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### **The Story of *Wanrow*: The Reasonable Woman and the Law of Self-Defense**

#### *Introduction*

On February 23, 1976, Yvonne Wanrow, a Native American woman and single mother, sat in the Olympia courtroom of the Washington Supreme Court, awaiting the argument of her case. She had been convicted of first-degree assault and second-degree murder, and after her conviction was reversed by the Court of Appeals, the prosecution had appealed to the state's highest court.

Wanrow's supporters packed the courthouse for her hearing. Hundreds of Native Americans sat on the floor and crowded around the back of the courtroom to watch the arguments and demonstrate their support.<sup>1</sup> Many of the supporters had come by caravan to Olympia. On the

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1. Interview with Yvonne Swan, in Inchelium, Wash. (Sept. 2002) (hereafter "Swan Interview"). Yvonne is now known by her maiden name Swan, rather than her married name Wanrow. Our research relies on the complete appellate record; interviews with Yvonne (Wanrow) Swan, her sister Alice Stewart, feminist activists Marge Nelson and Polly Taylor who worked on Yvonne's national defense organizing effort, Yvonne's trial attorney Eugene Annis, her appellate attorneys Elizabeth Schneider and Nancy Stearns, Beth Benora with the National Jury Project, and former Chief Justice of the State Supreme Court of Washington Robert Utter; archival documents and pictures from the Free Yvonne Wanrow campaign from Marge Nelson and Polly Taylor's collections and from the Center for Constitutional Rights (on file with author). Donald Brockett, then Spokane County Prosecuting Attorney and Fred Caruso, then deputy prosecutor, represented the state throughout the entire legal proceedings against Yvonne. Both are now retired. Caruso spoke with us briefly, but declined to be interviewed at length about the case. We were unable to reach Brockett. Comments from interviewees were made in the interviews noted here unless otherwise indicated. We are extremely grateful for the generosity of each of these individuals and for University of Miami law librarian Robin Schard's invaluable archival research assistance. We are also grateful for the helpful comments given us by

eve of the appeal, they had shared a meal of cooked salmon baked over an alder-wood fire prepared by the Puyallup Tribe. Wanrow's two young lawyers, Elizabeth Schneider and Nancy Stearns, were there. Native American folksinger Floyd Westerman serenaded the group. The following day, the supporters so flooded the courtroom that many spilled into the aisles, and many others were forced to wait outside the courthouse. As Schneider and Stearns sat at the counsel's table waiting to argue Wanrow's case, the sound of traditional Native American drumming could be heard throughout the hushed courtroom.<sup>2</sup>

The fundamental question before the court was whether Wanrow had received a fair trial when the judge restricted her ability to make out a self-defense claim. Wanrow, who stood five feet four inches tall, weighed 120 pounds, and at the time of the incident was wearing a cast on her foot, shot and killed William Wesler, an intoxicated<sup>3</sup> sixty year old white man and accused child molester who towered more than six feet tall. Wanrow argued that she killed Wesler in self-defense when he entered her friend's home intoxicated and uninvited, ignored loud demands to "get out," and after approaching the bedside of her young nephew, moved toward her.

Wanrow's now-famous case enters law school textbooks on the issue of what constitutes a fair trial for *women*. The jury instruction at her trial encouraged jurors to determine the reasonableness of Wanrow's fear from the standpoint of a man facing an unarmed attacker, rather than a small female, untrained in the use of her fists to defend herself. But race and racism were as important to the fair trial question in *Wanrow* as were gender and sexism. In Spokane, Washington, where Wanrow's trial took place, much of the white population harbored racist attitudes regarding Native Americans.<sup>4</sup> Furthermore, anti-Indian senti-

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Elizabeth Schneider, Martha Mahoney, and Zacchary Coker-Dukowitz, and the tireless efforts of Sonia Ramos, Felicia Martin, Tara Lora, Cossette Charles and Linda Kirk.

2. Tim L. Hanson, The Falls, Feb. 27, 1976; Swan Interview, *supra* note 1.

3. The coroner testified at trial that Wesler's blood alcohol level was .27 and that a level of .3 or .35 would result in convulsions.

4. Swan Interview, *supra* note 1 (recounting her own experiences and that of other Native Americans in Spokane). In preparation for a potential retrial in 1977, Wanrow's lawyers secured the assistance of the National Jury Project to conduct a survey of a sample of registered voters to determine likely bias in the jury pool. When asked to identify the primary cause of poverty among American Indians, nearly half chose answers that exhibited racist stereotypes: lack of ambition (32%) and lack of ability (14%). In addition, 41% agreed with the statement, "An Indian who carries a handgun is probably looking for trouble"; 43% agreed with the statement, "The reason most Indians get into trouble is that they drink too much"; however, 68% agreed that "Indian people have as much respect for

ment was at a fever pitch at the time of Wanrow's trial because of the widespread negative publicity accompanying the concurrent American Indian Movement (AIM) occupation of Wounded Knee. There, in a seventy-one day standoff beginning on February 27, 1973, AIM protested government mistreatment of Native Americans by taking over the site of an infamous 1890 massacre of Lakota Indians by federal troops.

Wanrow's case raised fundamental questions about the significance of race and gender in understanding the "reasonable man" standard that governed the law of self-defense. She and her lawyers would come to challenge the meaning of "reasonableness" in the jury instruction and the gendered language in which it was phrased, both of which suggested that a struggle between two men exemplified the legal definition of reasonableness. The shift in law that resulted from Wanrow's appeal recognized in the clearest terms possible that the circumstances and experiences of *women* must be accounted for if a jury is to determine the "degree of force which . . . a reasonable person in the same situation . . . would believe is necessary."<sup>5</sup>

For her lawyers, the case would represent more than a standard challenge to a criminal conviction. *Wanrow* became a powerful means of putting feminist theory into action to fight gender bias in the criminal justice system, and marked the beginning of what came to be called "women's self-defense work."<sup>6</sup> Many of the attorneys and law students who worked on Wanrow's case became leaders in the legal community and the legal academy.<sup>7</sup> They would expand the women's rights movement from the struggle against overt discrimination against women to the recognition that gender bias poses more subtle hurdles for female defendants in criminal cases.

For members of feminist organizations and AIM, the case represented a compelling example of racial and gender injustice in the criminal justice system. Her cause was first taken up by AIM members who spread the word through Native American newspapers and gatherings, participated in events to raise funds for her defense, and provided her with social support. It was soon promoted by feminists across the country, several of whom drove to Washington to organize popular support for her defense among non-Indians and who supported the work

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the law as white people." See Aff. of Beth M. Bonora, founding member and president of the National Jury Project, *State v. Wanrow*, No. 20876 (Wash. Super. Ct. 1973).

5. *State v. Wanrow*, 559 P.2d 548, 557 (Wash. 1977).

6. Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* 33 (2000). Schneider defines "women's self-defense work" as "legal reform and legal advocacy on the hurdles that women defendants face concerning choice of defense." *Id.*

7. See *infra* p. 221 (describing the work of CCR attorneys including Wanrow's co-counsel, Stearns and Schneider); *infra* p. 243 and note 84 (describing the work of Susan Jordan, Cris Arguedas, and Mary Alice Theiler).

of the Defense Committee for Yvonne Wanrow, created by Wanrow and her sisters. These activists were able to raise funds for her defense and to draw national attention to her case, and that of other women who claimed they acted in self-defense in killing a male attacker. Wanrow became the subject of national attention, including being the focus of a public television documentary.<sup>8</sup>

AIM organizing was at its peak the year that Wanrow's case went to trial, and much of that organizing focused on problems of anti-Indian racism in the criminal justice system. In the years between Wanrow's trial and the resolution of her appeal, the women's movement brought unprecedented national attention to the failure of the state to respond to high levels of male violence against women. The analysis of race and sex oppression offered by these movements mirrored Wanrow's own experiences. She came to understand her personal struggle as a part of a larger struggle for racial and gender equality. She credits this understanding and her activism with preventing her from being "swallowed up" by the pain of her own circumstances.

### *Yvonne's Story*

Yvonne Wanrow was born in 1943 on the Colville Reservation, approximately 113 miles northwest of Spokane, Washington. The U.S. government called the reservation "Colville," although the residents were actually descendants of twelve different Native nations: Colville, Nespelem, San Poil, the Lake, the Palus, the Wenatchi, the Chelan, the Entiat, the Methow, the southern Okanogan, the Moses Columbia and the Nez Perce of Chief Joseph's Bands.<sup>9</sup> Tribal enrollment in the Confederated Tribes of Colville stands today at about 9,065, with over 5,000 persons living on the Reservation.

Wanrow was the seventh of eight children. Her father farmed, hunted for wild game, and found paid work when he was able. Her mother frequently acted as an interpreter for elderly Native Americans. Through this work, Wanrow's mother became an activist against U.S. "termination" policy. The long-term goal of this policy was to "terminate" any special status for Native Americans, but it was functionally a program of forced assimilation in which tribal governments were sometimes disbanded, federal health care and education services were discontinued, and many residents of reservations were encouraged or coerced to relocate to urban centers.<sup>10</sup> Young people were given a stipend and

8. See, e.g., Christine La Beau, *When A Woman Fights Back* (KCPQ television broadcast 1980).

9. Confederated Tribes of the Colville Reservation Home Page, <http://www.colvilletribes.com/facts.php> (last visited Sept. 30, 2012). All facts regarding Colville are drawn from this official website.

10. See Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *Yale L.J.* 348, 383-84 (1953).

one-way bus tickets to urban destinations, where they were enrolled in vocational schooling.

In 1966, Wanrow, newly divorced with two young children, became a part of the government's termination policy. The Bureau of Indian Affairs (BIA) gave Wanrow a ticket to San Francisco and paid for schooling in fashion design, the closest thing she could find to her real passion—art. Wanrow wanted to bring her two children with her, but BIA officials told her it would be better if she left them at home with her parents; she could send for her children once she was settled. While Wanrow was in San Francisco, state child protection authorities took her children from her parents and placed them in foster care.<sup>11</sup> Wanrow sought to have her children join her. The authorities told her that she would first have to obtain an apartment, a job, and a babysitter. By 1967, she had accomplished all three, and Darren, who was four, and Julie, who was three, began living with Wanrow in San Francisco.

With the added responsibility of child care, Wanrow began attending school part-time and working part-time as an assistant designer. Three weeks after her children arrived, however, her daughter Julie died suddenly of encephalitis. This lesson in tragic uncertainty was one that was to stay with Wanrow. Years later, she reflected on the impact of Julie's death:

[Julie's death] was so devastating that I spent a lot of time worrying about my son. And then when I had another daughter Yvette, whenever one of them got sick, I would quit my job right away, and then I'd go on welfare so that I could stay home with my children. And then when they'd get well, and everything seemed to be going well, then I'd go out and get a job.

After Julie died, Wanrow quit school, left San Francisco, and reconciled with her ex-husband. She gave birth to her third child, Yvette, during this period. The reconciliation with her ex-husband did not last, though, and Wanrow was once again on her own with two young children. She returned briefly to her home town of Inchelium, and then, in the summer of 1971, she moved to Spokane to finish her art degree.

When Wanrow moved to Spokane, the area had a relatively large Native American population because of its proximity to a number of

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11. It was not unusual during this period for Native American children to be removed from their homes by child protection authorities and placed in foster care or adoptive homes. In some states, between 25–35% of Native American children were removed sometime during their lifetime. See H.R. Rep. No. 95–1386, at 9 (1978), reprinted in U.S.C.A.N. 7530, 7531. As a result of these widespread removals of Indian children, in 1978 Congress passed the Indian Child Welfare Act, which mandates a preference for the placement of Native American children in Native American homes and confers exclusive jurisdiction to the tribe in child custody proceedings involving an Indian child residing or domiciled on the reservation. *The Indian Child Welfare Act*, 25 U.S.C. §§ 1901–63 (2000).

reservations, including the Colville Reservation. Wanrow remembers the anti-Indian racism in Spokane, particularly evident in the relationship between the local Native American population and the Spokane police. She recounted years later:

There was a lot of anti-Indian sentiment . . . I was always bailing people out of jail, and I was always helping people out of predicaments and sheltering people . . . Indian people were not popular [with the police in Spokane.] It seems like they were the ones that always got arrested and got put in jail. My brother was maced . . . [From] family members and friends, I would hear where [the police] would just beat them up whenever they could. I'm not saying all of the police, but [even] a little is too much racism.

By the time Wanrow arrived in Spokane, her daughter Yvette was nearly two and her son Darren was eight. The only housing Wanrow could afford was in a neighborhood that was known for its high crime rate. Wanrow felt vulnerable and afraid and, thinking she could not count on the police to protect her, she purchased a gun in the hope that it would provide some safety.

### *The Story of Native American Activism in the 1970s*

Wanrow's case occurred at a time of extreme inequalities for Native Americans and at a time of unprecedented Native American activism. According to a U.S. government study published in 1976, 50% of Native Americans living on reservations were living in poverty as were one-third of *all* Native Americans—both on and off reservations. This was a much higher poverty rate than for any other group in the United States.<sup>12</sup> The rates of victimization of violent crime were higher as well.<sup>13</sup> Conditions on many reservations were bleak, but conditions for Native Americans in urban centers were also difficult.<sup>14</sup> In the communities that bordered Native American nations, anti-Indian racism was particularly

12. U.S. Department of Health, Education, and Welfare, *A Statistical Portrait of the American Indian: A Report for the Intra-Departmental Council on Indian Affairs, DHEW, Concerning Current Directions in Employment, Income, Education, and Health Care for the One Million American Indians in the United States* (1976).

13. *Id.* These disparities continue to exist. According to a Department of Justice report, the rate of crime victimization for American Indians is more than twice the rate for the U.S. as a whole. See Lawrence A. Greenfeld and Steven K. Smith, Bureau of Justice Statistics, *American Indians and Crime* (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/aic.pdf> (last visited Sept. 30, 2012). American Indian women in particular are more likely to be the targets of violence than the average American. See Pamela J. Kingfisher, *The Health Status of Indigenous Women of the U.S.: American Indian, Alaska Native, and Native Hawaiians*, Ctr. for Research on Women and Gender, Univ. of Illinois at Chicago (1996).

14. See James S. Olson and Raymond Wilson, *Native Americans in the Twentieth Century* 140–45 (1986).

virulent.<sup>15</sup> As the movements against the Vietnam War and for racial justice emerged in the 1960s, young, predominantly urban Native Americans were inspired to organize for Native American rights.

AIM was hardly the largest or most well established Indian civil rights organization, but its confrontational style of politics made it the most visible to many Americans.<sup>16</sup> AIM members first focused their efforts on the harmful effects of termination policies, including the loss of Native American identity, the diminution of tribal governments, and the loss of federal assistance for education and health care. They also actively fought police harassment.<sup>17</sup>

In 1972, AIM activists organized a national caravan to Washington, D.C., called the “Trail of Broken Treaties.” The caravan, which eventually included over 1,000 persons,<sup>18</sup> was intended to raise national awareness of the harms of federal policies concerning Native Americans. The participants presented the federal government with a twenty-point program calling for “renewal of treaty rights and treaty making power, reconstruction of Indian communities, and a complete revival of tribal sovereignty.” AIM members occupied the Bureau of Indian Affairs building from November 1 until November 5, when the protestors and the federal government negotiated an agreement providing them with amnesty and financial assistance. National coverage of the takeover was intense and, while AIM had many non-Indian supporters, it also gained many detractors. Sentiment among Native Americans was also mixed, with many local tribal government officials denouncing AIM’s militant tactics.

Four months later, when highly regarded Sioux elder Ben Black Elk died, hundreds of Native Americans including several AIM members attended his funeral on the Pine Ridge reservation in South Dakota,

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15. For example, AIM organizers responded to a homicide that occurred in 1972 in Gordon, Nebraska, near the Pine Ridge reservation. An Oglala Sioux man named Raymond Yellow Thunder was dragged into an American Legion hall, stripped of his clothing from the waist down, and forced to dance at gunpoint for the amusement of the crowd. He was then stuffed into the trunk of a car in February freezing temperatures, where he died of exposure. His assailants were charged with only second-degree manslaughter and released without bail. Leonard Crow Dog and Richard Erdoes, *Crow Dog: Four Generations of Sioux Medicine Men* 165 (1995).

16. See Paul Chaat Smith and Robert Allen Warrior, *Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee* 114–15 (1996).

17. AIM members noted, for example, that Native Americans comprised 70% of the inmate population in the Minneapolis city jail, but only 10% of the population of the city. John William Sayer, *Ghost Dancing the Law: The Wounded Knee Trials* 28 (1997).

18. Unless otherwise noted, the description of the events involved in the “Trail of Broken Treaties,” the occupation at Wounded Knee, and all related quotes are taken from Smith and Warrior, *supra* note 16.

near the site of the 1890 Indian massacre at Wounded Knee.<sup>19</sup> By this point “the Pine Ridge Reservation was ripe for a major confrontation.”<sup>20</sup> Tribal Chairman, Richard Wilson, was widely accused of corruption and AIM leader, Russell Means, had called for Wilson’s impeachment. In response, Wilson banned AIM leaders from the reservation and hired a group of local men—called the “goon squad” by AIM activists—who harassed local AIM supporters. Tribal members, particularly older “traditionalists,” had previously joined younger AIM activists in an unsuccessful attempt to gain assistance from the federal Bureau of Indian Affairs (BIA) to end what they believed to be the cronyism and corruption of Wilson’s tenure. This unlikely coalition met again after Black Elk’s funeral. The decision was made to drive to the nearby site of Wounded Knee, where they gathered at the mass grave site for the 200 Lakota who were killed in 1890 by U.S. troops. Meanwhile, sixty-three U.S. marshals and many FBI agents were dispatched to the Pine Ridge reservation because of fears of a violent clash between supporters of AIM and those of Wilson.<sup>21</sup> Over 100 AIM members and supporters took over the town, consisting primarily of a store and museum, with some members looting the store. A priest and the store owners were held hostage. Within a short period of time, FBI agents and U.S. marshals had sealed off the site. AIM issued a statement to the federal government demanding hearings on the U.S. government’s unilateral revocation of the 1868 Treaty with the Lakota and Cheyenne. They also demanded an investigation of corruption in the BIA. A seventy-one day standoff followed which ultimately resulted in 562 arrests and 185 federal indictments. The occupation of Wounded Knee was front page news all over the country and “received more attention during its first week than the entire previous decade of American Indian activism combined.”<sup>22</sup>

AIM efforts would intersect with Wanrow’s trial in several ways. During the period leading up to her trial, front page headlines decried AIM conduct at Wounded Knee. Indeed, the occupation ended on the second day of her trial. Wanrow’s attorneys would later argue that the negative publicity about AIM’s Wounded Knee occupation undermined Wanrow’s ability to get a fair trial. On the other hand, AIM ultimately took up Wanrow’s cause, helping to raise funds for her defense and

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19. In 1890, fearful of the growing popularity of the Ghost Dance Movement, a religious movement premised on the belief that dead loved ones would rejoin living relatives and bring back Native American dominance, U.S. soldiers killed over 300 Minneconjou Sioux, including women and children, at Wounded Knee, a small town in the Pine Ridge Indian Reservation. Smith and Warrior, *supra* note 16, at 97.

20. Sayer, *supra* note 17, at 29.

21. *Id.* at 31.

22. Smith and Warrior, *supra* note 16, at 207.

create awareness of the inequalities she and her lawyers sought to rectify. Through her association with AIM, Wanrow too would eventually become an activist for Native American issues.

### *The Story of the Lawyers*

While organizations like AIM were fighting to secure rights through social protest, civil rights attorneys were organizing to support those movements through litigation. In November 1966, civil rights lawyers William Kunstler, Arthur Kinoy, Morton Stavis, and Ben Smith founded the Center for Constitutional Rights (CCR).<sup>23</sup> CCR was founded to provide “a privately funded legal center [to] . . . undertake innovative, impact litigation on behalf of popular movements for social justice.” As former CCR attorney and Wanrow’s co-counsel Professor Elizabeth Schneider explained, “[W]e asserted rights not simply to advance legal argument or to win a case but to express the politics, vision, and demands of a social movement. . . .”<sup>24</sup>

By the early seventies, CCR had added a contingent of women lawyers that expanded the focus of the Center’s work to embrace civil rights work on behalf of women.<sup>25</sup> Nancy Stearns, hired in 1969, was soon joined by Rhonda Copelon and Janice Goodman. Elizabeth Schneider would begin work as a summer intern in 1971, and would join CCR full time after graduation in 1973. The Center’s commitment to working for women’s rights was groundbreaking. CCR was among the first, if not *the* first, of legal organizations to make women’s rights a major focus of work.<sup>26</sup> But the Center’s commitment to hiring women lawyers to carry out that work was equally pioneering. Women, at the time, were only 3% of U.S. lawyers admitted to practice.<sup>27</sup> Those women who were fortunate enough to be admitted to law school soon discovered that there were few

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23. The background information regarding the Center for Constitutional Rights is taken from CCR’s website. See <http://ccrjustice.org/about-ccr> (last visited Sept. 30, 2012).

24. Schneider, *supra* note 6, at 30.

25. These were not the first women attorneys to join CCR. Harriett Rabb worked with CCR from its founding in 1966 until 1969. She would later head up the Employment Rights Project at Columbia Law School, bringing one of the first round of employment sex discrimination cases against major New York law firms. Cynthia G. Bowman, *The Entry of Women into Wall Street Law Firms: The Story of Blank v. Sullivan & Cromwell*, in *Women and the Law Stories* (Elizabeth M. Schneider & Stephanie M. Wildman, eds., 2011) 415, 428.

26. See CCR Fortieth Anniversary video interview with Stearns and Copelon, available at <http://www.law.cuny.edu/faculty-staff/RCopelon.html>. Two more projects soon followed: the ACLU Women’s Rights Project, headed by Ruth Bader Ginsberg, was established in 1971; Equal Rights Advocates was established in 1974. Cynthia Fuchs Epstein, *Women in Law* (2d edition 1993) at 137–38.

27. See Barbara A. Curran, *Women in the Law: A Look at the Numbers* 8 (1995).

firms that would hire them.<sup>28</sup> As late as 1968, prestigious Wall Street firms were hiring only a handful of female summer clerks—and then putting them to work *in the typing pool*.<sup>29</sup> Even the civil rights bar was practically an all-male club, and local Legal Services jobs were often the only attorney positions available to women who wanted to do public interest work.<sup>30</sup>

Stearns, Goodman and Schneider were graduates of New York University Law School,<sup>31</sup> which by the late 1960s had emerged as a leader in educating women lawyers.<sup>32</sup> In 1967, the year Nancy Stearns graduated, women made up 12% of NYU's entering class.<sup>33</sup> That number will sound low to law students today, but it was nearly three times more women than the average female enrollment in law schools nationally. By 1968, the year Goodman started law school, the number of women at NYU had jumped to 16%, and it jumped again in 1970, the year Schneider enrolled.<sup>34</sup>

The four women who created CCR's women's rights practice were an extraordinary group. All were civil rights activists before they entered law school<sup>35</sup> and it was this commitment that inspired them to enroll. Just a few years out of school, these women were critical players in a feminist vanguard that revolutionized law as well as legal education. Janice Goodman helped to change legal education while in her first year

28. See Bowman, *supra* note 25, at 419. In 1964, 90% of the law firms in contact with NYU regarding hiring interviews refused to even interview women. *Id.* (citing Erwin O. Smigel, *The Wall Street Lawyer: Professional Organization Man?* (1964)).

29. *Id.* at 422. A 1969 survey of NYU Law women alumni documented the following remarks made by hiring attorneys to women applicants: "We hire some women, but not many"; "Women do not become partners here"; "Are you planning to have children?" Women were also told that women's salaries would be less than men's. *Id.* at 423.

30. Interview with Schneider and Stearns, *supra* note 1.

31. Copelon was a Yale Law School graduate.

32. Only Howard University had a higher percentage of women law students in 1967 than did NYU. Epstein, *supra* note 26, at 54.

33. Fred Strebeigh, *EQUAL: Women Reshape American Law* 16 (2009).

34. *Id.* The first increase was the result of changes in military draft laws which no longer allowed deferment for men enrolled in graduate school. The second increase occurred after the federal government delayed federal monies to Universities who discriminated against women in violation of federal rules governing government contracts. *Id.* at 17.

35. Goodman and Stearns had been organizers for the Student Non-Violent Coordinating Committee (SNCC), founded by African American civil rights activists in 1960. In 1964, SNCC organized the Freedom Summer action in which large numbers of mostly white students assisted with registering African American voters in Mississippi. Susan Brownmiller, *In Our Time: Memoir of a Revolution* 12 (1999); Interview with Schneider and Stearns, *supra* note 1. Schneider had been a member of the Students for a Democratic Society (SDS) while in college. Interview with Schneider and Stearns, *supra* note 1.

of law school when, in 1968, she and classmate Susan Deller Ross founded the Women's Rights Committee (WRC). The original goal of WRC was to challenge the male-only rules for NYU's most prestigious and valuable scholarship, the Root-Tilden.<sup>36</sup> Some of the scholarship holders as well as a professor and former dean opposed opening the scholarship to women because they could not share in the male camaraderie formed by activities such as "throwing water balloons at each other while running nude through the all-male Root-Tilden residence."<sup>37</sup> In a presentation to the faculty, Goodman and Ross warned that they would file suit against the school if the scholarship was not opened to women. Within days, NYU invited women to apply for Root-Tilden scholarships. As Professor Cynthia Bowman describes:

[W]ith a heady sense of possibility and power from this quick victory, the WRC went on to attack one problem after another over the next couple of years—exclusion of women from the steam room in a residence hall, sexist remarks by faculty in class, recruitment and admission of more women students, recruitment of women faculty (there were none), and the addition of a course in women and the law to the curriculum in 1970, the first in the nation.<sup>38</sup>

Copelon became a leading litigator and activist in the field of women's international human rights. She was instrumental in changing the human rights framework to recognize crimes against women including rape and domestic violence as violations of human rights. Her victory in *Filártiga v. Peña-Irala*<sup>39</sup> established the right of victims of gross human rights abuses committed abroad to bring suit against abusers in U.S. courts based on customary international law. In *Harris v. McRae*,<sup>40</sup> Copelon challenged the constitutionality of the federal prohibition on using government funds for abortions; although the initial challenge succeeded, the U.S. Supreme Court ultimately reversed the victory. She

36. Strebeigh, *supra* note 33, at 18–19.

37. *Id.* at 17.

38. Bowman, *supra* note 25, at 421–22. In April 1970, WRC organized a meeting of women law students from seventeen schools, resulting in the formation of the National Conference of Law Women (NCLW). In the next year's hiring season, NCLW gathered data on sex discriminatory hiring practices of major Wall Street firms. This data formed the basis for the first gender discrimination law suit to be brought against a major law firm. (Harriet Rabb, formerly with CCR and then a clinical teacher at Columbia, represented the plaintiffs.) See generally *id.* Goodman would later co-found one of the first feminist law firms in the U.S. *Id.* at 442.

39. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

40. The case is described in wonderful detail in Rhonda Copelon and Sylvia A. Law, 'Nearly Allied to Her Right to Be'—*Medicaid Funding for Abortion: The Story of Harris v. McRae*, in *Women and the Law Stories* 207 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011). For more information about Copelon, see <http://www.youtube.com/watch?v=5izkuWak3DY&feature=related>.

was a member of the founding faculty of CUNY Law School, the co-founder of the school's International Women's Human Rights Clinic, and the founder of the Women's Caucus for Gender Justice—an international organization that successfully advocated for the inclusion of gender crimes in the International Criminal Court.<sup>41</sup>

Beginning in 1970, Stearns, who would be Wanrow's co-counsel with Elizabeth Schneider, led a groundbreaking and successful state-by-state litigation strategy challenging anti-abortion laws.<sup>42</sup> A brilliant litigator, Stearns was among the first to bring multi-plaintiff suits to challenge abortion as sex discrimination,<sup>43</sup> suits that included “an especially sophisticated rendering of the equality claim under the Nineteenth Amendment.”<sup>44</sup> She would reprise her arguments in an amicus brief filed in *Roe v. Wade*.<sup>45</sup>

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41. Kate Gallagher, *On the Cutting Edge: CUNY Law's International Women's Human Rights Clinic* (2000), available at [www.law.cuny.edu/faculty-staff/RCopelon/cutting-edge.pdf](http://www.law.cuny.edu/faculty-staff/RCopelon/cutting-edge.pdf).

42. See, e.g., *Abramowicz v. Lefkowitz*, No. 69 Civ. 4469 (S.D.N.Y. 1970) (dismissed as moot when the state legislature eliminated the challenged abortion statute); Plaintiffs' Brief, *Abramowicz v. Lefkowitz* (March 9, 1970), reprinted in *Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling 140* (Linda Greenhouse & Reva B. Siegel eds., 2010).

43. Greenhouse and Siegel write:

Whereas previous equal protection arguments had focused on the disparity in access to abortion between wealthy and poor women, the *Abramowicz* brief represents one of the first attempts to argue that the abortion right is essential to ensure equality between men and women. At the time the brief was written, the Supreme Court had yet to strike down any law on equal protection/sex discrimination grounds.

Greenhouse and Siegel, *supra* note 42, at 140. The strategy that Stearns and her colleagues adopted in these cases, and the one she would apply again in an amici brief in *Roe*, was revolutionary. They argued that anti-abortion laws violated Fifth- and Fourteenth-Amendment Equal Protection, the Eighth Amendment prohibition against cruel and unusual punishment, the Thirteenth Amendment prohibiting involuntary servitude, and the Nineteenth Amendment's guarantees of women's political rights. Rather than represent physicians—as had been the practice in earlier suits seeking to liberalize abortion restrictions, Stearns and co-counsel brought the suit on behalf of women as a class. Rather than argue to loosen abortion restrictions to *protect* women, they argued that women had a *right* to control their own reproduction.

44. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L. J. 1943, 1991 n. 145 (2003). Post and Siegel quote the following from Stearns' complaint filed in *Rhode Island v. Israel*, No. 4605 (D.R.I. June 22, 1971):

The Nineteenth Amendment recognized that women are legally free to take part in activity outside the home. But the abortion laws imprison women in the home without free individual choice. The abortion laws, in their real practical effects, deny the liberty and equality of women to participate in the wider world, an equality which is demanded by the Nineteenth Amendment.

45. Brief Amicus Curiae of New Women Lawyers, et al. at 1, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70–18), 1971 WL 134283.

Schneider began law school in 1970. Though only three years separated Stearns's last year of law school from Schneider's first, their experiences were worlds apart. Women now represented a significant voice in law school politics at NYU and the focus of that voice was increasingly to challenge sex discrimination. Like Goodman, many of the activists who entered law school in those intervening years were deeply influenced by a revolution that began in civil rights work for racial justice and in the New Left anti-war movements. Frustrated with the ways in which women were disregarded and relegated to supporting roles in these organizations,<sup>46</sup> women began to organize for women's rights and to articulate a demand for "women's liberation."

Schneider was involved in civil rights and anti-war activism while in college, but it was not until the year after she graduated with a master's in political sociology from the London School of Economics that she became deeply involved in the women's movement. When Schneider returned to the U.S., she went to work for the Vera Institute for Justice, a criminal justice reform think tank. Soon, she was meeting with feminist lawyers like Jan Goodman, who urged her to attend law school. Persuaded that "there was a need for women to go into law," Schneider chose NYU "because there was this group of [activist] women who were already there." Schneider clerked at CCR both summers while in law school, working with Goodman, Stearns, and Copelon—her "heroines." "[The] critical mass of Nancy, Jan, and Rhonda . . . really created a women's presence [at CCR]."<sup>47</sup> When she graduated, Schneider joined CCR fulltime, and she would work there for nine years. During those years at CCR, and the years that followed when she taught in the Constitutional Law Clinic at Rutgers School of Law–Newark, Schneider would be involved in numerous cases—either representing a party or, as often was the case, representing *amici curiae*. The cases included work with Stearns and Copelon on groundbreaking civil rights claims of race and sex discrimination, as well as challenges to government misconduct, labor union representation, and criminal representation.<sup>48</sup> But it was her

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46. SNCC history provides an example. When Goodman volunteered for Mississippi Freedom Summer in 1964, she was the director of inner-city programs for Girl Scouts and had years of organizing experience. Volunteering was a brave move; three organizers had just been killed when the call came out for more volunteers. Despite Goodman's experience, her arrival (and that of her colleague, Susan Brownmiller) was met with derision by SNCC's field secretary: "Shit! I asked for volunteers and they sent me white women." Brownmiller, *supra* note 35, at 14–15. The same year, Mary King and Casey Hayden, SNCC volunteers, anonymously wrote a paper entitled "The Position of Women in SNCC," in which they criticized the "assumptions of male superiority" true of the general society and mirrored in the leadership of SNCC. The paper was ridiculed. It resurfaced the next year in an expanded version and this time the authors dared to sign their name. In 1966 it became the subject of intense conversation at a national SDS conference. *Id.*

47. Interview with Elizabeth Schneider and Nancy Stearns, *supra* note 1.

48. See, e.g., *Drew Municipal School District v. Andrews*, 507 F.2d 611 (5th Cir. 1975), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed*, 425 U.S. 559 (1976) (CCR

work for the civil rights of women—in criminal as well as civil court-rooms—for which she is best known. She would become an internationally recognized expert on women’s rights generally, and an expert on legal responses to domestic violence, in particular. She would author the prizewinning book *Battered Women and Feminist Lawmaking*, co-author a law school casebook on domestic violence, and consult for the U.N. Secretary General’s *In-Depth Study of All Forms of Violence Against Women*.<sup>49</sup> This work began with *Wanrow*.

***The Stories Converge:  
The Story of State v. Wanrow***

Though the facts surrounding the killing of William Wesler were sharply contested at trial, there was no real disagreement about what occurred the evening before his death.<sup>50</sup> On August 11, 1972, Yvonne Wanrow left her two children at the home of her friend Shirley Hooper so that she could go to a doctor’s appointment. She had a broken foot and was wearing a cast. This was the first day that she was allowed to put weight on her foot. Wanrow’s car broke down after her doctor’s appointment, so she caught a ride to her home and called Hooper to say that she would be late to pick up her children. Hooper told her that they could spend the night, and Wanrow agreed to pick them up the next day.

Shirley Hooper lived in a small house in a mostly industrial area of town.<sup>51</sup> Because there were only a few residences, the area was lonely and grew very dark at night. But Hooper’s reasons to be afraid went beyond her unfriendly environs. Only months earlier, her seven year old daughter had been sexually molested. Her daughter refused to identify the attacker, but the physical evidence was clear: the young child had contracted a venereal disease. Then, just a few nights before the day of the killing, Hooper saw a man crouching near the front of her house.

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attorneys Copelon, Schneider, Morton Stavis, and Stearns, along with Legal Services lawyers, brought a successful challenge on behalf of African American women who were fired or not hired due to a school policy of not employing unwed mothers); *Delfin Ramos Colon v. U.S. Attorney for the District of Puerto Rico*, 576 F.2d 1 (1st Cir. 1978) (Schneider and co-counsel filed a motion for the appointment of a special prosecutor and investigation of proceedings against the U.S. Attorney’s Office for the District of Puerto Rico on the basis that the government acted in bad faith in prosecuting petitioner for his political beliefs, knowing that it had insufficient evidence for the charge); *see also* Schneider, *supra* note 6, at 29 (describing CCR women’s rights cases).

**49.** See Schneider, *supra* note 6; Elizabeth M. Schneider, Cheryl Hanna, Judith G. Greenberg & Clare Dalton, *Domestic Violence and the Law: Theory and Practice* (2d ed. 2008); Women’s Rights Section, United Nations Division for the Advancement of Women, *The Secretary-General’s In-Depth Study on All Forms of Violence Against Women* (2006).

**50.** The facts and witness statements described in this section are from the *Wanrow* Trial Transcript, unless otherwise noted.

**51.** Swan Interview, *supra* note 1.

And only the night before, her bedroom window screen had been slashed for the second night in a row. It was a hot August night, and it seemed clear to Hooper that the person who slashed her screen was trying—or planning—to break into her house. Hooper told Wanrow about the prowler incident that morning when Wanrow dropped off her children, but she kept the information about her daughter's abuse to herself.

At some time after 6 p.m., Hooper called Wanrow in a panic. Hooper needed Wanrow to come over right away, and she wanted Wanrow to bring her gun.<sup>52</sup> William Wesler, her neighbor next door, had tried to grab Wanrow's son, Darren. Darren had broken free of Wesler's grasp and run to Hooper's house, leaving his bicycle behind. Just as Darren appeared breathless at Hooper's door, Wesler arrived claiming "I didn't touch the boy." Hooper recognized Wesler; he was the man she had seen hiding near the front of her house a few nights earlier. But the most terrifying revelation was yet to come. While Wesler stood on Hooper's front porch, Hooper's seven year old daughter told her that Wesler was the man who had molested her.

Hooper's landlords Mr. and Mrs. Joseph Fah<sup>53</sup> were at her house when Wesler appeared at Hooper's door. They were there to replace her slashed bedroom window screen. Hooper also had Joseph Fah look at her front porch light which had stopped working. Fah found that the bulb was fine; the problem was that someone had unscrewed it from the socket.

Joseph Fah recognized Wesler. He told Hooper that Wesler had attempted to molest the child of a prior tenant of the same house and that he had heard that Wesler had been committed to Medical Lakes, the state hospital for the mentally ill.

Hooper called the police and officers came to the house and took her statement. Despite Hooper's insistence that Wesler posed a threat to her safety and that of her children, the officers refused to arrest him. They told her that she would have to go to the District Attorney's office on Monday to file a complaint. Fah suggested that if Wesler returned, Hooper should "conk him on the head" with a baseball bat to which the police responded, "Yes, but wait until he gets in the house." The police also suggested that Hooper sprinkle flour by her bedroom window so that if someone tried to break in, his footprints would be captured in the flour.

Wanrow tried to convince Hooper that it would be safer if she and the children all came to Wanrow's house, but Hooper insisted that she

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<sup>52</sup>. Hooper testified that it was Wanrow's idea to bring the gun, while Wanrow testified that it was Hooper's idea.

<sup>53</sup>. The woman is referred to only as "Mrs. Joe Fah" in the trial transcript. Trial Transcript at 268, *State v. Wanrow*, No. 20876 (Wash. Super. Ct. 1973).

wanted to stay in her own home. When Wanrow got off the phone with Hooper, she grabbed her crutches, milk and clothes for her children, a six-pack of beer, and, with some reluctance, her gun, and she took a cab to Hooper's house. On the way, she left a note at a friend's house, asking her to come to Hooper's house to help them. Wanrow arrived at Hooper's house at about 9 p.m. Darren rushed to hug her. He showed her the bruise on his arm from where Wesler had grabbed him. He said that he had entered Wesler's house because Wesler promised to show him how his dog ate cat food. Unbeknownst to Wanrow at the time, Darren's story matched the facts of complaints reported to the police as early as 1969. In three separate incidents, children and their parents reported to the police that Wesler had lured children into his house with promises of candy, cigarettes, or other treats and that once inside, Wesler had sexually assaulted them.<sup>54</sup>

The police were no longer at Hooper's house when Wanrow arrived, but the Fahs were still there making home repairs. Soon the Fahs left, and Wanrow and Hooper faced the night alone, sleeping next door to an identified child molester who Hooper believed had tried to break into her house. After putting the five children to bed, Wanrow and Hooper continued to rehearse the events of the day, becoming more and more frightened at the prospect of spending the night without a car and without more adults. They thought of several people they might call and finally settled on calling Wanrow's sister Angie Michel and Angie's husband Chuck. The Michels and their three young children arrived at Hooper's house at about eleven at night. There were now eight children in the house ranging in age from a few months old to eight years old.

The adults were jumpy and nervous. They stayed awake, drinking beer and talking, going over and over the events of the day. They could see Wesler's house from Hooper's back porch, and they spent considerable time watching his house for signs that he was coming over. Wanrow carried her gun in the waistband of her pants. When day began to break, Wanrow and Hooper noticed that Chuck Michel, who had been sitting on the back porch alone for some time, was no longer in the house.

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54. The *Wanrow* case record reveals that in 1969 there were two prior reports of Wesler perpetrating child sex abuse and a third report alleging that he gave children beer and cigarettes. Ironically, only the last (and less serious) allegation resulted in criminal charges. He was found guilty of vagrancy, ordered to serve ninety days in jail with eighty-eight days suspended on good behavior, and was additionally ordered not to have any children in his house. The police officer's notes state that it was impossible to bring charges for the two alleged incidents of sexual abuse, because the children were unable to remember the dates on which the alleged acts of molestation occurred. Report No.421154 filed on May 31, 1969; Report No. 438565 filed on Dec. 15, 1969; Report No. 4213684 filed on May 29, 1969, in *State v. Wanrow* case file.

According to Wanrow, about thirty minutes after noticing Michel's absence, she saw him in the front yard with two men she did not recognize.<sup>55</sup> When one of the men, later identified as Wesler, appeared at the front door, Hooper began screaming, "I don't want that man in here!" Wesler, who was a large man and who was visibly intoxicated at the time, ignored Hooper, walked into the house, and moved towards the couch where Angie Michel's son was sleeping. Awakened by Hooper's screaming, the boy began crying. Wesler continued to approach him and, according to Hooper's testimony, said, "My, what a cute little boy."

Wanrow testified that she rushed to the front porch to call for Chuck Michel's assistance, but he did not respond. She turned to reenter the house. She testified at trial as to what happened next:

A: I had the gun in [the waistband of] my pants . . . I was walking on this cast. And I turned around, and all of a sudden he was there.

Q: About how close to you was he when you saw him?

A: Close. Just—I could have touched him.

Q: And did he continue to make any movement . . . toward you . . . ?

A: . . . To me it seemed like he was coming right at me. He was just there, you know.

Q: Then what did you do?

A: I pulled the trigger of the gun.

Q: Do you remember grabbing hold of it?

A: No, I don't remember (crying).<sup>56</sup>

Wanrow also fired three shots at Wesler's friend, David Kelly, hitting him once in the right arm. She testified at trial that she didn't remember firing at Kelly. The only memory she had of him was seeing a man running down the street and thinking that the man was hurt.

After Wesler was shot, Hooper called the police and both Hooper and Wanrow spoke with the police dispatcher. During the conversation, Hooper stated: "Please come to 2903 E. Gordon, there is a guy broke in and my girlfriend shot him." Wanrow then took the telephone and told the police operator that she had shot two people. She repeatedly urged the police to "hurry up" because she was afraid that they were in danger: "I'm the only one that has a weapon and the guy might come

<sup>55</sup>. Chuck Michel testified that he went to Wesler's house and accused him of molesting children and that Wesler suggested that they go together to Hooper's home to "get the whole thing straightened out." Wesler's companion, David Kelly, testified that it was *Michel's* idea to go to Hooper's house. Wanrow testified that she did not know that Michel went to Wesler's house.

<sup>56</sup>. *Wanrow*, Trial Transcript at 300.

back with another gun.”<sup>57</sup> The dispatcher told her that they had received a call from an injured man who was presently at a nearby service station. Wanrow responded, “We warned you—we told you guys.” Neither Hooper nor Wanrow realized that the 911 call was being recorded. When the police arrived shortly thereafter, Wanrow was arrested and charged with second-degree murder in the death of Wesler and first-degree assault for the shooting of Kelly. She spent three nights in jail before she was released on bond and her case was assigned to a public defender. Years later, Wanrow vividly recalled her first meeting with her defense attorney:

I didn’t get a good feeling about him because he didn’t seem willing to defend me. . . . He painted a gloomy picture. . . . I was sitting in his office, and my leg was still in a cast, and I must have looked really . . . pitiful. I felt small, anyway, because he was such a big man. . . . I tried to encourage him to go to trial for me. He said, “Yvonne you know you’re guilty.” I couldn’t believe it, this was my lawyer! I just looked at him. I said, “But I don’t *feel* guilty.”

Nevertheless, in October 1972, Wanrow took her lawyer’s advice and entered a guilty plea. She recalled feeling that she “was up against the whole system, and it was all non-Indian to me, so I just thought the worst.” About two months after entering her guilty plea, while awaiting her sentencing hearing, Wanrow talked by phone with her nephew, Jimmy Swan, who offered to send her money for an attorney. He told her “Don’t let them railroad you, get an attorney with the money I’m sending you, fight it like an Indian.” Wanrow, who was raised Catholic and attended Catholic schools, turned to her childhood priest Father Doyle for advice. Doyle recommended she contact local attorney Eugene Annis. Father Doyle had watched Annis in court and thought he was smart and tough. Annis was a young lawyer with a diversified litigation practice. Annis agreed to take the case, in part because he thought there were unique circumstances in the case that did not warrant a second-degree murder conviction.<sup>58</sup> He had handled a number of criminal cases before, but this was to be his first murder trial.<sup>59</sup> Wanrow retracted her guilty plea in December 1972,<sup>60</sup> and entered a plea of not guilty, which was later amended to include a plea of not guilty by reason of insanity.<sup>61</sup> Wanrow’s trial began on May 7, 1973.

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57. Wanrow, Trial Transcript at 13 (transcribing from the 911 tape).

58. Annis Interview, *supra* note 1.

59. Annis Interview, *supra* note 1.

60. On Feb. 2, 1973, the Court granted defendant’s motion and allowed her to withdraw the plea. Washington allowed a defendant to substitute a plea as a matter of right if the substitution motion was filed prior to judgment (RCW 10.40.175) or if the defendant showed a *prima facie* defense on the merits.

61. Annis recalls that initially Brockett contemplated charging Wanrow with first-degree premeditated murder, but Annis was able to persuade him to pursue the lesser second-degree murder charge. Annis Interview, *supra* note 1.

The morning that Wanrow's trial was to begin, Annis was horrified to read the following in the local Spokane newspaper:

Yvonne Wanrow . . . is being charged in the death Aug.12 of William E. Wesler. . . . Mrs. Wanrow had pleaded guilty to the charge last year but changed the plea to innocent.<sup>62</sup>

The jury had been allowed to return home the prior evening. Annis moved for a mistrial, arguing that the potential prejudice to Wanrow was significant. The trial court denied the motion. The court then questioned jurors about the newspaper article, but the questions were not transcribed. The transcript includes only this summary statement:

Following the recess the jury was returned to the courtroom and asked [as a group] . . . whether they had read or learned anything about the case from [local newspapers] and the response was negative.<sup>63</sup>

The Spokane County Prosecutor Donald Brockett and deputy prosecutor Fred Caruso represented the state. The prosecution's theory of the case was that Wanrow had lured Wesler to Hooper's house with the intent of killing him in revenge for his abuse of Hooper's child and his attempt to molest Darren. The state's case relied heavily on the testimony of Hooper and Kelly. Hooper's statement to the police immediately following the shooting largely corroborated Wanrow's description of events: Wesler entered her home uninvited; Hooper screamed for him to leave. To this, she added that she saw Wanrow "kinda reach" for Wesler, after which she (Hooper) went to the kitchen and did not see Wanrow shoot Wesler.<sup>64</sup> Her only comment regarding Wanrow's behavior earlier in the evening was that Wanrow and Chuck Michel "were arguing and making things worse than what it really should have come out to be." But at trial, Hooper's testimony changed. She said that earlier in the evening, Wanrow had said she was going to "fix" Wesler and at a different time had insisted, "We are going to get it over with." In addition, Wanrow had said that she knew how to handle the police because they were just like California police, adding, "I have done it before; I have pleaded insanity." Hooper added that just before the killing, she saw Wanrow grab Wesler's arm and lead him to the front door. Hooper turned her back and returned to the kitchen. Then she heard the gun go off. She ran to the living room and saw Wanrow

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<sup>62.</sup> Appellant's Brief at 53, *State v. Wanrow*, No. 20876 (Wash. Super. Ct. 1973); see also *State v. Wanrow*, Trial Transcript at 31 (motion for mistrial).

<sup>63.</sup> *Wanrow* Trial Transcript at 31-32.

<sup>64.</sup> Statement of Shirley Kay Hooper taken by Detective Al Hales, Aug. 12, 1972, Misc. 72-54656 (in court file for *State v. Wanrow*).

leaning over Wesler and heard Wanrow say, “You will never molest another son—another child, you son-of-a-bitch.”

Kelly testified that when he and Wesler arrived at Hooper’s house, two women—one of whom was Wanrow—invited them inside to have a drink. They declined, and Kelly went to the side of the house with Chuck Michel to see the flour Hooper had placed under her bedroom window, per police instructions. Wesler told Kelly that he was going to knock on the door and clear things up with Hooper whom neither Kelly nor Wesler had yet seen. Kelly returned to the front of the house just a few minutes later and entered the house with Chuck Michel. Wesler was already inside. As testified to by all the other witnesses, Kelly testified that Hooper was screaming for Wesler to leave. According to Kelly, Wanrow then told Hooper to “shut up, he ain’t bothering anybody.” Contradicting his prior statement to the police that Wanrow was carrying her gun in the waistband of her pants, Kelly testified that Wanrow left the room, returned with a gun in her hand, went to the front door to shut the door—not to call for Michel, as Wanrow testified—and then turned and fired on Wesler. After shooting Wesler, she turned the gun on Kelly. Kelly said that he then ran out the front door and as he was running, he heard Wanrow say, “Come back here, I have another one for you.”

The prosecutors contended in closing arguments that Wanrow’s calm demeanor immediately after the killing, as captured in her 911 call to the police, suggested that she planned the killing. Didn’t she seem calm on the 911 call tape? Didn’t she say, “We warned you guys”? Doesn’t that sound like a planned killing?

The defense attacked Hooper’s credibility by presenting evidence that Hooper had become hostile to Wanrow some time after the homicide as the likely result of her boyfriend’s hostility towards Wanrow’s family. Hooper’s boyfriend, Melvin Talou, was the ex-husband of Wanrow’s sister Angie Michel. Wanrow had no prior criminal record, so it made no sense that she would say that she had pled insanity before. It was Talou who had a criminal record. And it was Talou who forbade Hooper from talking with Wanrow’s defense counsel, telling counsel that Hooper wasn’t going to talk to him, adding for good measure, that he hoped Wanrow “gets it” (i.e., is convicted). As to Kelly’s testimony, the defense pointed out that no other witnesses recalled Kelly being inside the room at the time Wanrow shot Wesler, though all recalled seeing Kelly running across the front yard after the shooting. No other witnesses testified to hearing Wanrow tell Hooper to “shut up” or to her saying to Kelly, “come back here, I have another one for you.” In fact, the other witnesses testified that the front door was propped open by a box of old records and that closing the door would have required Wanrow to move the box—an improbable scenario, given that Wanrow was hobbling on a cast and, according to Kelly, holding a gun in her hand. Further, it

strained belief that Kelly and Wesler would have just stood there while Wanrow, moving slowly on her cast, walked through the room and directly past them holding a gun, or that Kelly could have run from inside the living room through the front door where Wanrow was standing, without knocking Wanrow down on his way out the door.

After each side had presented its case, the court delivered jury instructions setting forth the law of self-defense. Wanrow was charged with first-degree assault for the shooting of Kelly and felony murder for Wesler's death, with assault (on Wesler) serving as the predicate felony. Washington law was unusual in allowing assault to serve as a predicate felony for felony murder.<sup>65</sup> As a result, the prosecutor did not have to prove that Wanrow intended to kill Wesler. He only needed to prove that she intentionally used force against or intentionally inflicted bodily injury on Wesler and that she used a weapon likely to produce bodily harm.

If Washington's felony murder law was unusual, the self-defense law was not. Washington law provided that a person is justified in the use of deadly force against another person if he honestly and reasonably believed that he was in imminent danger of serious bodily injury or death and that the use of such force was necessary to avoid the danger. But in applying this fairly standard American legal doctrine requiring that the response to a perceived threat be proportional to the threat, the trial judge in Wanrow's case construed it in a way arguably narrower than standard doctrine—and certainly narrower than what American law would become in the years after this case. In Instruction 10, the *Wanrow* court directed the jury to consider only those acts and circumstances occurring “at or immediately before the killing.”

The court's proportionality instruction read as follows:

When there is no reasonable ground for the person attacked to believe that his person is in imminent danger of death or great bodily harm, and it appears to him that only an ordinary battery is all that is intended, and all that he has reasonable grounds to fear from his assailant, he has a right to stand his ground and repel such threatened assault, yet he has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless he believes, and has reasonable grounds to believe, that he is in imminent danger of death or great bodily harm.<sup>66</sup>

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<sup>65</sup>. *State v. Harris*, 421 P.2d 662 (Wash. 1996). The law in most jurisdictions was that assault “merged” with the murder charge and therefore could not serve as a predicate felony for felony murder.

<sup>66</sup>. *State v. Wanrow*, 559 P.2d 548, 558 (Wash. 1977) (*italics in original*) (quoting Jury Instruction 10).

The jury, composed of five women and seven men—all of them white—deliberated for twenty-three hours. The trial court had ruled that the 911 tape was not to enter the jury deliberation room. The jury twice requested to hear the tape again, and twice the court denied the request. But when the jury asked a third time, the court relented. A mere forty-five minutes after receiving the tape, the jury returned a verdict of guilty.<sup>67</sup> The verdict was delivered on Mother’s Day, May 13, 1973. Nearly forty years later, Annis remembers vividly that several women on the jury were in tears as the verdict was read.

Wanrow appealed her conviction to the Intermediate Court of Appeal. On appeal, Annis argued that the trial courts’ decision to admit the 911 tape was error under a new Washington State law that made it unlawful for a municipality to record private communications between individuals without the consent of all participants to the conversation.<sup>68</sup> Annis also argued that the trial court erred in denying his motion to call an expert witness on Native American culture, in refusing to grant a mistrial on the basis of prejudicial pretrial publicity, and in its jury instructions on self-defense. The court allowed Wanrow to be free on bail pending her appeal.

Two years after the trial verdict was reached, the Court of Appeals issued its opinion.<sup>69</sup> Its holding would hardly have foretold the ultimate legacy of the case. The Court reversed Wanrow’s conviction, finding that Washington’s privacy statute prevented the introduction of the 911 tape made without Wanrow’s awareness. The Court rejected Wanrow’s arguments that the trial court erred when it failed to admit expert testimony regarding Native American culture, and said not a word about whether the self-defense instruction was faulty.

With her initial appeal won, Wanrow waited to see if the prosecution would appeal the appellate court decision to the Washington Supreme Court, bring charges again, or (the least likely outcome of all) drop the case. While awaiting the government’s decision, Wanrow attended the Wounded Knee-related trial of AIM member Russell Means in 1975. She was impressed with what she saw in Means’s lawyer, CCR attorney Bill Kunstler. After watching Kunstler in action, Wanrow thought, “I wish I had *that* lawyer. . . . [I wanted] to see if I could get him to take my case.”

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**67.** Eugene Annis believes that the tape was particularly “damning evidence.” He remembers that as a witness Wanrow seemed too “intellectual” and less warm than she was in other settings. Thus, the prosecutor’s argument that she sounded “cool” and calculated on the phone was consistent with her demeanor on the stand. Annis Interview, *supra* note 1.

**68.** *State v. Wanrow*, 538 P.2d 849, 851 (Wash. Ct. App. 1975) (discussing RCW 9.73.030).

**69.** *See Id.* at 852–53.

Wanrow sought the help of Floyd Westerman, a well-known Native American country folksinger and AIM activist with whom she was romantically involved. Westerman had rallied many Native American people to attend Wanrow's hearing at the Court of Appeals, and she thought he would be able to help arrange a meeting for her with Kunstler. Westerman was traveling to New York, and though she had only enough money for a one-way ticket, Wanrow arranged to go with him.

Once in New York, Wanrow met with Kunstler, who told her, "I read the papers that you gave me and I see some . . . women's issues in there." Kunstler told Wanrow that he thought that the women attorneys at CCR would be interested in taking her case, but if they declined, he would agree to represent her.

Wanrow then met with Schneider and Stearns. Nearly thirty years later, she still remembers how impressed she was with their sensitivity to the gender politics of her case, but also to its inevitable racial politics. Stearns and Schneider decided to take the case in part because the accused was a Native American woman and they were familiar with the issues of anti-Indian racism likely to be present in a criminal trial in Spokane. Their choice was solidified by the fact that Wanrow was an incredibly motivated client who had already organized a significant defense committee in support of her case.

Already overjoyed at her meetings with the CCR attorneys, Wanrow found further good fortune in New York when Westerman introduced her to the actor and singer Harry Belafonte, who bought her a ticket home.

### *The Appeal*

The state filed an appeal with the Washington Supreme Court on September 25, 1975. Annis, who was still Wanrow's attorney of record, filed a brief arguing that the trial court's self-defense instruction was in error because it "fail[ed] to clearly indicate that the jury must judge the appellant's actions from the circumstances as they reasonably appear to the appellant at the time of the alleged illegal act."<sup>70</sup> Annis's brief also stated that "[the instruction] fails to unambiguously require the jury to consider the circumstances as they would have confronted a reasonable man in the appellant's position."<sup>71</sup> Annis further argued that, although the instruction may have included the key elements of self-defense, "the proper parts are so submerged in prejudicial language as to render the instruction as given ineffective."

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<sup>70</sup>. Brief of Respondent at 45, *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (No. 43949).

<sup>71</sup>. *Id.* (emphasis in original.)

On February 11, 1976, having substituted as Wanrow's counsel, Schneider and Stearns filed a supplemental brief with the Washington Supreme Court.<sup>72</sup> As Schneider later noted, it was only after reading the trial transcript, that she and Stearns realized that

[t]he judge's instructions [on self-defense] had prevented the jury from considering Yvonne Wanrow's state of mind, as shaped by her experiences and perspective as a Native American woman, when she confronted Wesler. The jury had not been presented with evidence concerning the general lack of police protection in such situations, the pervasiveness of violence against women and children, the effect on Wanrow of her belief that Wesler was a child molester, Wanrow's lack of trust in the police, and her belief that she could successfully defend herself only with a weapon. Moreover, the judge's instruction directed the jury to apply the equal-force standard and prevented them from considering Wanrow's perspective when it evaluated her claim of self-defense.<sup>73</sup>

The brief "grew out of a political analysis of gender discrimination." The theory that emerged "brought together diverse strands of feminist analysis and theory concerning gender bias in the criminal justice system."<sup>74</sup>

In their brief, Schneider and Stearns argued that "Instruction [number 10] not only fails to inform the jury that the standard to be applied is that of Yvonne Wanrow's own perspective . . . , but, in effect, it established an erroneous, sex-stereotyped and inflexible standard which directed the jury to exclude Respondent' [sic] own perspective."<sup>75</sup> This resulted from a set of erroneous statements included in Instruction 10. Each misstatement, they argued, was likely reversible error in its own right, but *combined*, these statements did further egregious harm to Wanrow's right to a fair trial.

First, the court's instruction that the jury consider only those acts or circumstances occurring "at or immediately before the killing" contradicted Washington law requiring the jury to consider *all* the circumstances surrounding the incident in determining whether the defendant had reasonable grounds to believe grievous bodily harm was about to be

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**72.** Annis filed the response brief before Schneider and Stearns were substituted as counsel. The court granted them permission to file a supplemental brief. The state filed a motion to strike the supplemental brief on the grounds that, in contravention of the court's order, the brief went beyond the issues presented in Annis's initial brief. The court denied the motion.

**73.** Schneider, *supra* note 6, at 30.

**74.** *Id.* at 3-4.

**75.** Supplemental Brief of Respondent at 1-2, *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (No. 43949).

inflicted. Requiring the jury to focus exclusively on acts that occurred “at or immediately before the killing” prevented jurors from considering the very evidence necessary to judge the reasonableness of Wanrow’s belief that she needed to defend herself or another. This language would prevent jurors from considering most of the events that occurred within twenty-four hours of the homicide: Wesler had grabbed her son; Hooper’s daughter had identified Wesler as the man who had sexually assaulted her; Hooper’s landlord had stated that Wesler had molested a prior tenant’s young son; Hooper had told Wanrow about seeing someone she thought was Wesler crouching in the bushes outside her home the week before; someone had twice attempted to break into Hooper’s home in the previous four days and had cut the screen on her bedroom window; someone had unscrewed her front porch light; and the police had refused to arrest Wesler on charges of child sexual assault or attempted kidnapping. By contrast, within the limits of Instruction 10, what events and circumstances might the jury consider? Wesler, a large sixty-year-old man standing six feet ten inches, had entered Hooper’s residence despite her screaming for him to leave; Wesler had been intoxicated when he entered the house; he approached Wanrow’s young nephew on the couch; he remarked that the boy was cute; Wanrow was five feet four inches, a small woman, had a leg in a cast and had been using a crutch; Wanrow had gone to the door to call for Chuck Michel’s assistance and received no reply; when she turned around, Wesler was right in front of her and seemed to be coming towards her.

More boldly, Schneider and Stearns argued that the second error in Instruction 10 was the court’s failure to instruct the jury to determine the defendant’s reasonableness from the perspective of a reasonable person in the defendant’s situation, as the defendant understood the situation. Gender, they argued, was a critical part of Wanrow’s situation. They explained that gender roles have

relegated women to a position of second-class citizenship with respect to their abilities to defend themselves. Women have been denied equal opportunity to education, access to physical training, and athletics. . . . Women have been discouraged from learning how to physically defend themselves . . . and are socialized to be less active physically, to display physical aggression less overtly, and to be more sensitive to physical pain than boys.

As a result of this socialization, women “experience great anxiety when confronted with a situation where they must display aggression.” The attorneys referred to research on rape supporting the view that women experienced a complete loss of confidence in their ability to protect themselves from a physical attack. They cited research showing the grossly inadequate criminal justice response to child abuse and rape of

women.<sup>76</sup> They explained that society's failure to protect women from male violence should play an important role in defining women's reasonable assessment of danger. And they argued that the effects of gender socialization and experiences of inadequate police protection were evident in Wanrow's case: she was a small woman, facing a child molester, and facing him without state assistance because the police had refused to intervene.

Third, defense counsel argued that the proportionality component of Instruction 10—including the language “he [the defendant] has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner . . .”—was erroneous because it created a standard “more appropriate to a fist fight between two men, than a physical confrontation between a large drunk man and a small woman on crutches.” The distinction between an “ordinary assault” and a “deadly assault” might be a “meaningful distinction when the victim and assailant are both men, accustomed to the notion of physical assault. . . . [B]ut women do not have the same history or experience.” Furthermore, “[t]he very notion of a 5'4" woman standing her ground and repelling the threatened assault of a 6'2" man without reliance on a weapon is absurd.” They also noted that the instruction's persistent use of the male pronoun to refer to the defendant further encouraged the jury to think of reasonableness in terms of what a male defendant would do and believe.

The CCR lawyers thus challenged the homicide law applied in Wanrow's trial as *de facto* gender biased. Implicit in the CCR brief was the notion that gender bias exists not only when facial distinctions are made between men and women, but also when the paradigm examples that inform legal categories are experiences that are mostly those of men and not women.<sup>77</sup> As Schneider later explained, she and her fellow CCR

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76. See Supplemental Brief, *supra* note 75. Schneider and Stearns cited research finding that only 29% of rapes that were reported in 1975 in Spokane resulted in an arrest and only 35% in 1976; in April, 1977, only 35 arrests (5%) were made as a result of 590 calls to police by women complaining of domestic violence. Police enforcement of child molestation laws, according to the defense brief, was “apparently characterized by a similar unwillingness to intervene and prosecute.” *Id.* at 15–16 (citing De Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 Federal Probation 15 (1971)).

77. Similar arguments regarding the ways in which criminal law reflects a “male” point of view would be made by later feminist scholars. See, e.g., Donna Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. Cal. Rev. L. & Women's Stud. 71 (1992) (arguing that the paradigm examples and emotions embodied in voluntary manslaughter's heat of passion enshrine male concepts and male experience of reasonableness, rather than women's); see generally Susan D. Rozelle, *The Story of Berry: When Hot Blood Cools*, this volume; Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* 277 (2003) (urging mechanisms such as “switching” to overcome the fact that “certain defendants, namely, majority culture defendants, are able

attorneys developed a “legal argument for women’s ‘equal right to trial,’ which maintained that the law of self-defense was biased against women.” She wrote:

The argument was based on our knowledge of the particular problems that women who killed men faced in the criminal justice system: the prevalence of homicides committed by women in circumstances of male physical abuse or sexual assault; the different circumstances in which men and women kill; stereotypes and other misconceptions in the criminal justice system that brand women who kill as ‘crazy’; the deeply ingrained problems of domestic violence, physical abuse, and sexual abuse of women and children; the physical and psychological barriers that prevent women from feeling capable of defending themselves; and stereotypes of women as unreasonable.<sup>78</sup>

Meanwhile, as Schneider and Stearns were hard at work on their brief, Wanrow was gathering additional support for her cause. She and her sisters, all talented artists and craftswomen, organized the Defense Committee for Yvonne Wanrow. The sisters used their fashion design know-how to create fashion shows in order to raise money and publicize Wanrow’s plight. The shows were successful. During one show, Wanrow met the famed singer Buffy Sainte-Marie, herself of native ancestry. Sainte-Marie gave Wanrow a check and told her to work with her publicist to get the word out about her case. The result was a five-page press release that Wanrow and her team began feeding to the feminist and the Native American press.

While publicists and feminist activists helped Wanrow connect with alternative newspapers, community organizers, and women’s movement activists, Wanrow continued to work with Native American activists, most importantly AIM members and members of the Native American Church. As a result, Wanrow’s message began to spread through a diverse, national network.

Throughout the process, Wanrow worked collaboratively with her attorneys, Schneider and Stearns. Years later, Wanrow recalled:

I liked the team of women lawyers because they educated me on every step of the way; they’d explain it and they’d look at me and say, ‘do you understand Yvonne?’ . . . But yet ultimately it was my choice. As the defendant, I had the choice as to which direction the case should go. . . . [With] any of the male attorneys, I felt like a dummy sitting there. . . . I grew up with four sisters. . . . There was

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to rely on dominant social norms of masculinity, race, and sexual orientation to bolster their claims of reasonableness while others cannot”).

78. Schneider, *supra* note 6, at 31.

a natural built-in sisterhood, so I never had to explain myself to women or sisters . . . And so it made sense that I had a team of women lawyers.

### *The Washington Supreme Court Decision*

The Supreme Court of Washington issued its decision in *State v. Wanrow* on January 7, 1977. The decision was a 5–3 victory for Wanrow and her attorneys. A majority of the court, composed of five justices, affirmed the appellate court’s ruling that the recorded 911 call was inadmissible.<sup>79</sup> A plurality, consisting of four justices, held that the trial court committed reversible error in the jury instruction on self-defense.<sup>80</sup> One of the five who found error in admitting the tape filed a concurrence that said nothing about the self-defense instruction. Three justices dissented, arguing both that the tape was admissible and that the self-defense instruction was proper.

Though only a plurality found fault with the self-defense instruction, their opinion came to have a dramatic effect on American law. The plurality’s opinion first stated that the trial court erred in directing the jury to consider only those acts and circumstances occurring “at or immediately before the killing,” stating in clear terms that “[t]his is not now, and never has been, the law of self-defense in Washington. On the contrary, the justification of self-defense is to be evaluated in light of *all* the facts and circumstances known to the defendant, including those known substantially before the killing.”<sup>81</sup>

The opinion next explained that Instruction 10 contained “an equally erroneous and prejudicial statement of the law” insofar as it directed the jury to evaluate the reasonableness of Wanrow’s fear without considering how her gender might have colored her perspective.

In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons. [The jury instructions do] not make clear that the defendant’s actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable.

The plurality further explained that the error in Instruction 10 was not only in its establishment of an objective standard for judging reasonable-

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**79.** *Wanrow*, 559 P.2d 548, 555 (Wash. 1977).

**80.** Justice Robert C. Finley died unexpectedly a month after oral argument in the case, so only eight justices participated in the decision. See <http://templeofjustice.org/justices/past/james-m-dolliver>.

**81.** *Wanrow*, 559 P.2d at 555. Subsequent quotes in this section are from the published opinion unless otherwise indicated.

ness, but also in its “persistent use of the masculine gender,” accepting the argument of Schneider and Stearns that such gendered language “leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men.”

Ultimately, said the plurality, the trial court’s use of an entirely “objective” self-defense standard violated Wanrow’s right to equal protection of the law.

The impression created—that a 5’4” woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6’2” intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent’s right to equal protection of the law. The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation’s ‘long and unfortunate history of sex discrimination.’

Since Wanrow’s perception of the situation on the morning of the murder was colored by her own experiences with societal sex discrimination,

until such time as the effects of [discrimination] are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.

Perhaps an even greater significance of the decision for American criminal law lies in a crucial nuance about the standard for self-defense—the principle that the opposite of the erroneous “reasonable man standard” is *not* what people think of as a “subjective” standard. Although the *Wanrow* court seemed to have announced that it was error for the trial court to apply an “objective” standard of reasonableness, the Court did not mean that Washington law embraced a completely subjective test that would simply ask whether the defendant actually and honestly believed deadly force to be necessary. Rather, the opinion in *Wanrow* expressly stated that the jury was to determine the “‘degree of force which . . . a reasonable person in the same situation . . . seeing what (s)he sees and knowing what (s)he knows, . . . would believe is necessary.’” What the *Wanrow* court recognized was that an instruction that encouraged jurors to judge a female defendant’s reasonableness vis-à-vis a male standard of conduct and belief was not an “objective”

standard, but a particularized male standard. The misnamed “objective” standard was therefore not supplanted by a subjective standard, but rather by a more accurate objective standard that takes into account the context of the defendant’s background and situation. In other words, the Court replaced a standard that appeared to be objective but was in fact quite biased with a standard that might be mistaken for subjective but was in fact far less biased than its predecessor.

Despite the desired result, the victory for Wanrow was partial. The Washington Supreme Court affirmed the ruling of the Court of Appeals that the trial court did not abuse its discretion in declining to allow expert testimony on the relevance of Wanrow’s Native American culture to her self-defense claim. In addition, the Court declined to rule on the argument that Wanrow suffered prejudice because of pretrial publicity and racial bias generated by publicity critical of AIM and other Native American activist efforts. Nevertheless, Schneider, Stearns, and Wanrow were satisfied with the win.

The prosecutors, on the other hand, were furious with the Court’s recitation of the facts from the defense perspective without acknowledging that these facts had been controverted by the prosecution. In a strongly worded pleading, Brockett and Caruso filed a petition for rehearing, arguing that there were serious misstatements of fact in the majority opinion which

[a]lthough . . . not . . . crucial to a determination of the legal issues involved, . . . [are] of great importance in light of the national attention this case has received, with the facts often being exaggerated, misreported, and portrayed in a one-sided manner more favorable to the defendant than she is truly entitled to. The effect of such inaccurate reporting is to challenge the very integrity of our judicial system.”<sup>82</sup>

On April 5, 1977, the Washington Supreme Court denied the State’s petition for rehearing.

### ***The Immediate Aftermath***

Nancy Stearns later recalled, “The truth is we were stunned when we got the opinion. . . . We thought we were right, [but] in a million years I don’t [think] we thought we’d get that opinion.” The criminal defense bar and feminist activists were stunned as well. Soon, Schneider and Stearns were fielding calls from criminal defense attorneys, feminist

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<sup>82</sup>. Petition for Rehearing at 1–2, *State v. Wanrow*, 559 P.2d 548 (Wash. 1977) (No. 43949). Years later, former Deputy Prosecutor Fred Caruso, in response to questions about the *Wanrow* case, would note that “as a matter of courtesy,” when a court cites to facts that are in dispute, the court should acknowledge the fact of doing so. Interview with Caruso, *supra* note 1.

and civil rights activists, and defendants from around the country, seeking their assistance with women's self-defense cases. Most of the calls regarded women charged with killing abusive current or former boyfriends or husbands—the legal context which was not present in *Wanrow* and yet with which *Wanrow* is now strongly associated.

While Schneider and Stearns were dealing with the national attention being paid to the case, Prosecuting Attorney Donald Brockett filed new charges against Wanrow for second-degree murder in the death of Wesler and first-degree assault for the shooting of Kelly.<sup>83</sup>

With a potential new trial on the horizon, Wanrow's attorneys needed additional expertise on their team. A National Lawyers Guild member and Washington state criminal defense attorney, Mary Alice Theiler, joined the defense team, along with leading San Francisco civil rights and criminal defense lawyer, Susan Jordan.<sup>84</sup> Stearns moved on to other CCR cases, but Schneider, now four years out of law school, stayed with the *Wanrow* case.

Wanrow's attorneys filed a motion to dismiss the charges on the basis of police misconduct. They argued that it was not in the interest of justice to charge Wanrow since, had the police responded appropriately to Hooper's call for assistance, Wanrow would never have needed to defend herself. No court in Washington had ruled that police policy—in this case, a policy of failing to aggressively pursue the alleged perpetrators of child sexual abuse—could constitute police misconduct. The court denied the motion to dismiss. As the new trial neared, members of the Defense Committee for Yvonne Wanrow, spearheaded mostly by Native American women, re-doubled their efforts at organizing and fund-rais-

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83. The charge was again felony murder. Wanrow's attorneys challenge to the constitutionality of Washington's felony murder statute was rejected by the Washington State Supreme Court. *State v. Wanrow*, 588 P.2d 1320 (1978).

84. Jordan was well known for her defense of Inez Garcia, charged with killing a man who was an accomplice to her rape. See *infra* note 91. She and Schneider, with the assistance of Cris Arguedas, would write the first law review article to describe the biases that affected cases involving women's claims of self-defense against a male attacker. See *infra* note 87 and accompanying text. Jordan died in a plane crash in 2009. Her remarkable accomplishments as a trial lawyer and activists are described at <http://ukiahcommunityblog.wordpress.com/2009/05/30/remembering-susan-jordan-hal-bennett/>

Cris Arguedas, then a law student at Rutgers and intern for CCR, would become one of the leading criminal defense attorneys in the country. See Peter Lattman, *Cris Arguedas in the Spotlight*, *The Wall St. J. L. Blog* (Oct. 6, 2006, 10:59 AM), <http://blogs.wsj.com/law/2006/10/06/h-p-ii-cris-arguedas-in-the-spotlight/>. Theiler, founding partner of the Seattle law firm, Theiler, Douglas, Drachler & McKee, practiced labor law and other civil litigation before becoming a federal magistrate for the U.S. District Court in the Western District of Washington. See <http://www.wawd.uscourts.gov/courthouseinformation/MagistrateJudges.htm>.

ing. Activists from around the country came to Spokane to support Wanrow.<sup>85</sup> They met with local church groups and women's organizations, sponsored fund-raising events, held press conferences, collected signature petitions, wrote letters to the Governor on Wanrow's behalf, and coordinated communication with members of the national Wanrow Defense Committee.

Native American rights organizations continued to be an important part of the movement on Wanrow's behalf. These activists collaborated with other civil rights activists to organize events such as a Native Women's Benefit "to honor Yvonne Wanrow and the struggles of native women."<sup>86</sup> The movement even reached an international audience, with organizations in Peru, Ethiopia, Iran, Grenada, and South Africa sending statements of support. The attorneys expanded their efforts to assist other similarly charged women, speaking at conferences and other fora. Schneider teamed with co-counsel Susan Jordan and law student Cristina Arguedas to write the first law review article explaining the feminist critique of the self-defense doctrine and the strategy used in the *Wanrow* case.<sup>87</sup> By 1978, CCR attorneys had joined with the National Jury Project<sup>88</sup> to create the Women's Self-Defense Project. Project members consulted on more than 100 cases, most of them involving women charged in the deaths of an abusive intimate partner or ex-partner.<sup>89</sup> A book grew from the Project's work, offering a practical guide for lawyers representing women charged with homicide who had killed male abusers in self-defense.<sup>90</sup> Entitled *Women's Self-Defense Cases: Theory and Practice*, the book focused on what became the overwhelming majority of

**85.** Interview with Marge Nelson and Polly Taylor, *supra* note 1. Nelson and Taylor traveled from their home in Minneapolis to Spokane, joining many other activists from all across the country. Their notes from the time state: "When we arrived, there seemed to be a lot of suspicion and hostility toward Yvonne from local feminists. . . . We set out to remedy these feelings and have." See *Major Foci of Our Work*, archives of Marge Nelson and Polly Taylor, *supra* note 1.

**86.** Sherrie Cohen, *Native Women's Benefit to Free Yvonne Wanrow*, in *Off Our Backs: A Women's Newsjournal*, April 30, 1979, at 6. The event was organized in D.C. and featured Floyd Westerman, civil rights activist Bernice Reagon, speakers from the Women of All Red Nations (WARN), the Native American Women's Association, AIM singers and drummers, and leading AIM activist Russell Means.

**87.** See Elizabeth M. Schneider and Susan B. Jordan, with the assistance of Cristina C. Arguedas, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 *Women's Rts. L. Rep.* 149 (1978).

**88.** The National Jury Project, founded in 1975, engaged in research and education regarding the jury system and "assisted lawyers and defendants in all phases of the trial process." *Women's Self-Defense Cases: Theory and Practice* xv fn \*\* (Elizabeth Bochnak ed. 1981).

**89.** *Id.* at xvi.

**90.** *Id.* Similar work is currently undertaken by the National Clearinghouse for the Defense of Battered Women. See <http://www.ncdbw.org/>.

women's self-defense cases—cases involving battered women. Schneider and Jordan co-authored a chapter.

### *The Social Significance of the Wanrow Decision*

Although Wanrow did not defend herself against an intimate abuser,<sup>91</sup> the plurality opinion would ultimately provide a crucial tool for victims of domestic violence who acted to defend themselves against their abusers. At the time of Wanrow's trial in May 1973, victims of domestic violence were virtually invisible. The first newspaper accounts of battered women did not occur until the following year, 1974.<sup>92</sup> But by the time the Washington Supreme Court decided her case in 1977, violence against women, and rape and wife abuse in particular, had become the focus of intense public attention, feminist activism, and some legislative action. Erin Pizzey's 1974 book, *Scream Quietly or the Neighbors Will Hear*, chronicled the experiences of battered wives in England and received significant attention in the United States. Susan Brownmiller's famous book on society's response to rape, *Against Our Will*, one of the books cited in the Washington Supreme Court opinion, was published in 1975. In 1976, U.S. activist Del Martin published *Battered Wives*, describing the plight of thousands of U.S. women. That same year, the first set of state laws concerning wife abuse were enacted, the federal government allocated \$700,000 for domestic violence intervention, and the results of the first national survey on spousal violence were announced.

A "media flurry" about wife-beating hit the national press in the late seventies. As historian Elizabeth Pleck describes: "Magazine and newspaper articles were emblazoned with close-up photographs of women's bruised faces and blackened eyes. . . . Television soap operas and police dramas featured sympathetic portrayals of abused women that diminished public apathy." In 1976, lawyers brought class action suits in Oakland, California, and New York City, claiming that police refusal to

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**91.** Two other contemporaneous cases involving women who claimed self-defense in response to male attackers received widespread publicity as a result of the efforts of feminist activists and attorneys. Joan Little, an African American woman in North Carolina, killed a white jailer whom she testified was attempting to rape her at the time of the killing. See *State v. Little*, No. 75-CRS-32405 (N.C. Super. Ct. Aug. 15, 1975). Inez Garcia killed an accomplice to the man who raped her. Garcia's conviction for murder was overturned on appeal and Susan Jordan, the attorney who would join Wanrow's defense team, represented her in the second trial. Jordan successfully argued that Garcia killed in self-defense. *People v. Garcia*, No. CR-4259 (Super. Ct. Cal. 1977).

**92.** Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* 182 (1987). Unless otherwise noted, Pleck is the source for the information in this section regarding the modern U.S. response to domestic violence.

respond to domestic violence calls was sex discrimination.<sup>93</sup> In 1977, the year of the *Wanrow* opinion, “the New York Times carried forty-four articles on wife beating, ranging from stories about hotlines and shelters to the trials of women who had murdered their assaultive husbands.”<sup>94</sup>

This attention to violence against women grew directly from the activism and methods of the women’s movement. Indeed, as Pleck writes, “[t]he rebirth of feminism was necessary for the rediscovery of wife beating.” Consciousness-raising meetings and “speak-outs” encouraging women to tell personal stories revealed the ubiquity of violence against women—in homes, offices, and on the street. These stories prompted activists to investigate the causes of violence more broadly and to challenge the failure of the state to respond adequately.

The years that immediately followed the *Wanrow* decision brought even more national attention to the prevalence of violence against women. The House, the Senate, and the U.S. Civil Rights Commission held hearings on domestic violence.<sup>95</sup> President Jimmy Carter opened the Office of Domestic Violence,<sup>96</sup> and leading radical feminist author and activist Andrea Dworkin published her now-famous essay on her own experiences of battering entitled *The Bruise That Doesn’t Heal*.<sup>97</sup> Newsweek magazine and other national newspapers ran stories on battered women who killed abusers in self-defense.<sup>98</sup>

### ***The Legal Significance of the Wanrow Decision***

The central importance of the *Wanrow* decision for the development of legal doctrine is the fair trial issue raised by Jury Instruction 10. The Washington court recognized that experiences related to a woman’s gender are a part of the “context” in which a female defendant kills and that failure to so instruct the jury will result in the application of an implicit male definition of reasonableness.

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**93.** See Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement* 159–61, 337 n.10 (1982).

**94.** Pleck *supra* note 92, at 189.

**95.** *Domestic Violence: Prevention and Services*, Hearing on H.R. 2977 Before the Subcomm. on Select Education of the H. Comm. on Education and Labor, 96th Cong. (1979); *Domestic Violence* 1978 Before the Subcomm. on Child and Human Development of the S. Comm. on Human Resources, 95th Cong. (1978); Carol A. Bonosaro, et. al., *Battered Women: Issues of Public Policy, A Consultation Sponsored by the United States Commission on Civil Rights* (Jan. 30–31, 1978), available at <http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED177450>.

**96.** Pleck *supra* note 92, at 196.

**97.** Andrea Dworkin, *The Bruise That Doesn’t Heal*, *Mother Jones*, July 1978, at 31.

**98.** See, e.g., *Wives Accused in Slayings Turning to Self-Defense Pleas*, Wash. Post/Jerrold K. Footlick, *Wives Who Batter Back*, *Newsweek*, Jan. 30, 1978, at 54.

However, the *Wanrow* case and the activism that surrounded it had an impact that went far beyond the change in doctrine. Not only did the case open up a new line of argument, but perhaps more importantly, defense attorneys began to understand female homicide defendants differently. Before *Wanrow*, self-defense was not seen as a viable defense strategy for battered women who killed their abusers. The contexts in which women were likely to kill in self-defense were not the paradigmatic stories that informed either cultural or legal narratives of self-defense. As Schneider later wrote, because gender was not seen as relevant to the reasonableness of a woman's defense against a male attacker, "both women defendants and the lawyers representing them were likely to perceive these cases as appropriate for (and thus claim) insanity or impaired-mental-state defenses rather than self-defense. . . . Both women defendants and their lawyers were not likely to argue self-defense because they could not perceive the women's actions as reasonable."<sup>99</sup>

In recognizing a woman's right to have the jury view the facts from a more realistic perspective, the *Wanrow* decision

moved the political work to a different level; it posed the political questions of what a woman's perspective might be, whether there was a distinct women's perspective, and what equal treatment might look like. It focused further legal work on the disparate hurdles that limited women defendants' choice of defense—particularly the various ways women's experiences were excluded from the courtroom—and laid the foundation for remedial political and legal strategies.<sup>100</sup>

Subsequent Washington Supreme Court decisions underscored the necessity of making "the subjective self-defense standard '*manifestly* apparent to the average juror.'"<sup>101</sup> Recognizing that a male paradigm could infect juror decision making in a number of ways—in a proportionality instruction or in the persistent use of the male pronoun—Washington courts required that instructions *specifically* call attention to the requirement that jurors place themselves in the circumstances of the defendant including the gender of the female defendant.<sup>102</sup>

<sup>99</sup> Schneider, *supra* note 6, at 32. Recall that *Wanrow*'s trial lawyer argued that she was not guilty by reason of insanity as an alternative to her self-defense claim.

<sup>100</sup> *Id.* at 33.

<sup>101</sup> State v. Allery, 682 P.2d 312, 314 (Wash. 1984) (quoting from State v. Painter, *infra* note 103).

<sup>102</sup> See, e.g., State v. Crigler, 598 P.2d 741 (Wash. Ct. App. 1979) (reversing conviction of domestic violence victim who killed her abuser on the basis that jury instructions requiring that an "overt act" occur "at or immediately before the killing" that justified the use of deadly force contradicted the *Wanrow* requirement that the jury look to *all* the circumstances); State v. Bailey, 591 P.2d 1215 (Wash. Ct. App. 1979) (reversing conviction of domestic violence victim who killed her abusive husband, because the court failed to instruct the jury to determine reasonableness "in light of all the facts and

In one such case, Janice Painter received a new trial after claiming self-defense in the killing of her stepson, Ted.<sup>103</sup> Painter, who was forty-six years old, physically frail due to a back injury, and sometimes used a crutch, alleged that her stepson had several times threatened to rape and murder her and her children. Ted, a Vietnam veteran, was 145 pounds, 30 years old, and “strong and wiry.” According to Painter, on the fatal day, Ted became abusive to her, then prevented her from calling the police for assistance by punching her and knocking her crutch out from under her, thereby causing her to fall and strike her back on the furniture. After she fell, she was unable to stand up. Ted continued to advance towards her telling her to “Go ahead and shoot,” even after she warned him, “Stay back or I’ll shoot.” The Court of Appeals, citing *Wanrow*, reversed her first degree murder conviction. The appellate court noted that the trial court *properly* instructed the jury to determine the reasonableness of Painter’s fear of imminent death or great bodily injury from the standpoint of “a reasonably and ordinarily cautious and prudent woman . . . seeing what she sees and knowing what she knows.”<sup>104</sup> But the effects of this instruction were “completely undermined” by the trial court’s proportionality instruction defining “great bodily harm” as “an injury of a more serious nature than an ordinary striking with the hands or fists.”<sup>105</sup> This instruction “injected an impermissible objective standard.” Although the proportionality instruction had been approved in a series of prior cases, the Court noted that those cases “were decided before *State v. Wanrow*.”<sup>106</sup>

Not every Washington trial court embraced the reasoning of the *Wanrow* plurality. When Sherry Lynn Allery was tried in the shooting death of her husband, the trial court was unsympathetic to defense counsel’s reliance on *Wanrow*, noting that the opinion did not express the views of a majority of the justices and asserting that it did not correctly state the law.<sup>107</sup> The trial court concluded: “If my brothers upstairs [members of the Washington Supreme Court] . . . are going to

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circumstances known to the defendant” and to “view the circumstances as they reasonably might have appeared to the defendant at the time”). The *Bailey* court further noted “a woman defendant should be entitled to have jury instructions framed in the feminine gender in order to convey to the jury that they consider her actions in the light of her own perceptions and experience.” *Bailey*, 591 P.2d at 1214.

**103.** *State v. Painter*, 620 P.2d 1001, 1004 (Wash. Ct. App. 1980). The Washington State Supreme Court declined to review the appellate court decision. 1981 WL 190850 (Wash.)

**104.** *Painter*, 620 P.2d at 1003.

**105.** *Id.* at 1004.

**106.** *Id.*

**107.** Ellen Yaroshefsky, *State of Washington v. Sherrie Lynn Allery: Victory Despite Conviction*, in *Trial Stories* at 14 (Michael E. Tiger & Angela J. Davis eds., 2008). Yaroshefsky, now a law professor at Cardozo School of Law, represented Allery at trial.

write some law on the subject, they ought to write clearly and ought to remember not only what they write but read what other people write.”<sup>108</sup> The Washington State Supreme Court answered the challenge. Quoting the appeals court decision in *Painter*, the court held that the trial court erred when it gave a self-defense instruction that failed to make “the subjective self-defense standard ‘manifestly apparent to the average juror.’”<sup>109</sup> A self-defense instruction must order the jury “to consider the conditions as they appeared to the slayer, taking into consideration all the facts and circumstances known to the slayer at the time and prior to the incident.”<sup>110</sup> Unlike the split opinion in *Wanrow*, this time the court was unanimous in firmly establishing the *Wanrow* plurality decision into Washington law.<sup>111</sup>

The emphasis in *Wanrow* on the importance of gender in the law of self-defense has since appeared in decisions by many other state courts. For example, the New Jersey Supreme Court reversed the manslaughter conviction of Ellen Gartland. Citing *Wanrow* as persuasive authority, the Court held that the trial court erred when it failed to instruct the jury to consider how “a reasonable woman who had been the victim of years of domestic violence would have reasonably perceived on this occasion that the use of deadly force was necessary to protect herself from serious bodily injury.”<sup>112</sup> Courts have also cited *Wanrow* in underscoring the relevance of the decedent’s history of violence against the defendant to a determination of the reasonableness of a defendant’s perception of the need to use deadly force to defend herself.<sup>113</sup> Still other courts have cited *Wanrow* for the proposition that jury instructions on self-defense should not use the male pronouns “he” and “him” to refer to a female defendant.<sup>114</sup>

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**108.** *Id.* at 21 and 44.

**109.** *Allery* 682 P.2d 312, 314, 314 (Wash. 1984) (quoting *State v. Fischer*, 598 P.2d 742 (1979)).

**110.** *Id.* As in many cases, the *Allery* court risked blurring this point with the unfortunate use of the word “subjective,” but the full wording of the decision clarifies the key implication of *Wanrow*.

**111.** Two of the justices who dissented in *Wanrow* joined the unanimous decision in *Allery*. Nearly 30 years later, former Chief Justice Utter explained their switch as the result of “changes in society’s attitudes” regarding domestic violence. He noted that at the time of *Wanrow*, not much was known about violence against women, but by the time *Allery* was decided, there was a great deal more public awareness. Interview with Utter, *supra* note 1.

**112.** *State v. Gartland*, 694 A.2d 564, 575 (N.J. 1997).

**113.** *See, e.g., State v. Dokken*, 385 N.W.2d 493 (N.D. 1986) (reversed conviction because trial court erred in excluding evidence of prior abuse of the defendant by the victim.)

**114.** *See, e.g., State v. Hennem*, 428 N.W.2d 859, 867 (Minn. Ct. App. 1988) (stating that a self-defense instruction should be gender-neutral, but declining to reverse on this basis).

Despite these important changes in the standard for self-defense, sex stereotypes, and stereotypes of battered women in particular, continue to influence judicial interpretations of legal standards. A study conducted fourteen years after the *Wanrow* decision underscored this point. In 1991, Professor Holly Maguigan reviewed all appellate homicide cases involving a convicted female defendant for whom evidence of domestic battering was proffered and who claimed self-defense at trial.<sup>115</sup> Maguigan's focus was not on judging the fairness of trial outcomes, but rather on judging the fairness of the trial process: Were these defendants allowed to present to the jury the evidence and the social context of their actions and were they granted legal instructions on the relevance of that context to their claims of self-defense?<sup>116</sup>

Maguigan discovered that these cases were reversed on appeal nearly five times more often than was generally true for homicide convictions: 40% compared to 8.5%. What accounted for this dramatic difference in reversal rates? In case after case, appellate courts reversed because trial courts were simply unable or unwilling to fairly apply standard self-defense law to battered women defendants.<sup>117</sup> Trial courts were inclined to see these defendants as vigilantes, even though the overwhelming majority of them faced a direct confrontation—that is, the classic self-defense scenario.<sup>118</sup> Maguigan concluded that contrary to popular notions that self-defense doctrine failed to adequately address the circumstances under which women kill abusers, it was the unfair *application* of standard self-defense doctrine that prevented these defendants from receiving a fair trial. This was the case despite the fact that most jurisdictions require the jury to view reasonableness from the circumstances of the defendant (as *Wanrow* would require), most of the cases studied were straightforward confrontation cases and thus should

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**115.** Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. Pa. L. Rev. 379, 394 (1991). The search of appellate cases was limited to those where “(1) the defendant was a woman, (2) the defendant was accused of killing her spouse or lover, (3) there was evidence of a history of abuse of the woman by the man, (4) the defendant claimed to have acted in self-defense, (5) the defendant was convicted.” Two hundred and twenty-three cases were identified. *Id.* at 393–94.

**116.** *Id.* at 383.

**117.** Maguigan concludes that “in most jurisdictions, to the extent that [battered women making self-defense claims] . . . are precluded from getting a self-defense instruction, from presenting evidence of a history of abuse or expert testimony, and from having the jury instructed on the relevance of that evidence, the preclusion is the result of unfair application of existing law and not [due to the law’s] . . . structure or content.” *Id.* at 458.

**118.** *Id.* at 394. Cases were identified as “confrontation” cases if there was evidence for all of the following criteria: “(1) the man (decedent) was awake [at the time of the homicide]; (2) he behaved in a way that the woman interpreted as posing an imminent or immediate threat of death or serious injury to her; and (3) there was evidence that she did not provoke his behavior by unlawful conduct and was not the initial aggressor.” *Id.* at 4.

not have presented an imminence problem, and most jurisdictions “reject the notion that the proportional force rule operates to forbid use of a weapon against an unarmed attacker.”<sup>119</sup>

Frequently, the problem in these cases was that courts were focused on the legally irrelevant question of why a battered woman “stayed” in an abusive relationship.<sup>120</sup> Take, for example, the rule on “imminence.” In order to successfully assert a claim of self-defense, a defendant must reasonably believe that she is in *imminent* danger of losing her life or suffering great bodily harm. But as Professor Victoria Nourse’s empirical study of cases found, rather than a narrow focus on the imminence of the risk of death or serious bodily injury, as the doctrine required, courts used the “imminence” requirement as a proxy for a number of other concerns—concerns that were often illegitimate under the state’s legal doctrine.<sup>121</sup> In cases involving battered women, Nourse discovered that courts confused the *proper* question of the imminence of the threat with the *improper* question of why the defendant had remained in an abusive relationship.<sup>122</sup> This kind of “pre-confrontation retreat” rule, as Nourse pointed out, is contrary to the law and disadvantaged battered women as compared to other homicide defendants. As Nourse described, “We do not ask of the man in the barroom brawl that he leave the bar before the occurrence of an anticipated fight, but we do ask the battered woman threatened with a gun why she did not leave the relationship.”<sup>123</sup>

### ***Race: The Limits of Wanrow***

Though a stunning success, the *Wanrow* decision also demonstrates the limits to which courts were willing to go to ensure a defendant’s right to a fair trial. Washington Supreme Court Justice Robert Utter authored the gender-focused plurality decision in *Wanrow*, but when

<sup>119.</sup> *Id.* at 417. Maguigan notes that some jurisdictions rejected this notion “decades before *Wanrow* was decided,” but whatever the history, it is clear that the current majority rule is that “the reasonableness of a defendant’s degree of force is decided on a case-by-case basis and that use of a weapon against an unarmed attacker is not *per se* disproportionate.” *Id.*

<sup>120.</sup> See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991) (describing the ways in which law and culture create a false dichotomy between “staying” and “leaving” and thus fail to recognize women’s acts of agency—even acts of separation, unless their actions are successful in stopping the violence).

<sup>121.</sup> Victoria F. Nourse, *Self-Defense and Subjectivity*, 68 U. Chi. L. Rev. 1235, 1236 (2001).

<sup>122.</sup> *Id.*

<sup>123.</sup> *Id.* at 1238. Nourse provides the following example: Barbara Watson was on the ground with her husband’s hands around her neck when she killed him, yet the trial court determined that the threat against her was not “imminent” because of the long course of physical abuse that characterized the marriage. *Id.* at 1247.

Justice Utter was asked about the case more than thirty years later, it was the anti-Indian racism of Spokane County that was uppermost in his mind.

Those were the times of *strong* anti-American-Indian sentiment in Spokane County. The prosecutor prosecuted [Wanrow] under the murder statute. The judge instructed the jury and the jury found her guilty.<sup>124</sup>

Further evidence of anti-Indian sentiment is found in Utter's description of the process he used to persuade his colleagues to uphold the appellate court's reversal of Wanrow's conviction.

[T]he other justices wanted to affirm the conviction. It started out 8-1. I was the lone dissenter. But one by one I was able to get one more vote, and one more vote. Finally, Bob Hunter from Ephrata was the last vote I needed for a 5-4 majority. Bob was a wonderful guy, heart as big as the whole outdoors. . . . And he said, "You know, sometimes you've got to pull up your socks and be a judge." So he voted [with] . . . me, *although that was his constituency over there on the east side*.<sup>125</sup>

In an interview conducted for this chapter, Justice Utter explained that his remarks regarding "the east side" referred to the strong anti-American Indian sentiment present in the east side of the state, the part of the state that had supported Justice Hunter's election to the bench.

Consistent with Justice Utter's recollection, Wanrow's lawyers also believed that anti-Native American prejudice was central to the fair trial concerns at issue in Wanrow's case, but there were limited ways in which to make those concerns cognizable on appeal.<sup>126</sup> They were left

<sup>124.</sup> John Hughes, *Robert F. Utter: Justice's Sailor, An Oral History* (2009), Washington State Legacy Project, at <http://www.sos.wa.gov/legacyproject/oralhistories/RobertUtter/pdf/complete.pdf> (emphasis in original).

<sup>125.</sup> *Id.* (emphasis added). It is not surprising that more than thirty years after the fact, Justice Utter would fail to remember that the decision was 5-3, rather than 8-1, and only 4 justices joined the plurality decision finding error with the self-defense instruction.

<sup>126.</sup> It is not clear that Annis would have been successful had he challenged the racial makeup of the jury. At the time of trial (1973), explicit exclusion of African Americans from jury service would have been unconstitutional, *see, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Glasser v. United States*, 315 U.S. 60 (1942); *Carter v. Jury Comm'n*, 396 U.S. 320 (1970). Further, the Court had stated in cases such as *Smith v. Texas*, that the jury pool must be "representative of the community." *Smith*, 311 U.S. 128 (1940). But it was not until 1975 that the Court ruled that the Constitution required that the pool from which a jury is chosen be a "cross-section" of the community. *Taylor v. Louisiana*, 419 U.S. 522 (1975) (finding the exclusion of women from jury service to be unconstitutional). And it was not until the 1979 case of *Duren v. Missouri* that the Court fleshed out the defendant's burden to establish a prima facie violation of the fair-cross-section requirement. *Duren*, 439 U.S. 357 (1979). Even under current law, the racial composition in Wanrow's case would not have been a constitutional violation unless she

with two legal arguments. First, they argued that the trial court erred when it rejected Annis's motion for a mistrial on the basis of the prejudice occasioned by newspaper reports of Wanrow's withdrawn guilty plea published on the eve of trial. Washington law required a court to examine the "entire context" to determine the impact of prejudicial publicity. In their supplemental brief, Stearns and Schneider expanded the frame of Annis's argument for error by arguing that "[t]o get a true sense of the probable impact of the newspaper account" the court had to take into consideration the "context" which included "the constant [negative] press coverage of the occupation of Wounded Knee."<sup>127</sup> The attorneys argued that the possibility of prejudice was particularly strong in Wanrow's case because "although Indians represent the largest minority in the Spokane area, the white majority has no real understanding of Indian history or culture." The case presented an "inflammatory context" because it involved "an Indian woman charged with killing one white man and injuring another," yet the court did not even voir dire the all-white jury properly to determine the likely impact of the newspaper article.

The second defense argument that was related to Wanrow's American Indian identity was that the trial court erred when it disallowed expert testimony regarding Native American culture.<sup>128</sup> Annis's proffer at trial explained that the expert would testify that within Indian culture there is a "strong feeling of respect for elders," and if "an older person, who should be respected and revered, . . . would take advantage of a younger [child] . . . or try to perform an unnatural sex act on that younger child, . . . that would strike at the very core of the Indian and his culture, . . . and [you would expect] a more severe reaction to such conduct . . . than there might be in the Anglo-Saxon culture." Further, "there is an especially close relationship between the Indian female and

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could demonstrate that Native Americans were systematically excluded from the jury pool from which the ultimate petit jury was drawn or that in the selection of the ultimate trial jurors from that pool the prosecutor used peremptory challenges in a racially discriminatory fashion that violated equal protection. *See, e.g.,* *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991). Several features of jury pool selection make it likely that Native Americans are underrepresented. *See*, Kevin K. Washburn, *American Indians, Crime and the Law*, 104 Mich. L. Rev. 709 (2006) 748–49 (Native Americans are underrepresented in federal jury pools because jurors are chosen from voting rolls, poverty among Native Americans is significant, and poor individuals are less likely to register to vote.)

**127.** Supplemental Brief of Respondent, *supra* note 75. Schneider and Stearns cited as examples of negative publicity a local newspaper article published a month before her trial that quoted a Congressman referring to AIM members as "goons or gutter rats" and "hoodlums."

**128.** The trial judge concluded, "I just feel to bring in the standards of another culture, when we are here under the same standards in relationship to this individual, would be insufficient relevance to allow it." *Wanrow* Trial Transcript at 452.

her children,” Native American mothers are often “over protective [of their children]” and “more protective” than are Anglo-Saxon mothers.<sup>129</sup> Annis argued that this evidence was relevant both to Wanrow’s self-defense claims and her insanity claim: “[T]hese factors would very much bear on the claim that she was fearful, reacting in this manner in self-defense, and that she may have reached an hysterical point and was unable to control her conduct or know the consequences of her act.” It was important for the all-white jury to hear the evidence because “no one on the jury is Indian, and [they] may not understand the Indian culture, and may not appreciate the additional stress and strain that would have been placed on this woman . . . .”

Admittedly, Annis’s proffer was not a model of clarity, mixing arguments for the relevance of the testimony to the sincerity of Wanrow’s fear for the purposes of a self-defense claim, her mental state for the purposes of an insanity claim, while also suggesting—rather obliquely—that the testimony was relevant to the reasonableness component of self-defense. A somewhat rehabilitated argument for the testimony’s relevance to self-defense might go something like this: the very idea that an elder—Wesler was in his sixties when he was killed<sup>130</sup>—would engage in sexual conduct with a child would be extremely disturbing and frightening. This response would then accentuate the fear that Wanrow felt when she waited all night to see what Wesler would do, when Wesler ignored Hooper’s demand that he “get out of the house,” when Wesler appeared to be approaching a sleeping boy, and when Wesler appeared to be coming towards her. As was true with the gender argument, the claim was that without an understanding of this context, the jury would be unable to weigh the sincerity of Wanrow’s fear as well as its reasonableness.

On appeal, Annis summarized the argument:

In offering such expert opinion, the defendant asks no special consideration. Rather, she asks only to be allowed to present to the jury the fundamental facts about herself—facts the jury would be expected to know and reasonably assume to understand about any white culture defendant—but which the jury could not know about an Indian culture defendant. The claim of error in excluding expert testimony is based on the right of the appellant to have her defense considered on an equal basis with defendants who have been raised in a dominant American culture group.<sup>131</sup>

<sup>129.</sup> *Id.* at 451. The remaining quotes are also from the trial transcript.

<sup>130.</sup> Arraignment and Plea from Oct. 18, 1972, *State v. Wanrow*, No. 20876 (Wash. Super. Ct. 1973)

<sup>131.</sup> Brief of Respondent, *supra* note 70.

The Washington State Supreme Court found no error in the trial court's decisions on these defense motions. For the court, Wanrow's experiences as a woman were critical to the jury's ability to understand her perceptions of the circumstances surrounding the homicide, but her experiences as a *Native American* woman were not. In contrast, Wanrow, her lawyers, and her supporters believed that her Native American identity was central to understanding the facts of the homicide—central to understanding why she was in reasonable fear for the safety of her children and herself when Wesler moved towards her and central to understanding the biases of the criminal justice system.<sup>132</sup> The courts who heard Wanrow's case failed to understand that gender and culture are not separate experiences, but rather “intersecting” experiences, as Professor Kimberle Crenshaw would later write.<sup>133</sup> The courts presumed that the jury could meaningfully understand Wanrow's experience “as a woman” apart from her experience as a *Native American* woman, “as if the perspective of the defendant's gender could be isolated from the perspective of her culture[,]”<sup>134</sup> when, in fact, it could not.

### *Conclusion*

On April 26, 1979, just days before Wanrow's new trial was to begin, Wanrow reached an agreement with the State in which she pled guilty to manslaughter and second degree assault. She received a suspended sentence of five years probation, and one year of community service. In the end, Wanrow served only three days in jail—the three days that immediately followed her arrest.

For Yvonne Wanrow, the seven years in the criminal justice system were transformative. In that time, she became romantically involved with the actor, singer/songwriter, and AIM activist, Floyd Westerman. She and Westerman became parents to a daughter, born in May 1974,

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**132.** One startling example of that bias is found in the sentencing hearing that followed Wanrow's conviction. At sentencing, the court allowed the expert testimony regarding Native American experience that it ruled inadmissible at trial. The expert witness testified that Indians are instilled with the belief that as one grows older, one becomes wiser, and therefore a mother's reaction when an older person sexually abuses a child “can be drastic.” On cross-examination, Brockett asked if she meant that an Indian mother in such a situation “behaves basically like an animal?” The expert witness replied, “I did not say this. We are homo sapiens.” Sentencing Hearing, *State v. Wanrow*, No. 20876 (Wash. Super. Ct. 1973)

**133.** See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1243 (1991) (“the experiences of women of color are frequently the product of intersecting patterns of racism and sexism”); see also, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990).

**134.** Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 *N.Y.U.L. Rev.* 36, 81–82 (1995).

whom they named Chante. Her defense had been the subject of benefit concerts by such well-known performers as Buffy Sainte-Marie and Rita Coolidge. She and her sister Alice had developed clothing lines and organized fashion shows to raise money for her defense fund and to raise awareness about her case.

Wanrow had become an activist for Native American rights and for other women who claimed self-defense in the killing of a male aggressor.<sup>135</sup> She joined AIM leaders as a speaker at conferences, rallies, and “Indian Awareness Week” activities on college campuses.<sup>136</sup> She presented at an International Tribunal on Crimes Against Women in Brussels, and she traveled to Germany at the invitation of the International Indian Treaty Council and other European organizations. When she returned from Germany, she traveled to Cleveland to offer support in the defense of Kathy Thomas, an African American woman on trial for killing her abusive husband.<sup>137</sup> At the time of this writing, more than thirty-five years after her case was concluded, she continues to be a leading activist on Native issues ranging from protection of Colville lands from strip mining to support for the Native American Church and for AIM.<sup>138</sup>

Wanrow recounted the importance of her own consciousness-raising and involvement in the larger Native American struggle:

If you don't create this exterior awareness for yourself, you're going to get bogged down in your own little struggle, swallowed up by it, eventually you'll probably give up. That was what saved me, to focus on something else; minimize my personal struggles. It put me in solidarity with other Indian people. Instantly, I was sympathetic to AIM, I understood it as being a spiritual movement. American Indian movement, that doesn't sound like any military force to me. It sounds like the wind. It sounds like a spirit, a spirit of defense. We are in defense of our land, our life, our human rights. There's nothing wrong with self-defense and self-defense is not a crime. . . . When I got up to speak eventually on my own behalf, that was the main thrust of my talk. That Indian people are defending their rights and their land. As a person, I'm defending my rights as a

**135.** A. Debeste, *Fighter for Women's Rights Tells her Story of Self-Defense*, Seattle Post Intelligencer, April 8, 1983, at B11.

**136.** Swan Interview, *supra* note 1.

**137.** *Letter from Yvonne Wanrow*, Akwesasne Notes (September 1977), from Nelson and Taylor archives, *supra* note 1. Wanrow was brought to Cleveland by the Gold Flower Defense Committee, a coalition of organizations supporting the right of women to act in self-defense. See *Self-Defense Rights to Be Focus of Talks*, The Plain Dealer, May 19, 1978, at 5A., from the Nelson and Taylor archives, *supra* note 1.

**138.** See a recording of Swan's talk at an AIM conference at <http://www.youtube.com/watch?v=aLqpQsbRf2I>.

mother. A mother that's defending her children and other people in that home.

As Wanrow became a public person, she engaged in soul-searching. “[I] just examined my life . . . because I knew if I decided to become a public figure I would be representing my people whether or not they delegated me to do that.” She explains:

I grew. I got a new Spirit. I got a strong Spirit. . . . [My] case forced me to change, and how I changed. I broadened my thinking. I felt less sorry for myself. I found ways to positively find help, and help myself, plus help others at the same time. . . . [W]hen I was introduced to different people that were active in bringing about social justice in Indian Country, I felt aligned with them, with their struggle, . . . and I felt good and I felt optimistic. I felt strong. I didn't feel alone.



Yvonne's children, her sisters, and her nieces wished her well as she departed Spokane for her hearing before the Washington State Supreme Court in Olympia, Washington (2/22/76). Front row, left to right: Yvette Swan, Viola Michel, Jamie Michel, Marcella Michel, Ana Tomeo, Aurora Michel, Chante Westerman, Lisa Swan. Back row, left to right: Bethley Jo Walters, Pamela Ludwig, Yvonne Swan Wanrow, Darren Swan (in tree), Alice Stewart.



Nancy Stearns, Elizabeth Schneider, and Yvonne Wanrow hope for victory on the eve of oral arguments before the Washington State Supreme Court (2/22/76).



Yvonne Wanrow and Floyd Red Crow Westerman, taken in Inchelium, Washington (1977).



Yvonne drew the picture which appeared on the cover of letters sent by Yvonne Wanrow's Defense Committee (3/76) (from the personal archives of Polly Taylor and Marge Nelson.)



Crowds gather outside the Washington Supreme Court building while the court conducts hearings on matters following the court's reversal of Yvonne's conviction (2/11/78) (from the personal archives of Polly Taylor and Marge Nelson.)



A drumming circle was formed by supporters gathered outside the Washington Supreme Court hearing on motions following the court's reversal of Yvonne's conviction (3/13/78). The circle includes Native American civil rights activists Steve Robideau (kneeling to the right), Harold Belmont (sitting), and Roque Duenas (facing the camera looking down) (from the personal archives of Polly Taylor and Marge Nelson.)



Elizabeth Schneider, Susan Jordan, and Cris Arguedas meet with Yvonne to prepare for a second trial (1979).