

## Rape by Fraud: Eluding Washington Rape Statutes

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### INTRODUCTION

Existing Washington law does not sufficiently safeguard its citizens from “rape by fraud,” an action whereby a person obtains sexual consent and has sexual intercourse of any type by fraud,<sup>1</sup> deception, misrepresentation, or impersonation.<sup>2</sup> Rape by fraud is a form of sexual predation not always prosecutable under existing Washington law.<sup>3</sup> In recent years, twelve states have adopted expanded rape by fraud statutory provisions.<sup>4</sup> Presently, Washington’s rape statutes lack the expansive rape by fraud statutory language adopted by these twelve states.<sup>5</sup> A recent sexual scam in Seattle has revealed holes in Washington’s rape statutes.<sup>6</sup> This Note examines the history of rape by fraud, considers criticisms against expanding existing rape by fraud statutory provisions, and concludes that Washington should adopt expansive rape by fraud statutory provisions to better protect its citizens from sexual impersonation, sexual scams, sexual theft, and sexual extortion.

Rape by fraud is perpetrated across six general categories (with some overlap): (1) fraudulent treatment, (2) sexual impersonation, (3) sexual scams, (4) sexual theft, (5) abuse of authority, and (6) sexual extortion.<sup>7</sup> First, fraudulent treatment, perhaps the most prominent of the categories

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\* During the summer of 2016, I was a legal extern at the King County Prosecuting Attorney’s Office’s (KCPAO) Special Assault Unit. During that summer, I witnessed some of the enormous challenges that victims of sexual assault face in Washington. I was motivated to write this Note in hope of relief for the many people affected by its subject matter. I would like to thank all the prosecutors and staff at KCPAO for their mentorship and service to the community, especially Ms. Lisa Johnson, Ms. Corinn Bohn, Mr. Hugh Barber, and Ms. Carla Carlstrom.

1. Fraud is “[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.” *Fraud*, BLACK’S LAW DICTIONARY (10th ed. 2014).

2. Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 48 (1998).

3. See WASH. REV. CODE §§ 9A.44.040, 9A.44.050, 9A.44.060 (2016).

4. See Jacqueline Symnick, *Challenging the Use of Fraud to Get into Bed After Suliveres v. Commonwealth—A Call for Legislative Reform*, 43 NEW ENG. L. REV. 321, 335–36 (2009).

5. See WASH. REV. CODE §§ 9A.44.040, 9A.44.050, 9A.44.060.

6. See *infra* notes 59–85 and accompanying text.

7. See Falk, *supra* note 2, at 52.

in existing case law, is characterized by fraudulent medical, psychological, psychiatric, and religious treatment used to obtain sexual intercourse.<sup>8</sup> Many of the most infamous rape by deception cases involve unscrupulous physicians convincing patients that sexual complicity is essential to or helpful in providing a needed medical operation or diagnosis.<sup>9</sup>

Second, sexual impersonation involves someone who pretends to be someone else to fraudulently obtain sexual intercourse.<sup>10</sup> Impersonation of a significant other is characteristic of this category;<sup>11</sup> however, case law also provides examples of defendants impersonating famous people to obtain sexual intercourse.<sup>12</sup>

Third, sexual scams typically involve fraudsters targeting vulnerable people, often impersonating agents or producers within the entertainment industry, especially pornographic content production.<sup>13</sup> Sexual scammers sometimes use other techniques to fraudulently induce sexual complicity, including operating under the guise of (bogus) scientific research and, in one particularly bizarre case, posing as an entranced psychic and demanding sex during a séance.<sup>14</sup>

Fourth, sexual theft involves one of the most controversial and vulnerable classes of victims: sex workers.<sup>15</sup> Case law is replete with this archetypal description of sexual theft: someone approaches a sex worker, offers money in exchange for sex, has sex, and subsequently refuses to pay.<sup>16</sup>

Fifth, abuse of authority occurs when someone uses occupational or social power to obtain sexual complicity.<sup>17</sup> Typically, abuse of authority cases involve defendants who utilize their positions as educators, police

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8. *Id.* at 52–64.

9. *See, e.g.,* Don Moran v. People, 25 Mich. 356 (Mich. 1872).

10. *See* Falk, *supra* note 2, at 65–66.

11. *See id.* at 66–69. *See generally* People v. Hough, 607 N.Y.S.2d 884 (N.Y. Dist. Ct. 1994) (holding that a woman consented to sexual intercourse with a man when he procured her consent by impersonating her boyfriend, who was his twin brother, because New York's non-consent statute required proof of force or incapacity).

12. *See* Falk, *supra* note 2, at 69.

13. *See id.* at 70–74.

14. *Id.* at 75.

15. *Id.* at 76–79.

16. *Id.*

17. *Id.* at 79–84.

officers,<sup>18</sup> supervisors, and employers to leverage sexual complicity against victims.<sup>19</sup>

Sixth, sexual extortion, which is often closely related to abuse of authority, occurs when a perpetrator lacks a formal position of authority but, nevertheless, exploits the power derived from his or her relationship with the victim.<sup>20</sup> Altogether, these six categories represent the scope of rape by fraud examined in this Note.

Washington law affords basic criminal protections against fraudulent treatment and abuse of authority, but it lacks the statutory language necessary to adequately protect against impersonation, sexual scams, sexual theft, and sexual extortion.<sup>21</sup>

Part I of this Note examines the disappointing history of rape by fraud in courtrooms across the nation. Additionally, this Part reveals that Washington rape statutes offer only limited power to prosecute rape by fraud. Although most states have narrow rape statutes like Washington, twelve states have adopted modern rape by fraud provisions that have significantly expanded the protections afforded to victims whose sexual consent was obtained by fraud. In Part II, this Note describes the various statutory models offered by these twelve states and the Uniform Model Penal Code. In Part III, this Note suggests that Washington should adopt expanded rape by fraud statutory provisions to enhance human dignity and gender equality, and it then considers and responds to criticisms against such action.

## I. A LONG AND DISAPPOINTING HISTORY OF RAPE BY FRAUD LAW

Seminal cases illustrate the historical and ongoing inadequacies of most states' rape statutes. In *Don Moran v. People*,<sup>22</sup> the defendant was a doctor who told his patient, a fifteen-year-old girl, that she had to have sex with him to save her life.<sup>23</sup> Coerced by the defendant, the young girl submitted.<sup>24</sup> Although the trial court convicted the defendant of rape, the

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18. In 2016, a former Oklahoma City police officer was convicted on eighteen of thirty-six charges, including four counts of first-degree rape and four counts of oral sodomy; the jury recommended a 263-year sentence because it believed the ex-officer used his authority to prey on vulnerable women. Elliott C. McLaughlin, Sarah Sidner & Michael Martinez, *Oklahoma City Cop Convicted of Rape Sentenced to 263 Years in Prison*, CNN (Jan. 22, 2016, 12:26 PM), <http://www.cnn.com/2016/01/21/us/oklahoma-city-officer-daniel-holtzclaw-rape-sentencing/> [https://perma.cc/63WW-BF6D].

19. See Falk, *supra* note 2, at 79–84.

20. *Id.* at 84.

21. See *infra* note 74 and accompanying text.

22. *Don Moran v. People*, 25 Mich. 356, 356 (Mich. 1872).

23. *Id.* at 357.

24. *Id.* at 357–58.

Supreme Court of Michigan relied on a definition of rape<sup>25</sup> that required force against the victim and reversed judgment against the defendant for lack of proof of force.<sup>26</sup>

Nearly a century later, the *Doran Moran* opinion was revitalized in *Commonwealth v. Goldenberg* by requiring proof of physical force, despite coercive and assaultive conduct.<sup>27</sup> The defendant, a doctor, met with an unmarried 19-year-old girl who was three months pregnant and seeking an abortion.<sup>28</sup> The defendant agreed to perform an abortion and told the girl that the procedure would span three treatments.<sup>29</sup> In the first treatment, the defendant had the girl undress, and then he applied a vibrator to her genitals.<sup>30</sup> He then gave her two injections that stammered her speech and made her feel delirious and unable to walk normally.<sup>31</sup> In the second treatment, the defendant, again, used a vibrator on her genitals and gave her another two injections.<sup>32</sup> He then told her that he had to have sexual intercourse with her and that it “would help in some way.”<sup>33</sup> She did not tell the doctor no, but she felt dizzy, powerless, and unable to control her body.<sup>34</sup> The girl later spoke with her friend and mother, describing the doctor’s actions.<sup>35</sup> Resultantly, she did not return for the third treatment and instead contacted the police.<sup>36</sup> At trial, a jury found the defendant guilty of rape.<sup>37</sup> Afterward, the defendant appealed, and the court set aside the verdict because there was no proof of force and “it could not be found beyond a reasonable doubt that the intercourse was without her consent.”<sup>38</sup>

Two decades later, in *Goldberg v. State*, the court continued to require proof of force when another defendant faced rape charges after he used a sexual scam to obtain sexual intercourse.<sup>39</sup> The defendant, a 25-year-old community college student, approached an 18-year-old girl and told her that he was a “free-lance agent and thought she was an excellent

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25. The court defined rape as “the unlawful carnal knowledge, by a man of a woman, forcibly (or by force), and against her will[.]” *Id.* at 359.

26. *Id.* at 364–65.

27. See *Commonwealth v. Goldenberg*, 155 N.E.2d 187 (Mass. 1959).

28. *Id.* at 189.

29. *Id.*

30. *Id.*

31. *Id.* at 189–90.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 191.

39. See *Goldberg v. State*, 395 A.2d 1213 (Md. Ct. Spec. App. 1979).

prospect to become a successful model.”<sup>40</sup> The defendant showed her an ID and convinced her that he was a genuine agent, so the girl agreed to meet with him later, and he picked her up in a Cadillac Eldorado (unbeknownst to the girl, the car belonged to his mother).<sup>41</sup> The defendant told her that he was taking her to “a temporary studio.”<sup>42</sup> When they found that the so-called studio was “closed,” he took her to a condominium that he told her they could use instead.<sup>43</sup> The girl testified that the defendant led her to a bedroom with a large bed and a red velvet bedspread.<sup>44</sup> The defendant took off his shirt and continued trying to convince her that this was all part of the modeling job, but “[she] knew that it wasn’t any more.”<sup>45</sup> Then, out of fear—she later testified that she was afraid that he was going to kill her—she removed her clothes.<sup>46</sup> The defendant pushed her onto the bed and had sexual intercourse with her.<sup>47</sup>

At trial, a jury convicted the defendant of rape.<sup>48</sup> The reviewing court, however, reversed judgment because, in “the absence of actual force, unreasonable subjective fear of resisting cannot convert the conduct of the defendant from that which is non-criminal to that which is criminal.”<sup>49</sup>

Almost thirty years later, a Massachusetts court reprised and expanded the *Commonwealth v. Goldenberg* opinion in *Suliveres v. Commonwealth* by holding that consent induced by fraudulent impersonation did not amount to rape.<sup>50</sup> In *Suliveres*, a female complainant reported that the defendant had sexual intercourse with her and had impersonated her boyfriend after he awakened her in a dark room.<sup>51</sup> She reported that when the defendant entered the dark room, she assumed that person was her boyfriend—in fact, she addressed him by her boyfriend’s name.<sup>52</sup> Moreover, she reported that she was “‘not fully awake’ at the time of penetration” and that, if she had known that the person in her room was the defendant, she “‘would have never consented.’”<sup>53</sup> The defendant argued that the sex was consensual.<sup>54</sup> Lacking any rape by fraud statutory

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40. *Id.* at 1214.

41. *Id.* at 1215.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1214.

49. *Id.* at 1220.

50. See *Suliveres v. Commonwealth*, 865 N.E.2d 1086, 1091 (Mass. 2007).

51. *Id.* at 1088.

52. *Id.*

53. *Id.*

54. *Id.*

provision, the jury was unable to reach a verdict and the judge declared a mistrial.<sup>55</sup> The defendant then moved for dismissal and the court denied his motion.<sup>56</sup> After the court denied his motion, the defendant sought relief from the Supreme Judicial Court of Massachusetts.<sup>57</sup> The Court held that “[f]raudulently obtaining consent to sexual intercourse does not constitute rape as defined in our statute.”<sup>58</sup>

Today, similar statutory inadequacies persist in Washington. Six women reported that a Seattle man, Mr. Matt Hickey, fraudulently posed as a pornography recruiter and lured them to bogus auditions and nude photography shoots where he coerced them into having sexual intercourse.<sup>59</sup> One twenty-year-old woman, Ms. Liz Shearer, alleged that Mr. Hickey promised to guide her into the pornographic industry after a sex audition “[t]o prove to production companies that having sex with someone [she] didn’t know was something that [she] could handle.”<sup>60</sup> Ms. Shearer had never worked in pornography before, but she was struggling financially working as a nanny, so she met Mr. Hickey in a hotel and agreed to have sexual intercourse with him for the so-called audition.<sup>61</sup> Afterward, Ms. Shearer reported that “if I had known what was going on, I wouldn’t have.”<sup>62</sup>

Ms. Allisia Bishop reported that she had been similarly assaulted by Mr. Hickey two years before Ms. Shearer’s experience. Ms. Bishop reported that Mr. Hickey gave her a similar promise of guidance into the pornographic industry, so she agreed to meet with him at his apartment.<sup>63</sup> Ms. Bishop alleged that Mr. Hickey offered her numerous alcoholic beverages and told her: “Well, we have to have sex, because if we don’t then how am I going to know you’re for real and you’ll actually be able to do this in the industry? So you have to prove to me you’re not going to bail out.”<sup>64</sup> Afterward, she reported that she would never have had sexual

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55. *Id.*

56. *Id.*

57. *Id.* at 1089.

58. *Id.* at 1091.

59. See generally Info., State v. Hickey, No. 16-1-05400-1 (Wash. Super. Ct. 2016); Default Judgment, State v. Hickey, No. 16-2-30379-0 (Wash. Super. Ct. 2016); Sydney Brownstone, *The Audition*, STRANGER (June 8, 2016) [hereinafter Brownstown, *Audition*], <http://www.thestranger.com/feature/2016/06/08/24182705/the-audition> [https://perma.cc/SZ8J-N5JP]; Sydney Brownstone, *Three Women Say Tech Journalist Matt Hickey Raped Them Outside of “The Audition” Scam*, STRANGER (July 20, 2016) [hereinafter Brownstown, *Three Women Accuse Matt Hickey*], <http://www.thestranger.com/features/2016/07/20/24361423/three-women-say-tech-journalist-matt-hickey-raped-them-outside-of-the-audition-scam> [https://perma.cc/Q6BK-R3XU].

60. See Brownstown, *Audition*, *supra* note 59.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

intercourse with him had she not thought that he was genuinely auditioning her for work.<sup>65</sup> Ms. Bishop left the so-called audition feeling upset and violated.<sup>66</sup> Later that same day, she slit her wrists in a bathtub; the cuts were not fatal and she reported that she has tried to “move on.”<sup>67</sup>

At least seven other women have also reported that Mr. Hickey sexually assaulted them using alcohol and deceptive pornographic auditions to obtain sexual compliance.<sup>68</sup>

Following the reports against Mr. Hickey, The King County Prosecuting Attorney’s Office (KCPAO) charged Mr. Hickey with three counts of Rape in the Second Degree.<sup>69</sup> The lack of a relevant rape by fraud statutory provision appears to have limited KCPAO’s charges to those instances of rape wherein the victims reported that they were incapacitated by alcohol and, thus, unable to consent.<sup>70</sup>

Mr. Hickey denied all allegations of rape and claimed that the women were “into it.”<sup>71</sup> KCPAO responded that “[s]uch an excuse might be believed with one rape or maybe even two, but after multiple situations in which women have accused him of raping them when they were *intoxicated*, the defendant’s excuses are no longer believable. . . . This defendant is a danger to the community.”<sup>72</sup>

However, without the attendant alcohol,<sup>73</sup> KCPAO would almost certainly not have had the statutory language necessary to prosecute Mr.

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65. *Id.*

66. *Id.*

67. *Id.*

68. *See id.* (initially reporting that six women accused Mr. Hickey of perpetrating a sexual scam against them and raping them); Brownstone, *Three Women Accuse Matt Hickey*, *supra* note 59 (reporting that another three women accused Mr. Hickey of rape).

69. Info. at 1–2, *State v. Hickey*, No. 16-1-05400-1 (Wash. Super. Ct. 2016). “A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated[.]” WASH. REV. CODE § 9A.44.050(1)(b) (2016).

70. *See* WASH. REV. CODE §§ 9A.44.040, 9A.44.050, 9A.44.060. “‘Mental incapacity’ is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.” WASH. REV. CODE § 9A.44.010(4). Washington law provides that, for criminal rape convictions, mental incapacity, including incapacity caused by the influence of a substance such as alcohol or drugs, may render a victim incapable of consenting to sexual activity. *Duvall v. Nelson*, 387 P.3d 1158, 1166 (Wash. Ct. App. 2017). Of note, KCPAO’s limited charges may also have been affected by, for example, evidentiary concerns, internal policies, and limited resources.

71. Prosecuting Attorney Case Summary and Request for Bail and/or Conditions of Release at 1, *State v. Hickey*, No. 16-1-05400-1 (Wash. Super. Ct. 2016).

72. *Id.* (emphasis added).

73. *See supra* note 70 and accompanying text.

Hickey with criminal rape charges in connection with the sexual scam.<sup>74</sup> Although Washington law provides limited protection against abuse of power, sexual extortion (protecting only those with developmental disabilities), and fraudulent healthcare treatment, it lacks statutory language necessary to fully protect against sexual theft, sexual scams, and impersonation.<sup>75</sup> KCPAO prosecutor, Ms. Carla Carlstrom, noted that, in cases like this, the defendant can simply say that the victims consented and “[o]ften that’s why the state isn’t even able to file charges.”<sup>76</sup>

Indeed, despite having been accused by at least six women,<sup>77</sup> KCPAO’s criminal rape charges were limited to three counts of Rape in the Second Degree against three different women.<sup>78</sup> However, KCPAO accepted guilty pleas for four lesser charges: Indecent Liberties, two counts of Assault in the Second Degree, and Assault in the Fourth Degree.<sup>79</sup> Mr. Hickey was given a 34-month sentence and placed on a sex offender registry.<sup>80</sup> KCPAO recommended a 30-month sentence, but after hearing the victim statements at sentencing, Judge Roberts ordered Mr. Hickey to a 34-month sentence.<sup>81</sup> Judge Roberts demonstrated Washington’s need for a flexible rape by fraud provision when she stated that she would have sentenced him even longer but was “limited by the law.”<sup>82</sup>

Additionally, the Washington State Attorney General’s Office successfully charged Mr. Hickey with civil violations under both the Consumer Protection Act and the Commercial Electronic Mailing Act,<sup>83</sup> and the resulting default judgment against Mr. Hickey noted that *at least six women* were subjected to Mr. Hickey’s sexual scam.<sup>84</sup> The default

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74. See WASH. REV. CODE § 9A.44.050(1)(c)(i)–(d). See generally *Suliveres v. Commonwealth*, 865 N.E.2d 1086, 1091 (Mass. 2007) (holding that a court may not interpret proof of fraudulent coercion as a substitute for proof of force without corresponding statutory language).

75. See WASH. REV. CODE § 9A.44.050(1)(c)(i)–(d).

76. Sydney Brownstone, *UPDATE: Porn Scammer and Sex Offender Matt Hickey Sentenced to Nearly Three Years in Prison*, STRANGER (Jan. 19, 2018, 2:20 PM) [hereinafter *Brownstone, Matt Hickey Sentenced*], <https://www.thestranger.com/slog/2018/01/19/25731442/porn-scammer-and-sex-offender-matt-hickey-sentenced-to-nearly-three-years-in-prison> [https://perma.cc/6SYJ-DU9M].

77. See *supra* note 68 and accompanying text.

78. Info. at 1–2, *State v. Hickey*, No. 16-1-05400-1 (Wash. 2016).

79. Presentence Statement of King County Prosecuting Attorney, *State v. Hickey*, No. 16-1-05400-1 (Wash. Super. Ct. 2017). See generally WASH. REV. CODE §§ 9A.44.100, 9A.36.021, 9A.36.041 (2016 & Supp. 2017).

80. *Brownstone, Matt Hickey Sentenced*, *supra* note 76.

81. *Id.*

82. *Id.*

83. Complaint for Injunctive and Other Relief at 21, *State v. Hickey*, No. 16-2-30379-0 (Wash. Super. Ct. 2016). See generally WASH. REV. CODE §§ 19.86.020 (1961), 19.190.030 (1999).

84. Default Judgment at 8, *State v. Hickey*, No. 16-2-30379-0 (Wash. Super. Ct. 2016) (emphasis added). Additionally, the default judgment ordered Mr. Hickey to pay \$32,201.38 in costs and fees. *Id.*

judgment ordered Mr. Hickey to pay a civil penalty of \$300,000.00, an amount representing no less than *150 violations* of the Consumer Protection Act and the Commercial Electronic Mailing Act.<sup>85</sup>

Next, this Note examines criminal statutes drafted to protect against the kind of sexual predation described above.

## II. A BRIEF HISTORY OF LEGISLATIVE REFORMATION

The American Law Institute (author of the Uniform Model Penal Code) has advocated for criminal justice for victims of rape by fraud.<sup>86</sup> The Model Penal Code's "global consent provision" provides that "[u]nless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if . . . it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense."<sup>87</sup>

Additionally, twelve states have adopted rape statutes that provide increased protections against rape by fraud.<sup>88</sup> New Jersey and Pennsylvania adopted in whole the Uniform Model Penal Code's global consent provision.<sup>89</sup> Another eight states, Alabama, Colorado, Delaware, Hawaii, Maine, Missouri, Montana, and North Dakota, adopted a global consent provision functionally similar to the Uniform Model Penal Code's, providing that consent is ineffective "if it is induced by force, duress or deception[.]"<sup>90</sup> Texas and Tennessee adopted unique language that is functionally similar to the Uniform Model Penal Code's global consent provision.<sup>91</sup> In Texas, "[c]onsent is not effective if . . . induced by force, threat, or fraud[.]"<sup>92</sup> In Tennessee, "[r]ape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim [when] . . . [t]he sexual penetration is accomplished by fraud."<sup>93</sup>

85. *Id.* at 9 (emphasis added).

86. See MODEL PENAL CODE § 2.11(3)(d) (AM. LAW INST. 2015).

87. *Id.*

88. See Russell L. Christopher & Kathryn H. Russell, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 102 (2007).

89. See N.J. STAT. ANN. § 2C:2-10(c)(3) (West 2018); 18 PA. CONS. STAT. § 311(C)(4) (West 2018).

90. ALA. CODE § 13A-2-7(c)(4) (2017); COLO. REV. STAT. § 18-1-505(3)(d) (2017); DEL. CODE ANN. tit. 11, § 453(4) (2018); HAW. REV. STAT. § 702-235(4) (2017); ME. REV. STAT. ANN. tit. 17-A, § 109(3)(C) (2017); MO. ANN. STAT. § 556.061(5)(C) (West 2017); MONT. CODE ANN. § 45-2-211(2)(c) (2017); N.D. CENT. CODE § 12.1-17-08(2)(c) (2017). For an example of a case effectively utilizing the Uniform Model Penal Code's global consent provision, see, for example, *State v. Oshiro*, 696 P.2d 846 (Haw. Ct. App. 1985) (affirming defendant's rape conviction because the defendant's deception vitiated the victim's consent).

91. See TEX. PENAL CODE ANN. § 1.07(a)(19) (2017); TENN. CODE ANN. § 39-13-503(a)(4) (2016).

92. TEX. PENAL CODE ANN. §§ 1.07(a)(19)-(a)(19)(A).

93. See TENN. CODE ANN. §§ 39-13-503(a)-(a)(4); see also Falk, *supra* note 2, at 109-10.

Additionally, in lieu of sexual penetration, Tennessee provides another similar statute prohibiting sexual contact not amounting to sexual penetration when accomplished by fraud.<sup>94</sup>

Notably, Tennessee created a nuanced, three-tiered, and graded statutory system for charging sexual assault offenses.<sup>95</sup> First, and most punitively, Tennessee's aggravated rape and sexual battery statutes prohibit unlawful penetration accompanied by the use of force or coercion when a defendant is armed with a weapon, causes bodily injury, or has accomplices.<sup>96</sup> Second, and less punitively, Tennessee's rape statute provisions prohibit sex accomplished by fraud.<sup>97</sup> Tennessee law also provides that consent is vitiated if it is induced by deception.<sup>98</sup> Third, and least punitively, Tennessee's sexual battery statute provisions prohibit instances in which the defendant achieves nonconsensual sexual contact but not penetration; the statute also protects against related sexual contact accomplished by fraud.<sup>99</sup>

Tennessee demonstrated the effectiveness of its rape by fraud statutory language in *State v. Tizard*.<sup>100</sup> In *Tizard*, a teenage, male patient had visited the defendant, a doctor, on several occasions, and the defendant rubbed the patient's genitals during several of the visits and stimulated the patient to climax on one occasion.<sup>101</sup>

The court affirmed the defendant's rape conviction because the "defendant used his position as a treating physician with the intent to touch the victim's genitals solely for his sexual arousal or gratification, not for medical purposes, and that the touching was accomplished under the guise of medical examination . . . for the purpose of having the victim allow such touching."<sup>102</sup> Moreover, the court held if a "physician intends to gain access for nonmedical purposes, uses his position as a treating physician for such purpose, and the patient allows such access because of a belief that it is for medical purposes, we have no problem in concluding that the physician perpetrates a fraud upon the patient[.]"<sup>103</sup> The *Tizard* court offered glowing praise for its state's rape by fraud statutory reformation:

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94. See TENN. CODE ANN. §§ 39-13-505(a)(2), (a)(4); see also Falk, *supra* note 2, at 109–10.

95. TENN. CODE ANN. §§ 39-13-502, 39-13-503(a)(4), 39-13-504, 39-13-505(a)(2), (a)(4); see also Falk, *supra* note 2, at 109–10.

96. See TENN. CODE ANN. §§ 39-13-502, 39-13-504; see also Falk, *supra* note 2, at 109.

97. See TENN. CODE ANN. § 39-13-503(a)(4); see also Falk, *supra* note 2, at 109.

98. See TENN. CODE ANN. § 39-11-106(a)(9)(A); see also Falk, *supra* note 2, at 110.

99. See TENN. CODE ANN. § 39-13-505(a)(2), (a)(4); see also Falk, *supra* note 2, at 109–10.

100. *State v. Tizard*, 897 S.W.2d 732 (Tenn. Crim. App. 1994).

101. *Id.* at 736–37.

102. *Id.* at 742.

103. *Id.* at 743.

We believe that the presently existing statutes cure the ills perceived in [prior rape by fraud cases] by providing fraud, in its broad meaning, as an alternative element to force or coercion for the purposes of rape and sexual battery. Also, we are mindful that the legislature, for the purposes of our criminal code, has provided that *consent is not effective when it is induced by deception*.<sup>104</sup>

Next, this Note concludes that Washington should expand its rape statutes and examines which expanded statutory provisions would provide the best protection for Washington and similarly positioned states. Additionally, this Note examines criticisms against adopting expansive rape by fraud statutes.

### III. WASHINGTON SHOULD ADOPT EXPANDED RAPE BY FRAUD STATUTORY PROVISIONS

Washington should adopt expanded rape by fraud statutory provisions similar to Tennessee's provisions because they not only provide improved victim protection but also provide graduated flexibility that better comports the punitive quality of prosecutorial charges with the severity of criminal offenses.<sup>105</sup> Alternatively, Washington could significantly increase its rape by fraud protection by simply adopting a global consent provision—providing that consent is not effective if induced by fraud or deception—similar to that of the Uniform Model Penal Code and Texas.

Importantly, the power to expand rape by fraud statutory provisions is the exclusive province of the legislature.<sup>106</sup> However, during the 2016–2017 legislative period, the Washington State Legislature introduced zero bills with rape by fraud statutory provisions.<sup>107</sup>

The Legislature is free to amend the rape statute or create a new substantive offense to encompass [rape by fraud], as many other States have done. However, where the Legislature has chosen not to do so, “[i]t is not for th[e] court . . . to rewrite the clear intention expressed by the statute.”<sup>108</sup>

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104. *Id.* at 742 (emphasis added).

105. See TENN. CODE ANN. §§ 39-13-502, 39-13-503(a)(4), 39-13-504, 39-13-505(a)(2), (a)(4); see also Falk, *supra* note 2, at 109–10.

106. See *Suliveres v. Commonwealth*, 865 N.E.2d 1086, 1090 (Mass. 2007).

107. See *Bills by Topic Results: Sex Offenses & Offenders*, WASH. ST. LEGIS. (2017), <http://app.leg.wa.gov/billsbytopic/Results.aspx?letter=S&year=2017> [https://perma.cc/CW5Q-U6DU]. Numerous bills were proposed regarding sixty-two distinct issues related to sex offenses, ranging from DNA testing to mandatory sexual assault awareness training for licensed cosmetologists, but none of them offered rape by fraud statutory provisions. See *id.*

108. *Suliveres*, 865 N.E.2d at 1090 (quoting *Mellor v. Berman*, 454 N.E.2d 907, 913 (Mass. 1983)).

a. *Washington's Rape Statutes Should Reflect Its Commitment to Protecting Human Dignity and Women's Equality*

Washington should expand its statutory rape by fraud provisions to better enhance and protect human dignity and women's equality.<sup>109</sup> Historically, law and society have relied on flawed justifications for creating and enforcing rape statutes.<sup>110</sup> “[R]ape is predominantly a male social practice. As is law. To understand rape law, . . . we should seek to understand why men pass laws that purport to outlaw the men who rape.”<sup>111</sup>

The fundamental historical justification for rape law has been to protect men's property interests in women. The historical construction of rape laws places women in a subordinate position as targets of men's sexuality.<sup>112</sup> Indeed, the earliest recorded rape laws seemed to indicate that the value of a woman's body belonged not to her but to her father or husband.<sup>113</sup> In ancient Jewish law, the rape of a married woman was punishable by death, but the rape of an unmarried woman was a civil offense; it carried the penalty of “fifty shekels” to be paid to the victim's father, and the victim was required to marry the man who raped her.<sup>114</sup>

The flawed justification of protecting men's property interests in women is engrained in modern American jurisprudence. Famed jurist Judge Richard Posner<sup>115</sup> argued that all women, not just prostituted women, commoditize their sexuality and exchange it for goods on a sexual marketplace.<sup>116</sup> Accordingly, rape statutes protect a marriage market where women sell their property interest in bodily and sexual integrity to would-be husbands.<sup>117</sup>

Of course, rhetoric that would commoditize sexuality as a fungible good is irreparably flawed “because it detaches from the person that which is integral to the person.”<sup>118</sup> Nevertheless, Judge Posner recommends perilously narrow rape statutes because he believes they advance

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109. See Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 44 (2014). “No State shall . . . deny any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

110. See McJunkin, *supra* note 109, at 22.

111. *Id.* at 2.

112. *Id.* at 32.

113. Keith Burgess-Jackson, *A History of Rape Law*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE* 1, 1–17 (Keith Burgess-Jackson ed., 1999).

114. *Id.* at 16.

115. Judge Posner is one of the most influential judges in American history and is, in fact, the most cited legal scholar of all time. See Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 401, 424 (2000).

116. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 202 (3d ed. 1986).

117. See *id.*

118. McJunkin, *supra* note 109, at 31 n.131 (quoting Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1880–81 (1987)).

economic efficiency: “Girls are taught by their parents to be suspicious of the blandishments of suitors; and the careful screening of suitors is the essence of the optimal female sexual strategy.”<sup>119</sup>

Judge Posner’s commentary highlights the degree to which rape laws have not been conceived for the paramount interests of promoting human dignity and women’s equality. “[T]he institution of rape law mirrors the macro-discourse of pop-culture seduction—men’s pursuit; women’s choice.”<sup>120</sup> Throughout history, narrow rape laws have supported the interests of the powerful by legitimizing their pursuit of the less powerful.<sup>121</sup> Today, narrow rape laws tacitly endorse a contractual model of sex that underscores that “it is permissible for men to try to attain sexual gratification for themselves . . . and it is the woman’s role to play ‘gatekeeper’ if she so desires.”<sup>122</sup>

Even with respect to the expansion of rape by fraud statutes, statutory provisions protecting against spousal impersonation have been used to reinforce and preserve male power and the property interests of husbands and boyfriends.<sup>123</sup> Uniquely, spousal impersonation often renders non-consent virtually impossible because social customs exert enormous pressure on women to make themselves sexually available to their husbands.<sup>124</sup> Thus, “[f]or men, the resulting sexual conquest [of spousal impersonation] is seen as illegitimate” because it negatively impacts the property interests of husbands and boyfriends.<sup>125</sup> In other words, the opprobrium male-dominated law attached to spousal impersonation exists not because of rape’s catastrophic effect on human dignity and women’s equality but because of rape’s depreciative effect on men’s so-called property—their wives and girlfriends.<sup>126</sup>

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119. See RICHARD POSNER, *SEX & REASON* 393 (1992); see also McJunkin, *supra* note 109, at 33.

120. McJunkin, *supra* note 109, at 31.

121. See *id.* at 32; Burgess-Jackson, *supra* note 113 and accompanying text.

122. See McJunkin, *supra* note 109, at 32 (quoting ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 196, 212 (1999)).

123. *Id.*

124. See McJunkin, *supra* note 109, at 35 n.149; Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 236 (Franklin G. Miller & Alan Wertheimer eds., 2010) [hereinafter West, *Sex, Law, and Consent*]. Despite criminal laws prohibiting spousal rape in all fifty states, statutory deterrence is inadequate in several states. See Samantha Allen, *Marital Rape is Semi-Legal in 8 States*, *DAILY BEAST* (June 9, 2015, 2:15 AM), <http://www.thedailybeast.com/articles/2015/06/09/marital-rape-is-semi-legal-in-8-states.html> [https://perma.cc/29Z8-QBTW]. In South Carolina, spousal rape can only be accomplished through aggravated force, and the rape must be reported within *thirty days*. S.C. CODE ANN. §§ 16-3-315(a)–(b) (2015) (emphasis added).

125. See West, *Sex, Law, and Consent*, *supra* note 124, at 35.

126. See *id.*

Perhaps less insidiously, Washington's inadequate rape statutes reflect popular, romanticized notions of seduction and sexuality.<sup>127</sup> Some critics view rape by fraud statutes as tantamount to the criminalization of boyish charms and courtship embellishments. Professor Jed Rubenfeld of Yale Law School wrote that "deceptive sex, however bad it may be, isn't *that* bad."<sup>128</sup> Beyond mere legal commentary, consider the judicial opinion of this New York trial judge Judge Edward Greenfield:

So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, *not to take no for a final answer, at least not the first time*. . . . Every man is free, under the law, to be a gentleman or a cad.<sup>129</sup>

The sheer absurdity of these comments and opinions is obvious when considered against the reality of Ms. Bishop's perilous experience attempting suicide after having been conned by Mr. Hickey in his sexual scam.<sup>130</sup> Moreover, compare Judge Greenfield's commentary with the default judgment against Mr. Hickey in Washington's consumer rights violation case:

As a result of [Mr. Hickey's] conduct, these women suffered harm, including loss of job opportunity, time, effort, money, and an intangible loss of bodily integrity and privacy. Women continue to suffer loss of privacy because Hickey currently maintains sole control of photos that were obtained through his business scam.<sup>131</sup>

Washington's criminal rape statutes should embody the commitment to women's equality and human dignity exemplified by its consumer protection laws in the judgment against Mr. Hickey.

*b. Overcoming Criticism Against Rape by Fraud Statutory Provisions*

This Note now considers arguments against expanded rape by fraud statutory provisions, including popular traditionalist and feminist objections.

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127. See McJunkin, *supra* note 109, at 34–35.

128. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1416 (2013) [hereinafter Rubenfeld, *The Riddle of Rape-by-Deception*].

129. *People v. Evans*, 379 N.Y.S.2d 912, 922 (N.Y. Sup. Ct. 1975) (emphasis added).

130. Compare Rubenfeld, *The Riddle of Rape-by-Deception*, *supra* note 128, and *Evans*, 379 N.Y.S.2d at 922, with *supra* notes 63–67 and accompanying text (describing the suffering a woman endured because of a Seattle sex scam, including an attempt to take her own life).

131. Default Judgment at 8, *State v. Hickey*, No. 16-2-30379-0 (Wash. Super. Ct. 2016).

## 1. Traditionalist Objections to Rape by Fraud Statutory Provisions

Legal scholar and educator, Ms. Vivian Berger, suggested that many of the men engaged in sexual theft are despicable characters but should not be considered rapists.<sup>132</sup> Ms. Berger explained that she has “minimal sympathy for the idea that the law should protect, via criminal sanctions, the cheated expectations of women who sought to sleep their way to the top but discovered, too late, that they were dealing with swindlers.”<sup>133</sup> In short, this view is that sexual theft may be bad, but it is not so bad as to merit criminal sanction.

Legal scholar and educator, Mr. Donald Dripps, argued that the expansion of rape by fraud statutory provisions would violate public policy by using the state to enforce quasi-contracts for illegal prostitution.<sup>134</sup> In short, this view is that the law should not be a payment enforcement mechanism for illegal financial activity related to prostituted persons.

However, these arguments misunderstand the scope of rape by fraud statutory provisions and fail to appreciate the humanity and vulnerability of sex workers. Ms. Berger’s dehumanizing rhetoric advances the “myth or stereotype that a prostitute’s consent to sex is less worthy of protection at criminal law than is that of other wom[e]n.”<sup>135</sup> “If anyone needs criminal protections against material fraud, street sex workers do.”<sup>136</sup> Perhaps “the real reason not to recognize rape (or battery) under these circumstances is that society often views the prostitute’s behavior as immoral and illegal.”<sup>137</sup> Regarding Mr. Dripp’s objection, the rape by fraud statutory provisions recommended by this Note would not guarantee financial exchanges between buyers and prostituted women—rather, the provisions would work to guarantee the equal protection of vulnerable prostituted women and children from the predatory opportunism facilitated by existing law.

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132. See Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 76–77 (1988); see also J. R. Broughton, *The Criminalization of Consensual Adult Sex after Lawrence*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125 (2014).

133. Berger, *supra* note 132, at 76.

134. See Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1803 (1992); see also Kim Shayo Buchanan, *Rape by Fraud* 20 (working paper 2015) (on file with the author).

135. Canada’s Justice Mary Ellen Turpel-Lafond writing in *R. v. Gartner*, [2003] S.J. No. 825, para. 30 (Prov. Ct.) (Can.); see also Buchanan, *supra* note 134, at 20.

136. Buchanan, *supra* note 134, at 21.

137. See Falk, *supra* note 2, at 79.

## 2. Feminist Concerns about Rape by Fraud Statutory Provisions

Some prominent feminist scholars are skeptical of rape by fraud legislation because they believe it tends to make “it more difficult for women to promulgate new images of female sexuality.”<sup>138</sup> Other feminist scholars are concerned that rape by fraud legislative schemes tend to exclude vulnerable sex workers from their protection.<sup>139</sup>

First, the purpose of rape by fraud legislation should not be to restrict female sexuality; it should be to expand female sexuality beyond the constructed role of buyer and seller on a so-called sexual marketplace.<sup>140</sup> Next, Washington can and should articulate an intention to protect vulnerable sex workers from sexual thievery without endorsing or legitimizing prostitution. Because of the stigma so widely attached to prostitution, victims of sexual theft often lack both social support and legal recourse.<sup>141</sup> The Canadian HIV/AIDS Legal Network commented that the “criminalization [of prostitution] reinforces the stigma associated with prostitution and pushes sex workers to the margins of society[.]”<sup>142</sup> In turn, this “reinforces the attitude that sex workers ‘deserve what they get’ when they are beaten up or murdered [and] creates an environment in which brutal forms of exploitation of sex workers can take root[.]”<sup>143</sup>

The exploitation of vulnerable sex workers is, in part, facilitated by a legal system that has routinely failed to offer its protections to sex workers. Indeed, apart from the lack of criminal protections examined above, even the highly influential Restatement (Second) of Torts bluntly advocates for a denial of recourse for prostituted victims of fraud:

1. A, to induce B to submit to *intimate familiarities*, offers her a paper which A represents to be a twenty dollar bill but which he knows to be counterfeit. B, believing the paper to be a genuine bill, submits. A is *not liable* to B for battery.
2. The same facts as in Illustration 1, except that the paper is offered if B will submit to a *blood transfusion*. A is *subject to liability* to B for the harm done by the operation to which A has fraudulently induced him to submit.<sup>144</sup>

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138. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 313–14 (1995); see also Buchanan, *supra* note 134, at 26 n.193.

139. See Buchanan, *supra* note 134, at 27; see also *supra* notes 132–133 and accompanying text; *infra* note 144 and accompanying text.

140. *But see* POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 116, at 202.

141. See Falk, *supra* note 2, at 76–77.

142. CAN. HIV/AIDS LEGAL NETWORK, *SEX, WORK, RIGHTS: CHANGING CANADA’S CRIMINAL LAWS TO PROTECT SEX WORKERS’ HEALTH AND HUMAN RIGHTS* 14 (2005).

143. *Id.*

144. RESTATEMENT (SECOND) OF TORTS § 57 cmt. a, illus. 1 & 2 (1965) (emphasis added).

Washington law should not condone the use of fraud to coercively obtain sexual intercourse.<sup>145</sup> “It is time to understand the law of rape differently. . . . The use or threat of physical violence is just one way men force women they know to have sex with them.”<sup>146</sup> “Men also use other kinds of threats, such as to leave women stranded, to publicly humiliate them, and to fire them from their jobs.”<sup>147</sup> “Threats and deceptions that would be prohibited by laws against extortion, fraud, or false pretenses as a way to obtain money should be prohibited by rape law as a way to obtain sex.”<sup>148</sup> Washington should “let go of the sexism of the past, and . . . condemn, not condone, coerced and nonconsensual sex.”<sup>149</sup>

#### CONCLUSION

Washington should reform its rape laws to protect against rape by fraud, a form of sexual predation not always criminally prosecutable under existing Washington rape statutes. Twelve pioneering states and the Uniform Model Penal Code have identified legislative solutions, the best of which is Tennessee’s statutory scheme because of its graded flexibility. The adoption of expanded rape by fraud statutory provisions would not only improve Washington’s ability to protect against abuse of power, sexual extortion, and fraudulent treatment, but it would also create new criminal law protections against sexual theft, sexual scams, and impersonation.

Statutory provisions that protect against rape by fraud enhance human dignity and safeguard women’s equality. Although some critics are worried that the adoption of Tennessee’s rape by fraud statutory scheme would be tantamount to a state endorsement of prostitution, Washington has a paramount obligation to extend equal protection of the law to sex workers. In doing so, Washington does not have to endorse or facilitate illegal sex work. Additionally, other scholars are concerned that rape by fraud statutory provisions may restrict female sexual expression. However, Washington can overcome this by using expanded rape by fraud statutory language to enhance and protect female sexuality, challenging the perception that women’s sexuality is a mere commodity on a sexual marketplace. Finally, other scholars are concerned that rape by fraud statutory provisions would not protect prostituted women, but Washington can and should recognize the humanity and vulnerability of sex workers—and it can do so without securing related illegal exchanges.

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145. Janet E. Findlater, *Reexamining the Law of Rape*, 86 MICH. L. REV. 1356, 1364 (1988).

146. *Id.* at 1363.

147. *Id.* at 1364.

148. *Id.*

149. *Id.*

Although Tennessee's statutory scheme is the most nuanced model available, Washington could craft legislation tailored to its unique needs or adopt select provisions from other states and models. Importantly, expansion of this law is not the province of the judiciary—only the legislature can remedy the inadequacies of Washington's current rape statutes. The Washington legislature should adopt expansive rape by fraud provisions to protect against the broad range of fraudulent and dishonest conduct used to obtain sexual complicity.