

Rape and the Law:
An Examination of the Relationship between Sexist Cultural Attitudes and
Washington State's 1975 Rape Law Revision

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History 492: History Honors Seminar
March 16, 2015

On October 15, 1973, a group of 75 women met in Seattle to discuss how rape had affected their lives. They recounted their personal experiences with rape, and all agreed that they were tired of being afraid. “Why don’t we just start arming ourselves?” one woman asked. “We certainly have an excuse for it.”¹ The women who attended that night were all invited to the meeting to share their experiences and worries with the Seattle Women’s Commission.² This Commission, headed by Jackie Griswold, was concerned with the prevalence of rape in the state and wanted to make sure that women who were raped could successfully prosecute their rapists. Meetings like this were not unique to Seattle; feminists across the nation believed it was time to address the issue of rape in the late 1960s and early 1970s. These feminists were not just disturbed and angered by the prevalence of rape, but they were also upset with the way the criminal justice system handled rape cases. Those who opposed existing rape statutes argued that they were riddled with gender biases that disadvantaged women in the courtroom and led to low conviction rates. These biases, they argued, were rooted in cultural ideas about the male and female body and sexist cultural norms. The fight to end rape and challenge these gender-biased rape laws became so widespread in the United States during the late 1960s and 1970s that it earned its own title: the Anti-Rape Movement.³ In Washington State, the Anti-Rape Movement played a key role in rape statute revision. Indeed, by 1975, it had helped launch a complete overhaul of the state’s old rape code.

In this paper, I will examine some of the ways in which the Washington State legislature revised the rape code in 1975, determine what led to those revisions, and draw connections between sexist cultural ideas and the revision of the state’s rape law. I will begin by examining

¹ Erin Vanbronkhorst, “Rape Stories Spark Discussion,” *Pandora* (Seattle, WA), Oct. 30, 1973.

² Established in 1971, the Seattle Women’s Commission reported to the mayor of Seattle in order to advise the mayor on issues concerning women and sexual minorities.

³ Maria Bevacqua, “Introduction” in *Rape on the Public Agenda* (Northeastern University Press, 2000).

the old rape statutes. Then I will move on to give a brief history of Washington's Anti-Rape Movement and the role it played in revising those old statutes. After I explain the Movement, I will argue that societal assumptions about gender roles and ideas about masculinity and femininity were embedded in Washington's rape law before it was reformed. Since the 1970s, many feminist authors have made similar claims. They have argued that the relationship that existed between old rape statutes in the United States and cultural sexist attitudes was a reciprocal one: sexist laws reinforced a male dominated culture by preventing women from prosecuting their rapists in many cases. Finally I will conclude by asserting that, because of the pervasiveness and persistence of sexist attitudes within Washington State, the revised law could not successfully remedy all of the problems feminist reformers had intended it to address.

My final claim is perhaps the most challenging to prove. In order to draw this conclusion, I will use several post-1975 Washington State court cases as case studies. By examining cases that were tried after the legislature reformed the rape statute, we can see firsthand whether the new law was reliably applied, and upon what grounds defendants and attorneys believed they could appeal. The way that defendants, attorneys, and judges behaved with regards to the new law can give us a good indication of the effectiveness of the new law as well as a glimpse into their approval or disapproval of the reform. In order to corroborate my evaluation of these cases, I will also examine a 1989 study on gender bias in the courts conducted by the state. This survey is particularly useful because it explicitly illustrates the opinions of many judges, attorneys, and caseworkers heavily involved in rape trials after 1975. Finally, I will rely upon a particular referendum on the existence of the Washington State Women's Council – a council heavily involved in the state's rape law revision. This will shed light on the opinions of those Washingtonians who were not directly involved in rape trial

proceedings. When taken together, these sources will show that a change in rape law was not enough to defeat rape myths in the courtroom or in society.

As promised, I will begin by delving into Washington's rape law prior to 1975. In order to fully comprehend the magnitude of the 1975 rape law revision, it is necessary to analyze Washington's former statutes. Before the revision, Washington's forcible rape statute was a single-degree statute, meaning there was only one degree of rape. The statute stated, "Rape is an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent."⁴ The old statute then went on to enumerate all of the instances that legally constituted rape at that time:

- 1) When, through idiocy, imbecility, or unsoundness of the mind, either temporary or permanent, she is incapable of giving consent;
- 2) When her resistance is forcibly overcome; or
- 3) When her resistance is prevented by fear of immediate and great bodily harm which she has reasonable cause to believe will be inflicted upon her; or
- 4) When her resistance is prevented by stupor or weakness of mind... or
- 5) When she is unconscious of the nature of the act, and this is known to the defendant.⁵

Note that all of these instances revolved around the issue of physical resistance and the victim's supposed consent. Indeed, one of the fundamental elements of the crime – consent – did not focus on the actions of the defendant but rather on the actions and mindset of the victim. In rape cases, prosecutors not only had to prove beyond a reasonable doubt that the defendant behaved in a particular way, but they also had to prove that the victim acted in a certain manner during the rape; in essence, they had to show that she did not consent beyond a reasonable doubt. Washington State courts used the "consent test" to determine whether or not the prosecution had

⁴ Washington Revised Code ch. 9.79 (Supp.1975) (originally enacted as ch. 14, [1975] Wash. Sess. Laws (1st Ex. Sess.) 172).

⁵ Ibid.

met its burden.⁶ This test first asked whether the victim resisted. If she resisted, if the male overcame that resistance, and if the prosecution could prove that this happened beyond a reasonable doubt, then the prosecution could hope to win its case. If the complainant did *not* resist or cry out for help, the test would then seek to answer why she neglected to act. If the prosecution could show that the victim did not attempt to get away from her assailant because she feared “immediate and great bodily harm,”⁷ the court could still find the defendant guilty despite the lack of physical resistance.

This focus on the victim’s actions during the attack is unique to rape cases. While complaining witnesses’ actions are sometimes relevant in other criminal cases, rape cases prior to 1975 were distinct in that the defendant’s guilt *hinged* on the victim’s actions, emotions, and decisions.⁸ For example, when a person is charged with simple assault, whether or not their victim fought back does not determine the defendant’s innocence or guilt. However when it came to instances of rape, the victim’s lack of resistance and outcry could devastate her case. Washington’s case law illustrated this point. In *State v. Marable*, the court determined that the defendant could not “be convicted of rape if consent of the prosecuting witness appears, however reluctant that consent may be.”⁹ The decision later suggests that if the victim did not cry for help and there were no signs of a serious struggle, then consent could reasonably be inferred. Unfortunately for the victim this meant that, if nobody was nearby to hear her cries, and if she received no substantial injuries, then consent could reasonably be inferred. Though this sort of

⁶ University of Washington YWCA and the ASUW Women’s Commission, *Rape and the Law*, (Seattle: University of Washington, 1972) 1. “Speak Out on Rape” Attendee Pamphlet.

⁷ University of Washington YWCA and the ASUW Women’s Commission, *Rape and the Law*, 2.

⁸ Camille LeGrand, “Rape and Rape Laws: Sexism in Society and Law,” *California Law Review* vol. 61 (May 1973), reprinted in *Forcible Rape: The Crime, the Victim and the Offender* (Columbia University Press, New York 1984), 81.

⁹ *State v. Marable*, 4 Wn. 650, quoted in *Rape and the Law*, Seattle: University of Washington, 1972. “Speak Out on Rape” Attendee Pamphlet, 2.

corroborative evidence was not necessary to bring a charge of rape before a court, *State v. Marable* makes it clear that a lack of corroborative evidence could certainly be taken into consideration by the jury in order to determine a woman's alleged nonconsent.

Though it may not be apparent at first, the condition that the victim not be married to the defendant also involves the issue of consent. The statute required that the accuser and the accused to be unmarried because, at the time the law was drafted, it was believed that a woman gave her person, or her body, to a man through the marriage contract. Therefore, husbands had a legal right to have sex with their wives via the marriage contract regardless of their wives' desire. Washington's rape statute, along with rape statutes across the nation, assumed that marriage constituted perpetual, irrevocable consent on the part of the wife. This meant that raping one's wife was an impossible crime. In Washington, the marriage contract gave men this right until a court officially dissolved it; Washington's state law did not make any exceptions for legally separated couples or for couples in the process of obtaining a divorce.¹⁰

Not only did the element of consent make the prosecution's burden difficult to meet, but rape trial procedures also made the prosecution's job exceedingly challenging. Prior to the 1975 rape law reform, defense attorneys were allowed to delve into what is known as the "character evidence" of the victim when she took the stand.¹¹ Character evidence is evidence used to prove that, because somebody acted a certain way in the past, that same person acted the same way in a particular instance. The Rules of Evidence, which determine what kinds of evidence the jury can hear, generally prohibit character evidence because it is seen as more prejudicial than probative. This simply means that character evidence tends to bias the jury against the witness to such an extent that the unfair bias outweighs anything valuable the jury may gain from hearing the

¹⁰ Helen Glenn Tutt; "Washington's Attempt to View Sexual Assault as More than a 'Violation' of the Moral Woman – the Revisions of the Rape Laws"; *Gonzaga Law Review* 11 (1975), 148-151.

¹¹ *Ibid.*, 162-164.

testimony. While there are certainly exceptions to this rule, character evidence is usually ruled inadmissible because the court wants the jury to focus on the present crime, not past actions. Additionally, the court does not want the past actions of a testifying witness to unfairly bias the jury against that witness.

Even though character evidence was (and still is) inadmissible in most criminal trials, Washington courts allowed both the defense and the prosecution to examine the character evidence of the victim in rape trials. Defense attorneys would often use this to their advantage by asking the victim questions about her sexual activity in order to show that she was unchaste. This tactic reveals that a woman's chastity was considered useful in determining whether or not she consented to sex in a given instance.¹² Before 1975, the defense could legally argue that, if the victim had consented to sex in the past with other men, then she likely consented to sex during the incident in question. They were also allowed to ask the prosecutrix questions about illegitimate children and divorce. The defense could then use this information to show that the victim had a propensity for engaging in promiscuous behavior and bias the jury against her. Indeed, the victim's chastity would be her only protection against such questioning. If the victim had done anything deemed inappropriate or impure by community standards in her sex life or marriage, the jury was allowed to hear it. Unfortunately, this meant that societal notions about propriety and women's roles could shatter a victim's case. This unfair questioning was so severe at times that many felt that the rapist was not the one on trial; rather, the victim's character was tried. Of course, this had severe implications for any woman who worked in a profession that was considered promiscuous or downright immoral, like dancing or prostitution. Some felt that

¹² LeGrand, "Rape and Rape Laws: Sexism in Society and Law," 77.

the use of character evidence during trials was responsible for low reporting and low conviction rates.¹³

On the other hand, the character evidence rule *was applied* to the defendant's past sexual encounters in rape cases, meaning the prosecution was prohibited from asking him questions about his sexual history in order to establish a reputation for promiscuity.¹⁴ The defendant received the protection of the character evidence rule; his past consensual sexual encounters would not color the jury's opinion of him. In the case of the victim, however, it seems there was a belief that character evidence should be admitted either because its probative value outweighed its prejudicial effect, or because the jury should be biased toward unchaste women. This clear double standard resulted from the fact that the defendant's consent was not a legal element of the crime that needed to be proved. Showing that the defendant had consensual sex with other women would not help the prosecution make its case because it would not go to support any element of the crime.

The injustice imposed on rape victims by Washington's criminal law and trial procedures became a fundamental problem that the Anti-Rape Movement sought to address in the early 1970s. This paper will now turn to discuss the ways in which the Anti-Rape Movement in Washington sought to reform these laws and trial procedures. Maria Bevacqua, the Department Chair of the Gender and Women's Studies Program at Minnesota State University, describes the Anti-Rape Movement in the United States as a "submovement" of the American Women's Rights Movement, or the Feminist Movement.¹⁵ She explains that the Anti-Rape Movement should be thought of as a "submovement" rather than as its own movement because it was a

¹³ Wallace D. Loh; "Rape Reform: An Empirical Study"; *Washington Law Review* 55 (1980), 560.

¹⁴ Tutt, "Washington's Attempt to View Sexual Assault as More than a 'Violation' of the Moral Woman," 173.

¹⁵ Maria Bevacqua, "Introduction" in *Rape on the Public Agenda* (Northeastern University Press, 2000).

single-issue movement that formed within the larger Women's Movement. As the Women's Movement began to challenge sex stereotypes and gendered hierarchies in the 1960s and 1970s, many activists began to realize that sexual violence played a significant role in reinforcing patriarchy. These were the women who created the Anti-Rape Movement. Bevacqua argues the Anti-Rape Movement was more than a mere fragment of the larger Women's Movement because it operated like a typical, stand-alone social movement with a strong organizational base, an effective communication network, and a "shared consciousness of a common oppression."¹⁶ Feminist writers of the time, perhaps most famously Susan Brownmiller, began to describe rape as a "conscious process of intimidation by which *all men* keep *all women* in a state of fear,"¹⁷ rather than a crime that one man commits against one woman. The aims of the Anti-Rape Movement were to help rape victims recover, to educate society about the problem of rape, to publicize rape as an extreme form of male entitlement that supported patriarchy, and finally to reform the law so as to make rape convictions more likely and rape trials more just.¹⁸

It is important to note here that not every feminist supported the Anti-Rape Movement. Some feminists believed that holding men accountable for sexual violence distracted people from what they thought were more important issues. In fact, the mother of modern feminism and founder of the National Organization for Women, Betty Friedan, disapproved of the Anti-Rape Movement. "Obsession with rape, even offering Band-Aids to its victims, is a kind of wallowing in that victim-state, that impotent rage, that sterile polarization,"¹⁹ she argued. Feminists like Friedan saw the Anti-Rape Movement as disempowering women by casting them as victims, when really the Movement sought to enable women by giving them the tools they needed to fight

¹⁶ Bevacqua, *Rape on the Public Agenda*, 26.

¹⁷ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Simon and Schuster: New York, 1975) 11.

¹⁸ Bevacqua, *Rape on the Public Agenda*, 15.

¹⁹ *Ibid.*, 6.

back against sexual violence. While some feminists believed that the Anti-Rape Movement undermined the Women's Movement, it is clear that many Seattle feminists internalized Brownmiller's claims about rape. Seattle's underground feminist newspaper, *Pandora*, consistently raised concerns about sexual violence, publishing articles that championed the Anti-Rape Movement in the early 1970s. The paper even published a review of Brownmiller's book. The journalist proclaimed that upon reading Brownmiller's work, "It becomes obvious that rape is not a sex crime, but an act of political aggression and masculine image."²⁰

Before delving into the methods the Anti-Rape Movement in Washington utilized, I would like to point out that they were not the only group advocating for the revision of Washington's rape laws. There were other movements in the state intent on redrafting the law for various reasons that feminist leaders were able to work alongside. Beginning in the early 1960s, a movement formed that sought to codify Washington State's criminal law. This group desired a more systematic, clean-cut criminal code to replace the complex, disorganized code they believed existed in Washington. Because of this, they sought a rape statute with a multi-degree structure and prescribed penalties for each degree of the crime. Additionally, beginning in the mid 1960s, there was a national push for "law and order," or crime control, that lent itself to the rape law reform in Washington. Policymakers who subscribed to this movement wanted to incarcerate more rapists, but did not necessarily agree with feminist Anti-Rape ideology. Nevertheless, their contributions and ultimate support of the bill were crucial.²¹ When the bill finally passed in 1975, it received unanimous votes in both the house and the senate.

Though the Anti-Rape Movement in Washington cannot take sole responsibility for initiating the 1975 comprehensive rape law reform, it is unlikely that such a massive redrafting

²⁰ Mavis Knight, "Book Review: *Against Our Will*," *Pandora: A Washington Women's News Journal*, April 1976.

²¹ Loh, "Rape Reform: An Empirical Study," 571.

of the law would have been successful without the work of feminists within the movement. The Anti-Rape Movement gained recognition in Washington after the University of Washington YWCA collaborated with the University of Washington's Student Women's Commission to host a "Speak Out on Rape" on April 15 and April 18 of 1972.²² The event consisted of multiple group discussions on various topics including self-defense, prosecuting rape, and medical treatment. Perhaps most importantly, women formed survivor discussion groups to share their own sexual assault experiences. These groups allowed rape survivors to realize that they were not alone. "Consciousness-raising strategies" such as the "Speak Outs" at the University of Washington were crucial for moving the discussion of rape out of the private realm and onto the public agenda.²³ After the "Speak Outs" in 1972, the University of Washington YWCA formed a Rape Crisis Center that provided advocates and assistance to rape survivors who contacted them. Seattle Rape Relief, the Sexual Assault Center, and the Center for the Prevention of Sexual and Domestic Violence were all founded in King County shortly after feminists at the University of Washington implemented consciousness-raising strategies to educate the public. At the grassroots level, these organizations eventually collaborated to lobby for a major revision of existing rape law.²⁴

What made these consciousness-raising strategies so influential was the fact that they directly addressed societal assumptions about rape known as "rape myths." Feminists around the country, including those in Washington, argued that rape myths reinforced the patriarchy by legitimizing rape in many instances. In Washington, feminists lobbying for rape statute revision argued that these myths were the basis of Washington's rape statutes, meaning that the statutes

²² Abused Deaf Women's Advocacy Services, Center for the Prevention of Sexual and Domestic Violence, King County Sexual Assault Resource Center, Seattle Rape Relief, Sexual Assault Center (1989). *Sexual Assault: We Still Have a Problem: Existing Services and Future Needs* (Seattle) 12.

²³ Maria Bevacqua, "Introduction" in *Rape on the Public Agenda* (Northeastern University Press, 2000).

²⁴ *Sexual Assault: We Still Have a Problem: Existing Services and Future Needs*, 12.

themselves were inherently sexist and needed to be revised. Feminists at the University of Washington “Speak Out on Rape” articulated many of these myths in their handout *Rape and the Law*, which they gave to all the women who attended.

The successful prosecution for rape is prejudiced by both general and social myths regarding rape and by conventional social mores. The following is a short list of these elements which mitigate successful rape prosecution:

- ...myth: all women secretly want to be raped;
- ...myth: most or much of rape is provoked by the victim;
- ...myth: rape is enjoyed by the victim
- ...myth: “good girls” don’t get raped;
- ...assumption: a woman who does not respect the double standard (chastity, virginity, and monogamy) deserves what she gets.²⁵

As women came together to discuss their own experiences, they began to see that these myths masked the reality of rape. They realized that women were often raped by men they knew, even by men they were dating. They started to accept that rape was not a crime committed only against sexually promiscuous women; it could happen to anybody.

Anti-Rape activism in Seattle played an important role in initiating the state’s rape law redrafting.²⁶ In fact, it was the Seattle Women’s Commission that strongly advocated for the rewrite. After the Equal Rights Amendment (ERA) passed in 1972, Seattle Women’s Commissioner Jackie Griswold recognized that it was time to revise the law. Griswold had already played an important role in achieving equality for women in Seattle. Upon moving to Seattle from Philadelphia in 1964, she immediately took on leadership positions in the National Organization for Women in King County and the Seattle League of Women Voters. After playing a key role in pushing the ERA through the legislature, she refocused her efforts on revising rape law.²⁷ In order to reach her goals, Griswold knew to go to the Washington State

²⁵ *Rape and the Law*, (Seattle: University of Washington, 1972) 1. “Speak Out on Rape” Attendee Pamphlet, 4.

²⁶ Loh, “Rape Reform: An Empirical Study,” 570.

²⁷ “Jacqueline Griswold Papers Finding Guide (Background),” *Featured Collections*, Washington State Historical Society, <http://digitum.washingtonhistory.org/cdm/ref/collection/faids/id/41> (accessed 16 Mar. 2015), 1-4.

Women's Council, a committee created by the governor in 1971 tasked with "considering appropriate questions pertaining to the rights and needs of women."²⁸ Griswold no doubt wanted the support of the Women's Council because the council's job was to recommend changes in the law to state agencies and to the governor. Gayle Barry, the attorney assigned to the Women's Council by the attorney general, remembers Jackie Griswold asking her for help with this demanding task.

Barry would see to it that Griswold's vision was realized. After earning a J.D. from the University of Washington in the early 1960s, a time when few women went to law school, Barry shared Griswold's goal of helping women achieve an equal status in society.²⁹ She worked tirelessly to help pass Washington's ERA, and when that was accomplished she moved on to help Griswold rewrite the rape statutes. Though it would consume much of their lives over the course of the next year, Barry, Griswold, and Pat Atkins, the chief criminal deputy prosecutor, were all heavily involved in the project. "We ended up a committee of three and started working," Griswold recounts, "We spent our time redrafting rape."³⁰ The trio began their work in 1974, and after much revision, the bill was presented as House Bill 208 to the 1975 state legislature.³¹

The changes House Bill 208 proposed sought to remove gender bias from rape law and from court procedures. This paper will now turn to analyze many of the alterations they suggested, beginning with the most drastic change, the creation of a three-degree statute. Many

²⁸ Kathleen Waugh, "Guide to the Records of the Washington State Women's Council 1971-1978," Office of the secretary of the State Division of Archives and Records Management, <http://www.washingtonhistory.org/files/library/Womenscouncilfindingaid.pdf>, 2006.

²⁹ "ERA Oral History Project," *Washington State Historical Society*, Washington State Historical Society, <http://www.washingtonhistory.org/research/whc/oralhistory/ERAOralHistory/> (accessed 16 Mar. 2015).

³⁰ Dilg, Janice. Interview with Gayle Barry. *Washington State Women's History Consortium Equal Rights Amendment Oral History Project*. Washington State Historical Society. August 26, 2008. Online PDF, 42.

³¹ *Ibid.*, 43.

people at the time, including Barry herself, believed that this revision would have the largest effect on the prosecution of rape. “It was very hard, with a one degree crime, to get convictions,”³² she explained. However, once the crime was divided into three degrees, she believed more defendants would actually be convicted. Many of the local law reviews that discussed the evolving rape statutes also put forward the idea that this would be the most significant change. The *Gonzaga Law Review* reported, “Because rape is a heinous crime for which a harsh penalty can be imposed, juries (and judges) are often hesitant to convict a defendant.”³³ And indeed, rape conviction rates in the 1970s were extremely low. Very few rape cases ever made it to trial, but the number of cases that ended in conviction is startlingly low. For instance, in 1972, of the 78 men arrested under suspicion of rape in Seattle, only 30 were actually charged for rape, and of them, only eight were convicted.³⁴

The low conviction rate in rape cases suggests that people were uncomfortable convicting defendants to serve such long penalties; it is likely they felt that the seriousness of the punishment did not fit the seriousness of the crime. While they may have deemed the penalties for rape as being appropriate for violent, stranger rape, when jury members were confronted with acquaintance rape cases, or cases with limited physical violence, the punishment for the crime no longer made sense.³⁵

Indeed, many feminist writers, including Estelle Freedman, maintain that convictions were difficult to obtain under a single-degree statute due to the perceived “normality” of the crime. These feminists argued that, because rape was seen as a biologically driven male tendency, juries were less likely to convict defendants in rape cases. If they knew that the

³² Ibid., 42.

³³ Tutt, “Washington’s Attempt to View Sexual Assault as More than a ‘Violation’ of the Moral Woman,” 154.

³⁴ *Forcible Rape in Seattle*, Seattle, Washington: Seattle Wash. Law and Justice Planning Office, 1974.

³⁵ Loh, “Rape Reform: An Empirical Study,” 550.

defendants would be forced to serve long prison sentences, jury members may have felt that it was better not to convict than to put a man in prison for extended periods of time for committing a biologically defensible crime. Therefore, if juries had the option to convict defendants on lesser counts of rape, it was thought rape convictions would become more numerous because the punishment would more closely mirror the severity of the crime in many cases. While this argument is speculative, there is evidence that supports the claim that Washingtonians viewed male sexual aggression as biologically normal in the early 1970s and that these attitudes towards rape and biological sexual expectations may help explain low rape conviction rates.

The booklet *Our Bodies, Our Selves*, which was circulated by the National Organization for Women in King County, directly addressed these assumptions about male and female sex roles. It explained that men are:

Allowed to masturbate...and be hot for a woman. Overt sexual initiative and aggression is encouraged... In the myth the male has carte blanche to take the unwilling woman. Under his charisma she will yield and love it. The man sets the stage and takes full responsibility for the sexual act and the woman succumbs.³⁶

During this period, feminists in Washington were worried about stereotypical male and female sexual roles; they were concerned that males were perceived as inherently sexual while women were characterized as being sexually passive. The booklet pointed out that many popular books, movies, and television shows reinforced these sexual identities. Feminists were worried about the dissemination of these ideas; they feared that these concepts linked what they perceived as normal sex to rape in an unacceptable way.³⁷ The fact that “normal sex” shared many properties with rape, including the initial nonconsent of the woman, upset feminists in the Anti-Rape movement.

³⁶ Nancy Hawley et al., *Our Bodies Our Selves: A Course by and for Women* (New England Free Press, Boston: 1971), 27.

³⁷ *Ibid.*, 26-29.

After rape was legally divided into a three-degree crime with lesser sentences for lesser degrees, conviction rates for rape increased. An empirical study done in Washington State in 1980 concluded that deferred and suspended jail sentences declined dramatically after the rape law reform as well; before the reform, 42% of jail sentences for rapists were deferred or suspended, whereas after the reform only 17% of sentences fell into this category.³⁸ The study attributed this success largely to the division of the rape statute into a three-degree statute that mandated varying prison sentences for each degree. “Courts are reflecting the public mood that rapists should be certain of conviction and confinement, but not necessarily of harsh imprisonment terms,”³⁹ the report concluded. In addition, the study revealed that rape convictions increased in the aftermath of the 1975 reform and that this increase was due largely to the fact that more accused rapists were actually being convicted for rape and not for other crimes such as assault and kidnapping.⁴⁰ This finding had several implications. First, it meant that the number of rape cases that made it to trial did not substantially increase by 1980; it only meant that those cases that did go to trial were more likely to end in rape convictions rather than convictions for other offenses. The 1980 report is clear that, “the overall conviction rate (i.e., rape plus other offenses) is constant.”⁴¹ Though the number of overall convictions did not increase as a result of the new law by 1980, jury members’ willingness to convict for rape under the new law is important to recognize. When the jury was given the tools to convict for second and third degree rape, they utilized them, expanding the legal concept of the crime. They were willing to consider certain instances as falling into the category of rape that they once did not. Before the reform, juries had consistently convicted defendants charged with rape of other, less

³⁸ Loh, “Rape Reform: An Empirical Study,” 599.

³⁹ Ibid.

⁴⁰ Ibid., 593-596.

⁴¹ Ibid., 593.

serious crimes, like assault. This is likely because they simply did not believe that the penalties for rape before 1975 matched the crime. Under the new law, they could reconcile their beliefs about the severity of the crime with the mandated sanctions.

Another significant alteration made to the rape statutes was the addition of what is known as a “rape shield law” to prevent defense counsels from asking the victim questions about her sexual history. The admission of character evidence was probably the most controversial aspect of Washington State rape law at the time. This shield law forbade defense counsels from asking questions about the woman’s sexual history when she took the stand in almost all cases. As mentioned earlier, before the reform defense counsels often had free range to ask about the woman’s past sexual encounters in order to reveal a pattern for promiscuity. They would then use this to either argue that she could not have been raped in the current instance, or that her character was so bad she must be lying and abusing the legal system. While the rape shield law of 1975 did not completely forbid evidence of past sexual encounters from reaching the record, it set up a procedure that made it enormously difficult for the defense to elicit such testimony. The law required that the defendant have an *in camera* hearing with the judge, meaning he and his counsel had to meet privately with the judge in order to determine whether or not the evidence was appropriate for the jury to hear. The evidence was inadmissible if the defendant was attempting to use it to impeach credibility. However, it could be used for the purpose of showing consent in very specific instances. And finally, even if the evidence was deemed relevant in determining consent, the judge still had to balance the probative and prejudicial value of the evidence.⁴² As with all evidence, if the prejudicial value substantially outweighed the evidence’s usefulness, then the judge would not allow it onto the record. This new procedure

⁴² Tutt, “Washington’s Attempt to View Sexual Assault as More than a ‘Violation’ of the Moral Woman – the Revision of the Rape Laws,” 167-169.

shifted the focus of the trial away from the victim's actions and onto the defendant's actions. An article published in the *Washington Law Review* addressed this shift, stating:

The symbolic value of the shift should not be minimized. The reform statutes announce society's interest in accurately identifying perpetrators of rape, not in reinforcing traditional assumptions regarding the appropriate behavior of the (virtuous) woman.⁴³

It is important to note that even before the redrafting there was some confusion in the legal system about whether or not to allow character evidence of the victim onto the record. Some judges allowed it only in certain instances, while other judges consistently allowed it. I mention this briefly to acknowledge that not every woman attempting to prosecute her rapist would have necessarily undergone such questioning. However, based on the vigilance with which anti-rape feminists attacked the law as well as local law review analyses of the rules of evidence in rape cases, this type of questioning appears to have been very common in rape cases. The *Washington Law Review* stated that evidence rules in rape trials were "among the most controverted and commented upon aspects of rape law."⁴⁴

When we examine both the evidence rules and the feminist resistance to their application in rape cases, we begin to uncover even more underlying assumptions about traditional female roles. Specifically, we begin to see how ideas about male property rights in women affected the creation and application of rape law. After considering the fact that women were essentially put on trial themselves when they attempted to prosecute their rapists, we must ask ourselves, "What was the law trying to protect?" It did not successfully protect the sexual self-determination of women, so what was its purpose? After the rape law revision, some legal commentators asserted that the old law was in place to protect male property rights in women through protecting

⁴³ Loh, *Rape Reform: An Empirical Study*, 557.

⁴⁴ *Ibid.*, 559.

chastity.⁴⁵ Because evidence rules encouraged the jury to consider the type of woman the victim was – to consider her sexual character – the evidence rules reinforced the idea that the woman’s virginity or non-virginity would help them determine whether or not she could be raped by a man. The evidence rules perpetuated the idea that only virgins could be raped by allowing the victim’s sexual history to be exploited at trial. The notion that rape law protects virginity rather than women brings us back to one of the rape myths identified at the “Speak Out on Rape” at the University of Washington: girls who respect societal moral values including virginity, do not get raped. By protecting the chastity of women, the law could protect monogamy, the traditional marriage relationship, and the patriarchal family.

While there was no considerable resistance to dividing the rape statute into a three-degree crime, the addition of a rape shield law was met with opposition. Barry remembers, “The hardest and most controversial [revisions] were the evidentiary issues.”⁴⁶ She mentioned that a three-statute crime would have been better for everybody; prosecutors would be able to convict more easily and defendants could plea bargain.⁴⁷ The bill, as first proposed to the senate, did not include the possibility of an *in camera* hearing to determine whether character evidence could be allowed in specific instances. Instead, it prohibited *all* character evidence that was used to prove consent or to besmirch the victim’s credibility. The bill did not pass until senators were reassured that there would be a designated method for allowing character evidence of the victim onto the record in at least some instances. Senators feared that, if the law passed with such a strict rape shield law in place, the defendant’s Sixth Amendment rights to a fair trial and to confront his accuser would be trampled. During the Senate’s discussion of the amendment,

⁴⁵ Tutt, “Washington’s Attempt to View Sexual Assault as More than a ‘Violation’ of the Moral Woman – the Revision of the Rape Laws,” 152.

⁴⁶ Dilg, Interview with Gayle Barry, 45.

⁴⁷ Ibid.

Senator Peter Frances declared, “This committee amendment is probably the key to whether or not this bill is going to pass and also as to whether or not this bill is going to do any good.”⁴⁸

Some lawyers were also concerned that the new law prevented them from impeaching witnesses appropriately, which they deemed they had the right to do. They argued that they should be allowed to use the victim’s past to assess her credibility at trial because they were allowed to impeach witness credibility in other types of trials. However, as was pointed out in the case *State v. Hudlow*, their argument was flawed; in order to impeach a witness in other types of trials, attorneys could elicit a general character for *untrustworthiness*. They could show that the witness had lied in the past and therefore would be likely to lie on the stand. The *Hudlow* decision aptly stated that consensual sex would not have an effect on a witness’s likeliness to tell the truth.⁴⁹ Concerns about the defendant’s Sixth Amendment rights are central to the discussion of the rape shield statute today.

Another important addition to Washington’s rape code deals with the issue of consent and resistance. Lawmakers decided that a new term would be used to replace the notion of physical resistance: “forcible compulsion.” According to the 1975 law, “forcible compulsion” is:

Physical force which overcomes resistance or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.⁵⁰

The rewording of the statute in this instance clearly attempts to focus the elements of the crime on the actions of the defendant rather than on the actions of the victim. Recall that before the rape law redrafting, women had to pass the “consent test” to get a conviction, meaning they

⁴⁸ *Revisions on Rape 1975*: Hearing on H.B. 208, Before the Judiciary Committee, (Statement of Peter Frances, State Senator) online, Washington State Archives – Digital Archives, AR11-11-5-004108.

⁴⁹ *The State of Washington, Petitioner, v. Allen Dale Hudlow, Respondent. The State of Washington, Petitioner, v. Douglas B. Harper, Respondent*, 99 Wn.2d 1; 659 P2d 514 (Wash. 1983) Lexis 1414 No. 48351-5.

⁵⁰ 1975 Session Laws of the State of Washington, Chpt. 14, §1(5).

either had to physically resist or prove that they did not resist because they were under threat of “great bodily harm” or death.

While it would be encouraging to say that this shift in wording reveals a shift in the way society thought about the crime of rape, the new wording unfortunately did very little to redefine rape. Some attorneys in the late 1970s attempted to argue that the language of “forcible compulsion” removed the issue of nonconsent from the crime, thereby completely changing the nature of the crime.⁵¹ However, “forcible compulsion” still focuses primarily on the actions of the victim. In fact, the two elements of the consent test used prior to the adoption of the new law are what make up the definition of “forcible compulsion.” Either the violence the assailant uses overcomes the victim’s resistance, or the victim is too frightened to resist. One 1975 issue of the *Gonzaga Law Review* correctly pointed out that, in a roundabout way, the consent test was codified again under rape law in Washington.⁵²

The fact that the issue of forcible compulsion still focused on the victim’s resistance or lack thereof illustrates several assumptions that underpin the application of the rape law. First and foremost, this aspect of the law highlights the societal belief that women are likely to deceive and that they often seek revenge against men they dislike or men who have jilted them. The idea that women have a natural propensity to lie helps to explain why prosecutors had to prove resistance if they hoped to get a conviction. Clear signs of resistance or obvious signs of a serious threat to the victim’s life would be invaluable in any forcible rape trial because the woman’s word was instantly doubted. The prosecuting attorney for Snohomish County articulated this view perfectly when the *Seattle Post Intelligencer* interviewed him in 1971:

⁵¹ Loh, “Rape Reform: An Empirical Study,” 551.

⁵² Tutt, “Washington’s Attempt to View Sexual Assault as More than a ‘Violation’ of the Moral Woman – the Revision of the Rape Laws,” 153.

It's very easy for a girl not to tell the truth. If a girl gets pregnant and there's a question of support, charging rape is a method of getting support...or sometimes a woman who's been jilted will charge rape to get back at her boyfriend...If she's under knife point, she doesn't have to resist, but a woman who's an adult and sexually knowledgeable knows how to shut a guy off. There are methods – a swift kick or laughter for example.⁵³

Here, the prosecutor explains that women are more likely than men to deceive, commit perjury, and unjustly use the law to their advantage. They are highly emotional, manipulative, and seek to entrap men. A woman who really wanted to protect her chastity would have no trouble doing so, as long as no deadly weapon was involved.

Feminists pushing for rape law reform were unsuccessful in one other area: adding marital rape to the rape statute. Originally, those who drafted the bill sought to include a provision that would allow women to prosecute their husbands for rape provided that they had attained a legal separation. However even after the redrafting, marriage was still a legal bar for rape prosecution, meaning raping one's wife continued to be an impossible crime. The struggle and ultimate failure to include even a modest marital rape statute in Washington's rape law suggests that a significant number of people still believed that a woman should not be able to refuse sex from her husband, even if they were legally separated. Barry, the legal counsel for the Washington State Women's Council who helped redraft the law, explained why spousal rape was not included in the new law. When talking about the possibility of including spousal rape in the bill, she recalls being told by one legislator, "I couldn't agree with you more, but I have constituents who feel they have an absolute right to their wives' bodies."⁵⁴ In a senate session in which the bill was discussed, another senator agreed that a marital rape provision should not be added, stating, "To the extent that spouses need protection from each other, the assault statutes

⁵³ Robert Schillberg, statement made to *Seattle Post Intelligencer* May 31, 1971, quoted in *Rape and the Law*, Seattle: University of Washington, 1972. "Speak Out on Rape" Attendee Pamphlet, 4.

⁵⁴ Dilg, 43.

and the other statutes including court restraining orders will have to be relied upon.”⁵⁵ The senator’s statement illuminates the traditional conservative idea that a man does in fact have a right to his wife’s body. While he cannot harm her, she does not have a right to refuse sexual relations with him. The senator’s comments reveal concerns for maintaining the traditional, patriarchal family power structure. It was not until the proposed marital rape portion was removed that the bill passed.

The debate around the issue of marital rape continued until 1983, when the state legislature amended the statute to include the definition of marital rape first proposed in 1975.⁵⁶ We can learn much more about the reasons behind the senate’s refusal to make spousal rape illegal in 1975 when we consider this continued debate. The concerns that lawyers and senators had in 1975 likely mirrored concerns they had just a couple years later, when the issue came up again. The purpose of focusing on the later (1983) debate is that the later debate was much more pointed; it focused solely on the issue of marital rape and not on a complete overhaul of Washington’s rape law. In 1983, the arguments against the proposed change were highly publicized and much clearer than they were in 1975, just a couple years later.

First, many lawmakers were concerned that giving the woman the power to charge her husband with rape would destroy the family structure. If a woman were given the right to refuse sex to her husband and to charge him with raping her if he did not respect her refusal, then she would gain a significant amount of power in her spousal relationship. This would flip the patriarchal family unit on its head. Others worried that women would take advantage of this law by lying about rape in order to manipulate their husbands.⁵⁷ Additionally, many prosecutors

⁵⁵ *Revisions on Rape 1975*: Hearing on H.B. 208, Before the Judiciary Committee, (Statement of Peter Frances, State Senator) online, Washington State Archives – Digital Archives, AR11-11-5-004108.

⁵⁶ Helen Warner, “Proponents Push for Bill on Wife Rape,” *Seattle Times*, Feb. 19, 1983, A13.

⁵⁷ *Ibid.*, A13.

were concerned about the financial burden this law would put on their offices. During a 1983 senate hearing on the proposed alteration to the rape statute, the representative from the Washington Association of Prosecuting Attorneys said that the Association had substantial reservations about the bill.⁵⁸ The Association knew that marital rape would be especially difficult to prove and that occurrences of it would be frequent. He worried that Washington courts would be overwhelmed with spousal rape cases if the bill were to pass. Clearly, protecting married women's sexual self-determination was not a priority for Prosecuting Attorney's Association. Finally, some legislators argued that the purpose of the law was to promote the family, not give spouses the means to prosecute each other. In 1975, legislators did not even want a wife who was legally separated from her husband to be able to charge him with rape. This would only encourage the dissolution of the marriage in addition to giving her a substantial amount of power in the relationship.⁵⁹ After reflecting on the legislators' concerns and actions, it appears that they were willing to put the sexual determination and freedom of women at risk in order to protect the social order and the patriarchal family structure.

As I have already mentioned, the most serious objections raised to the proposed rape law revisions were to the strict character evidence rules and to the inclusion of spousal rape. However, after a procedure was added to allow for character evidence of the victim in some cases and spousal rape was removed, the bill passed. In fact, it received a unanimous vote in both the house and the senate. The discussion on the senate floor about the proposed bill indicates that senators voting on the bill understood its importance. Multiple senators expressed concerns about the destruction of the victim's character on the stand as well as the low reporting rates. During a 1975 hearing on the bill, Senator Frances noted that the bill probably would not

⁵⁸ *Ibid.*, A13.

⁵⁹ Tutt, "Washington's Attempt to View Sexual Assault as More than a 'Violation' of the Moral Woman – the Revision of the Rape Laws," 150.

solve the problem, but it would certainly be a step in the right direction.⁶⁰ There is little evidence to suggest that the public was opposed to the bill either. Though not all agreed with the feminist ideology behind many of the reforms, there was no serious opposition to the rape law redrafting as a whole prior to or during 1975.

Unfortunately, the fact that no major opposition formed to stop the rape law revision does not mean that the new law was upheld in all instances. We must turn to Washington State court cases tried after 1975 in order to evaluate the effectiveness of the new statutes. This paper will now focus on three cases in particular: *State v. Geer*, *State v. Hudlow*, and *State v. Gonzalez*. All three of these cases were appealed to higher courts, which ultimately upheld the new law. These cases are helpful when determining how people responded to the new law. The way that defendants, attorneys, and judges interacted with the new law can help us understand their approval or disapproval of the reform. Additionally, by evaluating these examples as case studies, we can better see how the new law was applied and whether or not it removed a substantial amount of gender bias from rape trials.

The William Geer case is particularly interesting because it was first tried in 1974, before the rape statute revision. However, it was appealed in 1975, making it one of the first appellate cases to which the new rape statutes was applied. According to the accuser, Geer broke into her home in the evening, held a knife to her head, and raped her. She told the trial court she did not resist because she feared for her life. According to Geer, however, the sex the two of them had was consensual, and she had falsely accused him.⁶¹

⁶⁰ *Revisions on Rape 1975*: Hearing on H.B. 208, Before the Judiciary Committee, (Statement of Peter Frances, State Senator).

⁶¹ *The State of Washington, Respondent, v. William Dale Geer, Appellant*, 13 Wn. App. 71; 533 P2d 389 (Wash. App. 1975) Lexis 1305 No. 1447-2.

As one might expect, the defendant appealed, believing he would be able to use the old rape statute to his advantage. This is apparent due to the grounds upon which he appealed. First, he declared that he deserved a mistrial because the court had wrongfully barred the victim's past sexual history from being questioned.⁶² This history had nothing to do with Geer. In fact, the testimony he was hoping to elicit was that the accuser had lived with a man she was not married to and had several illegitimate children from different fathers. Geer and his attorney believed that the jury needed to hear this information if he were to receive a fair trial. It is unclear how this testimony would have had any legitimate bearing on whether or not the prosecutrix was raped in this case. It is also difficult to see how this evidence could have reasonably affected her trustworthiness, making it probable that she had falsely accused him. All the evidence could have reasonably done was unfairly prejudice the jury against the victim. Therefore, it is likely that the defense wanted to admit the evidence so that the jury would understand that this woman was not a virgin, believe that she was promiscuous, and therefore conclude that she was generally "bad." It is difficult to see any other cogent reason they would seek to elicit this testimony, especially considering the fact that the defendant had threatened the victim with a knife. Even if one believed that prior consensual sex would make a woman more likely to consent to sex in the future, this argument would be completely irrelevant if the woman was threatened with a deadly weapon.

Another reason the defendant believed he deserved a mistrial had to do with the testimony of the doctor that examined the victim.⁶³ Defense counsel asked the doctor whether the victim had any significant injuries, meaning counsel wanted the doctor to tell the jury that the victim had no broken bones, bruising, vaginal tearing, or any other injuries that would have

⁶² *Geer*, 13 Wn. App. 73, Lexis 1305.

⁶³ *Ibid.*

suggested a physical struggle had occurred. Based on this evidence alone, counsel then wanted the doctor to conclude that the defendant and the victim had “ordinary, normal, sexual intercourse.”⁶⁴ Fortunately, the court would not allow the doctor to form this opinion. Here, the defendant appeared to believe it was relevant that he had not injured the victim and that there were no signs of resistance. Perhaps he hoped to persuade the jury through this testimony that, if there was no resistance, there could be no rape. The defense again attempted to shift the focus of the case back to the victim’s actions. They tried to take advantage of the myth that only women who fight back are raped and that all women could fight off rapists if they really wanted to do so.

In the case of *State v. Geer*, the appellate court denied the defendant a new trial and explained how the reformed rape statute applied to the case. Firstly, it determined that due to the rape shield law, the victim’s sexual history could not be revealed in this case. The court was careful to say, however, that character evidence of the victim should not always be excluded; sometimes the victim’s past would be relevant. “If a witness’s reputation for chastity is so bad that it has in some way affected his or her reputation for truth and veracity, then a direct question can be asked as to reputation for truth and veracity.”⁶⁵ This appellate court was strict in the application of the new rape shield law by insisting that the questions must be formatted in such a way as to attack only the witness’s propensity for truthfulness, not her propensity for promiscuous behavior. The court’s analysis of the rape shield law’s purpose not only explains how the shield law applies to this particular case, but it also illuminates the problems in rape law application that the law was designed to remedy. The judges explain how questioning the victim about her sex life posed problems for rape prosecution:

⁶⁴ Ibid.

⁶⁵ *Geer*, 13 Wn. App. 74, Lexis 1305.

Any relevancy that may exist is outweighed by its inflammatory effect. Its use could easily discourage prosecution for rape; it is distracting and it may so prejudice the jury that it would acquit even in the face of overwhelming evidence of guilt.⁶⁶

Furthermore, the court explained that it was inappropriate for the defendant to attempt to convince the jury that, because there was no evidence of a violent struggle or rape, the rape did not occur. In the past, questions such as these had been permitted. However, the court determined in this case that the question bore too heavily on the issue of consent.⁶⁷

In the Geer case, the appellate court embraced the reformed rape law and showed a clear understanding as to why the law had been altered. They did not simply recite the new law. They also expounded upon the reasoning behind the reforms; they explained problems faced by victims seeking to prosecute their rapists before 1975. Obviously, the defendant and his counsel disagreed with the court's application of the new law. The defendant and his attorney (who presumably would have known about the new rape statute) still attempted to use old rape myths perpetuated by the law to their advantage.

While it may have been clear to the court in the Geer case that the victim's sexual history should not be admitted, the 1983 case *State v. Hudlow* illustrates that different courts interpreted the rape statutes in a number of ways. Because the rape shield law gave the court discretion to determine if the past instances of sexual conduct or the witness's reputation for chastity were relevant and whether that relevance was substantially outweighed by prejudicial value, courts often had to decide what types of information would unfairly bias the jury. They then had to weigh this potential for unfair bias with the defendant's Sixth Amendment right to pursue a defense. Needless to say, this admissibility test was subjective. *State v. Hudlow*, for instance, reveals that the new rape shield law was not consistently upheld.

⁶⁶ Ibid.

⁶⁷ *Geer*, 13 Wn. App. 75, Lexis 1305.

In *State v. Hudlow*, two men were convicted of raping two women.⁶⁸ The accusers recalled Allen Hudlow and Douglas Harper picking them up on the side of the road. They were hitchhiking in Bremerton, and decided to accept a ride from the two men. The women, whose names were changed in the courts' decision to Tammy Smith and Ellen Strong in order to protect their identities, claimed that Hudlow threatened them with a knife. They remember being forced to have sex with the two men and perform oral sex on both men. Immediately after they were released, they went to the police. The police stated that the women were frightened and that they immediately took them to the hospital. Of course, Hudlow and Douglas attacked Strong and Smith's story; the men stated that all four of them had been spending time together before deciding to drive to a secluded area where they then had consensual sex. Hudlow asserted that one of the women had even been giving the directions to the secluded area and that they were all under the influence of alcohol and marijuana.⁶⁹

Apart from the accusers' testimony that they had been raped, there was little evidence that rape had occurred. Police never found the knife allegedly used in the rape. Additionally, because they had been threatened with a deadly weapon, the women claimed they were too afraid to resist the attack. This meant that there were no obvious physical signs of assault or rape, save for a small bruise on Strong's stomach. Without convincing physical evidence, it was the accusers' story versus the defendants' story. This is likely why Hudlow sought to use character evidence of the victims in order to persuade the jury to accept his version of the events.

The character evidence Hudlow and his attorney attempted to use would have devastated the accusers' case. The evidence they sought to reveal to the jury came from the testimony of a male sailor named Harry Proctor. Mr. Proctor was prepared to take the stand and impugn the

⁶⁸ The State of Washington, Petitioner, v. Allen Dale Hudlow, Respondent. The State of Washington, Petitioner, v. Douglas B. Harper, Respondent, 99 Wn.2d 1; 659 P2d 514 (Wash. 1983) Lexis 1414 No. 48351-5.

⁶⁹ *Hudlow*, 659 P2d 514 at 516-517, Lexis 1414.

character of both accusing witnesses. He stated that he had sex with both of them consistently, and that he knew many sailors who had had sexual relations with these women. He claimed that the women had been to orgies, and even that they sometimes engaged in acts of prostitution.⁷⁰ Ultimately, the trial court ruled that this testimony was relevant in determining whether or not the women consented, but its probative value was so outweighed by its prejudicial value that the jury could not hear it. Hudlow appealed the trial court's decision, and the decision was overturned in part because the appeals court felt that Proctor should have been able to testify. The appeals court asserted that Hudlow did not receive a fair trial because he was not able to explain to the jury that these women were unchaste and immoral. The appeals court believed that the character evidence was relevant even though the women had never had sex with Hudlow and Harper in the past. Again, it is difficult to locate a coherent argument for allowing the character evidence onto the record except for the sexist claim that unchaste women are either likely to lie about rape, or that they deserve what they get. Regardless, because the defendant was unable to delve into the sex lives of these women, the appellate court declared he was denied his Sixth Amendment Right to a fair trial. The case ended up going all the way to the State Supreme Court on the issue of character evidence.

In its analysis of the case at hand, the Washington State Supreme Court carefully analyzed the rape shield law. After considering the new law's function and purpose, the Supreme Court overturned the appeals court decision and concluded that the trial court had the right to exclude the character evidence of the victims. The court stated that, while the character evidence did pass the relevancy test – meaning it did tend to make it more likely that the women may have consented in the given case – the relevance was so minimal and the prejudicial value was so

⁷⁰ *Hudlow*, 659 P2d 514 at 517-19, Lexis 1414.

extreme that it would hinder the fact-finding process if admitted. It would overshadow the facts of the case because the jury members would be so biased against the women. The court explained the thought process these jurors would likely go through if they heard the evidence:

Major Premise: women who possess the character trait of unchastity consent more readily than chaste women to sexual intercourse. Minor Premise: The complainant's reputation establishes that she possesses the character trait of unchastity. Conclusion: The complainant's character trait of unchastity makes her consent more likely than if she lacked this trait.⁷¹

In their decision, the justices directly pointed out the flaw in the argument that having consensual sex affects woman's ability to tell the truth. The decision also aptly commented on the double standard created when this sort of questioning is allowed for the victim and not for the defendant. They openly question why having multiple sexual partners would affect a woman's truthfulness but not a man's.

The court also asserted that Hudlow was not denied his right to confront his accuser and have a fair trial. The judges argued that, since the relevance of the character evidence was minimal, it could not have significantly affected the outcome of Hudlow's trial. Additionally, the court concluded that the defendant's Sixth Amendment rights have certain limits, and that the purpose of the rape shield law was so important that it could trump the defendant's 6th amendment rights in most rape cases. "The statute is designed to encourage rape victims to step forward and prosecute these crimes where conviction rates historically have been very low,"⁷² the court proclaimed.

The courts' analysis in *State v. Hudlow* reflects its desire not only to apply the new laws in an appropriate manner, but also to reiterate the importance of the new laws in addressing prior injustices. The Hudlow case clearly exhibits a shift in thinking within the legal system. The

⁷¹ *Hudlow*, 659 P2d 514 at end footnote for 517, Lexis 1414.

⁷² *Hudlow*, 659 P2d 514 at end footnote for 523, Lexis 1414.

State Supreme Court affirmed that the focus of rape trials should be on the defendant's actions rather than the accuser's willingness to conform to societal expectations. Nevertheless, the Hudlow decision also reasserted that the rape shield state was subjective. Judges still had to balance the Sixth Amendment rights of the defendant with the undue prejudice certain character evidence might create. In the end, the decision to allow character evidence would come down to how probative the judge believed a woman's past sexual encounters to be. This means that the admissibility of character evidence would – at least to some extent – rest on the judge's attitudes toward sex and gender roles.

In the 1989 case *State v. Gonzalez*, the judge determined that the accuser's past sexual encounters were relevant. When defense counsel asked her to list every man she had ever slept with during pre-trial, the victim stated she did not want to answer the question. When she refused to answer, the judge demanded that she be cooperative and give him a list of every man she had slept with in her life. While this occurred during pre-trial, meaning no jury was present to hear the information, the fact that the judge believed this line of questioning would be beneficial in the fact-finding process reveals that the judge himself likely assumed some rape myths to be true. It is hard to see why the judge would force the victim to answer defense counsel's question unless he believed that a woman would be more likely to consent in the incident in question if she had been sexually active in the past. The State Supreme Court later ruled that the rape shield statute did apply to pretrial.⁷³ However, the case illustrates that, as late 1989, judges still did not apply the reformed rape statutes in a uniform manner. Judges' gender biases could still play a decisive role in the outcome of rape cases.

⁷³ The State of Washington, Respondent, v. Jose Manuel Gonzales, Appellant, 18 Wn. App. 701; 571 P.2d 950 (Wash. App. 1977) Lexis 2052 No. 5217-1.

This was such a concern in the late 1980s, that the Washington State Legislature and the Washington State Supreme Court deemed it necessary to create a special task force to examine gender bias in the courts.⁷⁴ The Washington State Task Force on Gender and Justice in the Courts completed their final report in 1989. Though this report did not focus primarily on rape, it conveyed several strong conclusions about the ways in which rape myths continued to affect rape trials, despite the 1975 rape statute revision. The task force concluded that:

While improvements have been made in the handling of rape cases in the last 15 years, problems still exist. Rape victims are still afraid to report to the criminal justice system because they fear they will be disbelieved or viewed as responsible for their own victimization. These fears are supported both by stated attitudes of judges and by the types of questioning victims undergo at the hands of police and attorneys.⁷⁵

The task force based this conclusion on opinion polls and surveys of judges, sexual assault service providers, and attorneys who had worked on rape cases. The results of their study overwhelmingly support their conclusion. Their results clearly reveal how many rape myths still negatively affected rape trial procedures and outcomes in 1989. It appears that, even fifteen years after the 1975 rape statute revision, victims' actions and sexual histories were still focal points of many trials. Thirty-four percent of judges indicated that victims were "sometimes," "frequently," "usually," or "always" questioned about their past sexual encounters during pretrial proceedings.⁷⁶ Keep in mind that this study was conducted after the Supreme Court ruled in *State v. Gonzalez* that such questioning violated the rape shield statute. This suggests that judges were still likely to believe rape myths about promiscuity and that these attitudes caused them to ignore the new law as well as the Supreme Court's ruling. Additionally, thirty-seven percent of rape service providers indicated that character evidence questioning still occurred *at trial* in

⁷⁴ Joseph Coleman, *Final Report of the Washington State Task Force on Gender and Justice in the Courts*, (Olympia, Washington: Office of the Administrator for the Courts) 1989, xiii.

⁷⁵ *Ibid.*, 40.

⁷⁶ *Ibid.*, 42.

1989.⁷⁷ Again, this indicates that many judges blatantly disregarded the new law and believed that the sexual history of the victim was still important to consider when concluding whether she had been raped.

The results of the study also revealed that a significant number of judges believed that women could precipitate their own rapes. They could do this by the way they dressed and behaved. If they were dating the defendant, hitchhiking, flirting, or wearing mini-skirts, they were likely to provoke men. This belief revealed certain stereotypes about masculinity and the nature of rape. As I mentioned earlier, men were believed to be biologically sexually aggressive while women were believed to be sexually passive. Men were often thought to be incapable of controlling their desires when confronted with women they considered promiscuous. Due to sexual stereotypes about the very nature of men and women, rape was an understandable crime. Furthermore, because men were simply responding to strong natural desires, women needed to make sure not to do anything to provoke those natural desires if they wanted to avoid rape. Some judges even sympathized with male defendants, believing that women should take more responsibility for their behavior. These judges tended to give lenient sentences. After sentencing a defendant in a particular acquaintance rape case, one judge told both attorneys that the woman “had it coming to her and deserved assault because she met the defendant in a bar.”⁷⁸ The defendant received a light sentence. This judge was not alone in believing that victims should sometimes be blamed for their own rapes. Twenty-four percent of judges polled agreed that victims “sometimes” or “frequently” cause their own rapes.⁷⁹ This appears to have been especially true in acquaintance rape; there was significant evidence to show that judges and juries took acquaintance rape less seriously than stranger rape. This indicates that they tended to

⁷⁷ Ibid., 41-42.

⁷⁸ Ibid.

⁷⁹ Ibid., 40.

believe the victim would have a reason to be dishonest and accuse a man she knew of raping her as a form of revenge. The notion that a woman is likely to manipulate the criminal justice system in order to spite a man echoes the myth that women are likely to lie about being raped and therefore should not be trusted when they say they are raped.

The most prominent concern conveyed in the task force's report was that judges and juries, regardless of their gender composition, believed men who took the stand were more reliable than women who did the same. Attorneys who tried rape cases consistently complained about this issue in the surveys they were given. One attorney filled in the optional comment section, frustratingly asserting, "Rape victims...are viewed far too harshly because of their gender. If they are upset, they are 'vindictive and catty.' If they aren't upset, they are lying."⁸⁰ Another attorney noted that male judges "have been very hesitant or reluctant to believe female victims."⁸¹ Defense attorneys took advantage of the general disbelief of female witnesses by indicating to the jury that there are many reasons a woman might wrongfully accuse a man of rape. One prosecutor explained that he once heard a defense attorney argue in his closing statement, "Hell hath no fury like a woman scorned,"⁸² in order to prove the woman consented. The attorney clearly wanted to play on sexist cultural ideas about the behavior of women in his closing argument. He wanted to invoke sexist stereotypes by portraying all women as emotional, malicious manipulators when crossed in love. This would make the prosecutrix in the particular case ultimately unreliable. It appears that the trial tactics that the new law was designed to prohibit were still in wide use even fifteen years after the reform.

Another way we can glean some insight into society's response to the new rape statute is by evaluating the public's attitude towards the Washington feminist movement more generally

⁸⁰ Ibid. 39-40.

⁸¹ Ibid., 40.

⁸² Ibid.

during the rape law revision. In 1974, the year that the Washington State Women's Council promoted the redrafting, the state legislature sought to dissolve the Women's Council. A coalition of more than ten organizations, including the National Organization for Women, formed to save the council. The speed with which this coalition was able to come together and successfully block the Women's Council's dissolution reveals that there was a significant amount of support for the council's actions. We cannot directly attribute this general support to an unrestricted support of the 1975 rape statute revision. However, if much of the public had been strongly opposed to the work the Council was in the process of completing, it is unlikely the Council would have received enough popular support to keep operating.

Unfortunately, after the rape statutes were revised, resistance to the Women's Council grew. While there was no referendum on the rape statutes themselves, there was a referendum on the Women's Council. Barry, the assistant attorney general who helped the council rewrite the laws, recounts how Referendum 20 challenged the existence of the Women's Council in 1977.⁸³ Barry remembers being told about a particularly interesting conversation her friend overheard; she believes this conversation highlights the reason many decided to vote against the council. "I told my wife to vote against the council," one man said to his friend, "Until they get a men's council, I don't want any women's council."⁸⁴ The way Barry understood it, people wanted to dissolve the Women's Council largely because they did not believe women needed any special protections because they were not technically a minority. She comments that this sort of discussion came up often, and she found herself having to explain that, regardless of the fact that women were not technically a minority, they should still be treated as such because they were an oppressed group. The fact that this argument was frequently considered in the discussion of

⁸³ Dilg, Interview with Gayle Barry, 45.

⁸⁴ Dilg, Interview with Gayle Barry, 46.

Referendum 20 suggests that many people believed the changes the Women's Council made to the law were unnecessary. We can certainly infer that the public did not want the council continuing to change the law. Even though we cannot apply the referendum specifically to Washington's rape law redrafting, it appears that the public was generally unsupportive of the Women's Council backing any further protective and/or equal rights legislation.

Though the women's movement cannot take sole credit for initiating the 1975 rape law revision, it played an invaluable role in creating the new law. Feminists in the Anti-Rape Movement sought to point out and discard the gender-biased statutes and trial procedures that disempowered women in the courtroom. These laws, many of which were founded upon rape myths and patriarchal values, reinforced sexist attitudes towards women while simultaneously discouraging women from reporting sexual violence. In order to bring about change, feminists began to point out the sexist assumptions that underpinned the law. As they began to speak out about their own experiences with rape, more people began to recognize that the rape statutes did not directly address the real problem rape posed. The laws and trial procedures were not designed to protect women against some of the most common types of rape; instead, they put forward a definition of rape that was founded largely on rape myths.

The relationship between public opinion and the 1975 rape law reform is difficult to assess. While it may be encouraging to say that the 1975 statute indicates a progressive shift in the way society thought about rape, unfortunately it is not so simple. Even in 1989, those involved in rape trials agreed that the new law was not always applied correctly. In many cases, rape myths and sexist attitudes still permeated courtrooms, leading to outcomes inconsistent with the new law. This suggests that a change in law was not enough to fully combat rape myths and sexist societal attitudes. Even though the laws had changed to reflect new, feminist concepts of

rape, common sex and gender stereotypes prohibited the new law from being as effective as many feminists desired it to be. Furthermore, the public rejection of the Washington State Women's Council in 1977 indicates that there was either a public disapproval of the council's work, or that the public never fully grasped the importance of the council's achievements. After considering the general public's reaction to the Women's Council, post-1975 Washington State court cases, and the opinions of attorneys, judges, and caseworkers involved in rape trials after 1975, it seems that the revised law could not successfully remedy all of the problems Anti-Rape reformers had intended it to address. Unfortunately, rape myths and gender stereotypes continued to undermine rape victims' cases in Washington's courts well after the rape law revision.

Works Cited

- Abused Deaf Women's Advocacy Services, Center for the Prevention of Sexual and Domestic Violence, King County Sexual Assault Resource Center, Seattle Rape Relief, Sexual Assault Center (1989). *Sexual Assault: We Still Have a Problem: Existing Services and Future Needs* (Harborview, Seattle).
- Bevacqua, Maria. *Rape On the Public Agenda*. Northeastern University Press, 2000.
- Brownmiller, Susan. "A Question of Race." In *Against Our Will: Men, Women and Rape*. New York: Simon and Schuster, 1975.
- Coleman, Joseph. *Final Report of the Washington State Task Force on Gender and Justice in the Courts*. Olympia, Washington: Office of the Administrator for the Courts, 1989.
- Dilg, Janice. Interview with Gayle Barry. *Washington State Women's History Consortium Equal Rights Amendment Oral History Project*. Washington State Historical Society. August 26, 2008. Accessed December 4, 2014 Online.
- "ERA Oral History Project." Washington State Historical Society. Online. Accessed March 16, 2015.
<http://www.washingtonhistory.org/research/whc/oralhistory/ERAOralHistory/>.
- Forcible Rape in Seattle*. Seattle, Washington: Seattle Wash. Law and Justice Planning Office, 1974.
- Gerhard, Jane F. *Desiring Revolution Second-wave Feminism and the Rewriting of American Sexual Thought, 1920 to 1982*. New York: Columbia University Press, 2001.
- Griffin, Susan. "Rape: The All American Crime." *Ramparts* (September 1971). Reprinted in *Forcible Rape: The Crime, the Victim and the Offender*. Columbia University Press, New York 1984.

Hawley, Nancy, Toni Randall, Abby Schwartz, Jane DeLong, Ginger Goldner, Nancy London...and Lucy Candib. *Our Bodies Our Selves: A Course by and for Women*. Boston Women's Health Course Collective. New England Free Press, Boston. 1971.

"Jacqueline Griswold Papers Finding Aid." Washington State Historical Society Featured Collections. Accessed March 16, 2015.

<http://digitum.washingtonhistory.org/cdm/ref/collection/faids/id/41>.

Knight, Mavis. "Book Review: *Against Our Will*." *Pandora: A Washington Women's News Journal*, April 1976.

LeGrand, Camille. "Rape and Rape Laws: Sexism in Society and Law." *California Law Review* vol. 61 (May 1973). Reprinted in *Forcible Rape: The Crime, the Victim and the Offender*. Columbia University Press, New York 1984, 67-86.

Loh, Wallace D. "Rape Reform: An Empirical Study." *Washington Law Review* 55 (1980): 543-653. Accessed March 16, 2015. <http://heinonline.org>.

Revisions on Rape 1975: Hearing on H.B. 208, Before the Judiciary Committee. Statement of Peter Frances, State Senator. Online. Washington State Archives – Digital Archives, AR11-11-5-004108.

Session Laws of the State of Washington, Chpt. 14, §1(5). [1975] (1st Ex. Sess.) 172.

The State of Washington, Petitioner, v. Allen Dale Hudlow, Respondent. The State of Washington, Petitioner, v. Douglas B. Harper, Respondent, 99 Wn.2d 1; 659 P2d 514 (Wash. 1983) Lexis 1414 No. 48351-5.

The State of Washington, Respondent, v. Jose Manuel Gonzales, Appellant, 18 Wn. App. 701; 571 P.2d 950 (Wash. App. 1977) Lexis 2052 No. 5217-1.

The State of Washington, Respondent, v. William Dale Geer, Appellant, 13 Wn. App. 71; 533

P2d 389 (Wash. App. 1975) Lexis 1305 No. 1447-2.

Tutt, Helen Glenn. "Washington's Attempt to View Sexual Assault as More than a 'Violation' of the Moral Woman – Revisions of the Rape Laws." *Gonzaga Law Review* 11 (1975): 145-177. Accessed March 16, 2015. <http://heinonline.org>.

University of Washington YWCA and the ASUW Women's Commission, *Rape and the Law*, (Seattle: University of Washington, 1972). "Speak Out on Rape" Attendee Pamphlet.

Vanbrunckhorst, Erin. "Rape Stories Spark Discussion." *Pandora: A Washington Women's News Journal*, October 30, 1973.

Warner, Helen. "Proponents Push for Bill on Wife Rape." *Seattle Times*, Feb. 19, 1983. A13.

Warshaw, Robin. *I Never Called It Rape: The Ms. Report on Recognizing, Fighting, and Surviving Date Acquaintance Rape*. New York: HarperPerennial, 1988.

Washington Revised Code ch. 9.79 (Supp.1975) (originally enacted as ch. 14, [1975] Wash. Sess. Laws (1st Ex. Sess.) 172).

Washington State Task Force on Gender and Justice in the Courts. *Washington State Task Force on Gender and Justice in the Courts Final Report*. Olympia, Washington: Office of the Administrator for the Courts, 1989.

Waugh, Kathleen. "Guide to the Records of the Washington State Women's Council 1971-1978." Office of the secretary of the State Division of Archives and Records Management. Online. <http://www.washingtonhistory.org/files/library/Womenscouncilfindingaid.pdf>, 2006.

