

Precedent, Protest and Politics: Changes in the Prosecution of Rape in England, 1810-1845

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Introduction: Remnants of the Past

On March 21, 1821, five men entered a pub in Durham, England for several quarts of ale and a steak supper.¹ As the night progressed, the men became boisterous – it was not long before a fight broke out. Mr. Dinning, the owner of the pub, attempted to settle the quarrel and sent his wife to ask the men to pay for their meal. Most of the group drunkenly mocked the woman, filling the room with obscenities.

The argument escalated until one of the men spotted a young girl in the corner of the pub. He ordered the others to stop yelling. If someone would go with him to his mother's house, the man said, he could obtain the money to pay for the meal. The mistress of the pub called for the girl, her nineteen-year old maid, and ordered her to go collect the payment.

Ann McDonald, the maid, had been working for the Dinnings for a little less than a year. This was the first time she had ever been given such a task. At first, she refused to leave alone with the stranger. Her mistress persisted, assuring Ann that a local woman, Mrs. Bell, would go with the pair and prevent anything out of the ordinary from happening. When Ann continued to protest, Mrs. Dinning threatened to take the cost of the meal out of her wages. Ann had little choice but to go.

¹ *The Times*, August 27, 1821.

After only a few minutes of walking, Mrs. Bell announced that she could not walk any further. She suffered from erysipelas and her face could not withstand the pain of the cold night air. Once again, Ann refused to walk alone with the man. He promised that his mother's house was nearby, in Bishop-Wearmouth, and that his sister would walk Ann home. Though she had never been to the neighborhood, Ann reluctantly agreed and continued to walk along the poorly lit streets. When she realized that she was being led away from the houses towards a grass bank, she screamed. The man raped Ann and walked her home, warning her not to tell anyone what had happened.

The next morning, Ann's mistress told her that the man, Charles Dixon, had made a bet with her husband the previous night. Dixon had bet a gallon of ale that he would marry Ann before May, and Mr. Dinning wagered a pint of rum that they would not. When she learned about the bet, Ann ran into the kitchen and began to cry. The woman followed her, asking what was wrong. When Ann recounted the previous night, her mistress said "If it were me, I would stand at the gallows' foot and see him hanged." Together, Ann and Mrs. Dinning visited her father, who called for a doctor and a magistrate.

A constable was sent after Charles, who had attempted to flee. After some resistance, he was apprehended and cried, "I know I have been in fault, but I hope to get off with two years' imprisonment." For all his bravado the previous night, Dixon turned out to be a married man with three children. When called to testify at his trial, the prisoner rose and stated simply, "My Lord, I have nothing to say."

As it turned out, his testimony would not be necessary. Though Ann's story was confirmed by a witness who had heard her screams, though her complaint was filed almost immediately, though the doctor who examined her testified that there was evidence of violent

sex and though Charles confessed to the crime upon arrest, the jury acquitted because of a critical mistake Ann made on the stand.

When testifying, Ann repeated “the gross expression frequent in the mouths of sailors which [Charles] applied to her,” a mistake that left a strongly negative impression on the judge. By cursing, she obliterated what was most necessary to a successful rape prosecution – the perception of an “honorable,” “chaste” victim. The language singlehandedly erased the massive evidence that was in Ann’s favor. Before the jury retired, Justice Bayley reminded them of the following:

“This was a case which required careful and anxious consideration. The feelings were naturally roused in such a case, and it was therefore necessary to take care that [your] feelings should not get the better of the cool judgment which ought to be exercised. It was impossible that a greater injury could be inflicted on a helpless woman than a crime of this sort inflicted, and therefore the feelings must be strongly interested. The evidence of the young woman [would have appeared better] “if she had declined to repeat the coarse sailor terms.” [This evidence] might be so broken in upon, that [I] might be obliged to say that it was not safe to trust her testimony where life was at hazard.”

When the jury returned with an acquittal, Justice Bayley conceded, “it is likely that her evidence was quite true...but in such a case...your verdict was the one to which you could more safely come.”

In March 1822, less than one year after Charles Dixon’s trial, another married man, Henry Anderson stood before a judge at the gaol in Durham to face sentencing for the rape of Sarah Armstrong, a young girl from the fields of Houghton-le-Spring. Anderson had left his wife due to drinking problems and an addiction to gambling. It was rumored that Sarah was not his first victim and that his brother and uncle were both accused and convicted rapists. Anderson’s trial concluded quite differently from Dixon’s. The judge solemnly told the defendant, “the crime of which you have been convicted is one of the deepest die, and of the most aggravated nature, an offense of the strong against the weak, and only to be repressed by the severest punishment the law can inflict.” Henry began to convulse. “A young, innocent, and respectable

woman, has received at your hands the greatest outrage that could be committed...The sentence of the law is, that you be taken to the place from whence you came, and from thence, to the place of execution, and there be hung by the neck till you are dead.”²

When contrasted with Charles Dixon’s acquittal, Henry’s conviction, a true rarity in early nineteenth century England, demonstrates the essential conflict between theory and practice in the prosecution of rape. The judge’s denouncement of Henry’s crime – a crime “of the deepest die” – represented what criminal law technically considered rape to be. It was, in theory, a crime second only to murder in depravity and reprehension. Yet in practice, a rape trial centered on personalities, on the characters of victim and perpetrator. For a woman to have a case, she would have to convince a judge and jury that her sexual assault was a “real rape.”

The legal understanding of rape dated to an Elizabethan statute, which defined the crime as “the carnal knowledge of a woman forcibly and against her will.”³ The definition relied on the question of consent, on whether the sexual intercourse had really been against the woman’s will. The concept of forcible sex was difficult for many contemporaries to grasp – doctors frequently testified at trials that rape of a healthy, adult woman was physically impossible. Rape verdicts in trials of men like Henry Anderson’s and Charles Dixon’s frequently hinged “on whether the court chose to believe the victim or the accused.”⁴ In the Anderson case, the victim was a young virgin; the accused, an alcoholic gambler. In Dixon’s case, the victim “sullied”

² “Particulars of the life, trial, and execution of Henry Anderson, aged 33 : who was executed at the drop, in front of the new gaol, at Durham, on Monday the 18th of March, 1822, for a rape, committed on the body of Sarah Armstrong,” (Newcastle: Hoggett, 1822). Harvard Law School Library. *Dying Speeches & Bloody Murders: Crime Broadides*.

³ William Hawkins, *A Treatise of the Pleas of the Crown, Volume I* (London: 1721), 108.

⁴ Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent*, (Oxford: Oxford University Press, 1991), 82.

her reputation and her case by cursing. The purported severity of rape as a crime did not seem to matter – the victim and perpetrator’s characters were key.

These are stories that live on in courtrooms throughout America and Britain today. In 1984, a London police chief wrote in his local newspaper that “all women who report rape to the police are lying, mad, or having sexual fantasies.”⁵ A 2005 Home Office research report revealed that, despite “decades of feminist lobbying and extensive law reform,” only 5.6% of all rape cases reported to the police ever ended in a conviction.⁶ “In no other crime is the victim subject to so much scrutiny at trial, where the most likely defense is that the victim consented to the crime,” the report stated. “Powerful stereotypes function to limit the definition of what counts as ‘real rape.’”⁷ The societal and institutional biases against women who file rape complaints have become so notorious and so ubiquitous that they are now designated as “the second assault” by sociologists.⁸ Women born and raised over a century after Ann McDonald continue to share in her experience of shame and public humiliation. Many of the “obstacles to the successful prosecution of rape at the present time are almost precisely the same” as those in eighteenth and nineteenth century England.⁹

Perhaps because of these evident similarities, much of the literature emerging from feminist scholars in the 1970s and 1980s focused on the history of sexual violence and its

⁵ *Outwrite*, May 1984, 4. Quoted in Anna Clark, *Women’s Silence, Men’s Violence: Sexual Assault in England 1770-1845* (London: Pandora Press, 1987), 131.

⁶ Joanna Bourke, *Rape: Sex, Violence, History* (London: Virago Press, 2007), vii.

⁷ Liz Kelly, Jo Lovett, and Linda Regan, “A Gap or a Chasm? Attrition in Reported Rape Cases,” *Home Office Research Study 293*, February 2005, ix.

⁸ Joyce E. Williams and Karen A. Holmes, *The Second Assault: Rape and Public Attitudes* (London: Greenwood Press, 1981). For a more recent study, see Patricia Yancey Martin and R. Marlene Powell’s “Accounting for the ‘Second Assault:’ Legal Organizations’ Framing of Rape Victims,” *Law and Social Inquiry*, Vol. 19, No. 4 (Autumn 1994), which discusses the biases against rape victims inherent in institutions from hospitals to courtrooms.

⁹ Antony E. Simpson, “The ‘Blackmail Myth’ and the Prosecution of Rape and Its Attempt in 18th Century London: The Creation a Legal Tradition,” *The Journal of Criminal Law and Criminology*, Vol. 77, No. 1 (Spring 1986), 102.

treatment by the criminal justice system. The goal was to explain “how slow and partial change in legal conceptions and treatment of [rape] had been” and to a great extent, continued to be.¹⁰ Susan Brownmiller’s 1975 classic *Against Our Will: Men, Women, and Rape*, perhaps the most influential of the early feminist works on the subject, argued that “from prehistoric times to the present...rape has played a critical function. It is nothing more or less than a conscious process of intimidation by which *all* men keep *all* women in a state of fear.”¹¹

Momentous in its impact on both popular and academic discourses about rape, Brownmiller’s book was subject to immediate criticism as a polemic with little value. Much of the censure was reactionary – vitriolic and personally directed at the author, who was a prominent figure in the second wave feminist movement. Former U.S. Ambassador Michael Novak called it “nothing more or less than a propagandistic attack on heterosexuality and marriage.”¹² The criticism would not abate – as late as 1991, Gerald Schoenewolf, a well-known psychoanalyst and author, declared that Brownmiller’s work was simply a “manifestation of female hysteria.”¹³

The academic response to *Against Our Will*, while critical, was more measured. Acknowledging the weaknesses in the book, many scholars nevertheless recognized its necessity, and called for other historians to fill the gaps in Brownmiller’s efforts. “For a book that claims to be a history of rape, hers is remarkably lacking in developments,” wrote Edward Shorter in a review for *Signs*. “For Brownmiller, the frequency of rape is a historical constant...

¹⁰ Martin Wiener, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England* (West Nyack: Cambridge University Press, 2004), 77.

¹¹ Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Simon and Schuster, 1975), 15.

¹² Michael Novak, “Against Our Will,” *Commentary*, Vol. 61, No. 2 (February 1976), 90.

¹³ Gerald Schoenewolf, “The Feminist Myth About Sexual Abuse,” *The Journal of Psychohistory*, Vol. 18, No. 3 (Winter 1991), 331.

[Yet] I anticipate that her work will cause many other scholars to put this...challenging subject on their agendas.”¹⁴

In 1987’s pioneering *Women’s Silence, Men’s Violence*, Anna Clark presented a thorough and convincing historicized version of Brownmiller’s thesis, drawing from Michel Foucault’s contention that legal definitions of rape have made sex a “public issue, [with] a whole web of discourses, special knowledges, analyses and injunctions settled upon it [and] sustained by networks of power.”¹⁵ Clark contended that the discourses of the nineteenth century “structured the definition of rape around oppositions of chastity and unchastity, so that a rapist would only be punished if he assaulted a chaste woman,” reflecting the values of a patriarchal society where “chastity defines a woman’s value.”¹⁶ These definitions “magnified a thousand-fold individual men’s power to terrify women through rape, for fear served to warn women to behave according to restrictive middle-class standards.”¹⁷ Like Brownmiller, Clark emphasized the resounding similarities between the historical and the current treatment of rape victims. Both emphasized the importance of reflecting on the past as an act of protest, an act of revolution. “[Today’s] feminists...have broken the silence about rape, challenging masculine discourses with our own definitions.”¹⁸

For Clark, true protest against rape must come from feminist women. The protest, even if nominally about rape, should really be a protest against the patriarchal structures that reinforces aggression against women. This understanding limits the interpretation, both of this particular time period and of the history of sexual violence in general. The framework has been

¹⁴ Edward Shorter, “On Writing the History of Rape,” *Signs*, Vol. 3, No. 2 (Winter 1977), 476.

¹⁵ Michel Foucault, *The History of Sexuality, Volume I: An Introduction*, transl. Robert Hurley, (London: Penguin, 1978), 34.

¹⁶ Clark, *Women’s Silence, Men’s Violence*, 7-9.

¹⁷ Clark, *Women’s Silence, Men’s Violence*, 128.

¹⁸ Clark, *Women’s Silence, Men’s Violence*, 133.

“frowned upon as representing a kind of feminist functionalism...in which all evils could be traced to patriarchal structures.”¹⁹

The protests Clark envisions were avenues to which nineteenth century women did not have access due to social conventions and contemporary moralities. They could not publicly sustain or enforce the kind of protest and reform that modern feminists (like Clark and her peers) were able to. Even towards the end of the nineteenth century, early feminist protests were targeted at the Contagious Diseases Act, and not necessarily at the administration of criminal justice in rape cases.

Though Clark successfully argues that these structures dominated the treatment of rape cases in nineteenth century England, she leaves little room for the currents of protest that did exist underneath, and quite frequently, *within* the organs of patriarchy. These currents are important not only because they are surprising, but because they led and contributed to significant and meaningful changes in the prosecution of rapes.

The focus of this thesis will be the character, and influence of, the various nineteenth century protests against the treatment of rape by the criminal justice system. These protests are complex, and in many ways, frustrating. They are not the same as those of Brownmiller, Clark and their contemporaries. In the early nineteenth century, any proposed legal or procedural reforms would have necessarily come from men, from men working in government, in the judiciary, in the printing presses and even those ordinary fathers and husbands that made up the electorate. Correspondingly, these calls for change could in the same breath be a sympathetic plea to reduce the plight and humiliation of rape victims and a reassertion of the same discourses about chastity and proper behavior that made successful prosecution of the

¹⁹ Bourke, *Rape*, 141.

crime so challenging. Unsatisfying in many ways, these protests are nevertheless critical to understanding how and why the treatment of rape cases began to change and why those changes were so important.

The first section of this thesis, “Precedent,” will describe the treatment of rape cases by the English criminal justice system in the eighteenth century. For eighteenth century rape victims, the path to a prosecution was obstructed at every turn by effectively insurmountable obstacles. All cases brought to the court systems attracted massive attention – the sexual nature of rape magnified that attention even more. Since most cases of violence and abuse were handled privately between the victim and the perpetrator (and often their families), women who brought forth criminal rape charges were rewarded with mockery, hostility and humiliation.²⁰ Judges, and as the century came to a close, defense counsel, interrogated the victims for hours about their sexual histories, the assault, and an array of other invasive and embarrassing topics. Even the slightest inconsistency in a victim’s story led to an acquittal. The precedents of these injustices were influential in shaping the growing change of opinion and tone in the nineteenth century.

The next section of this thesis, “Protest,” draws upon primary sources to discuss the emergence and character of the responses to rape prosecutions in the early nineteenth century. I choose to focus on the calls for change in the patterns of rape prosecution that came from men in positions of power within patriarchal structures. There are two main bodies of protest that I will draw from – legislative and judicial. Studying the protests and motivations of the actors within these bodies provides an opportunity to understand how complex the line between self-interest and advocacy can be.

²⁰ J.M. Beattie, *Crime and the Courts in England: 1660-1800* (Princeton: Princeton University Press, 1986), 124. In many instances, the bias against female complainants was so strong, that a victim’s father or husband would file charges on her behalf.

Legislative changes in the treatment of rape were largely a part of the massive body of criminal justice reforms spearheaded by Robert Peel, the Home Secretary for almost a decade in the 1820s. These changes exemplify the different motivations behind nineteenth century protests against prosecution patterns in rape cases. While beneficial to rape victims, the reforms were frequently a reflection of Peel's frustration with the inefficiencies of the criminal justice system, rather than protests on behalf of rape victims. In one typical speech, Peel fervently denounced the lack of public funding for rape prosecutions. On the surface sympathetic, the outcry was more targeted against a defense bar Peel felt wielded too much power. Nevertheless, a significant body of protest eventually emerged as a collateral effect of the discussions surrounding criminal justice legislation.

Judicial protests were similarly nuanced. Many judges continued in the eighteenth century tradition of unyielding rulings and suspicious questioning of victims motives and respectability. Others began to alter precedents, however slowly. The landmark 1811 *Hodgson* ruling represented a remarkable change in the tenor of judges towards rape victims – Judge Baron Wood ruled that the questioning of a victim's specific sexual history would not be admissible as evidence. Though this ruling was partial (defense counsel was still allowed to present evidence that the victim “bore a notorious bad character for want of chastity or common decency”) and frequently circumvented, it set an important legal precedent that would be used in rulings throughout the century.²¹ These rulings, both individually and collectively, made pursuing a rape prosecution more attainable for a victim.

The third section, “Politics,” will focus on the 1841 Punishment of Death bill as a turning point in the changing discourses and opinions about rape. For many who have written about the

²¹ *Northern Star*, August 27, 1821.

history of English criminal law, the 1841 Punishment of Death bill – which eliminated rape (along with embezzlement and forgery of stamps) as a death penalty crime – has generally been considered yet another step in the gradual elimination of the famed “Bloody Code.” However, the contentious Parliamentary debates over the bill and the narrow margin by which it passed suggest that the rape clause was of particular significance.

The death penalty was an extreme punishment and juries frequently and admittedly looked for any reason to avoid conviction in order to avoid being responsible for the execution of a man. This Punishment of Death bill failed in the House of Commons the year before finally reaching the Lords in June 1841. There, it met with staunch resistance from peers who were adamantly opposed to the rape clause of the bill. The Earl of Mountcashell protested that the clause broke down “all those barriers which had hitherto remained sacred as a protection to defenseless women.”²² The Marquess of Westmeath “remarked that the law [would throw] all the hardship on the woman in cases of violation.”²³ Though the bill eventually passed the Lords, it did so by a very slim margin (64 votes to 60) and only after several days of contentious debate.

Due to a relatively delayed expansion of franchise, there was a long English tradition of community interaction with the state via these methods that differed from participation through voting. I am drawing examples of protest from four main categories of sources. The first, and most numerous, are newspapers and periodicals. The articles within these journals include open letters to the editor and to legislators, trial transcripts, editorial commentaries and many other examples of community opinions and involvement in the criminal justice system. My sample of papers includes main national publications such as *The Times* and the *Daily*

²² House of Lords Debate, “Punishment of Death,” June 14, 1841, *Hansard*, vol 58, cc 486-93.

²³ House of Lords Debate, “Punishment of Death,” June 14, 1841, *Hansard*, vol 58, cc 486-93.

News, as well as local dailies including the *Birmingham Daily Post*, *Manchester Times* and the *Liverpool Mercury*.

The second category of sources is legal records. The Central Criminal Court Sessions Papers (also known as the Proceedings of the Central Criminal Court, available online) are the records of all criminal trials held at the Old Bailey in London. For my discussion of eighteenth century precedents, these records are extremely enlightening. They include direct transcriptions of testimony and evidence and help to shed light on how rape was prosecuted and victims were treated. In the nineteenth century, these records become no more than a pithy listing of names, crimes and trial results. There are no narratives or biographies of either criminal or victim. From this point forward, they become useful mostly for statistical analysis. A much more important collection of legal records for the early nineteenth century are the English Reports and the Crown Cases volumes assembled by William Oldnall Russell and Edward Ryan. These two collections of legal opinions cover the most important cases in English common law.

The third category of sources is government records, the largest collections of which are the Hansard volumes of Parliamentary debates. The debates are colored with surprising statements that support the contention that legislators actively and frequently engaged in attempts to better understand rape as a crime throughout this time period. The House of Lords debate on the Punishment of Death bill, from which I have already quoted, is a critical example of this.

The fourth, and smallest, category of documents is literary sources, notably Harvard Law School's Crime Broadside Collection, the Newgate Calendar and several ballads and melodramas. Despite the extent to which they are fictive exaggerations of the truth, these

sources are useful in further illuminating community responses to rape as a crime in general and to specific cases.

With the examination of these protests, I argue that contemporaries saw massive problems with the patterns of rape prosecutions and the treatment of rape victims; often, these problems were the same ones studied by feminist scholars over a century later. The contemporary protests were not expressed in feminist terms and most of the time, not expressed in order to accomplish the feminist goals of challenging the patriarchal structures of power. Some of the calls for change were born out of sympathy, others out of practicality, and others out of political maneuvering. Nevertheless, these forms of protest contributed to significant, and in many instances, remarkable, changes that allowed more rape victims to come forward and seek justice against their attackers. The experience continued (and continues) to be difficult and unjust for many, but in the nineteenth century, it started to become a little less impossible.

Chapter One: Precedents

The eighteenth century English criminal justice system was overwhelmingly a system of private prosecution.²⁴ If a victim wanted to take a case through to trial, she was responsible for filing the complaint, gathering evidence and witnesses and presenting her case in court. This presented two major obstacles for rape victims, especially those from the lower classes. Firstly, the private accusation system assumed at least a basic knowledge of laws and of criminal justice procedure. Secondly, building a case, especially a rape case, required an exhaustive amount of time, energy, and financial resources, all of which were in limited supply for working class women.

It is impossible to know exactly how many cases of rape went unreported. John Beattie found that in Surrey, there were only forty-two rape trials in the years between 1660 and 1800. Of those, only five resulted in convictions.²⁵ Of those five, three eventually received pardons.²⁶

²⁴ Laurie Edelstein, "An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth-Century England," *The American Journal of Legal History*, Vol. 42, No. 4 (October 1998), 353.

²⁵ Beattie, *Crime and the Courts in England*, 131.

²⁶ Though it is impossible to know with certainty, it is likely that the high rate of high profile pardons for men convicted of rapes served as yet another deterrent for women considering seeking a rape prosecution. The 1730 trial of Francis Charteris for the rape of his servant, Anne Bond, was particularly notorious. Charteris's defense was extremely weak and he was known in London as a libertine who frequently abused women in his service. The press dubbed him the "Rape-Master General of Great Britain." A jury convicted Charteris of the rape, but several months later, he was granted a Royal Pardon. For details about this case, see Antony E. Simpson,

The conviction rate for cases that ever reached the courts was remarkably low, especially in comparison to property crimes, which had conviction rates were over 50%. Beattie and others who have examined the data from this time period have speculated that the majority of rape cases were never brought to the authorities.

Due to these inherent difficulties, any rape allegations that were made were immediately placed under grave suspicion. It was widely known that successfully prosecuting a rape was a monumentally difficult task that many, if not most, would not want to even attempt to pursue – the motives of any woman who came forward were immediately questioned. The most important impediment to rape prosecutions during this time period was the fear of malicious prosecutions, a fear expressed in Matthew Hale’s infamous cautionary warning that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”²⁷ The legal precedents of this time were very much wedded to this statement, a belief retreaded and repurposed by laymen and jurists alike.

As Laurie Edelstein has explained, Hale’s original statement – which has been quoted ad nauseam in all histories of rape – could not be explained away entirely by misogyny or a lack of belief in rape as a ‘real crime.’ On the contrary, Edelstein finds that Hale considered rape to be a “heinous and detestable offense that unquestionably deserved the capital sanction.” It was precisely the seriousness of the crime that led to his caution – “he was afraid that judges and juries...would be too quick to condemn the accused once charges were laid.”²⁸ Though Hale’s original concern may have been a noble defense of the presumption of innocence, the legacy of his statement was much more deleterious for rape victims.

“Popular Perceptions of Rape as a Capital Crime in Eighteenth-Century England: The Press and the Trial of Francis Charteris in the Old Bailey, February 1730,” *Law and History Review*, Vol. 22, No. 1 (Spring 2004).

²⁷ Matthew Hale, *Historia Placitorum Coronae. The History of the Pleas of the Crown*. Edited by Sollom Emlyn in 2 vols (London, 1736.) Reprint. Classical English Law Texts. (London: Professional Books, Ltd., 1971), 635-6.

²⁸ Edelstein, “An Accusation Easily to be Made,” 356.

Hale's warning resulted in a widespread distrust of women who brought forth rape allegations. A woman who brought a rape claim to trial was subject to the humiliating experience of recounting the trauma in lurid detail in front of an open courtroom filled with men from her community (women were forbidden from witnessing trials). The Old Bailey court in London, for example, was a highly public courtroom. Not only was it filled with spectators, but transcripts of the trials were sold as pamphlets. Imposing, "bewigged" defense attorneys and judges asked question after probing question, seeking inconsistencies in the victim's story.²⁹ As seen in the following exchange between Elizabeth Harris, a nineteen year old daughter of an innkeeper, and a defense attorney, this experience was unquestionably difficult and painfully embarrassing:

- Q. You must tell what he did to you.
Harris. I do tell you, he forced me quite entirely, to the ruin of my body.
Q. Did he lie with you?
Harris. Yes.
Q. You say you was so exhausted that you could not hold up your hands, was you sensible of what he did?
Harris. Yes, as sensible as possible I could be.
Q. Did you feel his private parts?
Harris. I did.
Q. Upon this occasion delicacy must be laid aside, because a man's life is at stake, and I hope you consider what you are about, that you are upon your oath.
Harris. I wont speak a word more than is true.
Q. You did feel his private parts?
Harris. Yes, very sharp.
Q. Do you mean by sharp pain?
Harris. Yes, very much.
Q. What did you feel in consequence of that - how long did you find it so?
Harris. As much as a quarter of an hour.
Q. That is private parts were in your's?
Harris. Yes.
Q. You are sure you tell me the truth?
Harris. Every word.

²⁹ Clark, *Women's Silence, Men's Violence*, 54.

After questioning Harris for two days and finding no inconsistencies in her story, the defense counsel called the accused man's maid to provide positive character testimony. The trial ended in an acquittal.³⁰

The growing strength of the defense bar made bringing a rape accusation to court quite difficult. The late eighteenth century established a precedent (codified in the 1836 Prisoner's Counsel Act) that the accused had a right to professional counsel. Like Hale's statements, this move to protect the presumption of innocence had the collateral effect of stigmatizing rape victims. Early defense counsel was quite aggressive and could skillfully sway juries. They were familiar with the law and had professional training in cross-examination and the presentation of a case. After 1836, they were allowed to address the jury. Rape victims, on the other hand, were responsible for collecting their own evidence and presenting their cases. Towards the beginning of the nineteenth century, victims, especially married women, began to seek the help of their own lawyers; however, this was an advantage available mostly to women from wealthy families.³¹

In addition to the horrifying experience of reliving the rape in detail, victims were also subject to a litany of accusations about their sexual histories. In 1791, Lord Kenyon, a judge presiding over a rape case, stated that "it was expected that the person who complained of this offense should produce an untainted and an unsullied character." In this case, the victim had prior consensual sex with the accused. The trial ended in acquittal.³² In 1805, a rape trial ended in acquittal because the defense counsel called a witness who testified that the victim confessed

³⁰ *Old Bailey Sessions Papers*, February 18, 1775, #175.

³¹ For discussion about the rise and importance of defense counsel in eighteenth and nineteenth century criminal trials, see Allyson May, *The Bar & the Old Bailey* (Chapel Hill: The University of North Carolina Press, 2003).

³² *The Times*, November 2, 1791.

that “she had read books of a very vicious and profligate tendency.”³³ In 1829, a rape accusation was dismissed in Chelmsford when the victim admitted she had been drinking in a public house on the night of her attack. The judge declared that “it was doubtful whether the woman had consented, but there appeared to have been no force beyond disgracefully taking advantage of the drunken condition of the girl.”³⁴

In the first quarter of the nineteenth century, Old Bailey, the central criminal court for London and Middlesex, held only 65 trials for rape. Of these 65 trials, merely 9 resulted in a conviction.³⁵ In her study of Kent, Carolyn Conley found that only 21 percent of rape accusations ever reached a trial.³⁶ A fear of malicious prosecutions, among other suspicions about women, continued to cripple efforts to successfully convict rapists. As Conley concluded, “judges and jurors frequently concluded that no man should lose his respectability, let alone his freedom for [a] mere seduction.”³⁷

These were among the many obstacles rape victims faced. Successful convictions for rape happened almost universally under one of two sets of circumstances – “an encounter between strangers, in which the alleged victim was a highly respectable woman, usually of a higher social class...or else violation of a child, which usually only came to light if the victim showed symptoms of venereal disease.”³⁸ A popular defense strategy used by men accused of raping adult women was the medical expert, who was paid to testify that “a healthy adult

³³ *The Times*, September 19, 1805.

³⁴ *The Times*, December 12, 1829.

³⁵ Unless noted otherwise, all data from Old Bailey records was compiled by the author using the records of the *Old Bailey Sessions Papers/Proceedings of the Central Criminal Court*. For an interesting discussion about the importance of the Sessions Papers in contemporary English society, see: Simon Devereaux, “The City and the Sessions Paper: ‘Public Justice’ in London, 1770-1800,” *The Journal of British Studies*, Vol. 35, No. 4 (October 1996). Devereaux argues that the OBSP “became firmly embedded, not only within the administrative pressures of a severe penal code...but also in the ideological concerns that underpinned that system,” 469.

³⁶ Conley, *Unwritten Law*, 82.

³⁷ Conley, *Unwritten Law*, 95.

³⁸ Wiener, *Men of blood*, 84.

woman could not be raped.”³⁹ The eighteenth century reliance on this kind of testimony resulted in yet another round of intense questioning – a rape victim, in addition to proving her chastity, the occurrence of the assault and the emission of semen, had to prove that she adequately resisted the attack. The following cross-examination of fifteen year old Sarah Sharpe is exemplary:

- Q. Did you cry out?
Sharpe. He put his hand on my mouth.
Q. You did not cry out much till he hurt you on the bed?
Sharpe. Not till his private parts hurt me.
Q. Did you cry out or not before you was on the bed?
Sharpe. Yes, a little; but not so much.
Q. Was his hand on your mouth or breast before he went into the bed-room.
Sharpe. On my breast.
Q. Did not you think he would hurt you before he went into the bed-room?
Sharpe. He said he would stab me; he bade me not cry out. On the bed he throttled me; he pinched me on my throat that I could hardly swallow a bit of meat.
Q. So you have not been able to swallow since the second of March? what was the price you and your mother insisted on to make you satisfaction?
Sharpe. I do not know any thing about it; I never asked any thing.
Q. You say you sat in the outward room in your shift?
Sharpe. Yes.
Q. Why did you not put on your cloaths?
Sharpe. They were in the next room on the bed; I was afraid to go for my cloaths; I was afraid to go near the bed.
Q. You was in the other room, why did you not call out for assistance?
Sharpe. I was afraid of my life; he had the key of the door; he locked the fore room door.⁴⁰

These stories, among many others, are consummate demonstrations of the known characterizations of the eighteenth and nineteenth century English criminal justice system as unsympathetic, and even cruel towards rape victims. Yet at the same time, in the midst of an undeniably patriarchal society, against the background of unquestionably biased and unfair procedural standards, there were signs of dissent, of “heightened contention and major change in this realm,” of protest against the status quo.⁴¹ On the morning of May 27, 1817, the body of Mary Ashford was pulled from a pond in Langley Heath, a “purely agricultural region...in spite

³⁹ Clark, *Women’s Silence, Men’s Violence*, 55.

⁴⁰ *Old Bailey Sessions Papers*, April 10, 1771, #273, 274.

⁴¹ Wiener, *Men of blood*, 76.

of its proximity to Birmingham.”⁴² Her story would raise a community in uproar. Though it would not lead to the kind of legislative or judicial changes that will be discussed later, Mary Ashford’s case demonstrated the capacity of nineteenth century England to discuss rape with an eye towards justice for the victim.

When the police pulled Mary’s body from the water, they immediately noticed bruising which indicated that she had been raped before her murder. Fresh blood was found close to the edge of the water. Footprints were also found, which seemed to show two people walking and then running, suggesting some sort of struggle. Since numerous witnesses had seen him leave a public house dance with Ashford the previous evening, Abraham Thornton was almost immediately arrested and charged with her rape and murder.

The trial was held in August with the *Times* reporting that “public curiosity to hear this trial [was so great] that the street in front of the County-hall was crowded before 7 o’clock. When the gates were opened at 8, the rush was tremendous.”⁴³ Thornton argued that he had consensual sex with Ashford, but did not murder her. Without any conclusive evidence connecting him to the crime, Thornton was found not guilty and was released.

The case of Mary Ashford captivated the public. “That [Thornton] was guilty and owed his acquittal...to a lucky chance was an opinion which was not confined to ignorant sight-seers.”⁴⁴ The public was eager to punish Thornton for a crime they were positive he committed. Though the alleged crime occurred in a small rural village outside Birmingham, Abraham Thornton’s trial received major national press, notably thorough coverage in the *Times*. Public outrage over the defendant’s eventual acquittal sparked a charged pamphlet discussion, a virtual canon of local ballads, and no fewer than three melodramas.

⁴² *Trial of Abraham Thornton*, ed. Sir John Hall (Edinburgh and London: William Hodge & Co, 1926), 1.

⁴³ *The Times*, August 11, 1817.

⁴⁴ *Trial of Abraham Thornton*, 45.

Though in reality, Ashford and Thornton came from the same class (she was a servant, he was a bricklayer), the two came to be represented as vastly different in the trial and in public opinion. In his opening statement, chief prosecutor Nathaniel Gooding Clarke introduces “the deceased” as “the daughter of poor parents – of poor but very honest parents.”⁴⁵ According to all accounts, Ashford was a girl in a “humble sphere of life, [whose] father was a gardener... [who] lived...with her uncle...a small yeoman farmer.”⁴⁶ Thornton, on the other hand, was immediately described as “the son of a prosperous builder at Castle Bromwich,”⁴⁷ and a “well-made young man.”⁴⁸ The prosecution almost immediately connected the defendant with the negative aspects of the libertine myth, telling the jury that upon seeing Ashford, Thornton exclaimed “I have been connected with her sister, and I will with her, or I’ll die by it.”⁴⁹

The antagonisms became clearer in the post-acquittal outrage from the public. “Locally, Thornton’s guilt was assumed from the moment of his arrest...and few people were disposed to alter their original opinion. That witnesses had been bribed and that the verdict had been obtained on perjured evidence was an almost universal conviction in the Sutton Coldfield district.”⁵⁰ Thomas Dales, the constable responsible for questioning and arresting Thornton, was thrown under heavy suspicion. It was rumored that the prosecution was eager to present evidence from Omar Hall, Thornton’s cellmate, who wished to testify that “Thornton... had assured him that he did not fear the results [of the trial] because Dales...had been paid by [Thornton’s] father to suppress the only piece of evidence which could convict him.”⁵¹ William

⁴⁵ *Trial of Abraham Thornton*, 66.

⁴⁶ *Trial of Abraham Thornton*, 1.

⁴⁷ *Trial of Abraham Thornton*, 2.

⁴⁸ “Abraham Thornton: Acquitted on a Charge of murdering a girl, and on being rearrested claimed Trial by Battle, April, 1818,” *Complete Newgate Calendar*, ed. J.L. Rayhert and G.T. Crook (London: Navarre Society, 1926) Volume V, 168.

⁴⁹ *Trial of Abraham Thornton*, 66-67.

⁵⁰ *Trial of Abraham Thornton*, 32.

⁵¹ *Trial of Abraham Thornton*, 48.

Bedford, the attorney for the Ashford family, wrote to Lord Sidmouth asking for Dales to be “dismissed from the police office with great disgrace.”⁵² Press coverage also demonstrated an urge to retry Thornton, with the *Times* reporting that the case was about to be taken up again, and that “the oppressive cloud on the unappeased sense of public justice”⁵³ would be lifted. Corruption from the “libertine” defendant was immediately assumed. Though he was by no means a landed aristocrat, he was believed to have the villainous characteristics associated with that class, and was met with the brunt force of resentment towards those characteristics.

Almost immediately after Thornton’s trial, London sensationalist John Fairburn published an unambiguously titled pamphlet *Horrible Rape and Murder!! The Affecting case of Mary Ashford, A beautiful young Virgin, Who was diabolically Ravished, Murdered, and thrown into a Pit, as she was returning from a Dance; Including the Trial of Abraham Thornton for the Wilful Murder of the Said*, which used language of chivalry and female honor to lament the crime. The Reverend Luke Booker was responsible for a great amount of literature which presented Mary Ashford’s story as a warning to women to “submit to chivalrous protection instead of acting freely and independently.”⁵⁴ His pamphlet, *A Moral Review of the Conduct and Case of Mary Ashford In Refutation of the Arguments Adduced in Defense of her Supposed Violator and Murderer*, continued many of the themes established in Fairburn’s. It is also widely suspected that Booker was responsible for the anonymous publication of one of the three melodramas published after the conclusion of Thornton’s trial. The play, entitled *The Murdered Maid; or, the Clock Struck Four!!!*, continued to hammer the points of Booker’s and Fairburn’s brochures. The heroine is

⁵² *Trial of Abraham Thornton*, 48.

⁵³ *The Times*, August 25th, 1817.

⁵⁴ Anna Clark, “Rape or Seduction? A Controversy over Sexual Violence in the 19th Century,” *The Sexual Dynamics of History*, ed. London Feminist History Group (London: Pluto Press, 1983). 20.

presented as a “stereotypical naïve virgin” and the play is “about virtue warned and vice-punished.”⁵⁵

Another work, George Ludlam’s provincial Birmingham melodrama *The Mysterious Murder, Or, What’s o’ Clock*, focused on the class elements of the story, placing “the whole play in the context of hard times for the poor.”⁵⁶ Ludlam’s play reflects the “complex structure of local rural, economic, theatrical and print cultures” and its circulation “at fairs and halls of a popular character”⁵⁷ rather than at the theatre, reflects its relevance to the working-class opinions on the case.

The play, like *The Murdered Maid*, turns several of the interactions between Ashford (Maria Ashfield) and Thornton (Thorntree) into demonstrations of gender stereotypes; however, much of the work is laden in social and economic commentary. Milkman, a witness, laments “Tis well for many of ‘em, that they were born with silver spoons in their mouths! Or they would not have had ingenuity enough to have got iron ones to eat with, and must have been contented with wooden spoons, like myself.”⁵⁸ The play also reestablishes the common belief that Thornton and his father bribed the witnesses in an exchange between the two characters, where the defendant declares, “a little money will soon make up all things.”⁵⁹ The radical press also joined in damning Thornton. Editor James Amphlett of the *Lichfield Mercury* argued passionately for a retrial and conviction, convinced of the corruption of the witnesses and police.⁶⁰

⁵⁵ David Worrall, “Mysterious Murder and the Murdered Maid: The Case of Mary Ashford and the Cultural Context of Late-Regency Melodrama,” *Journal of Gothic Studies*, Vol. 3, No. 2 (August 2001), 185-186.

⁵⁶ Clark, “Rape or Seduction,” 13.

⁵⁷ *Trial of Abraham Thornton*, 42.

⁵⁸ George Ludlam, *The Mysterious Murder or What’s o’clock?* (Birmingham, 1818): 18-19.

⁵⁹ Ludlam, *The Mysterious Murder*, 40.

⁶⁰ Worrall, “Murdered maid or Mysterious Murder,” 189.

There were several circumstances that made the response to Thornton's acquittal so different from the many other acquittals men received for rapes. Perhaps most importantly, Mary Ashford was dead. She could not be humiliated on the stand, cross-examined about her sexual history and the details of her assault. The community, both local and national, knew her only as the daughter of a well-liked family in a small agricultural town. Rather than publicly bully a scared young girl, Thornton and his defense counsel were forced to respond to a community appalled by the crime he was accused of, armed with a mass of class hostility. To the community, the acquittal was problematic because it seemed so unfair.

In the end, the uproar surrounding the Thornton trial did not result in legislative or judicial changes in the way rape was prosecuted. It was, after all, a murder trial, not a rape trial. Nevertheless, the Ashford story is important to the story of these protests. The discussions surrounding and emerging from the case represented a community whose sense of "public justice" – the "means by which justice is represented and seen to be done" – had been perverted.⁶¹ The response from the popular press, from religious figures, from playwrights and community members, was a protest not only about Mary Ashford, but about the injustice that was the actual prosecution of the case. Real progress was yet to come, but the dialogue concerning rape was already active.

⁶¹ Devereaux, "The City and the Sessions Papers," 468.

Chapter Two: Protest

In June 1822, James Mackintosh's parliamentary committee on criminal law reform delivered a report to Robert Peel, the newly appointed Home Secretary. The report was a result of three years of research into the mindboggling tangle of statutes, legislation and common law precedent that constituted English criminal law. There was little order to the madness – “the system looked in theory exceptionally severe, but in practice its cruelty was tempered by its incoherence.”⁶² There were about two hundred crimes that technically merited the death penalty – some crimes that, in practice, had not been punished by an actual execution in decades.⁶³ At the same time, the report noted that there were more executions per capita in England and Wales than anywhere else in the world. English criminal law, according to Mackintosh and his colleagues, was both barbaric and illogical.⁶⁴

The campaign to restructure this body of law had been active since the beginning of the century, but this was the first official attempt to propose suggestions. After receiving the report, Peel informed Lord Liverpool, the Prime Minister, that “he intended to tackle the

⁶² Douglas Hurd, *Robert Peel*, (London: Weidenfield & Nicholson, 2007), 73.

⁶³ Hurd, *Robert Peel*, 72.

⁶⁴ House of Commons Debate, “Criminal Laws,” June 4, 1822. *Hansard*, vol. 7, cc790-805.

reform of the criminal law.”⁶⁵ For the next several years, Peel worked obsessively to promote his vision of a criminal justice system – centralized, state-controlled and clearly defined.

Historian V.A.C. Gatrell has excoriated Peel for focusing less on “repudiating the barbarism of past times” and more on “restoring the law’s credibility against public attack, and...making it more efficient, even more punitive.”⁶⁶ These doubts about Peel’s vision emerged even during own his time.

A segment of both Parliament and the public believed in the importance of community policing and crime prevention – they saw Peel’s plans as seeking to undermine individual liberties and increase his own power. He was, more often than not, successful despite resistance. Yet the push against his proposed reforms often frustrated Peel. In a speech delivered before the House of Commons on March 9, 1826, Peel explained the need to consolidate criminal law, reiterating that “the law, of which all men are supposed to have cognizance [and] which all are bound under heavy penalties to obey, should be as precise and intelligible as it can be made.”⁶⁷

One of Peel’s most controversial reforms was the push to increase state control over the administration of criminal justice – in effect, demolishing the system of private prosecutions which had dominated English legal tradition. Peel saw crime as an act of disobedience against the state. In his opinion, a burglary on a street corner was as much of a transgression as a massive protest or uprising. As a consequence, he believed that the state should have the authority to prosecute and punish all crime, not just acts of riot and high treason. It was the

⁶⁵ Hurd, *Robert Peel*, 72.

⁶⁶ V.A.C. Gatrell, *The Hanging Tree: Execution and the English People*, (Oxford: Oxford University Press, 1994), 568.

⁶⁷ House of Commons Debate, “Consolidation of the Criminal Laws,” March 9, 1826. *Hansard*, vol. 14, cc 214-44.

responsibility of the state to defend its interests; for Peel, the interests of individual safety were the interests of the state.

Peel legitimized his call for reform by calling attention to the inefficiencies and the injustices of the system as it stood. “By withholding the authority altogether,” Peel argued “you frequently close the avenues of justice in instances in which the poorest classes are the sufferers.”⁶⁸ Among these sufferers, Peel argued, were rape victims, especially those from impoverished backgrounds. Indigent victims who could not afford private attorneys were frequently subject to cruel and humiliating interrogation by experienced and talented defense attorneys, a practice Peel found to be abhorrent. For many victims, Peel argued, the varied costs of private prosecution were prohibitive and in contradiction to the purported aims of justice.

What distinction in point of moral guilt, nay, in many cases, what distinction in point of injury to the sufferer, is there between actual rape and the attempt to commit a rape? The law calls the latter offense a misdemeanor, it expects that the party aggrieved...shall overcome all the natural feelings of delicacy and shame, and shall appear in a public court to prove the disgusting details of the injury she has received; it requires the sacrifice of time...and after all, inflicts on the injured party the heavy penalty of paying the whole expenses of the suit...can we expect that private individuals will take upon themselves the invidious duty of lodging the complaint, the painful task of arranging the proofs, and finally the whole costs of prosecution, and all this out of a pure abstract love of justice and tender care for the public interests?⁶⁹

Fundamentally, Peel believed that crime was above all a public wrong, not a private injury. For him, rape was not a crime of property, as precedent suggested. By attacking a woman, the rapist did not take the property of her father or her husband. Instead, he violated the laws of a state, and it was the state’s responsibility to decide what his crime was, to prosecute it, and to execute his punishment. This is still quite a distance from the modern feminist understanding of rape as a violent attack against a woman’s body and will. Labeling Peel’s

⁶⁸ House of Commons Debate, “Consolidation of the Criminal Laws,” March 9, 1826. *Hansard*, vol. 14, cc 214-44.

⁶⁹ House of Commons Debate, “Consolidation of the Criminal Laws,” March 9, 1826, *Hansard*, vol. 14, cc 214-44.

broader efforts to seize state control over criminal law a protest against rape would be tenuous at best. His protest was against what he considered to be an inadequate system of private prosecution that left too much discretion in the hands of the judiciary and defense counsel.

Nevertheless, Peel's growing focus on public funding of prosecutors meant that wealth, or lack thereof, became less of an obstacle for women seeking to bring rape charges. In the eighteenth century, except in the most egregious cases such as the trial of Francis Charteris, allegations of rape from female servants against their masters were doomed to failure. Few were recorded, although it is almost certain that many occurred.⁷⁰ As the nineteenth century progressed, not only were more allegations made, but more cases proceeded past magistrates into courtrooms.⁷¹ The idea that a master could rape a servant, laughable in an eighteenth century mindset that saw rape as a property crime, was beginning to be understood as an act of violence. By introducing rape as a crime worthy of consideration within the larger framework of massive criminal law reform, Peel opened the door for more explicit public discourse about the injustices inherent in the prosecution of rapes.

In August 1826, *The Republican*, a small radical publication, published an open letter to Home Secretary Peel from a gentleman who called himself 'RH.' The letter was entitled "On the Defects of our Criminal Code, in respect to the Crime of Rape, or forcible Violation." It was a sophisticated and complex interpretation of the failure of criminal justice to prosecute and prevent rapes. It was also a poignant plea for extensive change. "You have of late obtained some deserved praise for endeavors to arrange and simplify certain portions of our Criminal

⁷⁰ Clark, *Women's Silence, Men's Violence*, 104-9.

⁷¹ For the most complete discussion of violence against working women, see: Shani D'Cruze, *Crimes of outrage: sex, violence and Victorian working women*, (London: UCL Press, 1998), 88-95.

Code,” the letter read. “This gives me reason to hope that any other defect which can be proved will receive your attention, and if possible, a remedy.”⁷²

Despite claiming to possess little professional legal knowledge, RH expressed an acute understanding of the way rape victims were treated and the crime was prosecuted. He immediately drew attention to the dramatically low conviction rates for rape. “I may venture to affirm that not more than one out of every twenty cases that are taken before a jury obtains a verdict for the capital offense.”⁷³ RH fixated on the irony that while rape was technically considered an abhorrent transgression, offenders continued to assault women with impunity.

RH laid out three major reasons why the prosecution of rape was so difficult. First and foremost, the death penalty was an impediment to conviction, not because the crime did not warrant it, but because “many persons will rather remain quiet sufferers, than attempt to swear away the life of a fellow-creature...and juries will reject almost positive evidence rather than give a verdict when the consequences are so terrible.”⁷⁴ Secondly, the required proof of emission was in many instances impossible to provide and an unnecessary obstacle, since the “offence [was] just as heinous without it as with it.”⁷⁵ Finally, RH argued that “it is an unnecessary cruelty to the injured parties, to question them, as they now are questioned, in our courts of justice.”⁷⁶

In the next two chapters, I will discuss some of the issues raised in RH’s letter and their role in public discourse and protest about the treatment of rape. While there is no way to know whether Peel read RH’s letter, and thus, no way to know whether it was an influence on

⁷² RH, “A Letter to the Rt. Hon. Robert Peel, On the Defects of our Criminal Code, in respect to the Crime of Rape, or Forcible Violation,” *Republican*, 14:7 (August 1826), 213.

⁷³ RH, 214.

⁷⁴ RH, 214.

⁷⁵ RH, 214.

⁷⁶ RH, 215.

public policy, the Home Secretary's legislative efforts in regards to rape paralleled RH's suggestions almost entirely. Judicial rulings began to reflect the patterns of thinking about rape exhibited in this letter. Perhaps the slowest to change, the public was also beginning to perceive rape as more of a crime of violence against a person, rather than a property crime against a father's or husband's possession. It is important to remember that many, if not most of these protests, were not targeted at alleviating the suffering of rape victims, though like Peel, many used such language as justification. The motivations for these protests were personal, political and religious, among others. RH's letter, while perhaps not exemplary of the totality of nineteenth century thought, provides us with several important jumping points into the past.

In RH's letter, significant discussion is devoted to what was perhaps the least exciting and most procedural factor in rape trials – the evidentiary constraint that required proof of both penetration and emission to constitute a rape. For RH, the proof of emission was nonsensical – “we frequently read that the prosecutrix clearly proved that a forcible violation had been effected, but failed in giving the requisite legal evidence. She might have sworn, that she was overpowered by superior strength, had her mouth stopped to prevent her calling for assistance, her hands bound or held so that she could not struggle, and that she was compelled to submit to the will of the prisoner; and yet because she cannot swear to one particular point, a verdict of *not guilty* is given, and her ravisher escapes punishment.”⁷⁷ While on the surface technical, legalistic and dull, the emission requirement and its removal in 1828 sparked discussion about rape which sought to reform rape law based on the very patriarchal principles that made it so unjust in the first place.

⁷⁷ RH, 214.

The opinion expressed by RH was by the late 1820s widely accepted by judges and laymen alike. In 1823, the judicial precedent was set in *R v. John Burrows*. In that case, the victim had testified that she was being raped, but the attack was interrupted before emission. Justice Holroyd ruled that though he was unsure whether the crime was completed, he would leave it to the jury to decide. This was in direct opposition to the general procedure, which would have mandated an immediate dismissal of the case when the proof of emission was not met.

The jury convicted and the case was appealed to the Twelve Judges, the High Court of England. They found that “if something occurs to create an alarm to the party while he is perpetrating the offense it may be for the jury to say whether he left the body...because of the alarm or whether he left it because his purpose was accomplished.”⁷⁸ Because the conviction was upheld, the *Burrows* ruling set the precedent for removing the burden of proof of emission from the prosecutrix.

The 1828 Law of Evidence Act could, in most ways, be categorized as another one of Robert Peel’s administrative measures. He prided himself on his ability to push forward a condensed version of the criminal code which “made sense.” His speech in favor of the act was not one of his most eloquent – he needed to do very little convincing, as it was clear that public and judicial opinion was in support of this reform. The logic he did use was nevertheless quite interesting.

“It was well known, that in the cases of rape...two kinds of proof were necessary to conviction” Peel began. “As far as regarded the suffering of the unfortunate female who was the victim of the offense” proving emission was not necessary to establish the attack, the

⁷⁸ William Oldnall Russell and Edward Ryan, *Crown Cases: Reserved for Consideration and Decided by the Twelve Judges of England, from the year 1799 to the year 1824* (London: A. Strahan, 1825), 519.

reprehensibility of the moral offense, or the magnitude of the crime.⁷⁹ As Anna Clark writes, Peel and his contemporaries understood that many rapists do not ejaculate, and that “a woman’s terror and pain, not to speak of ignorance, often prevented her from perceiving this occurrence.”⁸⁰ The line of reasoning so far seemed to parallel RH’s – the evidentiary requirement was an unnecessary burden that prevented both prosecution and conviction.

Yet in his speech, Peel referred to a much older source to justify this legislation. “It had been well observed by lord Hale, that although rape was a most detestable crime, and ought to be severely punished, it was one upon which a charge could easily be made, hard to be proved, and harder still to be contradicted...If [Hale] thought that any alteration of the law...would lead to false accusations, he would be the last to offer such proposition...But [Hale] was of the opinion, that [the proof of emission] required in such cases was unnecessary.”⁸¹ In order to promote legislation that would make the prosecution of rape easier, Peel alluded to the very statement that had made the prosecution of rape nearly impossible for over a century.

It is worthwhile to consider why Peel used this tactic. Ostensibly, the argument that the proof of emission made it nearly impossible to prosecute rapists should have been sufficient on its own. There were cases upon cases that could have been used as evidence to support this notion and the *Burrows* ruling already established case law precedent. Peel’s reform of the criminal law was rooted in a preoccupation with increasing the power of the state to successfully prosecute and punish criminals – if his goal was to continue along this path, the arguments were laid out for him.

By calling upon Hale’s authority, Peel justified continuing worries about malicious prosecutions. He needed to set the minds of doubters at rest by convincing them that

⁷⁹ House of Commons Debate, “Law of Evidence Bill,” May 5, 1828, *Hansard*, vol. 19, cc 350-60.

⁸⁰ Clark, *Women’s Silence, Men’s Violence*, 62.

⁸¹ House of Commons Debate, “Law of Evidence Bill,” May 5, 1828, *Hansard*, vol. 19, cc 350-60.

removing this evidentiary requirement would *only* make it easier for rapists to be punished, that it would not have the collateral effect of increasing the so-called ‘malicious prosecutions.’ By saying that even Matthew Hale supported removal of the emission requirement back in his time, Peel was reassuring his audience that this law would not undermine the interests of men, no matter how much lip service he gave to the notion of relieving victims’ suffering.

Historian Martin Wiener has given Peel much more credit for pushing forth this legislation. By making proof of penetration the major evidentiary requirement, the law “more clearly defined the offense as one of violence rather than of illegitimate taking, a crime against a woman as a person rather than as the property of her husband or father.”⁸² Though I would not go as far as Wiener, I agree that the Act was a massive accomplishment and progression for nineteenth century rape law, both practically, in easing prosecutions, and ideologically. Prior to this legislation, penetration, or physical violation, was not enough to prove a rape. Emission carried with it possibility of conception, the idea of “soiling” a woman, and ruining another man’s property. By removing this requirement, the law began to treat rape as first and foremost a physical violation of a woman’s body.

Returning to RH’s letter, we come to another critical flash point for nineteenth century discussions about rape. The humiliation of rape victims in their communities and in the courtroom was a major concern for RH, and as we will see, for judges, legislators, and laypeople alike. “When a female desires to bring her ravisher to punishment, she has to go before a public court and to be questioned on the minutiae of a forced connection before hundreds of the other sex, while those of her own sex, who may be willing to hear and to

⁸² Wiener, *Men of blood*, 91.

countenance her, are excluded.”⁸³ The language used by RH resembles the language used by Brownmiller, Clark and other feminist historians one hundred and fifty years later. Even more surprisingly, these issues had already begun to be addressed as early as 1811, in the landmark ruling of *R. v. Hodgson*.⁸⁴

Both the circumstances that led to the trial, as well as the ruling itself, were in their own ways remarkable and reflective of the growing developments in British rape law. Harriet Halliday, a sixteen year old servant girl, had been returning to work after a visit to her parents’ home on Good Friday. She was approached by a strange man, who asked her where she was going. He offered to walk her to her masters’ home and put his arms around her. She refused, striking him across the face. He struck her back – “knock for knock...I will see thee home yet!” he cried out.

Harriet continued to struggle as William pulled her into a stable until she “fainted away and [William] accomplished his purpose.” When Harriet returned to consciousness, she continued to cry out, until she was at last heard by a passerby. “They have found us out,” William said, “but they shall not find thee out, for I will kill thee in this place.” Nevertheless, he became frightened, pushed Harriet out of the stable and fled. Fortunately for Harriet, the passerby who had overheard her cries was a prominent local surgeon. He would testify at her trial that he found Harriet “in a state of great distress” with torn and bloody clothing.⁸⁵ After being examined by the surgeon, Harriet returned to her masters’ house and told them what had happened.

⁸³ RH, 215.

⁸⁴ *The Times*, August 14, 1811; *The Times*, August 15, 1811.

⁸⁵ The surgeon served as Harriet’s benefactor in funding the prosecution, making this a rare instance of a rape allegation brought forward by a lower class victim.

Hodgson's defense counsel, Mr. Raine, was, as expected, extremely aggressive and confrontational. During Harriet's cross-examination, he immediately asked whether "it was the first time she had been connected with a man." Here, the trial turned from interesting, to momentous. As soon as the words had left Raine's mouth, Justice Baron Wood interjected, "observing that it was an improper question, which witness had no occasion to answer." This was a major departure from the common practices of impeaching a prosecutrix's sexual history, as described in the previous chapter. Wood also attempted to limit the effectiveness of two defense witnesses (Hodgson's friends) who claimed that they had seen the pair together without her showing any resistance. Though he could not forbid the friends from testifying, when the Jury returned with a plea for mercy attached to their guilty verdict, Baron Wood "asked upon what ground" they dared to give a recommendation for mercy. The jury was confused – the recommendation was standard practice in rape cases where the defendant presented witnesses that testified to his good character. Stunned and unprepared, the "foreman was not prepared to state any."

At sentencing, Baron Wood expressed further fury. Presented with petitions for mitigation to transportation from the prosecutrix, her master and her witnesses, the Justice was unyielding towards Hodgson. After sentencing seven men to death and suggesting that they should "hold out hopes of mercy" from a pardon, Wood turned to Hodgson. "You here have been found guilty of violating the person of a young woman, which is an offense...[that] ought to be impartially punished with death...Such a series of brutal and cruel conduct I have never heard detailed in a Court of Justice, and...I hope never to hear again...By your own declaration...it is probable [that] other unfortunate females have been the victims of your brutality, who have not had the courage to avow and seek justice, but who have pined under

dire outrage in silent affliction...I hope this example of justice will operate to deter others... warned by your fate.”

Unsurprisingly, the language of this ruling shocked many. Defense counsel immediately appealed, on the grounds that Wood did not allow for questioning of the prosecutrix’s sexual past, which in turn, did not allow them to impeach her credibility. Wood referred the case to the Twelve Judges of England, a tribunal of justices who heard appellate cases. The judges unanimously backed the initial decision and declared that “upon an indictment for a rape, the woman is not compellable to answer, whether she has not had connection with other men *or* with a particular person named; nor is evidence of her having such connection admissible.”⁸⁶ As we will see later in this chapter, it is important to note that this was still very much a partial ruling – it forbid only specific questioning and left room for more general impeachments of the prosecutrix’s characters, a loophole that was continually exploited by other judges and defense counsel.

By not allowing women to be cross-examined about their specific sexual histories, the *Hodgson* ruling reflected what was becoming a fact of life and society – women were sexually active before marriage. The average age of marriage for women continued to rise at the beginning of the century – by 1829, it was 25.⁸⁷ Sexual relations began to be seen as more of a norm in courtships. Virginity, while still highly prized, was no longer a prerequisite for conviction. As Wood would say in a later ruling, even if a woman had sex in the past, it did not justify a rape.

⁸⁶ William Oldnall Russell and Edward Ryan, *Crown Cases: Reserved for Consideration and Decided by the Twelve Judges of England, from the year 1799 to the year 1824* (Philadelphia: T. & J.W. Johnson, Law Booksellers, 1839), 211.

⁸⁷ Gatrell, *The Hanging Tree*, 461n.

Throughout his career, Wood continued to preside over rape cases with the same kind of zealousness he displayed in the *Hodgson* ruling. In 1821, he forbid another defense counsel from pursuing a line of questioning aimed to uncover the victim's sexual history. The attorney objected – “this is the first time I was ever checked in this manner...At [Queen Caroline's] trial, the questions were put much stronger.” Wood did not relent, and in his speech to the jury went on to say that even if the victim had previous sexual relations, “that has nothing to do with the prisoner at the bar; she has no right to be ravished on that account...I will not suffer a witness to disgrace herself...[I do not approve of] the mode of hunting and terrifying witnesses when put into the box, and the whole history of their lives raked up, as a set-off against their evidence; for who amongst us, at one time or another, has not committed one foible.”⁸⁸

Wood's protests can perhaps be understood better in terms of his devout religious beliefs and his unorthodox judicial philosophy – “an inflexible determination to resist any contagion from the prejudices of others.”⁸⁹ It was Hodgson's unwillingness to repent that irked the judge – the defense counsel seeking to provide justification for the rape only underlined that the defendant would not admit wrongdoing. Wood did believe rape to be a horrific crime; but then again, so did Matthew Hale. The difference between the two jurists was that Hale's jurisprudence led him to support the rights of the defendant. Wood's religious beliefs led him to support the rights of the victim. Yet this outrage continued to be contingent on a very particular archetype of rape victim, the kind who did not deviate from the norms of propriety.

Harriet Halliday was extraordinarily fortunate – she was a young girl, who worked for a respectable family and was backed by a very wealthy and well-established benefactor. She was an ideal victim even by eighteenth century standards. It is difficult to completely paint any of

⁸⁸ *Northern Star*, August 27, 1821.

⁸⁹ *The Annual Biography and Obituary for the Year 1825* (London: Longman, 1825), 468.

these rulings or legislative changes with a progressive brush, as they were as reliant on the characters of victim and rapist as the system they were attempting to reform. (It would take decades, perhaps even over a century, before the idea that prostitutes could be raped was accepted in legal circles, for example.) Nevertheless, Wood's speeches are interesting because they, perhaps inadvertently, extended the trust afforded to victims.

The second interesting element of Wood's rulings is the acknowledgement of rape victims suffering in silence – in part, he sought to use the *Hodgson* ruling as a warning to others that crime committed would be crime punished. This is a fascinating predecessor to Peel's future legislative reforms. As Gatrell has written, the Home Secretary “was the first politician of note to shape and exploit a rich vein of anxiety about the decay of moral values to which increases in ‘crime’ supposedly testify.”⁹⁰ The idea that criminal law should be targeted to root out the crimes that went unpunished would come to be exploited to its full extent by manipulating rulings like *Hodgson* to suggest that people who commit the most heinous of crimes risk going unpunished.

On its own, the *Hodgson* ruling seems unquestionably visionary, even by the standards of our own time.⁹¹ Unsurprisingly, however, many of Baron Wood's peers did not agree with his position or with the Twelve Judges' holding. In an 1834 case, Justice Williams explained that he could not understand how the ruling could be “in strict accordance with the general rules of evidence.” Williams went on to allow defense counsel to question the prosecutrix about

⁹⁰ Gatrell, *The Hanging Tree*, 572.

⁹¹ Ironically, Wood's view of what constitutes a rape victim seems to be even more progressive than some positions held by our own legislators today. In South Dakota, during a 2006 debate on a partial abortion ban, a State Senator gave his own vivid description of what he believed a rape victim was: “A real-life description to me would be a rape victim, brutally raped, savaged. The girl was a virgin. She was religious. She planned on saving her virginity until she was married. She was brutalized and raped, sodomized as bad as you can possibly make it, and is impregnated. I mean, that girl could be so messed up, physically and psychologically, that carrying that child could very well threaten her life.” *PBS Online News Hour*, “South Dakota Abortion Ban,” March 3, 2006.

whether she had consensual sexual relations with the defendant prior to the alleged rape.⁹² In 1836, in another parliamentary report on the criminal law, Sir Frederick Pollock expressed the kind of intense dissatisfaction with the *Hodgson* decision many other judges had been expressing in their own rulings and opinions.

“if his counsel could have addressed the jury [on the girl’s moral character] he must have been acquitted, and it was a conviction that gave dissatisfaction to the whole Bar, and I believe to the public...There can be no doubt of his innocence of the crime as charged upon him, though probably he had been in a situation to create considerable suspicion...I have no doubt she was at first a consenting party, but that she was forcibly detained a longer time than was convenient to the domestic arrangements of the family in which she was a servant, and having been detained, probably by some degree of force, during the latter part of the interview, she converted the whole matter into a charge of rape.”⁹³

Other judges used the nebulous distinction between “general” and “particular” evidence to continue to allow for questioning about the victims’ character. The most aggressive and inventive defense counsel could work around the *Hodgson* ruling with relatively little effort. The easiest way to do this was to present witnesses who could testify to the victim’s past sexual relations and ask the prosecutrix to deny this evidence – putting the victim in the awkward position of choosing between committing perjury and admitting to prior sexual relations.⁹⁴ Even when they did not allow for questioning based on *Hodgson* appeals from the prosecution, judges would editorialize to juries about being aware of the female tendency to lie, especially about sexual matters.

⁹² *R. v. Martin*, 172 Eng. Rep. 1364. This line of questioning continued to be affirmed as admissible evidence in rape trials well through the 20th century. Even today, “of all the rape cases that come across prosecutors’ desks, stranger-rape cases have the best courtroom odds, with 68 percent ending with a conviction or guilty plea. But when a woman knows her assailant briefly (less than 24 hours), a mere 43 percent of cases end in a conviction. When they know each other longer than 24 hours, the conviction rate falls to 35 percent. Even fewer, 29 percent, of intimate partners and exes are punished.” Sabrina Rubin Erderly, “The date-rape ‘doctor’ they could not convict,” *Self*, November 2008. Accessed on www.msnbc.com.

⁹³ *Royal Commission on the Criminal Law*, 2nd report (Parliamentary Papers, 1836, xxxvi, 4-5), quoted in Gatrell, *The Hanging Tree*, 472-3n.

⁹⁴ It wasn’t until the 1871 *R v. Holmes & Furness* ruling that the issue was resolved. The Court concluded that this tactic was not in line with *Hodgson* and that it opened up an “endless and unjust trial of the prosecutrix herself.” Wiener, *Men of blood*, 99.

Other justices felt bound by the *Hodgson* ruling and did not let their personal dissatisfaction interfere with the way they presided over cases. In 1827, Justice Park, a judge notorious for favoring the defendant in rape cases, stopped defense counsel from questioning a victim about her sexual past, even though “for his own part, he dissented from the doctrine thus laid down [by the Twelve Judges].”⁹⁵ Other judges took *Hodgson* and expanded its scope to cover trials for attempted rape.⁹⁶ In 1827, during a trial for attempted rape, Justice Baron Vaughan told the jury that “it was a hardship in cases of this kind...that [the victim] had not only to undergo the wounded feelings and sufferings occasioned by the injuries they had received, but were obliged to come before strangers, and before a male audience, to disclose the details of the case.”⁹⁷ Vaughan mirrored many of Baron Wood’s practices in presiding over rape cases – during an 1829 case, he interrupted a surgeon who was testifying on behalf of the defense that the victim was not a virgin.⁹⁸ Though *Hodgson* has been criticized by feminist scholars as a flimsy ruling that was circumvented throughout the century, it did set an important precedent and introduced the voices of several justices who, for better or for worse, would speak on behalf of rape victims when those victims could not speak for themselves.⁹⁹

As we have seen, discussions about rape in this time period were charged with conceptions not only about gender relations, but also about politics, religion, the rise of national government, the role of crime in society and so forth. What I have termed as ‘protests’ about rape were, quite evidently, about more than rape. Nevertheless, they brought the issue into the light of public discourse in a way it had not been during the eighteenth century. Peel’s

⁹⁵ *The Times*, April 19, 1827.

⁹⁶ This precedent was set in the 1817 ruling of *R. v. Clarke*.

⁹⁷ *The Times*, September 5, 1827.

⁹⁸ Gatrell, *The Hanging Tree*, 474.

⁹⁹ Clark and D’Cruze both criticize the ruling, as does Zsuzsanna Adler in *Rape on Trial* (London: Routledge, 1987), 70.

removal of the evidentiary requirement of emission revealed the existing tensions between men who desired to be simultaneously tough on crime, protective of their wives and daughters and suspicious of the motivations of women. The judicial rulings in *Hodgson*, *Burrows* and other cases highlighted the voices of judges who have long since been forgotten, but who often provided the strongest support that rape victims they would ever receive.

Rape had a powerful effect on exacerbating these tensions, as we have seen in this chapter. In the next chapter, we will discuss how these discourses, these protests, these strains came to a powerful head in 1841, when RH's first proposal was finally realized, when, in a storm of sound and fury, the death penalty was removed as a punishment for rape.

Chapter Three: Politics

There is a little known postscript to the story of William Hodgson – he was never executed for the rape of Harriet Halliday. A year and a half after his conviction, Hodgson was pardoned on the condition that he serve in the army.¹⁰⁰ The rate of pardons for rapists was much higher at the beginning of the nineteenth century than in the eighteenth century. When RH wrote his letter in 1826, the rate of rape *prosecutions* was already on the rise – it was the rate of convictions, and even more interestingly, the rate of executions that was on a precipitous decline.¹⁰¹

“It is often said,” RH wrote, “that a very severe punishment is not so great a restraint upon the viciously inclined, as a more moderate one...this is correct only when the severe punishment is distant or uncertain, and the mild one, prompt and seldom failing, almost certain to follow the commission of the offense.”¹⁰² This was, of course, Peel’s reasoning as well. Though he congratulated himself on being merciful – “there is not a single law connected with my name which has not had as its object some mitigation of the severity of the criminal law,” he

¹⁰⁰ *The Times*, May 10, 1813.

¹⁰¹ House of Commons Debate, “Criminal Laws,” May 21, 1823. *Hansard*, vol. 9, cc397-432.

¹⁰² RH, 213.

bragged in 1827 – Peel sought to make punishment more efficient, not less serious or less likely.¹⁰³

Although the gradual elimination of the “Bloody Code” has been traditionally attributed to a legislative acceptance of a popular distaste for executing men for crimes other than murder, a more realistic and honest reading lies in the motivation to prosecute and punish more effectively and more often.¹⁰⁴ Public revulsion and the reluctance of juries to convict sparked the reduction of capital offenses, but legislators did not always share in this revulsion against the death penalty. The era of Peel’s tenure was highly punitive and the aims of criminal law reform were largely steeped in this tradition even after he left his post as Home Secretary in 1830.¹⁰⁵

While the number of death penalty statutes began to fall as early as 1823, rape did not seriously enter the discussion of criminal law reform in Parliament until 1837. The earliest advocate of removing rape as a capital crime was William Ewart, one of the most outspoken opponents of the death penalty in the House of Commons.¹⁰⁶ Acknowledging that there was a “very strong opinion entertained with respect to the propriety of inflicting the punishment of death in cases of rape,” Ewart continued that, “in all the places to which he had referred, the punishment of death was not inflicted for the commission of that crime...the crime was so difficult and so uncertain of proof, that there was the greatest difficulty in bringing the jury to

¹⁰³ Quoted in Gatrell, *The Hanging Tree*, 567.

¹⁰⁴ For the traditional interpretation of the elimination of the ‘Bloody Code,’ and a classic overview of criminal justice in this era, see: Leon Radzinowicz, *History of English Criminal Law and Its Administration from 1750* (5 volumes, London: Stevens, 1948-1986).

¹⁰⁵ For the most complete, nuanced and insightful discussion of the death penalty in eighteenth and nineteenth century England, see: Gatrell, *The Hanging Tree*. Also see: Brian Block, *Hanging in the Balance: A History of the Abolition of Capital Punishment in Britain* (Winchester: Waterside, 1997). For literary and cultural responses to the death penalty, see *Executions and the British Experience from the 17th to the 20th century*, ed. William B. Thesing (Jefferson: McFarland, 1990).

¹⁰⁶ S. M. Farrell, “Ewart, William (1798–1869),” in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004), <http://www.oxforddnb.com/view/article/9011> (accessed April 9, 2009). Ewart would later advocate for the elimination of the death penalty entirely.

convict.” He concluded that if the death penalty were taken away, “the same obstacles would not exist.”¹⁰⁷

This part of his speech was not referred to by a single other member of Commons for the duration of the debate – instead, the MPs discussed removing arson as a capital crime. Yet Ewart introduced the idea because he understood that conviction rates for rape happened to be low at a time when legislators sought high conviction rates. A man with very radical ideas, Ewart hoped to capitalize on the prevailing desire to punish effectively in order to eventually eliminate the death penalty altogether. “[We should] only proceed on the principle of wishing to render punishment certain...if [we] continued the punishment of death in any case but murder, the difference between the verdicts of the juries and the words of the law would be as great as it is now,” Ewart said in his 1837 speech.¹⁰⁸

At the time of Ewart’s first speech, people were not yet ready to have a discussion about the death penalty and rape. By 1840, however, it had become clear that rape, like larceny and burglary, had become an outdated capital crime – the last execution for the crime had taken place in 1836. Conviction rates were, in some places, lower than they had been in the eighteenth century. The few death sentences that were given were summarily commuted to transportation for life. Contemporaries interpreted the low rates as symptomatic of a general unwillingness to convict non-murderers of death penalty crimes. Legislators brought a bill proposing the removal of rape as a capital crime to the Commons. The MPs discussed it over the course of three separate days in 1840 – June 23, July 15 and July 29.

Historians of death penalty abolition have not paid much attention to the details of this debate. Like the criminal law reforms of the 1820s, reform of capital punishment was

¹⁰⁷ House of Commons Debate, “Capital Punishments,” May 19, 1837, *Hansard*, vol. 38, cc 907-26.

¹⁰⁸ House of Commons Debate, “Capital Punishments,” May 19, 1837, *Hansard*, vol. 38, cc 907-26.

proceeding at such a rapid pace throughout the 1830s and into the 1840s that this bill seems to be another unremarkable stepping stone in the gradual elimination of England's famed "Bloody Code." The bill seems even more irrelevant when it is noted that forgery and embezzlement were the other two clauses – for the scholars who treat death penalty reform by rattling off lists of condensed statutes, a simple note that "the number of capital offences continued to be reduced throughout the 1830s and 1840s" seems adequate.¹⁰⁹

Yet it is quite clear from the discussions which emerged from this bill that removing rape from the list of capital crimes was not a routine measure. The debates highlighted central questions surrounding the responsibility and role of the Parliament in determining criminal law. Some believed that the decision of juries to not convict defendants of rape – for whatever reason – should be held paramount. Parliament, if it was the voice of the people, should not legislate in order to override their opinions. Yet the MPs who supported the bill envisioned an entirely different responsibility – the responsibility to advocate on behalf of victims, the responsibility to execute the laws of the state, the responsibility to legislate based on overriding moral or pragmatic concerns, not on public opinion.

For some men in Parliament, alleviating rape victims' suffering was an overriding moral concern. For others, the primary concern was increasing the efficiency of the state to punish. The debates preceding the passage of the Punishment of Death Bill brought to light a variety of opinions about rape and its moral and social implications that extend beyond a blanket vision of the time period as an oppressive, patriarchal state. Some of the most poignant and effective calls for reform came from those who accepted patriarchal norms.

¹⁰⁹ Clive Emsley, *Crime and Society in England, 1750-1900* (London: Longman Group, 1987), 270.

On June 23, 1840, the House of Commons seriously discussed removing the death penalty as a punishment for rape for the first time. By the outset of the debate, judicial decisions and procedural practices were starting to favor the prosecutrix in rape cases. Juries, however, remained susceptible to favoring defendants and doubting the motivations of women who brought rape charges. The law was much kinder to rape victims than juries were willing to be. Indeed, even during the debates, the appropriateness of the death penalty for rape was often framed around the danger of malicious prosecutions. According to Fitzroy Edward Kelly, if he were to “select from the whole catalogue of human crime one which above all others ought not to be subjected to the punishment of death, he should say it was the crime of rape.”¹¹⁰

Kelly believed that rape was inappropriately categorized as a capital crime because of the unreliability of victim testimony in accusations. “The evidence of rape must always depend upon the testimony of a single witness [who] might commit perjury for the purpose of retrieving her own character...An innocent man might be brought home from transportation, but could not be recovered from death,” Kelly stated.¹¹¹ This argument was rooted in a fundamental mistrust of female intentions and, essentially, an eighteenth century conception of what a “real rape” was. Though there was an overwhelming body of case studies where a jury did not convict despite overwhelming evidence against the defendant, Kelly simply refused to relieve himself of the notion that the death penalty was too severe and too risky for a crime like rape.

¹¹⁰ House of Commons Debate, “Punishment of Death,” June 23, 1840, *Hansard*, vol. 55, cc 18-41.

¹¹¹ House of Commons Debate, “Punishment of Death,” June 23, 1840, *Hansard*, vol. 55, cc 18-41.

Acknowledging the controversy of this speech, Kelly warned that there would be a “great diversity of opinion” on the subject.¹¹² In Parliament, the MPs considered their positions as elected officials to be quite important, especially when discussing issues that affected disenfranchised members of the population. One MP believed so forcefully in his mandate that he declared himself “to be the advocate of Woman... [in] demanding that the crime of rape be put in another category of punishment.”¹¹³ The sentiment would be echoed in the House of Lords the following year, when the Marquess of Westmeath proclaimed that “Parliament had no right to pass such a measure, without consulting...the feelings of the female portion of the community.”¹¹⁴

While these exultations were mostly rhetorical, the Parliament’s determination to be the voice of women, to express what their real interests were, pervades the discussions of the rape clause in this bill. Although they frequently discussed the crime in broad, theoretical strokes that revealed a misunderstanding of the plight of actual rape victims, members of Parliament genuinely considered themselves as speaking on behalf of women, and as a result, struggled to come to a consensus on this clause in a way they had not experienced with prior debates about the death penalty.

Even traditional proponents of capital punishment reform had mixed feelings about this bill. Lord Russell recalled that when the issue was first introduced by Ewart in 1837, the prevailing opinion was that rape, especially in aggravated cases, warranted capital punishment. Since that time, though, there had not been a single execution for rape. Judges consistently recommended royal pardons for convicted rapists. If the judges who spent their careers

¹¹² House of Commons Debate, “Punishment of Death,” June 23, 1840, *Hansard*, vol. 55, cc 18-41.

¹¹³ House of Commons Debate, “Punishment of Death,” July 29, 1840, *Hansard*, vol. 55, cc 1078-101.

¹¹⁴ House of Lords Debate, “Punishment of Death,” June 11, 1841. *Hansard*, vol 58, cc 458-9.

presiding over rape cases recommended mercy, “it might be a ground for calling upon the House to take away the punishment in such cases,” suggested Russell.¹¹⁵

Russell believed strongly in the severity and magnitude of rape as a crime. He was fixated on the institutional difficulties the state faced when it tried to adequately deter rape. His strongest supporter on the matter, Dr. Lushington, concurred. “The punishment of death [for rape] was, in consequence of the state of public feeling, abolished de facto – not by law be it observed,” he argued.¹¹⁶ Rape victims would find it easier to come forward if they had greater certainty that their attacker would be punished. Potential rapists would be deterred when faced with the guarantee of a punishment. For Russell and Lushington, the passage of this bill was of deep interest to the well-being of the community and to the decline of crime.

Repeatedly, MPs struggled with this argument. Thomas Wakley insisted that the government needed to retain the power to execute men convicted of aggravated rape. If a jury refused to convict and a judge recommended mercy, Wakley argued, the problem lay with their lack of judgment, not with the death penalty. “What [are we] to do with these sort of persons, as they might...from a mawkish sentimentality, refuse to inflict any punishment?”¹¹⁷ George Muntz stated it as frankly as possible – “what the committee had to determine was, which was the greater evil, rape or murder.”¹¹⁸

The June 23 and July 15 debates continued in such a manner. The proponents on either side were unwilling to compromise and those in the middle were not successfully swayed by the arguments. The bill’s chances for passage were decreasing precipitously, and the final nail in the coffin came on July 23, with a fierce denunciation from none other than Sir Robert Peel.

¹¹⁵ House of Commons Debate, “Punishment of Death,” June 23, 1840, *Hansard*, vol. 55, cc 18-41.

¹¹⁶ House of Commons Debate, “Punishment of Death,” July 15, 1840, *Hansard*, vol. 55, cc 733-49.

¹¹⁷ House of Commons Debate, “Punishment of Death,” July 15, 1840, *Hansard*, vol. 55, cc 733-49.

¹¹⁸ House of Commons Debate, “Punishment of Death,” July 15, 1840, *Hansard*, vol. 55, cc 733-49.

With the exception of a brief minority government in December 1834, Peel had not held office from 1830 to late 1841. Separated from daily reports about crime, disorder and distress, Peel's attention had, in the words of biographer Douglas Hurd, "wandered away from the subject [of the Condition of England]."¹¹⁹ He was more concerned with Catholic Emancipation, parliamentary reform and other large-scale political issues.¹²⁰ The Whig government under Lord John Russell had picked up Peel's mantle of criminal law reform and social justice. The Whigs focused on tackling questions of poverty, notably with the 1834 Poor Law which established the (ultimately disastrous) system of workhouses to replace other forms of relief. Though Peel supported these Whig initiatives, he could not support a reform of capital punishment that was supported by the opinion of juries and the public, rather than state interests. For Peel, the removal of death penalty statutes had to be pursued carefully and clinically with the primary goal of retaining state power.

Peel began his speech with a somewhat snide jab at the Whig leadership. He stated that he "was of the opinion that they were right in making the amelioration of the criminal code proceed gradually...but he could not [support] the carrying out [of] that amelioration to the extent which [they] proposed to carry it out."¹²¹ He challenged the notion that juries were not convicting because of the death penalty – instead, he argued, the "moral guilt of the prisoner was not sufficient for the jury, and...in many cases, the fear of death did not deter the offender from the commission of crime."¹²² This was really a remarkable statement. To be sure, it was politically motivated and rooted in an effort to undermine Whig criminal law reform by questioning their interpretation of jury decisions, the primary support for their proposals.

¹¹⁹ Hurd, *Robert Peel*, 227.

¹²⁰ Hurd, *Robert Peel*, 227.

¹²¹ House of Commons Debate, "Punishment of Death," July 29, 1840, *Hansard*, vol. 55, cc 1078-101.

¹²² House of Commons Debate, "Punishment of Death," July 29, 1840, *Hansard*, vol. 55, cc 1078-101.

Yet, there was also an acute understanding of how the public understood and treated rape that was much more nuanced and more honest than Lushington's unending retreads of prosecution and conviction statistics. While Lushington read these statistics as proof that sympathetic juries were motivated by repulsion for capital punishment, Peel understood that many juries refused to convict because they did not see rape as a 'real crime.' While the Whigs gave juries credit for visionary thinking, Peel remained skeptical. Peel was not impressed by how strongly the Whigs weighed the actions of juries in their arguments and argued that the state could not relinquish its power to execute rapists; it could not capitulate to public opinion.

Peel refused to accept that rape was a crime undeserving of the death penalty and capitalized on his masterful manipulation of emotions and what would today be termed as blatant appeals to populism. "Suppose the violation of a poor woman by a wealthy man, under the circumstances of aggravation...or the case of a conspiracy on the part of a rich man to effect the violation of a woman in humble life...were cases such as these, when violence little short of taking life was committed...were they to be passed over with an ordinary punishment?"¹²³ Allowing for anything less than the maximum punishment in these cases would do no more than anger public sentiment and "lessen the sense that ought to be entertained of the enormity of the crime."¹²⁴ While these appeals were unabashedly political, they drew attention to the victim, to the experiences and the suffering of those who relied on the criminal justice system for some form of justice or retribution. Though he was knowingly defending his policies and his vision of justice, Peel was at the same time providing a perspective that was greatly lacking in the Whigs' discussion of rape.

¹²³ House of Commons Debate, "Punishment of Death," July 29, 1840, *Hansard*, vol. 55, cc 1078-101.

¹²⁴ House of Commons Debate, "Punishment of Death," July 29, 1840, *Hansard*, vol. 55, cc 1078-101.

Peel's experience as a criminal law reformer afforded him some extra liberties in discussing what did and did not warrant the restructuring of the death penalty. Though he had claimed over a decade earlier that he worked only to mitigate the criminal law, it was quite clear that Peel was in many ways supportive of a very retributive system of justice; one that left the level of retribution at the discretion of the government. Ewart attempted to defend the bill against Peel's speech but could do little to contest his points, other than a pointed jab that "if [certain Members] imagined it would at all affect themselves, they would not consider it very desirable to die."¹²⁵ At the end of the day, the bill failed, 78 votes to 51. The issue would be put off until March of the following year.

When the bill was presented again on March 8, 1841, the debate in the Commons was nowhere near as contentious as it had been the prior year. Armed with statistics, the nineteenth century's most powerful tool, Lord John Russell defended the rape clause with much stronger conviction than ever. Starting with 1834, he traced a rise in rape convictions as sentences began to be commuted to transportation sentences. "The result...of these returns was this," he said. "Since it had become the practice in cases of conviction to inflict the minor punishment of transportation, the proportion of convictions had been greater."¹²⁶ The primary support for Russell's reasoning was pragmatic, not moral. If rapists were being not being convicted when the death penalty was the only option and were being convicted when there was a more moderate punishment, the choice was clear. On this issue, Russell said, it would be wise to defer to the opinion of the juries.¹²⁷

¹²⁵ House of Commons Debate, "Punishment of Death," July 29, 1840, *Hansard*, vol. 55, cc 1078-101.

¹²⁶ House of Commons Debate, "Amendment of the Criminal Law," March 8, 1841, *Hansard*, vol. 57, cc 47-65.

¹²⁷ House of Commons Debate, "Amendment of the Criminal Law," March 8, 1841, *Hansard*, vol. 57, cc 47-65.

By this point, opposition to the bill had more or less died down. Some MPs even began to argue for future visions of rape law reform, visions that would not be realized for decades. Sir John Campbell, the Attorney General at the time, supported the bill, but argued that even removing the death penalty would not solve the problem of rape, since it would still leave the crime undefined. “Suppose a common prostitute violated without her consent by three or four men – that would be rape in construction of the law; but no judge would [execute] that man.”¹²⁸ Campbell struck at an interesting dilemma at the heart of this legislation – if the ostensible goal was to increase the punishment of rapists, how could the state do so, if it could not even satisfactorily define or enforce what actions constitute rape?

Campbell’s remarks hearken back to the idea of a “real rape” standard in public and legal opinion. Whether the public found all rapes, some rapes, or no rapes to be morally repugnant was still a question up for debate. Robert Peel, voting ‘no’ on this bill once again, warned that “[if] the offence was committed by members of the higher classes of society, for the gratification of the most brutal passions...public indignation might be so great that the House would find it expedient to retrace its course.”¹²⁹ Peel was immediately rebuffed by Charles Buller, an MP from Liskeard, who adamantly stated that “there were no capital convictions which so little satisfied the public mind as those for rape.”¹³⁰

Perhaps because these questions were so difficult to resolve, the members of the House of Commons who did support the bill chose to couch their support in terms of pragmatism and the need to improve conviction rates. Even in these early years of state-controlled criminal justice administration, there was a hankering to improve the efficiency of the law to punish. Though he admitted that rape was a reprehensible crime, Russell noted that as legislators, the

¹²⁸ House of Commons Debate, “Punishment of Death,” May 3, 1841, *Hansard*, vol. 57, cc 1408-31.

¹²⁹ House of Commons Debate, “Punishment of Death,” May 3, 1841, *Hansard*, vol. 57, cc 1408-31.

¹³⁰ House of Commons Debate, “Punishment of Death,” May 3, 1841, *Hansard*, vol. 57, cc 1408-31.

MPs “could not assume themselves the Divine power, and affix to every moral crime the penalty that ought to be attached to it.”¹³¹ By focusing on practicality rather than ethics, Russell disavowed the Parliament’s function as a creator and enforcer of a moral agenda through criminal law.

This disavowal not shared by the House of Lords. The bill finally reached the peers on June 14, after passing the Commons with a final vote of 123-61. Ostensibly, the debate in the Lords should not have been as contentious as it was, since many peers traditionally deferred to the lower House on issues of criminal law reform. According to Lord Brougham, since the Commons had come “forward with the majority of two or three to one in favour of this clause...[the Lords] should agree to it.”¹³² Brougham restated Russell’s statistics and urged the need to trust the judgment and behavior of juries, who “could not be prevailed upon for any consideration to be made parties to what must turn out to be the destruction of human life.”¹³³ Lord Abinger agreed, stating that the death penalty for rape led “anxious” jurors to “seize upon every trifling pretext or formal legal nicety in order to destroy the evidence of the woman.”¹³⁴

Others, even those who supported the bill, were not willing to accept that the crux of the issue was about the efficiency of punishment. Rather, the Lords debate turned on moral issues and on deciding what the appropriate punishment for rape was. The reluctance of juries to convict and their heightened suspicion of women was not only a violation of the administration of justice, but it was a violation of the woman’s right to present her story as a victim. There was a peculiar sense of awareness about the victim’s experience. Justice was understood as retribution for the victim, rather than a demonstration of power by the state. “If

¹³¹ House of Commons Debate, “Amendment of the Criminal Law,” March 8, 1841, *Hansard*, vol. 57, cc 47-65.

¹³² House of Lords Debate, “Punishment of Death,” June 14, 1841, *Hansard*, vol 58, cc 486-93.

¹³³ House of Lords Debate, “Punishment of Death,” June 14, 1841, *Hansard*, vol 58, cc 486-93.

¹³⁴ House of Lords Debate, “Punishment of Death,” June 14, 1841, *Hansard*, vol 58, cc 486-93.

[we] passed this law,” the Earl of Wicklow warned, “[we] would sanction what the people of this country would never confirm – that sodomy and rape were not crimes of so heinous a character as to deserve death.”¹³⁵

There were several voices of this kind of opposition to the bill. The Marquess of Westmeath, the same man who earlier called for a survey of the nation’s women before passing the bill, later added that this clause “threw the whole hardship” of rape onto the victim. For Westmeath, shielding women from the potential collateral effects of this bill was paramount. Yet, though this opposition pays special attention to the victim, it does so in a way that reinforces her dependence and vulnerability. The Earl of Winchilsea, for example, protested the clause because he believed “that the punishment of death for cases of violent assault and forcible rape was indispensable for the protection of *virtuous females*.”¹³⁶ All protests along this line envisioned the role of Parliament as the protector of chaste women’s interests and the watchman over devious men’s morality – discussion of victim’s suffering was framed in this context as well.

The debate on June 14 concluded with little progress. The two sides seemed evenly split and the fundamental dispute was nowhere near resolution. On June 17, the Marquess of Normanby called for another reading of the bill. Rather than statistics, which failed miserably during the last debate, Normanby attempted to sway the Lords with an anecdotal story about an 1837 rape trial. Three men were indicted for rape; the evidence was heavily in the victim’s favor and suggested strongly that the rape was quite violent. After initial deliberation, the jury asked the judge whether there would be an option for a “mitigating verdict” – not acquittal, but also not death. The judge refused, and the jury returned a verdict of ‘not guilty.’ Normanby

¹³⁵ House of Lords Debate, “Punishment of Death,” June 17, 1841, *Hansard*, vol. 58, cc 1152-60.

¹³⁶ House of Lords Debate, “Punishment of Death,” June 14, 1841, *Hansard*, vol 58, cc 486-93. Emphasis mine.

concluded his story with a strong assertion – “every one feels that there must be something decidedly wrong for men so clearly guilty of so black a crime to be thrown back upon society altogether unpunished, by the verdict of twelve disinterested men.”¹³⁷ Normanby’s anecdote seemed quite effective in front of an audience that seemed particularly moved by the moral implications of removing the death penalty as punishment for rape. Normanby may very well have succeeded, had it not been for a speech that presumably supported his position, yet single handedly, destroyed it.

Lord Denman, a judge in criminal cases, supported the passage of the bill; however, his reasoning was entirely different from Normanby’s. He argued that he had never seen a jury acquit a defendant guilty of rape. Rather, he said, “he knew by experience [that] rapes were seldom deliberately committed. They were usually the result of some accidental communication at a fair or junketing, where persons of different sexes came together, and when at a late hour of the night, some unfortunate female, whose imprudence had led her into the company, became the victim of brutal and disgusting outrage.”¹³⁸ The themes expressed in Denman’s statement are the kind assumed to be the standard in nineteenth century opinion. It spans the gamut of the most repugnant rape apologist tropes –blaming the victim’s “imprudence” and calling the crime an “accident.” He argued that the death penalty was not an appropriate punishment for rape because rape was not necessarily a morally reprehensible crime.

The response to Denman was not supportive. This mindset, this ideological treatment of rape, was not universally held, and provided those who opposed the bill with ample ammunition. Among many others, the Earl of Harwood was offended at Denman’s remarks and his purported expertise on the subject. “[We] ought neither to legislate on the opinion of the

¹³⁷ House of Lords Debate, “Punishment of Death,” June 17, 1841, *Hansard*, vol. 58, cc 1152-60.

¹³⁸ House of Lords Debate, “Punishment of Death,” June 17, 1841, *Hansard*, vol. 58, cc 1152-60.

judges, nor on the opinion of the juries,” Harwood said. “[I] would never consent to see [rape] visited with any punishment short of death.” Denman’s speech led to such feverish debate that the scheduled vote on the bill had to be postponed. The two camps were even more divided at the conclusion of the June 17 debate than they had been three days earlier.

On the morning of June 18, the Lords seemed ready to conclude this contentious debate. The Marquess of Normanby called for a vote immediately – “one of the worst things their Lordships could do,” he said “was to enter into a discussion on [this] amendment.”¹³⁹ The Earl of Wicklow remained unconvinced that Normanby had proven his case, but agreed that further discussion would be unhelpful. The Lords voted. The final count was 64-60, in favor of passage. Rape was no longer a capital crime – a decision finalized by only four votes.

¹³⁹ House of Lords Debate, “Punishment of Death,” June 18, 1841, *Hansard*, vol. 58, cc 1568-70.

Conclusion: Voices, Then and Now

In her sample of London trials, Judith Travers found that after 1841 the conviction rate for rape jumped from 18% to 51%. Like many, she interpreted the statistic as proof that the elimination of the death penalty liberated juries from the moral dilemma of sentencing a non-murderer to death.¹⁴⁰ The numbers strongly suggest that the removal of the death penalty did yield, or at least, contribute to, a rise in rape convictions. Yet if by the middle of the nineteenth century Britons were beginning to approach capital punishment differently, could it be possible that there was also a changing understanding of rape? In addition to the removal of the death penalty, could the rise have been buoyed by continued changes in procedure, prosecution and treatment of rape, changes that had their roots in the transformations discussed thus far.

In addition to the transforming legal and judicial attitudes towards rape that have been discussed, popular opinion was beginning to alter as well. Increasingly, rape was seen as an abhorrent crime and the number of contexts and victims which elicited this reaction also continued to broaden. The kind of riotous response generally inspired by labor disputes or

¹⁴⁰ Judith Travers, "Cultural Meanings and Representations of Violence Against Women, London 1790-1895" (Ph.D. diss., State University of New York at Stony Brook, 1997), 153. Martin Wiener makes similar points in *Men of blood*. The introduction to the online database of the *Proceedings of the Central Criminal Court* repeats the argument.

controversial government actions could now be seen in communities touched by rape. In the summer of 1846, four young men convicted of rape were scheduled for a prison transfer between Appleby and Milbank, a distance of several hundred miles. The news of their transfer reached the en route villages. “Numbers of men, women and children...had collected together to show their disgust at the heinous conduct of the prisoners.” At Barnard Castle, the crowd became so aggressive, that the prisoners required the assistance of the police to disperse the mob. Rumors from Darlington suggested that the mob was prepared to attack the prisoners mid transport. *The Times* commented that there was “no doubt...that some personal violence would have been used towards the prisoners” were they not protected by the police.¹⁴¹

In addition to a changing social perception about the rapist, the definition of the rape victim continued to broaden after 1841. Only four years after the Punishment of Death bill passed, a new judicial precedent was set in *R. v. Camplin* that extended protection to intoxicated women. The defendant, William Camplin, gave a young girl copious amounts of alcohol, rendering her extremely drunk, and proceeded to have sex with her – his counsel argued that no rape had been committed, as the girl did not adequately demonstrate a struggle – “to constitute rape there must be actual force used, and actual resistance to that force,” he stated.¹⁴² This line of reasoning, the lawyer continued, had been accepted in prior cases.

The jury was not swayed and convicted Camplin. His lawyer appealed to the higher court, who upheld the conviction. In their opinion, the Judges interpreted the rape statute to define the crime as “ravishing a woman ‘where she did not consent’ and not ravishing against her will.”¹⁴³ The *Camplin* ruling determined that proving a lack of consent, in its broader definition, superseded the need to prove physical resistance. This is a remarkable ruling whose

¹⁴¹ *The Times*, August 29, 1846.

¹⁴² *R.v Camplin*, 169 Eng. Rep. 163.

¹⁴³ *R.v Camplin*, 169 Eng. Rep. 163.

goal remains to be fulfilled; nevertheless, by redefining the rape statute, it opened the door for more prosecutions pursued by women who may have felt like they had no recourse.

These patterns of change continued throughout the nineteenth century. Though they are sometimes obstructed from historical view by the numerous cases, trials and rulings that were dismissive of victims and of the crime, these legal and judicial changes altered, however slowly, the way rape was treated and understood. The transformations continued to progress over time, culminating in the remarkable work of feminist historians, activists and leaders such as Susan Brownmiller and Anna Clark. Bringing their early origins to light became especially important to me after a particular moment in the early conceptual stages of this thesis.

A few weeks into my research, I came across a series of articles in the *Philadelphia Daily News* about a 2007 rape case. The victim, a prostitute, had posted an advertisement for sexual services on the website Craigslist. She was contacted by the defendant, and they agreed to meet at an address he provided. The defendant claimed it was his house – it was really an abandoned parking lot. They set the terms of the agreement - \$150 for one hour of sex. He asked if she would also sleep with his friend for more money. She agreed. Instead of a friend, three additional men arrived, wielding a gun. The victim tried to leave, but the men raped her anyway, until a fifth man arrived and helped her flee.

The case was brought before Municipal Judge Teresa Carr Deni by the Philadelphia District Attorney's office. At the preliminary hearing, Deni dropped all rape and assault charges against the defendant. The victim "consented and didn't get paid," Deni said. "I thought this was a robbery." The defendant was instead charged with "theft of services." When she was interviewed by the *Daily News* reporter several days later, Deni said "Did she tell you she had another client before she went to report it? I thought rape was a trauma. [A case like this]

minimizes true rape cases and demeans women who are really raped.”¹⁴⁴ The language was sensationally clear – since the victim was a prostitute, the only problem with her being assaulted by a group of men at gunpoint was that she was not paid. This was not a “real rape.”

At the time I read this case, I was buried under a mountain of scanned articles from *The Times* covering rape cases from the nineteenth century. Save the date and perhaps the mention of Craigslist, was this Philadelphia case really all that different from the pile that surrounded me?¹⁴⁵ I realized that, one hundred, two hundred years from now, a student, a historian who came across this story could convincingly come to the conclusion that that twenty first century America was a backwards, misogynist society, hostile to rape victims and their suffering.

It was a sobering realization. On one hand, Deni’s ruling and her lack of remorse or sympathy was difficult for me to accept. On the other, I knew that such a conclusion about our society would have been unfair, unfair to those who spent their careers counseling rape victims, who worked tirelessly to prosecute rape cases, who founded grassroots outreach programs spreading awareness about sexual violence. I dug deeper into this case, looking for the evidence of outrage and protest I was expecting.

The first evidence came in the form of Jill Porter, the *Daily News* columnist who found this story and brought it to national attention. She called the ruling “an insult [and] more evidence of the skepticism and contempt most rape victims -- prostitutes or not -- confront

¹⁴⁴ Jill Porter, “Hooker raped and robbed – by the criminal justice system?” *The Philadelphia Daily News*, October 12, 2007.

¹⁴⁵ In an eerie moment, hours after I read about this case, I came across a trial discussed in Anna Clark’s *Women’s Silence, Men’s Violence* that was strikingly similar. In 1824, when a woman raped by three men in front of a crowd of 100 admitted on the stand that she had taken money from the men in the past and drank with them earlier in the day, her case was dismissed. *The Times* commented that “this transaction, though clearly not warranting a conviction against the prisoners, was attended with circumstances indicating a state of manners and morals which we should scarcely have suspected to exist in any part of the country.” *The Times*, August 30, 1824, quoted in Clark, *Women’s Silence, Men’s Violence*, 73.

when they seek justice in court.”¹⁴⁶ Porter was not the only protestor to come forward. Rick DeSipio, the prosecutor on the case, made his outrage known. “For a judge to make a judgment on a human being -- I've never seen that before,” he told Porter. He also made it clear that he was planning to reinstate the charges immediately.

A week after Porter broke the story, a grassroots movement, calling themselves “Deny Deni” organized an effort to unseat the judge in the upcoming retention election. The story attracted attention from national blogs and organizations, including the National Organization for Women, and Women Organized Against Rape. The Philadelphia Bar Association reported an influx of calls and emails from all over the country. Jane Leslie Dalton, the Chancellor of the Bar Association issued a rare public statement blasting Deni’s treatment of the case. “The victim has been brutalized twice in this case: first by the assailants, and now by the court,” Dalton wrote. “Judge Deni's belief that because the victim had originally intended to have sex for money and decided not to because she didn't get paid posits that a woman cannot change her mind about having sex, or withdraw her consent to do so, regardless of the circumstances. We cannot imagine any circumstances more violent or coercive than being forced to have sex with four men at gunpoint.”¹⁴⁷

The efforts to unseat Deni were unsuccessful – it is nearly impossible to remove a judge in a retention election. Nevertheless, the movement and the case’s notoriety made some slight electoral difference. Deni received only 66% endorsement from the voters; her peers generally

¹⁴⁶ Jill Porter, “Hooker raped and robbed – by the criminal justice system?” *The Philadelphia Daily News*, October 12, 2007.

¹⁴⁷ Jill Porter, “Move afoot to unseat judge in rape ruling,” *The Philadelphia Daily News*, October 24, 2007. Jill Porter, “Phila. Bar rips judge who nixed rape of hooker,” *The Philadelphia Daily News*, October 31, 2007.

received 75% or higher.¹⁴⁸ More importantly, the outrage extended beyond the Philadelphia community and inspired reaction from people nationwide. There was more to this case than just the ruling.

Like nineteenth century England, American society still has many misconceptions and biases about women and about rape. Quite frequently, those biases seem to be exactly the same ones. Yet it would be misleading to think that these injustices overwhelm the voices of those who protest for change, who promote progress. The outrage over Deni's ruling seems to have little in common with the protests discussed in this thesis – they are reflective of the many social and cultural differences between the two time periods. They come from women in positions of power, of authority, from women who have the capacity to organize. Yet, they also come from men, from prosecutors such as DeSipio and from the many men who joined in the grassroots protests.

The nineteenth century protests are important in their own way. They are complicated – they come from men in positions of power, they are intrinsically linked to political and social motivations, they are sometimes constrained by notions of patriarchy. Yet these legal and judicial changes created a national discussion about rape, a widespread urge to talk about and consider how the legal and judicial system treated and understood rape. Like in modern America, injustices in nineteenth century England were met with voices calling for change. To forget these voices would be a great disservice to the way change actually proceeds.

¹⁴⁸ "2007 Municipal Election, Tuesday, November 06, 2007, Judge of the Municipal Court: Judicial Retention, 1st Judicial District (Philadelphia County)", *Pennsylvania Department of State: Elections Information* (website). Accessed March 30, 2009.

Bibliography

Primary Sources

Newspapers, Periodicals and Other Media:

- *Birmingham Daily Post*
- *Derby Mercury*
- *Leeds Mercury*
- *Lloyd's Weekly Newspaper*
- *Morning Chronicle*
- *Northern Star*
- *PBS Online NewsHour*
- *Philadelphia Daily News*
- *Reynold's Weekly Newspaper*
- *Self*
- *The Republican*
- *The Times*

Legal Records and Treatises:

- *Old Bailey Sessions Papers*
- *English Reports*
- Matthew Hale. *Historia Placitorum Coronae. The History of the Pleas of the Crown*. Edited by Sollom Emlyn in 2 volumes. London, 1736. Reprint. Classical English Law Texts. London: Professional Books, Ltd., 1971.
- *Trial of Abraham Thornton*. Edited by Sir John Hall. Edinburgh and London: William Hodge & Co, 1926.

- William Hawkins. *A Treatise of the Pleas of the Crown, Volume I*. London: 1721.
- William Oldnall Russell and Edward Ryan. *Crown Cases: Reserved for Consideration and Decided by the Twelve Judges of England, from the year 1799 to the year 1824*. London: A. Strahan, 1825 and Philadelphia: T. & J.W. Johnson, Law Booksellers, 1839.

Government Documents:

- *Hansard*
- Liz Kelly, Jo Lovett, and Linda Regan, "A Gap or a Chasm? Attrition in Reported Rape Cases," *Home Office Research Study 293*, February 2005.
- "2007 Municipal Election, Tuesday, November 06, 2007, Judge of the Municipal Court: Judicial Retention, 1st Judicial District (Philadelphia County)", *Pennsylvania Department of State: Elections Information*.

Literary and Other Sources:

- *Annual Biography and Obituary for the Year 1825*. London: Longman, 1825.
- *The Complete Newgate Calendar*. Edited by J.L. Rayhert and G.T. Crook. London: Navarre Society, 1926.
- *Dying Speeches & Bloody Murders: Crime Broadside Collection at Harvard Law School Library*.
- S. M. Farrell, "Ewart, William (1798–1869)," in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004).

Secondary Sources

Adler, Zsuzsanna. *Rape on Trial*. London: Routledge, 1987.

Bashar, Nazife. "Rape in England between 1550 and 1700." *The sexual dynamics of history: men's power, women's resistance*. Edited by London Feminist History Group. London: Pluto Press, 1983: pp. 28-42.

Beattie, J.M. *Crime and the Courts in England: 1660-1800*. Princeton: Princeton University Press, 1986.

Bourke, Joanna. *Rape: Sex, Violence, History*. London: Virago Press, 2007.

Brownmiller, Susan. *Against our will: men, women and rape*. New York: Simon and Schuster, 1975.

Clark, Anna K. "Rape or seduction?: a controversy over sexual violence in the nineteenth century." *The sexual dynamics of history: men's power, women's resistance*. Edited by London Feminist History Group. London: Pluto Press, 1983: pp. 13-27.

Clark, Anna K. *Women's silence, men's violence: sexual assault in England, 1770-1845*. London: Pandora Press, 1987.

Conley, Carolyn A. "Rape and justice in Victorian England." *Victorian studies* 29 (1986), pp. 519-536.

Conley, Carolyn A. *The Unwritten Law: Criminal Justice in Victorian Kent*. Oxford: Oxford University Press, 1991.

D'Cruze, Shani. *Crimes of outrage: sex, violence and Victorian working women*. London: UCL Press, 1998.

Devereaux, Simon. "The City and the Sessions Paper: 'Public Justice' in London, 1770-1800." *The Journal of British Studies* 35 (1996), pp. 466-503.

Edelstein, Laurie. "An accusation easily to be made?: rape and malicious prosecution in eighteenth-century England." *American journal of legal history* 42 (1998): pp. 351-390.

Emsley, Clive. *Crime and Society in England, 1750-1900*. London: Longman Group, 1987.

Foucault, Michel. *The History of Sexuality, Volume I: An Introduction* (1978). Translated by Robert Hurley. London: Penguin, 1978.

Gatrell, V.A.C. *The Hanging Tree: Execution and the English People, 1770-1868*. Oxford: Oxford University Press, 1994.

Hurd, Douglas. *Robert Peel*. London: Weidenfield & Nicholson, 2007.

Ludlam, George. *The Mysterious Murder or What's o'clock?* Birmingham: 1818.

Martin, Patricia Yancey and R. Marlene Powell. "Accounting for the 'Second Assault': Legal Organizations' Framing of Rape Victims." *Law and Social Inquiry* 19 (1994): pp. 853-890.

May, Allyson N. *The Bar and the Old Bailey, 1750-1850*. Chapel Hill: University of North Carolina Press, 2003.

Novak, Michael. "Against Our Will." *Commentary* 61 (1976): p. 90.

Radzinowicz, Leon. *History of English Criminal Law and Its Administration from 1750*, 5 volumes. London: Stevens, 1948-1986.

Schoenewolf, Gerald. "The Feminist Myth About Sexual Abuse." *The Journal of Psychohistory* 18 (1991): pp. 331-344.

Shorter, Edward. "On Writing the History of Rape." *Signs* 3 (1977): pp. 471-482.

Simpson, Antony E. "'Blackmail myth' and the prosecution of rape and its attempt in 18th Century London: the creation of a legal tradition." *Journal of criminal law and criminology* 77 (1986): pp. 101-150.

Simpson, Antony E. "Popular perceptions of rape as a capital crime in eighteenth-century England: the press and the trial of Francis Charteris in the Old Bailey, February 1730." *Law and history review* 22 (2004): pp. 27-70.

Travers, Judith. "Cultural Meanings and Representations of Violence Against Women, London 1790-1895." Ph.D. dissertation., State University of New York at Stony Brook, 1997.

Wiener, Martin J. *Men of blood: violence, manliness and criminal justice in Victorian England*. Cambridge: Cambridge University Press, 2004.

Williams, Joyce E. and Karen A. Holmes. *The Second Assault: Rape and Public Attitudes*. London: Greenwood Press, 1981.

Worrall, David. "Mysterious Murder and the Murdered Maid: The Case of Mary Ashford and the Cultural Context of Late-Regency Melodrama." *Journal of Gothic Studies* 3 (2001): pp. 181-195.