liars and experts to put on a defense of insanity -- as in this case. But this defense is not insanity. It is sympathy."

Tommie Massie is not insane. He was not insane at the moment Kahahawai was killed. He did not black out. He remembers too many things that he could not have known had he been unconscious when Kahahawai died. "If he remembers one thing, he remembers everything -- and their insanity plea, like the dove of peace, flies out the window."

⁵³ Kelley's closing argument is derived from VAN SLINGERLAND, *supra* note 2, at 270 and STANNARD, *supra* note 2, at 373-75.

⁵⁴ The Harry Thaw trial in New York City in 1907 was perhaps the first case dubbed "the trial of the century." Harry Thaw, a Pittsburgh millionaire, was tried for murdering the architect Stanford White, who had designed Madison Square Garden and other New York City landmarks. The trial resulted in a hung jury. At the re-trial in 1908, Thaw was found not guilty by reason of insanity. See generally Douglas O. Linder, HARRY THAW TRIALS (STANFORD WHITE MURDER) 1907 & 1908, <http://law2.umkc.edu/faculty/projects/ftrials/thaw/thawhome.html> (last visited Sept. 6, 2012).

All four of these defendants were perfectly sane, and they willingly and knowingly formed a conspiracy to commit a felony, the kidnapping of Joseph Kahahawai. They committed that felony, and, as a result, Joseph Kahahawai was killed.

You know, they almost got away with it. Another five minutes. A shade up on the left side of that car, and the body of Joseph Kahahawai would have been consigned to the deep forever. But an omnipotent God prevented that, saying "Thou shall not kill -- and get away with it." Three able men and a cold, calculating woman let that man bleed to death in front of them, inch by inch. They let him die. They dragged him into the bathroom like a dog and let him die.

Tommie Massie claims he was driven insane by Kahahawai's so-called confession. Anyone might confess to anything at gunpoint, but I doubt that Kahahawai did -- Tommie Massie testified to what were supposedly the victim's last words, but he didn't have the local dialect right. Another Tommie Massie lie.

But even if Joseph Kahahawai did confess -- even if, in fact, he committed the crime his kidnapers accused him of, although to this day, in his grave, he remains innocent -- I say even if he had committed the crime, that did not give these defendants the right to kill him. No, for that killing they must be punished. . . .

What do you think will happen if you give Lieutenant Massie a walk-away ticket in this case? Why they'll make him an admiral! They'll make him chief of staff! He and Admiral Pratt are of the same mind -- they believe in lynch laws. And if one is allowed to take the law into his own hands, others will do so. I tell you, if the serpent of lynch law is allowed to raise its head in these islands, watch out. Watch out!

The best you can say for Massie is that he lied like a gentleman and had a very convenient memory. The defense must take you for a bunch of morons. Is there going to be one law for strangers in our midst and another for you and me?

I say to you Mr. Stone, and you Mr. Waterhouse, and you Mr. Napoleon, and you Mr. Chang **[looking at jurors]**, . . . that each of you has the most vital duty to perform of any twelve men who ever sat in a jury box under the American flag. And as long as that flag flies on its staff without an admiral's pennant over it, you must regard the Constitution and the law.

Pay no heed to what the admirals say. I say "To hell with the admirals!" Do what is right. You will have nothing to fear. Your families, your loved ones will have nothing to fear.

Mr. Darrow has spoken of mother-love. Repeatedly, he has spoken of Mrs. Fortescue as "the mother" in this courtroom. Well, there is another mother in this courtroom -- and that is Joe Kahahawai's mother. Has Mrs. Fortescue lost her daughter? Has Massie lost his wife?

Where is Kahahawai?

THE JURY INSTRUCTIONS⁵⁵

NARRATOR 2: Judge Davis charged the jury, fairly and precisely, for 35 minutes.

JUDGE DAVIS: Our law provides that everyone shall be presumed to intend the natural and plainly probable consequences of his acts and that, when the act of killing another is proved, malice aforethought shall be presumed, and the burden shall rest upon the party who committed the killing to show that it did not exist . . .

If you believe from the evidence beyond a reasonable doubt that the defendants conspired together to kill and murder Joseph Kahahawai, or to kidnap him with a loaded pistol to extort a confession from him, and that during the existence of such conspiracy and in furtherance thereof said Joseph Kahahawai was shot and killed by one of the defendants, then all of the defendants are guilty of murder, or manslaughter, even though you may find from the evidence that one of the defendants became insane at the moment of the killing.

No man may take the law into his own hands, and no amount of mere mental suffering or worry, no amount of mental harm, injury, or shame caused to one man by another, not causing insanity, can or will furnish legal justification for the taking of a life of another, and the alleged fact, if it be a fact, that the deceased in this case had assaulted or ravished the wife of one of the defendants cannot and does not furnish any legal justification to any of the defendants to kill said deceased and furnishes no defense to any of them.

THE VERDICT⁵⁶

NARRATOR 1: On Friday, after three days of deliberations, the jury returned a verdict.

JUDGE DAVIS: Gentlemen, have you reached a verdict?

FOREMAN: We have, Your Honor.

JUDGE DAVIS: Gentlemen of the jury, how say you?

FOREMAN: We, the jury, find the defendant, Thomas H. Massie, guilty of manslaughter. Leniency recommended.

We, the jury, find the defendant, Mrs. Grace Fortescue, guilty of manslaughter. Leniency recommended.

NARRATOR 2: The jury returned similar verdicts as to Lord and Jones.

⁵⁵ The jury instructions are derived from VAN SLINGERLAND, *supra* note 2, at 272-73.

⁵⁶ The announcement of the verdict is derived from STANNARD, *supra* note 2, at 378-80.

EPILOGUE

NARRATOR 1: Following the verdict, members of Congress, Navy officials, and business leaders demanded pardons for all four defendants. President Herbert Hoover reportedly called Governor Judd to ask that the defendants not be sent to jail.

On May 4, 1932, Judge Davis sentenced each of the four defendants to ten years' imprisonment at hard labor. As soon as court adjourned, the sheriff escorted the defendants to the Governor's office. Governor Judd then read a statement to reporters: "I hereby announce that I have commuted their sentences to one hour, to be served in the custody of the High Sheriff."⁵⁷

Princess Abigail Kawananakoa, the last living symbol of Hawaii's deposed monarchy, also issued a statement: "Are we to infer from the Governor's act that there are two sets of laws in Hawaii -- one for the favored few and another for the people generally?"⁵⁸

At the suggestion of John Kelley, Governor Judd commissioned the Pinkerton Detective Agency⁵⁹ to investigate the Ala Moana case "to determine, if possible, the true circumstances of the assault on Mrs. Thalia Massie."⁶⁰ In October 1932, the Agency concluded that Mrs. Massie had *not* been raped, and that the five accused men had *not* been involved in the assault. In February 1933, Kelley dropped the charges against them.

INTERVIEW OF DEACON JONES by VAN SLINGERLAND⁶¹

NARRATOR 2: In the 1960s, Peter Van Slingerland, author of the book, *Something Terrible Has Happened*, interviewed Deacon Jones. Although Tommie Massie had testified that he had been the one to shoot Kahahawai, Jones said something different.

Q. What happened then?

A. Tommie began asking [Kahahawai] questions.

Q. What questions?

A. Naturally, one of them was why he done such a thing. The whole conversation seemed to be about not only the violation but the terrific beating the girl took. That was what Tommie was trying to get at. He was trying to get this *kanaka* to admit it, see.

⁵⁷ *Id.* at 389-90. Governor Judd would later express regret for granting commutation in his memoirs. See LAWRENCE M. JUDD, LAWRENCE M. JUDD & HAWAII, AN AUTOBIOGRAPHY 168 (1971) ("[W]hen I commuted the sentences of the Navy quartet convicted of killing Kahahawai, I acted under the heaviest congressional pressure and against my better judgment. Had I possessed facts which I learned later, I doubt if I would have commuted the sentences.").

⁵⁸ STANNARD, *supra* note 2, at 392.

⁵⁹ At the time, the Pinkerton National Detective Agency was the oldest and largest private detective firm in the United States. The agency had built an esteemed reputation for itself in domestic espionage in crime fighting and union-busting since the 19th century. STANNARD, *supra* note 2, at 396.

⁶⁰ Summary of the Pinkerton Report of the "Ala Moana" case from Asher Rossetter to Governor Lawrence Judd (Oct. 3, 1932), http://darrow.law.umn.edu/documents/Pinkerton_report_Ala_Moana_Assault_Case_1932.pdf.

⁶¹ The following portions of the interview of Deacon Jones are derived from VAN SLINGERLAND, *supra* note 2, at 317-18.

Q. What was Kahahawai's response?

A. He was scared. He was scared almost white. Let's put it this way: supposing you and me are sitting here and we got a nigger sitting right there and I got a gun. He's going to be scared, isn't he? Unless he's a God damn fool, and this guy was no fool. . . .

Q. How did Tommie appear to you?

A. Tommie was a very direct personality. He was all man and all officer. . . He had a really high-class academic training. A fellow with that background would no doubt feel nervous, because we were breaking the law. There was no doubt about that.

Q. Now, you had no personal animosity toward Kahahawai?

A. Well, I don't hate anybody. Hate is another expression of fear and I didn't fear this black bastard, although I had no use for him.

Q. You say Massie was questioning him. Then what happened?

A. Massie asked him a question and Kahahawai lunged at him. I say, "lunged." Somebody else might say he just leaned forward.

Q. And then?

A. I shot him.

Q. *You* shot him?

A. You're God damn right I did. I shot him right underneath the left nipple. When that slug hit him he just went over backwards. That was the climax, right there.

Q. Did you know what you were doing?

A. When I shot that son-of-a-bitch, I knew what I was doing.

NARRATOR 1: The Massie case had a lasting legacy. It significantly delayed statehood for Hawaii.⁶² The newspaper headlines took their toll as some U.S. Senators from the South became even more convinced that Hawaii, with its majority non-white population, should never be allowed to become a state.⁶³ It was not until August 1959 that Congress finally voted to make Hawaii the fiftieth state.

The Massie case also convinced Hawaiian, Chinese, and Japanese community leaders to set aside their differences. They began to understand that they had common interests and began to identify themselves as Pacific Islanders or Asians.⁶⁴ More people spoke out against the powerful business oligarchy that had long controlled the islands, and the political landscape changed as non-whites started to vote in record numbers.⁶⁵

⁶² See generally Melvin Masuda, *Cases and Places in Hawaii*, HAW. B.J., July 2006, at 110, 111.

⁶³ *Id.* Ironically, Hawaii's racial makeup was also one of the reasons Congress voted for statehood: to demonstrate that democracy can succeed even among non-whites. See ANN RAYSON, MODERN HISTORY OF HAWAII 195 (2004) for a discussion of the racial and political factors involved in Hawaii's long road to statehood.

⁶⁴ Hawaiian, Japanese, Chinese, and Filipino community leaders began meeting, leading Admiral Stirling to remark that the trials "produced sinister forces in that polyglot community." STANNARD, *supra* note 2, at 410.

⁶⁵ Before the Massie trials, the city and county public prosecutors were elected by the people. However, in the aftermath, the Territorial Legislature created a public prosecutor's department which placed the power of

NARRATOR 2: What of the individuals involved?

Tommie and Thalia were divorced in 1934. Thalia died from an overdose of barbituates in 1963.⁶⁶ Tommie was discharged by the Navy in 1940, disqualified from active service by reason of manic depressive psychosis. He died in 1987, 55 years after Kahahawai was murdered. Grace Fortescue came into an inheritance. She had an architect design a home for her in Florida that reminded her of Hawaii, and took up water-skiing at the age of 75. She lived until the age of 95. Clarence Darrow died in 1938, at the age of 80.

NARRATOR 1: Back in Hawaii, the Pinkerton Report was not made public for many years. The four surviving rape suspects continued to live under a shadow. Some of Joe Kahahawai's relatives changed their last name. The jurors were impacted as well, despite prosecutor Kelley's assurances that they had nothing to fear. The day after the verdict, a newspaper columnist called for a boycott of all the companies that employed the men who had served as jurors. The owner of a local Piggly Wiggly received a letter demanding that he fire one of his meat-cutters, juror Walter Napoleon, or face a boycott by 200 of his customers. He refused, saying the boycotters were free to take their business elsewhere.

And so it went. The Massie case generated many such stories of individuals who tried to do the right thing, even as public opinion was against them: the defense attorneys in the Ala Moana trial; Judge Cristy, who urged the grand jurors to lay aside their prejudices and follow the rule of law; the jurors in the Honor Killing trial;⁶⁷ Judge Davis, who sentenced the four defendants to ten years' imprisonment; and prosecutor Kelley, who received hate mail from the Ku Klux Klan threatening to kill him. These stories -- their stories -- still resonate today for all who believe in our system of justice.

appointment in the hands of the mayor. This change in 1932 was a result of a fear that martial law would be imposed in Hawaii. See Alexa Fujise, *A Hundred Years In the Pursuit of Justice*, HAW. B.J., Oct. 1999, at 71.

⁶⁶ *Thalia Massie Dies; Figure in '32 Trials*, N.Y. TIMES, Jul. 3, 1963.

⁶⁷ Darrow believed that a white jury would have acquitted all the defendants but that the presence of Chinese, Japanese, Hawaiians, and "mixed-bloods" jurors yielded the different outcome. However, this statement lacks any merit. Of the jurors, six were white and none were Japanese or Hawaiian. Further, only one negative vote is needed for a hung jury. After the trial, one juror also explained to the press that race did not play a role in the deliberations. Marumoto, *supra* note 22, at 283-84.